P.E.R.C. NO. 2024-47

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

VINELAND BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2023-171

VINELAND EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission sustains the refusal of the Director of Unfair Practices to issue a complaint on an unfair practice charge filed by the Association. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) when it subcontracted with private companies and contractors to fill vacant teaching positions and provide additional health services to its students. Applying the Supreme Court's Local 195 holding, the Commission finds that the Board's decision to subcontract was non-negotiable and that the Association did not allege that the Board subcontracted in bad faith. The Commission also finds that N.J.S.A. 34:13A-46 (P.L. 2020, c. 79) only prohibits subcontracting that affects the employment of currently employed unit employees; therefore, as the Board's subcontracting did not displace any current employees but only filled vacancies and new positions, it did not violate N.J.S.A. 34:13A-46.

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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Appearances:

For the Respondent, Blaney Donohue & Weinberg, P.C., attorneys (Nicole J. Curio, of counsel)

For the Charging Party, Selikoff & Cohen, PA, attorneys (Keith Waldman and Hop T. Wechsler, of counsel)

DECISION

On February 5, 2024, the Vineland Education Association (Association) appealed from the January 24, 2024 decision of the Director of Unfair Practices (Director) refusing to issue a complaint on its unfair practice charge and amended charges filed on April 12, June 29, and September 6, 2023. D.U.P. No. 2024-12, 50 NJPER 299 (¶72 2024). The Association's charge, as amended, alleges that the Vineland Board of Education (Board) violated subsections 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act (Act) and P.L. 2020, c. 79 (codified as N.J.S.A. 34:13A-44 to -49 in our Act) when it unilaterally transferred unit work by subcontracting with ESS Substitute Staffing Services (ESS), Educere, and adjunct faculty from Rowan College of South

Jersey (Rowan) to fill vacant teaching positions and subcontracted with Complete Care Health Network (Complete Care) to provide nursing services.[1/]

We summarize the pertinent facts as follows. The Association is the exclusive majority representative for all permanent certificated personnel (including teachers and nurses) as well as all clerical staff members employed by the Board. Substitute teachers are excluded from the unit. The Board and Association are parties to a collective negotiations agreement (CNA) with a term of July 1, 2018 through June 30, 2021 and have ratified a memorandum of agreement (MOA) for a successor CNA extending from July 1, 2021 through June 30, 2025.

The Board has been subcontracting with ESS, Educere, and Rowan adjunct faculty to fill teaching vacancies. The record does not contain the terms of the contracts with the entities with which the Board subcontracted teaching services and does not provide how long the Board has been subcontracting with these different entities and for how many positions. The parties agree there are teaching vacancies but do not agree on how many there

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1/ N.J.S.A. 34:13A-5.4a(1) and (5) prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees on 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, or refusing to process grievances presented by the majority representative."

are and the exact number has not been established in the record. The Board asserted before the Director that its subcontracting of teaching services is not intended to replace unit positions with non-unit contractors, but is limited to positions it could not fill through the regular hiring process.[2/]

The Board's contract with Complete Care is to provide health care services at Vineland High School North and is effective from July 1, 2020 through June 30, 2025. Neither party asserted that there were any vacant nursing positions filled by the Complete Care contractors. The Board asserted that Complete Care contractors provide additional health services that are not and/or cannot be performed by Association nurses.

There is no claim or evidence in the record that any current Association unit employees have been displaced by the Board's subcontracting to fill vacant teaching positions or to provide health services.

In D.U.P. No. 2024-12, the Director refused to issue a complaint on the Association's unfair practice charge. The Director concluded that the subcontracting limitations applicable to school districts in P.L. 2020, c. 79 (N.J.S.A. 34:13A-46) only preclude subcontracting during the term of an agreement if it results in current unit employees being displaced, which has not

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2/ The record does not include facts concerning the Board's recruitment efforts, hiring processes, or the qualifications of any applicants for the vacant teaching positions.

occurred here. The Director also noted that because the Board's contract with Complete Care preceded the effective date of P.L. 2020, c. 79, it was not subject to its provisions. The Director found that the Association's unit work rule argument was not applicable because this case involves subcontracting, which is generally non-negotiable except as modified by P.L. 2020, c. 79, rather than the reassignment of unit work to other Board employees. Nevertheless, the Director proceeded to analyze the unit work claim under the traditional unit work rule and the Local 195, IFPTE v. State, 88 N.J. 393 (1982) negotiability test. The Director concluded that an exception to the unit work rule applied and that the Board's managerial prerogative to fill vacancies "in response to a teacher shortage" was dominant over the Association's interest in preventing the loss of unit work positions to non-unit contractors. Finally, the Director found that the Association's education law allegations are within the Commissioner of Education's jurisdiction.

Where no complaint is issued by the Director, the charging party may appeal to the Commission, which may sustain the refusal to issue a complaint or may direct that further action be taken. N.J.A.C. 19:14-2.3(b).

In its appeal, the Association asserts that the Director's interpretation of N.J.S.A. 34:13A-46 was flawed because it improperly limited the statute's subcontracting prohibition to

situations in which unit employees are actually displaced, rather than applying it to subcontracting that erodes unit work by replacing vacant unit positions with non-unit positions. The Association argues that the Director improperly relied on the Board's claims of a teacher shortage when the record did not establish a staffing emergency requiring the Board to subcontract. The Association further asserts that the Director erred by finding that the unit work rule cannot apply to subcontracting unit work and erred in his application of the exceptions to the unit rule by comparing substitute teachers to the contractors who are filling positions.

The Board asserts that the Director correctly found that the subcontracting prohibition in N.J.S.A. 34:13A-46 does not apply because no current Association employees have been replaced with non-unit contractors. The Board argues that the Director properly found that the unit work rule only applies to cases involving the shifting of unit work from one group of employees to another, but that the decision to subcontract unit work is non-negotiable. It contends that if the unit work rule did apply, the waiver and exclusivity exceptions apply because Association employees have shared unit teaching work with substitute teachers. The Board asserts that the Director correctly applied the Local 195 negotiability test to find that

the Association's interests were not harmed and the Board had educational policy reasons for subcontracting.

Analysis

The Commission and courts distinguish between unit work cases and subcontracting cases. The typical unit work case involves a public employer shifting negotiations unit work from one group of its employees to another group of its own employees. By contrast, the typical subcontracting case involves a public employer shifting unit work to a private entity or independent contractor whose employment conditions are not controlled by the public employer during the life of the subcontract. Hudson Cty., P.E.R.C. No. 2008-43, 34 NJPER 13, 17 (¶6 2008); Rutgers, The State University and AFSCME, 1983 N.J. Super. Unpub. LEXIS 15 (App. Div. 1983), aff'g P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981); and Washington Tp., P.E.R.C. No. 83-166, 9 NJPER 402 (¶14183 1983). While the preservation of unit work is generally mandatorily negotiable and subject to the Local 195 negotiability balancing test, a public employer's decision to subcontract unit work is not mandatorily negotiable.[3/] City of Jersey City v.

3/ In cases where a public employer subcontracts with a different public employer, the Commission will apply the Local 195 balancing test to determine whether the decision to transfer work to the employees of another public employer is mandatorily negotiable. See Union Cty., P.E.R.C. No. 2010-82, 36 NJPER 183 (¶67 2010); Hudson Cty., supra; and Middletown Tp. Bd. of Ed., P.E.R.C. No. 2000-24, 25 NJPER 429 (¶30189 1999).

Jersey City POBA, 154 N.J. 555 (1998); Local 195, IFPTE v. State, 88 N.J. 393 (1982). "Subcontracting and the unit work doctrine may have similar consequences, but the former is not negotiable while the latter is, depending on the circumstances." Ocean Tp., P.E.R.C. No. 2011-90, 38 NJPER 72, 75 (¶15 2011). The instant case does not directly implicate the unit work doctrine because it does not concern unit work being shifted to other Board employees (whether non-union or from a different unit). Rather, this case concerns the Association's challenge to unit work being subcontracted to non-employees (e.g., ESS, Educere, Rowan, and Complete Care contractors).

In Local 195, supra, 88 N.J. at 407-08, the Supreme Court held that public employers have a non-negotiable managerial prerogative to subcontract governmental services to a private company even if the decision is based solely on a desire to save money and even if employees will lose jobs as a result. The Court held that public employees' vital interest in not losing their jobs was outweighed by the employer's interests 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." Local 195 at 407. The Court further held that notice provisions and procedural aspects

concerning the impact of subcontracting remained mandatorily negotiable and that proposals to "discuss" alternative solutions to subcontracting motivated by economic considerations were negotiable. Id. at 409-410. Finally, the Court explained that a public employer could not subcontract "in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers." Id. at 411.

Following Local 195, the Commission and courts have consistently prohibited negotiations or arbitration over the substantive decision to subcontract unit work to private companies and contractors and dismissed unfair practice charges alleging a failure to negotiate over the decision to subcontract. See, e.g., Toms River Tp., 2008 N.J. Super. Unpub. LEXIS 2622 (¶72 App. Div. 2008), certif den., 198 N.J. 315 (2009), rev'g P.E.R.C. No. 2007-56, 33 NJPER 108 (¶37 2007) (subcontracting tree removal); Kean University, P.E.R.C. No. 2022-43, 48 NJPER 430 (¶98 2022) (subcontracting grounds and housekeeping work); Vernon Tp. Bd. of Ed., P.E.R.C. No. 2016-9, 42 NJPER 115 (¶33 2015) (subcontracting child study team services to therapy company); Matawan-Aberdeen Regional Bd. of Ed., P.E.R.C. No. 2004-35, 29 NJPER 541 (¶173 2003) (subcontracting cafeteria services); East Brunswick Bd. of Ed., P.E.R.C. No. 2000-41, 26 NJPER 21 (¶31006 1999) (subcontracting child study team services to independent social workers); and Burlington Cty. Bd. of Social

Services, P.E.R.C. No. 98-62, 24 NJPER 2 (¶29001 1997) (subcontracting energy assistance program).

In Ridgewood Bd. of Ed., 1994 N.J. Super. Unpub. LEXIS 10 (App. Div. 1994), certif. den., 137 N.J. 312 (1994), aff'g P.E.R.C. No. 93-81, 19 NJPER 208 (¶24098 1993), the Appellate Division affirmed the Commission's decision finding that, even during the term of a CNA, the employer had no obligation to negotiate over subcontracting school custodial and maintenance services that terminated the employment of an entire negotiations unit. Relying on Local 195, the Appellate Division held:

> [T]he Court left no doubt that ". . . public employees have no right to negotiate on the ultimate decision to subcontract." [Local 195] at 409. The import of the Court's holding is that public employees cannot by negotiation protect themselves during the contract term from the risk of job termination resulting from subcontracting during the life of the contract. By definition, therefore, the public employer retains the right, if it acts in good faith, to subcontract at any time and without reference to the existing contract. That conclusion is impelled by In re IFPTE. We are obliged to follow it.
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> [Ridgewood, 1994 N.J. Super. Unpub. LEXIS 10, *3.]

However, limitations on a public employer's non-negotiable right to subcontract were implemented with the enactment of P.L. 2020, c. 79 (codified as N.J.S.A. 34:13A-44 to -49 in our Act).[4/]

4/ These statutes apply to certain public employers including (continued...)

