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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1306-17T1

IN THE MATTER OF
BOROUGH OF MILLTOWN,

Petitioner-Appellant,

and

OPEIU LOCAL 32,

Respondent-Respondent.

Argued April 24, 2018 – Decided May 4, 2018

Before Judges Hoffman and Gilson.

On appeal from the New Jersey Public
Employment Relations Commission, P.E.R.C. No.
2018-15.

Andrea E. Wyatt argued the cause for appellant
(Gilmore & Monahan, PA, attorneys; Andrea E.
Wyatt, on the briefs).

Kevin P. McGovern argued the cause for
respondent Opeiu Local 32 (Mets Schiro &
McGovern, LLP, attorneys; Kevin P. McGovern,
on the brief).

Joseph P. Blaney, Deputy General Counsel,
argued the cause for respondent New Jersey
Public Employment Relations Commission (Robin
T. McMahon, General Counsel, attorney; Joseph
P. Blaney, on the statement in lieu of brief).

PER CURIAM

The Borough of Milltown (the Borough) appeals from a Public Employment Relations Commission (PERC) determination, which declared as arbitrable the decision of whether certain employees were covered by a collective negotiations agreement (CNA). We affirm.

I

The underlying dispute involves a CNA between OPEIU Local 32 (the Union) and the Borough covering certain Borough employees. Article I of the CNA addresses recognition and designates the Union as "the bargaining agent for all full-time and part-time employees who regularly work in the job titles set forth on Schedule A" Schedule A includes "Part-time Public Safety Telecommunications Operator," commonly referred to as dispatcher. Article I also specifically excludes "all supervisors, managerial executives, and confidential employees" as well as "seasonal employees."

Article XXV defines part-time employees as "employees who regularly work at least twenty (20) hours per week. Effective January 1, 2006 part-time employee means employees who regularly work at least twenty-five (25) hours per week." Article XXV then continues to define benefits for part-time employees. Those benefits include "[t]hat portion of any holiday listed in Article

XII which the employee was regularly scheduled to work." Article XII addresses holidays, and includes Christmas Day as a paid holiday. Article V addresses overtime and states "[a]ny employee scheduled or called into work Thanksgiving or Christmas shall be paid double time plus the regular holiday pay." Article XXIII states the grievance process ends with binding arbitration through PERC.

Three part-time dispatchers worked on Christmas Day 2016. They received double time, but not the additional holiday pay. The Borough asserts the dispatchers were hired after January 1, 2006, and regularly worked less than twenty-five hours per week. The Union does not dispute that fact.

The Union filed a grievance with the Borough on behalf of the part-time dispatchers. The business administrator for the Borough denied the grievance on the grounds that "the subject employees are not members of the Union." The grievance proceeded to the next step, where the Committee of the Borough Council held a meeting with the Union. The Committee denied the grievance, "maintain[ing] its position that these employees are not Union employees."

The Union next requested arbitration from PERC. The Borough responded by filing a petition with PERC for a scope of negotiations determination, seeking restraint of arbitration

because the employees are not unit members. On October 26, 2017, PERC denied the Borough's request to restrain the arbitration, reasoning an arbitrator should decide whether the employees are unit members; the Borough appeals from that decision.

II

The Borough argues the New Jersey Employer-Employee Relations Act (the Act), N.J.S.A. 34:13A-1 to -43, does not permit a union to arbitrate grievances on behalf of non-unit members. The Union contends there is a dispute regarding whether the employees are unit members covered by the CNA, and that dispute is a matter of contract interpretation that should be decided by the arbitrator. The Borough responds by arguing there is no factual dispute over whether the employees are non-unit members because the Union presented no evidence to the contrary.

Courts must "apply a deferential standard of review to determinations made by PERC." Jersey City v. Jersey City Police Officers Benevolent Ass'n, 154 N.J. 555, 567 (1998). "The Legislature has vested PERC with '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.'" Id. at 567-68 (quoting N.J.S.A. 34:13A-5.4(d)). "The standard of review of a PERC decision concerning the scope of negotiations is 'thoroughly

settled. The administrative determination will stand unless it is clearly demonstrated to be arbitrary or capricious.'" Id. at 568 (quoting In re Hunterdon Cty. Bd. of Chosen Freeholders, 116 N.J. 322, 329 (1989)).

PERC is charged with administering the Act, N.J.S.A. 34:13A-5.2, and has primary jurisdiction to determine "whether the subject matter of a particular dispute is within the scope of collective negotiations." Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 154 (1978) (citing N.J.S.A. 34:13A-5.4(d)). PERC's role is to make a threshold determination of whether the disputed matter is something the parties can legally negotiate and make subject to arbitration. N.J.S.A. 34:13A-5.4(d). PERC may not interpret contracts; contractual interpretation is for an arbitrator. Bd. of Educ. v. CAM/VOC Teachers Ass'n, 183 N.J. Super. 206, 211 (App. Div. 1982) (citing Ridgefield Park, 78 N.J. at 154).

PERC has previously held that questions regarding whether a particular employee is covered under the recognition clause of a CNA, is a question of contract interpretation for the arbitrator to decide. City of Hoboken, P.E.R.C. No. 96-016, 21 N.J.P.E.R. ¶ 26214, 1995 N.J. PERC LEXIS 241 at 6 (1995), aff'd, No. A-1619-95 (App. Div. Feb. 5, 1997). In Hoboken, a police sergeant also worked as an Emergency Management Coordinator (EMC). Id. at 3.

The issue presented was whether the sergeant was covered under the recognition clause of the police officers' CNA while performing duties as an EMC. Id. at 6. PERC allowed arbitration, holding, "We do not decide these questions which properly belong to the arbitrator instead of us." Ibid. (citing Ridgefield Park, 78 N.J. at 155).

Here, we agree with the Borough that the Act does not permit a union to arbitrate grievances on behalf of non-unit members. See, e.g., Twp. of Lyndhurst, P.E.R.C. No. 2017-41, 43 N.J.P.E.R. ¶ 85, 2017 N.J. PERC LEXIS 9 at 11 (2017). However, the underlying dispute here concerns whether the employees are unit members covered by the CNA. PERC decides whether a dispute is within the scope of collective negotiations, that is, whether the Act allows collective negotiation of the subject. N.J.S.A. 34:13A-5.4(d). However, when the subject is one permitted within the Act and there is an arbitration clause, the arbitrator decides whether a subject is actually covered by a particular agreement. Ridgefield Park, 78 N.J. at 155. In this case, the Borough does not argue the Act prohibits negotiation of holiday pay; instead the Borough argues the particular employees are not covered by the particular agreement. The question of whether the employees are covered under the CNA's recognition clause is for the arbitrator to decide.

Furthermore, we reject the Borough's argument that the Union presented no evidence to dispute the Borough's contention the employees are non-unit members. The Union takes the position that the CNA covers all part-time dispatchers, arguing the twenty-five hour requirement only applies to certain benefits. That determination does not require a factual finding, but rather a legal interpretation. The PERC decision allowing the arbitrator to resolve that legal question was neither arbitrary nor capricious, but based on established case law.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION