P.E.R.C. NO. 98-62

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BURLINGTON COUNTY BOARD OF
SOCIAL SERVICES,

Respondent,

-and- Docket No. CO-H-95-281

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1086,

Charging Party.

BURLINGTON COUNTY BOARD OF
SOCIAL SERVICES,

Charging Party,

-and- Docket No. CE-H-95-19

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1086,

Respondent.

BURLINGTON COUNTY BOARD OF
SOCIAL SERVICES,

Petitioner,

-and- Docket No. SN-H-95-75

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1086,

Respondent.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the Burlington County Board of Social Services. The Complaint was based on an unfair practice charge filed by the Communications Workers of America, Local 1086 alleging that the Board violated the New Jersey Employer-Employee Relations Act by shifting Home Energy Assistance work from income maintenance aides represented by CWA to Kelly personnel outside CWA's negotiations unit. The Commission finds that this case is primarily about contracting to hire extra temporary personnel for seasonal work rather than erosion of the negotiations unit. The Commission also

dismisses a Complaint against CWA, based on an unfair practice charge filed by the Board. The charge alleges that CWA violated the Act when it distributed leaflets advising citizens that they could direct inquiries about the HEA program to CWA as well as the Board. The Commission finds that CWA did not undermine, change or affect terms and conditions of employment in any way, nor did it refuse to negotiate.

The Commission also grants the Board's request for a restraint of binding arbitration of a grievance filed by CWA alleging that the Board violated the parties' collective negotiations agreement when it staffed its HEA program with personnel contracted through Kelly Temporary Services, Inc. (Kelly) rather than offering non-supervisory HEA positions to employees in CWA's negotiations unit.

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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BURLINGTON COUNTY BOARD OF
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Petitioner,

-and- Docket No. SN-H-95-75

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1086,

Respondent.

Appearances:

For the Public Employer, Capehart & Scatchard, attorneys
(Alan Schmoll, of counsel; Susan S. Hodges, on the brief)

For CWA Local 1086, Weissman & Mintz, attorneys
(Steven P. Weissman, of counsel)

DECISION

On February 17, 1995, the Burlington County Board of Social Services petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Communications Workers of America, Local 1086 (CWA). The grievance alleges that the Board violated the parties' collective negotiations agreement when it staffed its Home Energy Assistance (HEA) program with personnel contracted through Kelly Temporary Services, Inc. (Kelly) rather than offering non-supervisory HEA positions to employees in CWA's negotiations unit. The Board asserts it had a managerial prerogative to subcontract the HEA work. The HEA program helps needy clients meet their heating expenses and operates primarily during the winter.

On February 21, 1995, CWA filed an unfair practice charge against the Board. The charge, as amended, alleges that the Board violated 5.4a(1) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by shifting the HEA work from income maintenance aides represented by CWA to Kelly

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1/ These provisions prohibit public employers from: (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act [and] (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....

personnel outside CWA's negotiations unit. CWA alleges that the Board so controls the Kelly personnel that they should be viewed as joint employees of Kelly and the Board and that the Board therefore had a duty to negotiate with CWA before using Kelly personnel to reduce its compensation costs.

On May 8, 1995, the Board filed an unfair practice charge against CWA. That charge, as amended, alleges that CWA violated 5.4b(3)[2/] when it distributed leaflets advising citizens that they could direct inquiries about the HEA program to CWA as well as the Board.

On September 27, 1995, the Director of Unfair Practices consolidated the charges, issued a Complaint, and ordered a hearing. The scope petition and charges were later consolidated.

On October 17 and 18, 1995, the Board and CWA respectively filed their Answers. The Board denies that the HEA work is negotiations unit work or that Kelly personnel are Board employees. It claims a prerogative to subcontract with Kelly. CWA asserts that its leaflets were lawful and did not constitute a refusal to negotiate in good faith.

On February 26 and April 1 and 2, 1996, Hearing Examiner Susan Wood Osborn conducted a hearing. The parties examined

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2/ This provision prohibits a majority representative from: (3) Refusing to negotiate in good faith with a public employer...concerning terms and conditions of employment of employees....

witnesses, introduced exhibits, and filed post-hearing briefs by September 19, 1996.

On December 14, 1996, the Hearing Examiner issued her report. H.E. No. 97-13, 23 NJPER 78 (¶28049 1996). Concluding that the Board had a prerogative to contract with Kelly to staff the HEA program, she recommended restraining arbitration of CWA's grievance and dismissing CWA's charge. Concluding that CWA's leaflets did not constitute a refusal to negotiate in good faith, she also recommended dismissing the Board's charge.

On January 6 and 7, 1997, CWA and the Board respectively filed exceptions. CWA asserts that the Kelly personnel are jointly employed by Kelly and the Board and that the Board does not have a prerogative to shift negotiations unit work to Kelly personnel without first trying to reduce its compensation costs through negotiations with CWA.3/ The Board asserts that the Hearing Examiner erred in concluding that the HEA work had been exclusively performed by employees represented by CWA before Kelly personnel took over that work. The Board also asserts that the leaflets interfered with communications between the Board and HEA clients and their distribution therefore violated N.J.S.A. 34:13A-5.4b(3).

3/ CWA requests oral argument. We deny that request.

We have reviewed the record. We incorporate the Hearing Examiner's accurate and undisputed findings of fact (H.E. at 4-20). We add to finding no. 3 that each year the HEA program operated, the Board hired temporary employees in November, laid off some temporary employees in January or February, and then rehired some employees in March (2T22). Temporary employees did not have a contractual right to be rehired each heating season and were rarely rehired. During the heating seasons of 1991-1992, 1992-1993, and 1993-1994, a total of 16 persons received temporary appointments as income maintenance aides. None of these employees worked all three years and only two employees worked two years (CP-17). We also note that between 1980 and 1994, only six in-house employees sought and received the opportunity to earn out-of-title pay as a temporary income maintenance aide.

We first consider the Board's scope of negotiations petition and CWA's unfair practice charge. The key question in both cases is whether the Board's decision to use Kelly personnel instead of CWA-represented personnel to staff the HEA program is within the scope of negotiations.

N.J.S.A. 34:13A-5.3 requires a public employer and a majority representative to negotiate over "terms and conditions of employment." Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets forth these tests for determining whether a subject is a "term and condition of employment" under section 5.3:

> [A] subject is negotiable between public employers and employees when (1) the item

> intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

No statute or regulation preempts negotiations.

Under section 5.3 and Local 195's balancing test, a public employer must negotiate over shifting work traditionally done by a group of employees within a negotiations unit to another group of its own employees outside that unit. See, e.g, City of Jersey City, P.E.R.C. No. 96-89, 22 NJPER 251 (¶27131 1996), aff'd 23 NJPER 325 (¶28148 App. Div. 1997), certif. granted S.Ct. Dkt. No. 44,268; Borough of Belmar, P.E.R.C. No. 89-73, 15 NJPER 73 (¶20029 1988), aff'd NJPER Supp.2d 222 (¶195 App. Div. 1989); Rutgers, the State Univ., P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd NJPER Supp.2d 132 (¶113 App. Div. 1983); Middlesex Cty., P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd 6 NJPER 338 (¶11169 App. Div. 1980); Rutgers, the State Univ., P.E.R.C. No. 79-72, 5 NJPER 186 (¶10103 1979), recon. den. P.E.R.C. No. 79-92, 5 NJPER 230 (¶10128 1979), aff'd 6 NJPER 340 (¶11170 App. Div. 1980). The unit work rule permits employees to seek

protection of such interests as preserving their jobs; maintaining their salaries, fringe benefits, and overtime opportunities; and not having their collective strength easily eroded. The unit work rule also protects the public interest in having stable negotiations relationships since negotiations over pay and other employment conditions are generally premised on the expectation that negotiations unit employees will continue to do and be paid for doing the same duties.

Under the Supreme Court's actual holding in Local 195, a public sector employer need not negotiate over a decision to subcontract with a private sector company to have that company take over governmental services. Applying Local 195's balancing test, the Court held that a contract proposal was not mandatorily negotiable. That proposal covered State employees and provided:

> The State shall meet with the Association to negotiate all incidents of contracting or subcontracting whenever it becomes apparent that a layoff or job displacement will result.

The Court recognized the employees' vital interest in not losing their jobs, but held that this interest was outweighed by the employer's interest in determining "whether governmental services are provided by government employees or by contractual arrangements with private organizations" and making "basic judgments about how work or services should be performed to best satisfy the concerns and responsibilities of government." Id. at 407. No negotiations duty attaches even if a subcontracting

decision is based solely on a desire to save money and even if employees will lose their jobs as a result. In such instances, however, public employees can seek a contractual provision requiring the employer to discuss (rather than negotiate) economic issues, thus giving them a chance to show that they can do the work at a price competitive with that charged by a private sector subcontractor. Following Local 195, we have prohibited negotiations or arbitration over decisions to subcontract work to private sector companies. See, e.g., Ridgewood Bd. of Ed., P.E.R.C. No. 93-81, 19 NJPER 208 (¶24098 1993), aff'd 20 NJPER 410 (¶25208 App. Div. 1994), certif. den. ___ N.J. ___ (1994); Borough of Pompton Lakes, P.E.R.C. No. 90-68, 16 NJPER 134 (¶21052 1990); Lacey Tp., P.E.R.C. No. 90-59, 16 NJPER 43 (¶21019 1989).

CWA asserts that this case presents a situation not yet expressly addressed by the body of case law on subcontracting because Kelly and the Board allegedly function as joint employers of the employees doing the HEA work.[4/] However, even if we

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4/ For cases on joint employer status, see, e.g., Association of Retarded Citizens, Hudson Cty. Unit, P.E.R.C. No. 94-57, 19 NJPER 593, 603 (¶24287 1993); Morris Cty., P.E.R.C. No. 86-15, 11 NJPER 491 (¶16175 1985); Bergen Cty. Sheriff, P.E.R.C. No. 84-98, 10 NJPER 168 (¶15083 1984). Accord NLRB v. Western Temporary Services, Inc., 821 F.2d 1258, 125 LRRM 2787 (7th Cir. 1987); Continental Winding Co., 305 NLRB No. 17, 138 LRRM 1397 (1991); cf. Re/Max of New Jersey, Inc. v. Wausau Ins. Companies, 304 N.J. Super. 59 (Ch. Div. 1997)(for workers' compensation purposes, employees of real estate brokerage were not independent contractors because employer controlled what they did and how they did it);

Footnote Continued on Next Page

assume (for purposes of this decision only) that CWA is correct that the subcontracting case law alone does not control this case; we would still conclude that the unit work case law does not govern either. Compare Cape May Cty. Bridge Commission, P.E.R.C. No. 92-8, 17 NJPER 382 (¶22180 1991)(Bridge Commission had prerogative to contract with County under Interlocal Services Act to have County provide maintenance services; neither subcontracting cases nor unit work cases control); accord Borough of Teterboro, P.E.R.C. No. 92-108, 18 NJPER 265 (¶23111 1992)(Borough had prerogative to contract to have County provide police coverage at night). Considering all the circumstances in light of all the cases, we hold that there was no duty to negotiate over this decision to staff the HEA program with Kelly personnel. Local 195 recognizes an employer's need for flexibility in contracting with private companies and we find that this case is primarily about contracting to hire extra temporary personnel for seasonal work rather than eroding a negotiations unit. We note the minor effect of this decision on the in-house

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Footnote Continued From Previous Page

4/ Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 611 F. Supp. 344, 26 FEP Cases 6 (S.D.N.Y. 1994)(for Title VII purposes, temporary employment agency was not an independent contractor because it did not exercise any control over means and manner of employee's performance); Whitehead v. Safway Steel Products, Inc., 304 Md. 67, 497 A.2d 803 (1985)(for workers' compensation purposes, temporary services employee was an employee of company using his services). See generally Stalnaker, Employer's Guide to Using Independent Contractors, pp. 92-99 (BNA 1993).

staff and the lack of a contractual right of temporary personnel to reemployment each heating season or any expectation of reemployment.

For these reasons, we restrain arbitration of CWA's grievance and dismiss CWA's unfair practice charge.

We next consider the Board's unfair practice charge. That charge alleges that CWA violated its duty to negotiate in good faith with the employer over terms and conditions of employment when it distributed leaflets suggesting that CWA, as well as the Board, could answer questions about HEA. We agree with the Hearing Examiner's analysis of this issue (H.E. at 25-26) and dismiss the Board's charge.

ORDER

The request of the Burlington County Board of Social Services for a restraint of binding arbitration is granted.

The Complaint in CO-H-95-281 is dismissed.

The Complaint in CE-H-95-19 is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Finn, Ricci and Wenzler voted for this decision. Commissioner Buchanan voted against this decision. Commissioners Boose and Klagholz were not present.

DATED: November 20, 1997
Trenton, New Jersey
ISSUED: November 21, 1997

H.E. NO. 97-13

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LOCAL 1086,
Respondent.

BURLINGTON COUNTY BOARD OF
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Petitioner,

-and- Docket No. SN-H-95-75

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1086,
Respondent.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss charges alleging the employer illegally shifted seasonally performed unit work to temporary workers hired through Kelly Services. The Hearing Examiner finds that the employer's decision to subcontract the unit work was not motivated by union animus. Further, although the public employer asserts significant control over the Kelly temps' assignments and daily work, it is not their employer and the subcontracting arrangement is not a sham.

The Hearing Examiner also recomends the Commission dismiss a second charge alleging the union violated the Act when it distributed a flyer to the community urging residents to apply for the program.

Finally, the Hearing Examiner recommends that the Commission restrain the union's arbitration request over the employer's decision to subcontract the seasonal work.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which 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 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.

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Appearances:

For the Public Employer
Capehart & Scatchard, attorneys
(Alan Schmoll, of counsel)

For CWA Local 1086
Weissman & Mintz, attorneys
(Steven P. Weissman, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On February 21 and August 21, 1995, the Communications

Workers of America, Local 1086 filed an unfair practice charge and amended charge with the Public Employment Relations Commission alleging that the Burlington County Board of Social Services violated subsection 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/] by staffing its seasonal Home Energy Assistance (HEA) program with personnel contracted through Kelly Temporary Services rather than CWA unit members in violation of the parties' contract and the Act. CWA alleges that the Board retained substantial control over the Kelly personnel so that they are, in effect, employees of the Board.

On February 17, 1995, the Board of Social Services filed a Scope of Negotiations Petition, seeking to restrain binding arbitration of CWA's grievance alleging that the Board violated the parties' collective negotiations agreement when it staffed the HEA program through an outside employment agency. The Board asserts that its decision to subcontract the work to Kelly Services was a managerial prerogative and not arbitrable.

On May 8 and 22, 1995, the Board also filed an unfair practice charge and an amended charge alleging that CWA violated

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1/ These subsections 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."

5.4(b)(3) of the Act[2/] when it interfered with the Board's business operation by distributing leaflets to clients directing HEA program inquiries to CWA.

On September 27, 1995, the Director issued a Complaint and Order consolidating the charges for hearing. On October 11, 1995, the Commission Chairman issued a Notice of Hearing concerning the Scope Petition and ordered that these matters be consolidated.

On October 17 and 18, 1995 the Board and CWA each filed Answers to the Complaint. The Board admits that it contracted with Kelly Services to staff the HEA program but denies that it violated the Act. It denies that the HEA program is bargaining unit work. It also denies that the Kelly Services personnel are Board employees. CWA admits that it provided certain information to the community concerning the HEA program but denies it committed an unfair practice. It contends that its actions to inform the community were lawful and protected.

On February 26, April 1 and April 2, 1996, I conducted a hearing on the consolidated matters. The parties examined witnesses and presented exhibits.[3/] After several extensions of time, the

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2/ This subsection prohibits employee organizations, their representatives or agents from: "(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

3/ Transcripts of the hearing will be referred to as "1T-", "2T-", "3T-". CWA's exhibits will be referred to as "CP-", the Board's exhibits will be referred to as "R-", and jointly submitted exhibits will be referred to as "J-".

parties filed post-hearing briefs and reply briefs by September 19, 1996.

Upon the record, I make the following:

FINDINGS OF FACT

Background

1. The CWA represents the employees of the Burlington Board of Social Services[4/] in a broad range of titles. CWA's most recent contract (J-1) covering this unit extended for the period January 1, 1993 through December 31, 1995. At the time of the hearings, the CWA and the Board were negotiating for a successor contract. Elaine Waller, President of Local 1086, believes that the Local and the Board has always had a good relationship (1T72).

2. Since 1981, the Board has been operating an HEA program to help needy clients meet their heating and cooling costs (1T22; 2T97). The program operates primarily during the winter months. The program length varies from year-to-year (2T130). A federal grant, which is controlled by the State, pays for the program itself as well as certain administrative costs associated with operating the program (1T24-1T25).

3. The Board has always staffed the HEA program with a combination of permanent and temporary positions (1T25). Permanent staff assigned to the program include Income Maintenance Supervisor Denise Hammer, an Income Maintenance Specialist, and a clerk

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4/ The Board of Social Services was formerly known as the County Welfare Board.

(1T25). The number of temporary positions has ranged from 15 in the early 1980's to eight in 1995 (2T21).

4. Prior to 1994, the Board staffed the HEA temporary positions by first "borrowing" its own employees from other work units, paying them out-of-title pay, and charging their salaries for the period against the HEA program funds. These employees were usually clerks who were on the civil service list of certified Income Maintenance Technician candidates. At the end of the heating season, they returned to their regular assignments. When the Board could not reassign enough of its own employees to fill the positions, it hired temporary employees from the civil service list of certified Income Maintenance Technicians. When sufficient candidates could not be found from the civil service list, then the Board hired temporary workers off-the-street. (1T52; 1T53; 2T20; 2T99; 2T103).

5. The HEA program workers (both in-house personnel and temporary employees) were assigned the title Income Maintenance Technician and, pursuant to CWA's collective agreement with the Board, they were paid at salary range 13 and provided the same fringe benefits as regular employees (1T26-1T27; 1T77-1T78; 2T37; 2T151-2T152).

6. In the early 1980's, the HEA program was fully funded, enabling the Board to hire as many employees as needed. During this period, it filled about 15 slots annually (2T21). In the mid-1980's, the State capped funding of the program's administrative

costs at six percent, which limited the amount the Board could spend on staffing (2T20; 2T23).

7. By 1989, the Board needed to reduce HEA administrative costs to live within the State-set cap. It sought CWA's approval to use a lower range title to fill the HEA temporary positions (1T28; 1T48; 2T102). CWA understood the Board's need to reduce costs associated with the program, and was willing to assign a lower range title if the Board agreed to reduce the duties and responsibilities for the HEA employees (1T29; 1T31; 1T33; 1T47-1T48). The parties agreed that the civil service title Income Maintenance Aide seemed most suitable (1T29).

8. By letter of September 15, 1989 (CP-1) to Victor Waller, then Local 1086 President, Welfare Director Ann Saboe confirmed that she would seek Board approval to use the Income Maintenance Aide title to staff the HEA program. Saboe acknowledged that this would be a bargaining unit title and proposed it be assigned to salary range 10 (CP-1). Waller responded that range 10 seemed too low for the duties and instead suggested a range 11 (1T29-1T30). He requested a meeting to negotiate over the pay rate (CP-2).

The Board and CWA met to discuss the salary range for the Income Maintenance Aide title, and eventually agreed to a salary range 11 (1T32). The Board did reduce the workload, and a revised job description (CP-3) was implemented (2T102-2T103).

9. In March 1990, the parties signed the 1990-92 successor contract, which included the new title "temporary" Income Maintenance Aide in the contract recognition clause (CP-4; 1T34). This new title was not used in connection with any other Board program (1T38). The parties' 1993-95 contract (J-1), signed on December 19, 1993, continued to include Income Maintenance Aide in the recognition clause, as well as the appended, list of titles with correlated salary ranges. The 1993-95 contract also includes at Article XXI, "Temporary/Interim Job Replacement", the following provision:

> 1. When the employer decides that there is a need to fill a position which has become vacant on a temporary/interim basis, the procedure will be in accordance with applicable New Jersey Department of Personnel Regulations (citations omitted).
>
> 2. If the employer fills a vacancy under this article, based on program needs, the employer shall make every reasonable effort to fill the vacancy from current employees who meet the qualifications of the vacancy and whose past work history is satisfactory, prior to filling the positions from other sources in accordance with Department of Personnel Regulations, recognizing the employer has other options under New Jersey Department of Personnel regulations (J-1 at 35).

10. The Board followed this contract provision by posting a notice of anticipated vacancies in the HEA program, giving employees an opportunity to apply for the positions, and assigning qualified employees to the HEA positions. In-house employees temporarily assigned to the HEA program gained experience and earned out-of-title pay as Income Maintenance Aides pursuant to contract Article XXI (1T36; 1T37-1T38; 1T39; 1T44; 1T50; 1T51-1T52).

Although several employees applied for the program assignment annually, only six employees were assigned to the HEA program between 1981 and 1994 (CP-23; CP-24; R-1).

CWA monitored the Board's assignment and hiring practices for the HEA program to assure that in-house employees were offered a chance to apply for the positions, and that temporary employees were taken from the civil service list (1T53). The Board was sometimes reluctant to give in-house employees the HEA positions because it would have to back-fill their regular position (1T54). On one occasion, CWA grieved the Board's failure to give in-house employees an opportunity to apply.

The Shift to Kelly Services

11. The Board's annual budget for administering its various programs is about $12 million (2T95). A large part of its funding comes from the federal government; funding is also provided by the State, the County, and various grants (2T95). The Board has tried to operate the HEA program exclusively on federal funds dedicated for that purpose.

12. The State supervises the distribution of the HEA federal funds to each county welfare agency. It determines the administrative costs allocated to each county by adding a percentage to the State's total program dollars, then distributing the administrative funds to the various counties operating a program. How much each county is funded for administrative costs is dependent upon the number of clients served. Cost overruns must be funded

locally (2T159). Since 1985, administrative costs associated with operating the Board's HEA program had been capped at six percent (2T98; 2T157). Costs have since escalated while the administrative funding has remained flat. The Board avoided a funding shortfall in 1989 by lowering the salary range for the HEA employees; however, by 1994, administrative costs again exceeded funding, resulting in a deficit (2T106; 2T108).

