P.E.R.C. NO. 85-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONROE TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and- Docket No. CO-84-6-51

MONROE TOWNSHIP EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge the Monroe Township Education Association filed against the Monroe Township Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act when, during successor contract negotiations, it allegedly failed to keep the Association fully informed about the possibility of subcontracting its cafeteria operations and, following the completion of negotiations, it did subcontract that operation. The Commission, under all the circumstances of this case, holds that the Association has not proved its allegations by a preponderance of the evidence.

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MONROE TOWNSHIP EDUCATION
ASSOCIATION,

Charging Party.

Appearances:
For the Respondent, Aron & Salsberg, Esqs.
(Richard M. Salsberg, of Counsel)

For the Charging Party, Klausner & Hunter, Esqs.
(Stephen B. Hunter, of Counsel)

DECISION AND ORDER

On July 5, 1983, the Monroe Township Education Association ("Association") filed an unfair practice charge against the Monroe Township Board of Education ("Board") with the Public Employment Relations Commission. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4 (a)(1),(3),(5), and (6), when, during successor contract negotiations

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; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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; and (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

it did not keep the Association fully informed about the possibility of subcontracting its cafeteria operations and, following the completion of negotiations, it did subcontract that operation. The charge further alleges that the Board subcontracted this operation to punish employees for exercising their rights under the Act and that the post-contract subcontracting decision made a sham of the negotiations process.

On December 5, 1983, the Administrator of Unfair Practices issued a Complaint and Notice of Hearing. On December 12, the Board filed an Answer. It admitted subcontracting the cafeteria operation, but claimed that it had a non-negotiable managerial prerogative to subcontract work, that it informed the Association during negotiations of the possibility of subcontracting, and that it provided the Association with opportunities to present its views on economic issues involved in the subcontracting decision.

On March 12, 1984, Hearing Examiner Nathaniel L. Fulk conducted a hearing. The parties argued orally, examined witnesses, presented exhibits and made motions.[2/] The parties filed post-hearing briefs.

On June 18, 1984, the Hearing Examiner issued a report recommending dismissal of the Complaint. H.E. No. 84-66, 10 NJPER ___ (¶_____ 1984) (copy attached). He found that the Association had not proved by a preponderance of the evidence that the Board had negotiated in bad faith or that its subcontracting decision was illegally motivated.

2/ At the close of the Association's case, the Board made a motion to dismiss which the Hearing Examiner denied. The Board then presented its case.

On July 12, 1984, after receiving an extension of time, the Association filed exceptions. The Association contends that the Hearing Examiner erred in: (1) finding that the Association had effectively been put on notice of the possibility of subcontracting; (2) relying upon events occurring after the filing of the unfair practice charge; (3) concluding that the filing of the charge did not trigger an obligation to negotiate over severance pay and related matters; (4) finding that the subcontractor hired all the Board's cafeteria workers; (5) finding that at an August 17, 1983 meeting the Association did not request negotiations over either the substantive or procedural aspects of the subcontracting decision; (6) concluding that In re Local 195, IFPTE v. State, 88 N.J. 393 (1982) ("Local 195") does not require a public employer to keep a majority representative fully informed of all developments leading to subcontracting; (7) finding that the Board had non-economic as well as fiscal reasons for subcontracting; (8) finding that the collective negotiations agreement itself made clear the possibility of subcontracting; (9) finding that the Board did not know throughout negotiations that it was going to subcontract cafeteria operations; (10) finding that the Board never refused to negotiate over mandatorily negotiable aspects of the subcontracting decision such as severance pay; (11) finding that the Association did not pursue its negotiations interests at the August 17 meeting; (12) concluding that the Board did not violate subsections 5.4(a)(1) and (5) by not notifying

the Association during negotiations of its subcontracting intentions; (13) concluding that the Board did not violate these subsections when it refused to negotiate over mandatorily negotiable aspects of the subcontracting decision; (14) concluding that the Board's actions were not inherently destructive of employee rights and therefore violative of subsection 5.4(a)(3); and (15) concluding that the Board did not violate subsection 5.4(a)(1) as a result of not giving the Association adequate notice of its subcontracting decision.

On August 16, 1984, after receiving an extension of time, the Board filed a response disputing each of the Association's exceptions.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-8) are accurate with the modification and additions set forth in the following footnote.[3/] We adopt and incorporate them here.

