H.E. NO. 2015-001

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERSET HILLS BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2011-174

SOMERSET HILLS EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner grants Respondent's motion to dismiss. She determined, based on the evidence presented in Charging Party's case-in-chief, that the Board was not the actual or de facto employer of coaches in the middle school after-school sports program and, therefore, had no negotiations obligation to the Association. The control of labor relations test supports that BMS, a 501c(3) non-profit corporation, was the employer of the coaches. The fact that the Board contributed partial funding to the program, use of its sports uniforms and fields did not establish de facto employer status where BMS hired the coaches, set stipends and paid them, hired its own athletic director and collected student participation fees and paid for worker's compensation for the coaches. The Hearing Examiner determined, therefore, that the Board did not repudiate the parties' collective agreement nor did it illegally transfer unit work.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
Adams Gutierrez & Lattiboudere, LLC, attorneys
(Adam S. Herman, of counsel)

For the Charging Party,
Oxfeld Cohen, P.C.
(William P. Hannon, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION
ON MOTION TO DISMISS

On October 29, 2010, the Somerset Hills Education Association (Charging Party or Association) filed an unfair practice charge against the Somerset Hills Board of Education (Respondent or Board) (C-1).[1/] The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act (Act),

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1/ "C" and "J" refer to Commission and Joint exhibits, respectively, received into evidence at the hearing. The transcript of the hearing is referred to as "1T".

N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5)[2/], by transferring the work of the middle school sports program to BMS Sports, Inc. (BMS), a non-profit 501c(3) corporation, without negotiations and by repudiating the collective agreement when BMS paid coaches less than the stipends set out in the parties' collective agreement.

On April 16, 2012, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing (C-1). On January 6, 2014, the Board filed its Answer (C-2) admitting that it permitted BMS to run the middle school sports program but denies it is the employer of coaches hired by BMS. It raises various affirmative defenses.

On June 10, 2013, I conducted a hearing. Charging Party introduced exhibits, and its witnesses were examined and cross examined. At the conclusion of Charging Party's case-in-chief, Respondent moved to dismiss. Briefs were filed by June 16, 2014.

Based upon the record, I make the following:

2/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

FINDINGS OF FACT

1. Somerset Hills Board of Education and Somerset Hills Education Association are public employer and public employee representative within the meaning of the Act (1T8).

2. The Association represents all certified personnel, support staff (office staff, custodial and maintenance staff and para-professionals) and technology technicians employed by the Board (J-1, J-2).

3. J-1 and J-2 are, respectively, the parties' collective negotiations agreements for 2008-2011 and 2011-2014. Both agreements contain provisions for Bernardsville Middle School athletic stipends for coaches in various sports for each year of the agreements. The stipends vary by year and sport.

4. In the 2009-2010 school year, the State reduced funding to the District resulting in a budget deficit. As a result of the budget deficit, the Board eliminated middle school sports for the 2009-2010 school year (1T43-1T42).

5. In 2010-2011, some middle school parents formed BMS Sports Incorporated (BMS), a 501c(3) non-profit corporation, to run the middle school sports program (1T44). BMS hired its own athletic director who worked with the District's athletic director to schedule the use and preparation of fields, some of which were owned by the district and some by the town, (1T38, 1T57). BMS hired coaches, most, if not all, of whom were

individuals from out of district, and none of whom were represented by the Association (1T31, 1T59-1T60). BMS set the coaches' stipends which were approximately 50% lower than the stipends set forth in the parties' collective agreement, paid them, and paid for workers compensation insurance (J-3; 1T30, 1T53-1T54). To pay for these expenses, BMS collected registration fees from students who participated in the sports program (J-3; 1T53-1T54).

6. BMS received approximately $29,000 in funds from the district which amounted to $3,222 per sport. The funds were used to pay for equipment/supplies, tournament and referee fees as well as scheduling fees. These expenses varied by sport and ranged from approximately $678 to $4,500 depending on the sport (J-4).

In addition to the $29,000, the District donated equipment used by the district's teams in the past as well as Bernardsville Middle School uniforms (1T37-1T38). The Board's general insurance policy covered BMS (1T37).

7. Prior to the creation of BMS, the middle school sports program was run by the district. The coaches were predominantly district teaching staff who were paid in accordance with the stipend guide negotiated by the parties (J-1, J-2; 1T26-1T27). There were a few coaches who were not in-district teaching staff,

but they were hired by the district and paid according to the guide set out in the parties' collective agreement (1T27).