13. The State formula controlling HEA federal funding mandates that, when the Board charges an employee's compensation to a payroll account, the salary debit automatically triggers companion charges for fringe benefits, as well as for a portion of the agency's overhead expenses -- supervisory payroll, supplies, rent, equipment, etc. (2T109). By 1994, that "surcharge" was about 60¢ for every salary dollar (2T109-2T110).

14. In July 1994, the Board determined that, because of this cost allocation formula, the HEA program budget was in jeopardy of an overrun. The Board passed a resolution (R-2) authorizing the solicitation of bids to contract out the temporary personnel services. On September 26, 1994 the Board placed an advertisement in the Burlington County Times soliciting bids to contract for temporary employee services (R-4; 1T61). On October 24, 1994, the Board signed a contract (R-5) for services with Kelly Temporary Services to provide temporary personnel seasonally for a one-year period.

The contract with Kelly saved money. The Kelly temps cost less than the salaries and fringe benefits of Income Maintenance Aides. Also, the indirect "overhead" costs are no longer charged to the HEA program. The Kelly contract, in essence, eliminated the 60% overhead charge because the employees are not paid from a salary account (2T110-2T111). Although the overhead costs, such as rent and equipment, are still incurred, they are now charged to other programs, where funding is matched dollar for dollar (2T162). Salaries and fringe benefits of the permanently assigned HEA supervisors must continue to be charged to the program (2T163).

15. CWA learned about the possible contracting out of HEA temporary employees in August, 1994. CWA representatives had a discussion with Saboe about the apparent contracting out of a maintenance worker and a paralegal from an outside agency (1T94). Saboe explained that the maintenance person was hired through an agreement with the Association for Retarded Citizens, and the paralegal was hired from a temporary agency to replace someone on leave of absence (1T83). During the meeting, Saboe also told CWA that the Board was considering broadening the use of temporary agencies for other programs, including HEA (1T84; 1T61; 1T95; 2T117). CWA was concerned because it realized this could happen with any of the Board's programs (1T84).

16. On October 2, 1994, CWA wrote to Saboe, asking to reopen negotiations over the use of temporary employees in the HEA program, asserting that "these positions are within the CWA [unit]"

(CP-5; 1T62). On October 7, 1994, Board Attorney Alan Schmoll replied, declining to renegotiate and stating that the "temporary employees" are not the Board's but are supplied by an outside temporary employment agency (CP-6).

17. CWA also filed a grievance (CP-7) on October 7, alleging the Board did not afford the current employees an opportunity to fill the HEA slots in violation of contract Article 21. Saboe denied the grievance (CP-8), finding it not grievable. CWA met with the Board to express its concerns that the Board would contract out other programs, that unit employees were not given an opportunity to apply in violation of the contract, and that the temps agency personnel were really controlled by the Board (1T71). The Board denied CWA's grievance (CP-9; 1T66). The following Monday, Saboe met informally with the CWA (1T73). Saboe explained the problem with the State formula for allocating federal funding of money for administrative costs (1T82). CWA did not know the Board was supplementing the program (1T82-1T83). Saboe also supplied CWA with information it requested on the HEA program costs and a copy of the bids (1T81).

18. In December 1994, CWA met with County Freeholder Director Vincent Farias, Board Chairman Nottigan and Vice-Chair Manco. The Board assured CWA that it had no intention of replacing staff in other programs, but if it did decide to do so, it would communicate with the CWA (1T91; 2T121-2T122).

Another meeting with the Board concerning this issue occurred in April 1995 (2T124). Although CWA was prepared to offer the Board cost savings proposals as an alternative to its contracting with Kelly, CWA made no proposal at any meeting. The Board continued to refuse to negotiate (2T124).

On December 20, 1994, Local 1086 President Elaine Waller again sent Saboe a letter requesting to negotiate over the use of the agency temps (1T74). Board attorney Alan Schmoll denied that request by letter on January 5, 1995, again asserting the Board's managerial prerogative to subcontract (CP-11).

19. The use of Kelly did not result in the layoff of any permanent workers (1T86). No overtime opportunities were lost (1T86), but the in-house staff not assigned to the program lost opportunities for out-of-title pay and work experience (1T87; 2T178-2T179).

The Board's Relationship With Kelly

20. The contract with Kelly Services (R-5) provides that,

> Kelly promises and undertakes to assign appropriate persons under its employ to provide temporary seasonal services relating to the Home Energy Assistance Program for the Board at its premises, the Burlington County Human Services Facility [in] Mount Holly.
>
> Kelly shall be compensated by the Board at the rate of $8.89 per hour worked upon presentation of a signed voucher to the Board for the cost of screening, testing, and interviewing prospective workers for placement and the provision of 0-10 workers on an 'as needed basis' approximately 35 hours per week....

> ...The Board, at its sole discretion, shall reserve the right to accept or reject any employee or agent of Kelly for any reason whatsoever.
>
> ...Kelly agrees that it is performing this contract as an independent contractor, and that Kelly's employees or agents are in no way ever to be considered employees or agents of the Board.

The contract also contains provisions, such as the guarantee of confidentiality of client information and the provision of liability insurance by Kelly (R-5).

21. Kelly Services is paid based upon the actual number of hours the Kelly temps work (2T175). In 1994-95, the Board paid Kelly $8.89 an hour, of which Kelly paid its temps $6.50 an hour for their work in the HEA program (1T77). The hourly rate under the CWA contract for Income Maintenance Aide was $11.28 (1T77). The Kelly temps receive no fringe benefits or paid leave time (2T85).

22. In the beginning of the heating season, the Board asks Kelly for candidates. The number of HEA positions to be filled depends upon the level of funding (2T48). There were eight positions available for the 1994-95 heating season; between five and eight were filled (2T76; 2T22). Turnover among the Kelly workers is high (2T78; 2T22).