Under N.J.S.A. 34:13A-46, an employer is prohibited from entering into a "subcontracting agreement which affects the employment of any employees" in a unit represented by a majority representative during the term of an existing CNA. When a CNA expires, an employer may only subcontract if, at least 90 days prior to soliciting subcontracting bids, it "[p]rovides written notice to the majority representative of employees in each collective bargaining unit which may be affected by the subcontracting agreement" and the Commission, and offers to meet and consult with the majority representative and negotiate over the impacts of subcontracting. N.J.S.A. 34:13A-46(a)-(b). The employer maintains its right to subcontract if no successor agreement exists. N.J.S.A. 34:13A-46(b).

The Association asserts that the subcontracting limitations of N.J.S.A. 34:13A-46 apply in this case even though only vacant positions were filled and no current unit employees were displaced. P.L. 2020, c. 79 defines "subcontracting" as: "any action, practice, or effort by an employer which results in any services or work performed by any of its employees being performed or provided by any other person, vendor, corporation, partnership or entity." N.J.S.A. 34:13A-44 (emphasis added). Based on that definition alone, it is not clear whether it is

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4/ (...continued)
school districts such as the Board. N.J.S.A. 34:13A-44.

intended to cover subcontracting of any unit work or limited to subcontracting that shifts work away from current employees to a private contractor. However, the law's operative provisions set forth a more targeted definition of subcontracting. N.J.S.A. 34:13A-46 provides, in pertinent part (emphasis added):

> No employer shall enter into a subcontracting agreement which affects the employment of any employees in a collective bargaining unit represented by a majority representative during the term that an existing collective bargaining agreement with the majority representative is in effect.

The next two sections of the statutory scheme further elucidate the law's intent to place limitations only on subcontracting agreements that affect current unit employees. N.J.S.A. 34:13A-47 and -48 focus on employee-specific rights and remedies for replaced or displaced employees (emphasis added):

> 34:13A-47. Rights of displaced employee
>
> Each employee replaced or displaced as the result of a subcontracting agreement shall retain all previously acquired seniority during that period and shall have recall rights whenever the subcontracting terminates.
>
> 34:13A-48. Violation, unfair practice; remedies
>
> An employer who violates any provision of this act [C.34:13A-44 et seq.] shall be deemed to have committed an unfair practice, and any employee or majority representative organization affected by the violation may file an unfair practice charge with the New Jersey Public Employment Relations Commission. If the employee or organization

> prevails on the charge, the employee is entitled to a remedy including, but not limited to, reinstatement, back pay, back benefits, back emoluments, tenure and seniority credit, attorney's fees, and any other relief the commission deems appropriate to effectuate the purposes of this act.

N.J.S.A. 34:13A-48 allows either the employee or the majority representative to file the unfair practice charge over a subcontracting violation. However, the remedy for prevailing in either case specifically provides that "the employee is entitled to a remedy including, but not limited to, reinstatement, back pay, back benefits . . ." N.J.S.A. 34:13A-48.

Moreover, nothing in the legislative history of P.L. 2020, c. 79 supports the Association's broad interpretation of the law's limitations on subcontracting. The June 26, 2020 Assembly Appropriations Committee's Statement on Senate Bill No. 2303 provides, in pertinent part (emphasis added):

> As amended, this bill prohibits an employer from entering into a subcontracting agreement which may affect the employment of any employees in a collective bargaining unit under any circumstances during the term of an existing collective bargaining agreement covering the employees. . . . Each employee replaced or displaced because of a subcontracting agreement would retain all previously acquired seniority and would have recall rights when the subcontracting terminates. The bill provides that an employer who violates the act has committed an unfair practice and may be subject to an unfair practice charge with the Public Employment Relations Commission, under which the employee may be entitled to a remedy including, but not limited to: reinstatement,

> back pay, back benefits, back emoluments, tenure and seniority credit, and attorney's fees.