8. When the assistant superintendent notified the association by e-mail in the spring of 2010 that coaching positions were being posted by BMS, the Association requested a meeting with the administration (1T28-1T29). At the meeting, the Association raised concerns about the coaches' stipends and liability issues and were informed that the district had nothing to do with these issues (1T30). The Association then informed its membership of these concerns, namely that the stipends were substantially lower than negotiated rates, pointed out also the liability issues, and left it to each individual whether to apply for coaching positions with BMS (1T45). Most, if not all, district staff did not apply for these positions (1T31).

9. Suzanne Ryan is the middle school nurse (1T70). She is responsible for, among other duties, reviewing student sports physicals to make sure they are complete and training coaches as EpiPen delegates in the event any student athlete had a history of anaphylaxis requiring the administration of medicine in an emergency (1T71-1T72). As to the latter responsibility, as a school nurse and pursuant to State guidelines, Ryan could only train district employees (1T72, 1T74).

In 2010-2011, after BMS took over the middle school sports program, Ryan was asked to review student sports physicals and to

train BMS coaches to be EpiPen delegates (1T73). She objected to the training responsibility because, in her words:

> As far as I knew they were hired by the newly formed parent organization that ran the sports program. So they were hired by them and they were also paid by them. So, to my knowledge they were not school employees. [1T75-1T76]

When Ryan shared her concerns with the administration, it was agreed that she did not have to train the BMS coaches because of her concern that it would violate State guidelines to train coaches not employed by the district (1T74-1T75). That task was assigned to the school physician (1T74). Ryan never actually trained any of the BMS coaches (1T76). Ryan, however, continued to review student sports physicals as part of her daily responsibilities with the district (1T75).

ANALYSIS

In New Jersey Turnpike Auth., P.E.R.C. No. 79-81, 5 NJPER 197 (1979), the Commission set forth the standards for determining whether to grant a motion to dismiss at the close of Charging Party's case-in-chief:

> ...the Commission utilizes that standard set forth by the New Jersey Supreme Court decision in Dolson v. Anastasia, 55 N.J. 2 (1959). Therein the Court declared that when ruling on a motion for involuntary dismissal the trial court "is not concerned with the worth, nature or extent...of evidence, but only with its existence, viewed most favorably to the party opposing the motion". Id. at 198.

See also, Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 535-542 (1995); Cameco, Inc. v. Gedicke, 157 N.J. 504, 509 (1999).

The Dolson Court stated the following:

> The test is whether "the evidence, together with the legitimate inferences therefrom, could sustain a judgment in ... favor" of the party opposing the motion, i.e., if, accepting as true all the evidence which supports the position of the party defending against the motion and affording him the benefit of all inferences which can reasonable and legitimately be deduced therefrom, reasonable minds could differ the motion must be denied. Dolson at 5.

Here, Charging Party asserts that the Board violated 5.4(a)5 and derivatively a(1) of the Act when it failed to negotiate in good faith before it transferred unit work to non-unit employees, namely coaches hired by BMS. It also contends that the Board repudiated the collective agreement when the BMS coaches were not paid the stipends negotiated by the parties and set forth in the collective agreement. The Board, it contends, was the de facto employer of the BMS coaches.

The Board responds that it is not, and never was, the employer of the BMS coaches, because it does not control any of their terms or conditions of employment. It explains that BMS is a non-profit, 501c(3) corporation, formed by middle school parents to run the middle school after-school sports program. The Board asserts,

therefore, that it had no negotiations obligation to the Association relative to the stipends paid by BMS to its employees.

N.J.S.A. 34:13A-5.3 states:

> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit...

The Act covers employees of public employers, including "the State of New Jersey, or the several counties and municipalities thereof, or any other political subdivision of the State, or a school district, or any special district, or any authority, commission, or board, or any branch or agency of the public service." N.J.S.A. 34:13A-3(c). It is an unfair practice for a public employer to refuse to negotiate in good faith with a majority representative of employees over the terms and conditions of employment of employees in that unit. N.J.S.A. 13A-5.4a(5).

It is not argued that BMS as a non-profit, 501c(3) corporation, is a public employer. Rather, the central issue in this matter is whether the BMS coaches are de facto Board employees as alleged by the Association. If so, a negotiations obligation is triggered between the Board and Association, and the parties' collective agreement controls terms and conditions of employment. The evidence, however, adduced by Charging Party, and viewed most favorably to it, does not support this legal obligation.

In determining employer status, the Commission considers generally which entity controls labor relations, namely which

entity exercises substantial control over employees' hiring, performance evaluations, promotions, discipline, firing, work schedules, vacation, hours of work, wages, benefits, funding and expenditures. See generally, Mercer Cty. Superintendent of Elections, P.E.R.C. No. 78-78, 4 NJPER 221 (¶4111 1978), aff'd 172 N.J. Super. 406 (App. Div. 1980); Hudson ARC, P.E.R.C. No. 94-57, 9 NJPER 593 (¶24287 1993); Morris Cty. Bd. of Social Services, P.E.R.C. No. 86-15, 11 NJPER 491 (¶16175 1985).