Kelly sends as many workers fitting the qualifications as it has available (2T175; 2T27). The Board gives the Kelly temps a routine pre-employment test (CP-12), which was developed, administered and scored by the Board's Training Supervisor. Part of the test is a routine clerical test, which has been given in the

past to permanent employees; the rest is from the ARCO skills test books (2T9).

23. All candidates who score above 70 are interviewed by an interview panel, which consists of Income Maintenance Supervisor Denise Hammer, and two other Board administrators (2T46-2T48). The panel asks the candidates a series a prepared questions (CP-15) and then separately evaluates them on their answers, as well as other factors such as appearance, attitude and demeanor (2T50-2T51). Candidates are scored numerically. The panel then discusses the ratings, and the candidates with the highest mutual ratings are hired (2T51-2T53). A similar interview and rating process was used for Income Maintenance Aides hired into the HEA program (2T54-2T55). After the candidate is hired, he or she is sent to the Training Department for training (2T55).

24. The Training Department provides one to two days of training for the Kelly temps, followed by on the job training (2T15; 2T29). Training Supervisor Royell Simpson is responsible for training the Kelly temps. She uses a shortened version of the same training program used for the Income Maintenance Aides assigned to the HEA Program (CP-13; 2T11-2T13; 2T80). The training mainly consists of practical mathematics (2T29). The Kelly temps are also given the HEA training manual (CP-14), the same manual which was given to Income Maintenance Aides (2T14). The orientation section of that manual, which contains an overview of the Board's other programs and services, is the same as is given to all Board

employees (2T31). The Kelly temps are given this information because they are expected to be able to refer clients' inquiries to appropriate units of the Board (2T31-2T32; 2T40).

25. The Kelly temps report to and are supervised by HEA Supervisor Denise Hammer. Hammer instructs them on the HEA's specific procedures when they first report. The HEA unit processes over 3,000 cases in a season. The Kelly temps all do the same work. They review the HEA applications after they have been completed by the client. Most applications are received through the mail, but the Kelly temps assist clients who appear in person. The Kelly temp reviews the application for completeness, checks the required supporting documentation, records the results of the interview or application review and assembles information in a file folder. They make calls to verify the client's eligibility and to check with fuel dealers (CP-3; 2T16; 2T18; 2T55-2T59; 2T73; 2T79).

The Kelly temps complete daily work logs showing the number of clients seen, applications processed and eligibility verified. Hammer reviews the daily logs as well as the clients applications and document verification. Hammer signs off on each file after it is verified by the Kelly temp (2T56-2T57).

26. They use Board phones, desks, equipment, calculators, forms and supplies (2T62). The Kelly temps use identification badges identifying themselves as Kelly employees; they are not issued Board identification (2T83). However, in making telephone contacts for the HEA, they identify themselves as representing the Board of Social Services or the Heating Assistance Program (2T61).

Except for a reduction in the use of the computer terminals, the job content has not changed since the Income Maintenance Aides performed the work (1T73). Hammer has no direct contact with Kelly Services other than the workers (2T79). Kelly provides no on-site supervision (CP-25).

27. While the Kelly temps do not punch in and out on the Board's time clock, they are required to sign in and out. The HEA Supervisor, Denise Hammer, monitors and initials the sign-in sheet for accuracy. She also monitors their break and lunch periods (2T19; 2T38; 2T63-2T65; 2T83).

The Kelly temps are required to sign client information confidentiality statements, as are all Board employees, promising to keep all client information confidential (R-5; 2T39).

28. Unlike the Income Maintenance Aides, the Kelly temps are subject to neither regular evaluations nor civil service disciplinary procedures (2T74-2T76). Hammer counsels Kelly temps who report late. If a problem persists, she reports it to her supervisor (2T65). Hammer has reported both lateness and incompetence to her supervisor, who has reported the problem to Kelly Services. The worker was removed (2T66-2T67).

29. The Board has other contracting arrangements for services such as transportation and security (2T182). With those contracts, the drivers and security guards are not recruited, hired, tested or supervised by the Board, nor does the Board provide any equipment. They report to the contracting companies (2T183-2T184).

Flyer Issue

30. On October 31, 1994, Chief Steward Marlene Schwarz wrote to Saboe announcing that the Local's Community Services Committee was doing a "community outreach" service project involving the HEA program. Specifically, Schwarz stated that the Committee intended to contact churches, hospitals, senior citizens groups and other community groups to "assure that all eligible individuals apply for and receive Home Energy Assistance" (R-10). The letter asked Saboe for a large supply of application forms and information to facilitate the project. Schwarz reiterated the request on November 17, 1994 (R-11 attachment).

31. Saboe responded to Schwarz by letter of November 18, 1994, attaching a flyer prepared by the State describing the HEA program, and suggesting the union might want to use the State's flyer (R-11).

32. Sometime in early 1995, CWA distributed a leaflet to the public, which states:

> NEED HELP WITH YOUR HEATING BILLS?
>
> The Home Energy Assistance Program at the Burlington County Welfare Board may be the solution!
>
> Call 261-1022 for an application Mon-Fri, 8:00 A.M. - 4:30 p.m.
>
> Hurry - Don't Delay - Call Today, it may save you $ $ $.
>
> The Communications Workers of America, AFL-CIO, Local 1086, is also willing to assist you. Please call 609-267-6229, 261-1000, ext. 367 or ext. 233 during the day, or 261-0007 after 5:00 P.M.

Eligibility Determined by Home Energy Assistance New Jersey regulations.