This legislative history supports our interpretation of N.J.S.A. 34:13A-46 that it is intended only to restrict subcontracting that affects the employment of an employer's current represented employees, such as through replacement or displacement. The Association's contention that N.J.S.A. 34:13A-46 prohibits any subcontracting that would remove unit work from the unit, even though no current unit employee's work is affected, is not supported by the statutory language or the legislative history. We must constrain our interpretation and application of N.J.S.A. 34:13A-46 to the particular language used as well as the legislative scheme as a whole. See Medical Soc'y of N.J. v. N.J. Dep't of Law and Pub. Safety, 120 N.J. 18, 26 (1990) (we "should not assume that the Legislature used meaningless language"); and Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 129 (1987) (when discerning legislative intent, "we consider not only the particular statute in question, but also the entire legislative scheme of which it is a part"). Accordingly, we find that, as the Board's subcontracting did not affect the employment of any current Association unit employees, it is not prohibited or limited by N.J.S.A. 34:13A-46.[5/]

5/ Additionally, as the Board's health/nursing contract with Complete Care was effective July 1, 2020, prior to the (continued...)

As N.J.S.A. 34:13A-46 is inapplicable to the subcontracting at issue in this dispute, the Supreme Court's Local 195 holding controls and directs that we find the Board's subcontracting decisions non-negotiable. We therefore dismiss the Association's 5.4a(5) and 5.4a(1) charges alleging that the Board failed to negotiate in good faith when it subcontracted certain teaching and nursing work. Furthermore, the Association's unfair practice charge does not allege that the Board's decision to subcontract was made in "bad faith" in violation of subsection 5.4a(3) of the Act.[6/] The Association also provided no specific allegation that it demanded to negotiate any potential negotiable impacts or that the Board refused to negotiate any such issues.[7/] See Monroe Tp.

5/ (...continued)
enactment of N.J.S.A. 34:13A-46, it cannot be challenged under the new legislation. Kean University, supra, 48 NJPER at 430 (identical subcontracting statutes applicable to state colleges and universities did not apply where subcontracting agreement predated their enactment).

6/ Based on Local 195, the Commission can consider whether subcontracting was done in "bad faith" due to anti-union animus in violation of subsection 5.4a(3) of the Act. See, e.g., Warren Hills Reg. Bd. of Ed., P.E.R.C. No. 2005-26, 30 NJPER 439, 442 (¶145 2004), aff'd, 2005 N.J. Super. Unpub. LEXIS 78 (App. Div. 2005), certif. den., 186 N.J. 609 (2006) (employer violated Act by subcontracting bus services in retaliation for protected union activity); and Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985) (employer violated Act by subcontracting certain bus runs in retaliation for protected union activity).

7/ The Board submitted evidence that during successor contract negotiations in 2021, the Association proposed and the Board rejected a unit work preservation clause.

Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984) (charge over subcontracting cafeteria operations was dismissed because employer had no duty to negotiate and union provided no evidence it attempted or employer refused to negotiate impacts); compare Buena Reg. Bd. of Ed., P.E.R.C. No. 2023-9, 49 NJPER 187 (¶44 2022) (union could proceed to hearing on 5.4a(5) charge that employer breached sidebar agreement reached during concession bargaining over potential subcontracting of paraprofessionals). Finally, we concur with the Director that the Association's education law allegations fall within the Commissioner of Education's jurisdiction to hear and determine disputes arising under the school laws. See N.J.S.A. 18A:6-9.

We turn to the Director's analysis of the "unit work rule" and its exceptions. The Commission considers unit work claims by applying the Local 195 test to determine whether the majority representative's interest in preserving unit work would significantly interfere with the employer's managerial prerogative to determine governmental policy. Jersey City, 154 N.J. at 574-575; Local 195, 88 N.J. at 404-405. Initially, we concur with the Director's determination that the unit work rule is not applicable because this is a subcontracting case. D.R. No. 2024-12 at 13-14; see Hudson Cty., supra; Ocean Tp., supra. However, as the Director went on to analyze the case under both

the unit work rule and Local 195 negotiability test, we find it necessary to clarify several determinations.