Here, Charging Party established that the Board contributes partial funding ($29,000) to BMS. These funds are dedicated to expenditures for equipment and supplies, tournament and registration fees as well as scheduling fees for each sport. The Board also allows BMS to coordinate the use and preparation of its fields which is done by BMS' athletic director in consultation with the Board's athletic director. There is some general liability insurance coverage provided through the Board's general policy. That is the extent of the Board's control over labor relations in regard to the coaches.

On the other hand, although BMS initially offered its coaching positions through a posting to the Association's unit employees, it hired all coaches from out of district. There is no evidence that the Board participated in the hiring process. Moreover, no in-district employees applied for the positions, after the Association informed them of its concerns regarding the stipends

(50% less than negotiated stipends) and possible liability issues. BMS hired its own athletic director, set the director's and coaches' salaries and paid them. None of the coaches are members of the Association. BMS collected registration fees from student participants to fund the coaches' stipends as well as to pay for workers compensation insurance.

Even Charging Party's own witness, the school nurse, testified that the BMS coaches were not district employees. After BMS took over the after-school sports program, she was asked to train BMS coaches as EpiPen delegates for students needing medication. When the nurse objected to the administration that training non-district employees would violate State guidelines, the Board agreed with her, so she did not have to do the training.

Considering all of this evidence, it is apparent that Charging Party has not established that the BMS coaches were employees of the Board. In Association of Retarded Citizens, Hudson County Unit, P.E.R.C. No. 94-57, 19 NJPER 593 (¶24287 1993), the Commission wrote:

> A non-profit corporation that controls such employment conditions as hiring, assigning, scheduling, supervising, evaluating, promoting, transferring, disciplining, and discharging employees is a private employer instead of a public employer under the New Jersey Employer-Employee Relations Act. **It does not become a public employer simply because it is funded by the government** or because the NLRB has declined to exercise its jurisdiction. Id. at 602. [emphasis added]

Here, the $29,000 funding alone, even if a substantial part of the BMS budget, does not support de facto employer status. Although the Board provided partial funding, some equipment, use of fields and general liability insurance, it did not exercise control over the coaches terms and conditions of employment. That is key under Commission case law. The Board is, therefore, not actually or de facto, the employer of the BMS coaches. Contrast Glassboro Housing Auth., P.E.R.C. No. 90-16, 15 NJPER 524 (¶20216 1989) (Authority was de facto employer of contract employees where substantial control over all terms and conditions of employment exercised including final authority over hiring decisions, setting salary, work hours and schedules and input into discipline or terminations decisions).

Having not proven by a preponderance of evidence that the Board is the de facto employer of the BMS coaches, the Board did not have a negotiations obligation to the Association regarding the stipends.[3/] Accordingly, the Board did not repudiate the parties' Collective Agreement which set out terms and conditions of employment for Association unit employees. That Agreement did not dictate stipends for BMS coaches.

3/ Charging Party asserts that the Board has hired out-of-district coaches in the past when it ran the after-school program and paid them the negotiated stipend rate set out in the parties' collective agreement. That fact is irrelevant, because the Board was the employer of those coaches whether they were in-district or out-of-district. Here, BMS is the employer of the coaches.

Also, the transfer of unit work doctrine does not apply. That doctrine prohibits a public employer from shifting unit work outside the collective negotiations unit to other employees of the public employer. See generally, City of Jersey City v. Jersey City PBA, 154 N.J. 555 (1998); Burlington Cty. Bd. of Social Services, P.E.R.C. No. 98-62, 24 NJPER 2 (¶29001 1997).[4/] Here, work previously performed by the middle school sports coaches was transferred to coaches employed by BMS. Therefore, the Board had no duty to negotiate with the Association as a result of BMS taking over the middle school sports program.

Based on the record developed by the Association through witness testimony and documents and granting every reasonable inference to the Association, I make the following:

RECOMMENDATIONS

The Somerset Hills Board of Education did not violate 5.4a(5) or derivatively a(1) of the Act when it permitted BMS, a non-profit, 501c(3) corporation, to run its middle school sports program nor when BMS hired and paid coaches less than the stipends set out in the parties' collective agreement. I recommend that

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4/ Charging Party cites Burlington Cty. to support its contention that a violation of the Act occurred. This case is inapposite. There, the Commission held that an employer cannot subcontract work to avoid its contractual obligations, if it remains the de facto employer. Here, the evidence does not establish that the Board was the de facto employer of the BMS coaches.

Respondent's Motion to Dismiss be granted, and the Complaint be dismissed.

Wendy L. Young
Hearing Examiner

DATED: July 21, 2014
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by July 31, 2014.