The second CWA leaflet, on CWA Local 1086 stationary, states:

SPECIAL NOTICE REGARDING HOME ENERGY ASSISTANCE

Our Union is conducting a special community outreach service to Burlington County residents to assure that all eligible individuals apply for an if eligible, receive Home Energy Assistance benefits. We are in the process of contacting churches, community organizations, hospitals, senior citizens groups, etc., in an effort to reach as many people as possible.

We are enclosing an informational flyer listing income/eligibility requirements for HEA benefits and information on how individuals can apply for these benefits. It would be appreciated if you would please distribute this flyer to members of your congregation, patients, residents, club members, friends, family members, etc., and encourage them to apply for these benefits as soon as possible.

If you have any questions concerning the program, contact Burlington County Welfare Board at [Board number]. Members of our Union are willing to assist, as well. If you would like someone from our Union to address your group, please contact us at [CWA office number].

The third CWA leaflet, also on CWA Local 1086 stationary, states:

HOME ENERGY ASSISTANCE

The Communications Workers of America, AFL-CIO, Local 1086, is conducting a special community outreach service to Burlington County residents, to assure that all eligible individuals apply for and receive Home Energy Assistance benefits. The HOME ENERGY ASSISTANCE PROGRAM accepts applications from November 1, 1995 until February 28, 1995 for both heating and cooling assistance.

This program is designed to help low income families meet heating and medically necessary cooling costs. The heating payments are

determined based on income, household size and fuel type.

To be eligible for this program, the household members must be residents of New Jersey, pay for their heating and/or cooling costs directly, or have heat included in their rent. The following income eligibility requirements must also be met:

MAXIMUM INCOME CHART

Household Size	Maximum Income	Household Size	Maximum Income
1	$ 920.00	6	$2470.00
2	$1230.00	7	$2781.00
3	$1540.00	8	$3090.00
4	$1850.00	9	$3400.00
5	$2160.00	10	$3710.00

Individual households, especially those containing elderly or disabled individuals, may receive and return applications by mail. Employees at Burlington County Welfare Board are available to assist in the completion of the application.

If you have questions, call Burlington County Welfare Board at [Board number]. If you would like someone from our Union to assist you as well, please call [CWA Office number].

33. The three leaflets (R-12) were distributed together as a package through a local Burlington pastor to other area churches (3T77). At CWA's request, the Burlington County Office on Aging sent the CWA leaflet to approximately 60 organizations on its mailing list (3T77; 3T91). CWA did not solicit clients' applications. It intended to show the union in a positive light to the community (3T78-3T79).

The telephone numbers listed for "CWA assistance" in the flyer are: the CWA office number, followed by the office extension numbers of two Board employees who are CWA Stewards, followed by a

CWA Steward's home number. Neither of the two CWA Stewards work in the HEA program (2T148; 3T87-3T88). Neither of the two stewards obtained permission to disseminate their work numbers for this purpose (3T88-3T89). In response to the flyers, Ruth Hollowell received one call -- an officer in a seniors organization -- asking for information on behalf of her group (3T94). Hollowell explained how to get in touch with the HEA program and that eligibility is set by the State guidelines (3T94-3T95). Marlene Schwarz, the other shop steward, acknowledged that she did not obtain permission to list the work telephone number on the flyer, but that she had used the office number for a Christmas program without objection (3T99).

34. The flyer was brought to the Board's attention through a client (2T146). On April 16, 1995, Saboe wrote a letter to Waller (R-12), expressing the Board's displeasure with the CWA flyer.

35. Local 1086 has been involved in other community service projects such as collecting toys for clients' children, purchasing coats for senior citizens and giving holiday baskets. This is its first project involving an effort to help clients apply for programs (3T63). The result of the flyer distribution was that CWA received one call from a senior citizens organization (2T76).

ANALYSIS

CO-H-95-281; SN-H-95-75

The CWA argues that the Board shifted unit work to non-unit employees without negotiations in violation of subsection 5.4(a)(5) of the Act. It argues that the workers supplied through the

contract with Kelly Services are, in effect, employees of the Board because of the significant control the Board exercises over them.

The Board asserts that it exercised its managerial prerogative when it contracted out the HEA work through Kelly Services and that it had no negotiations obligation.

It is clear that, until 1994, the HEA program work was performed exclusively by CWA unit employees. Both in-house employees and temporary workers hired for the heating season were treated as unit employees, represented by CWA and covered by the terms of CWA's contract. (See fact numbers 5, 9, 10). Therefore, I find that the HEA program work was exclusively CWA unit work.

The shift of unit work to employees outside the collective negotiations unit requires collective negotiations. Bergen Cty., P.E.R.C. No. 92-17, 17 NJPER 412 (¶22197 1991); Gloucester Tp. Dist. No. 4, P.E.R.C. No. 94-36, 19 NJPER 534 (¶24250 1993).

However, the New Jersey Supreme Court has held that contracting work to an outside contractor based upon economic reasons is a non-negotiable, management prerogative. State of New Jersey and Local 195, IFPTE, 88 N.J. 393 (1982). The Court wrote:

> The decision to contract out work or to subcontract is...an area where managerial interests are dominant.... We therefore hold that to the extent the contractual provision at issue...includes negotiation on the ultimate substantive decision to subcontract, it is a non-negotiable matter of managerial prerogative. [Id. at 408].

But Local 195 restricts a public employer's right to subcontract. The Court cautioned:

> [O]ur holding today does not grant the public employer limitless freedom to subcontract for any reason. The State could not subcontract in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers. State action must be rationally related to a legitimate governmental purpose. Our decision today does not leave public employees vulnerable to arbitrary or capricious substitutions of private workers for public employees.
> [Id. at 411].