First, we disagree with the Director that the Association's interest in preserving unit work is not implicated by the filling of vacancies in unit positions with non-unit contractors. The preservation of unit work is generally mandatorily negotiable because a union has an interest in "protecting unit work from encroachment by non-unit members." Middlesex Cty., 6 NJPER 338 (¶11169 App. Div. 1980), aff'g in rel. part P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979); see also Belmar Bor., P.E.R.C. No. 89-73, 15 NJPER 73 (¶20029 1989), aff'd, NJPER Supp.2d 222 (¶195 App. Div. 1989); and Ocean Cty. College, P.E.R.C. No. 2019-49, 45 NJPER 417 (¶112 2019). Preserving unit work involves more than just current jobs, but also making sure unit jobs are not lost later, maintaining salaries and benefits, and "not having their collective strength easily eroded." Burlington Cty. Bd. of Social Services, 24 NJPER at 3; Hudson Cty., 34 NJPER at 17. In Belmar PBA v. Belmar Bor., 89 N.J. 255 (1982), the Supreme Court cautioned that temporary supplemental special police officers (SPO's) should not be employed "as a subterfuge to avoid hiring regular police." 89 N.J. at 270. Thus, a union's interest in preserving unit work is not only implicated when a current unit employee is displaced, but also when a new or vacant unit position is filled by a non-unit employee. Mercer Cty. Special

Services School Dist., P.E.R.C. No. 2011-25, 36 NJPER 355 (¶138 2010) (hiring of non-unit physical therapists for summer work was arbitrable). We therefore find that the Association would satisfy the first prong of the Local 195 test.

Next, we disagree with the Director's finding that the Board's use of substitute teachers amounts to the Association's loss of exclusivity under the traditional unit work rule. A negotiations unit's historical sharing of certain work with other employees does not foreclose it from seeking to prevent further erosion of unit work to a different type of employee or under different circumstances. See Jersey City at 578 (exclusivity exception was applied in cases where unit work shifted to same employee group that historically shared same work). Similar to the SPO's in Belmar, the substitute teacher system is highly regulated[8/] and serves a particular purpose to maintain staffing during emergent circumstances. Substitute teachers have historically performed unit work only to fill in for absent unit employees; they do not replace unit employees. In contrast, the subcontractors are performing the work of vacant unit positions. We therefore find that the exclusivity exception to the unit work rule would not have applied here.

Finally, we do not necessarily agree with the Director's conclusion that under the Local 195 test the Board has

8/ See, e.g., N.J.S.A. 18A:16-1.1 to -1.1d (substitutes to act in place of staff member during their absence, disability or disqualification and cannot gain tenure; time limits of 20, 40, or 60 days on substitutes filling vacancies or long-term absences depending on credentials and certificates).

demonstrated that its managerial prerogative to fill vacancies was dominant over the Association's interest in preserving unit work. A public employer may temporarily deviate from normal unit assignments if necessitated by emergent conditions. See Howell Tp. Bd. of Ed., P.E.R.C. No. 2022-18, 48 NJPER 224 (¶50 2021) (reassignment of bus runs was arbitrable where employer did not establish whether it was temporary and due to emergent circumstances). We find that the record here is insufficient to establish that there was a staffing emergency requiring the Board to utilize private contractors rather than filling vacancies with unit employees through the regular hiring process.

Ultimately, regardless of the Director's determinations in his unit work analysis, we repeat that this case involves subcontracting rather than the shifting of unit work to other Board employees. Therefore, as discussed earlier, the Board's decision to subcontract was non-negotiable under Local 195 and not subject to the statutory limitations of N.J.S.A. 34:13A-46.

ORDER

The Vineland Education Association's unfair practice charge is dismissed.

BY ORDER OF THE COMMISSION

Chair Hennessy-Shotter, Commissioners Ford, Higgins, Kushnir and Papero voted in favor of this decision. None opposed. Commissioner Eaton recused herself. Commissioner Bolandi was not present.

ISSUED: March 28, 2024

Trenton, New Jersey