See also, Ridgewood Bd. of Ed., P.E.R.C. No. 93-81, 19 NJPER 208 (¶24098 1993), app. pending App. Div. Dkt. No. A-3903-92T2. Deptford Tp. Bd. of Ed., P.E.R.C. No. 83-44, 8 NJPER 603 (¶13285 1982); Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985). I find nothing arbitrary or capricious about the employer's decision to contract out the HEA program services.

The appropriate standard to determine whether subcontracting was illegally motivated is set forth in In re Bridgewater Tp., 95 N.J. 235 (1984). The undisputed facts show that the Board and the CWA had a positive working relationship and that the Board showed no hostility toward the union or to the employees in considering how to staff the HEA program. It appears that the Board made its decision based upon the economic realities of the situation: that the HEA administrative costs were in a serious deficit, and the fact that, under the federal grant guidelines, most of the 60% overhead charge could be avoided by the use of an outside agency. I find that this record does not demonstrate that the Board's decision to subcontract was illegally motivated by hostility

toward the employees' protected activity in violation of 5.4(a)(3). Ridgewood; contrast Glassboro Housing Authority, P.E.R.C. No. 90-16, 15 NJPER 524 (¶20216 1989).

CWA argues that it was denied an opportunity to negotiate over the Board's decision to subcontract. The Board had no such obligation. Local 195. However, the Board and Director Saboe met several times with CWA representatives to hear their views concerning the subcontracting.

Finally, CWA contends that the Board retains significant control over the Kelly temps so as to be found their de facto employer. In determining employer status, the Commission focuses on which entity generally controls the employees' hiring, performance evaluations, promotions, discipline, firing, work schedules, vacation, hours of work, wages, benefits, funding and expenditures. See 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); Bergen Cty. Prosecutor and Mercer Cty. Prosecutor, P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110 1978), aff'd 172 N.J. Super 363 (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); Bergen Cty. Sheriff, P.E.R.C. No. 84-98, 10 NJPER 168 (¶15083 1984). Applying the control of labor relations test, I cannot find that the Board has complete control over Kelly temps.

The Kelly temps are tested and interviewed by the Board. The Board will reject anyone it decides is not qualified. All

training for Kelly temps is done by Board employees. All work is assigned, monitored and reviewed by the Board. The Board monitors their work time, including breaks and lunches. It has the right to and does remove employees who do not properly perform. The Board provides the facilities, equipment and supplies to the temps to do the job. The Kelly temps sign a confidentiality statement, as do other employees.

However, the Board has no control over the most important of their terms and conditions of employment -- their wages. Absent this essential component, it cannot be found that these workers are employed solely by the Board.

In light of my finding that the Kelly temps are not employed directly by the Board, therefore, it cannot be said that the employer transferred unit work from unit employees to non-unit employees. Absent a finding that the Board is the de facto employer of the Kelly temps, I find no (a)(5) violation.

Further, unless the public employer is found to be the sole employer of employees, we have no jurisdiction. See Union Tp., D.R. No. 95-9, 21 NJPER 14 (¶26008 1994), ARA Services Inc., E.D. No. 76-31, 2 NJPER 112 (1976).

CWA cites Continental Winding Co., 305 NLRB No. 17, 138 LRRM 1397 (1991) and asserts that even where a joint employer relationship exists, a violation should be found when the employer replaces unit employees with temp agency employees. However, the circumstances in this matter are distinguishable. In the

Continental matter, the National Labor Relations Board found that the employer committed an (a)(3) violation because its refusal to bargain was motivated by its desire to erode the union's majority status, and that the employer's use of the temp agency was for the "discriminatory purpose of retaliating against its employees because of their union activities." 138 LRRM at 1401. Here, as found above, the Board demonstrated no illegal motive in subcontracting the HEA services and I find no violation of 5.4(a)(3).

CE-H-95-19

The Board charges that CWA violated 5.4(b)(3) of the Act by interfering with the Board's business operation when it distributed the leaflets directing HEA program inquiries to CWA. Section 5.4(b)(3) prohibits an employee organization from: Refusing to negotiate in good faith with the employer concerning employees' terms and conditions of employment. Nothing in the facts of this case support such a conclusion. At worst, CWA encouraged the use of its shop steward's work telephone for union business.[5/] At best, it made an effort to provide a service to the general public by distributing information about an available program. A fair reading of the leaflet, other than the substantive program information, shows that the "assistance" CWA offered the public was information on where and how to file. It did not attempt to distribute or

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5/ While, in some circumstances, the employer might seek to discipline an employee for the private use of its telephone lines, it could not do so solely on the basis that the unauthorized use of the telephone involved union activity.

collect client applications or otherwise hold itself out as the agency for filing purposes.

In any event, CWA did not undermine, change or affect terms and conditions of employment in any way, nor did it refuse to negotiate. Accordingly, I find that Local 1086 did not violate 5.4(b)(5) of the Act.

CONCLUSION

The Burlington County Board of Social Services did not violate subsections 5.4(a)(1), (3) or (5) of the Act by contracting out with Kelly Services for temporary workers to fill positions formerly held by CWA unit members, or when it refused to negotiate with CWA over its decision to subcontract such services.

The CWA Local 1086 did not violate subsection 5.4(b)(3) of the Act by disseminating a flyer about the Board's HEA program.

The subject matter of the CWA grievance concerning the Board's staffing of the HEA program through an outside employment agency is not mandatorily negotiable.

RECOMMENDATIONS

I recommend that the Consolidated Complaint be dismissed in its entirety.

I recommend that the Commission restrain arbitration of CWA's grievance concerning the Board's staffing of the HEA program through an outside employment agency.

Susan W. Osborn

Susan Wood Osborn
Hearing Examiner

DATED: December 4, 1996
Trenton, New Jersey