In Local 195, the New Jersey Supreme Court held that a contractual provision restricting a public employer's right to subcontract work is not mandatorily negotiable. The Court

3/ We modify finding of fact no. 10 to reflect that the subcontractor, Servomation, hired all the Board's cafeteria workers who applied for employment. We add to finding of fact no. 6 that on April 15, 1983, the Board advertised for subcontracting bids in newspapers. We specifically reject the Association's exceptions asserting that the Hearing Examiner erred in finding that at the August 17 meeting the Association did not seek, and the Board did not refuse to negotiate, over severance pay and reemployment rights (no. 13); that the Board had non-economic as well as fiscal reasons for subcontracting (p. 10); and that the Board did not know throughout negotiations that it was going to subcontract after negotiations (p. 12, n. 12).

also held that a contractual provision obligating the employer to discuss subcontracting proposals is mandatorily negotiable, provided the proposed subcontracting stems solely from fiscal reasons, and that procedural aspects, such as advance notice, of a subcontracting decision are mandatorily negotiable. The Court concluded:

> We emphasize that our 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 In re Deptford Twp. Bd. of Ed., P.E.R.C. No. 83-44, 8 NJPER 603 (¶13285 1982).

In the instant case, the Board was not obligated under Local 195 to negotiate over its decision to subcontract. Further, the decision was not illegally motivated and the Board had legitimate economic and personnel-related reasons for subcontracting.[4/]

4/ We agree with the Hearing Examiner (p. 10) that the Board, in addition to desiring to save $14,404, desired to eliminate the burden of hiring, firing, and disciplining cafeteria workers and in particular the problem of cafeteria workers employed by the Board disobeying their supervisor employed by Servomation. We express no opinion on whether a contractual obligation to discuss such a subcontracting decision would be enforceable under Local 195. We also agree with the Hearing Examiner (p. 15) that the decision to subcontract was not inherently destructive of employee rights.

We recognize, as did the Hearing Examiner (p. 12, n. 12), that a public employer may negotiate in bad faith if it hides an already-made decision to subcontract and negotiates benefits for the affected employees in exchange for concessions concerning other retained employees. That determination, however, depends upon a review of the totality of the circumstances in a particular case. In re State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super. 470 (App. Div. 1976); In re Mt. Olive Bd. of Ed., P.E.R.C. No. 84-73, 10 NJPER 34 (¶15020 1983). Under all the circumstances of this case, we agree with the Hearing Examiner's conclusion that the Board did not act in bad faith during successor contract negotiations.[5/]

We next consider whether the Board violated any obligation to negotiate during the period between its June 22, 1983 decision to subcontract and the implementation of that decision the next fall. We have held, for example, that proposals concerning severance pay and recall rights for employees who lose their jobs are mandatorily negotiable. In re Pennsville Bd. of Ed., P.E.R.C. No. 84-21, 9 NJPER 586 (¶14246 1984); compare In re Maywood Bd. of Ed., 168 N.J. Super. 45, 52 at n. 2 (App. Div. 1979), certif. den. 81 N.J. 292 (1979). In the instant case, however,

5/ Contrary to the Association's argument that the Board concealed the possibility of subcontracting, we note that the Board advertised in newspapers for subcontracting bids; that one of its members told the Association at a negotiations meeting that the Board was probably going to subcontract cafeteria operations; and, most importantly, that the collective negotiations agreement signed one month later specifically conditioned cafeteria employee benefits upon the maintenance of the then present type of cafeteria operation and specifically recognized the Board's right to have a management company replace it as the employer of cafeteria workers.

the Association made no request to negotiate over these matters before it filed the charge, and the Board never refused to negotiate over them. Accordingly, we hold that the Association has not proved by a preponderance of the evidence that the Board refused to negotiate over severance pay, reemployment rights, or other related matters.[6/]

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Suskin, and Wenzler voted for this decision. Commissioner Graves voted against this decision. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
September 19, 1984
ISSUED: September 20, 1984

6/ We agree with the Hearing Examiner that, given the Board's non-negotiable managerial prerogative to subcontract its cafeteria operation, the Association, rather than the Board, had the burden of initiating negotiations over the severable issues of reemployment rights and severance pay for affected employees. This case does not present a situation in which an employer repudiated or unilaterally altered existing terms and conditions of employment, thus permitting the immediate filing of a charge without a prior demand to negotiate. We also agree with the Hearing Examiner that the filing of an unfair practice charge did not constitute a request to negotiate over severance pay and related matters in this case. This finding is especially so here since the instant unfair practice charge is silent with respect to such matters (except insofar as a remedy is concerned) and was never amended. If we assumed that the unfair practice charge could be considered a request to negotiate, we would agree with the Board that its post-charge letters and meeting with the Association were relevant to show and in fact did show its good faith response to Association concerns. The important point here, however, is that the Association had the obligation to request negotiations on severance pay and related matters, and the Board had the right to an opportunity to respond, before the filing of an unfair practice charge.

H. E. No. 84-66

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

In the Matter of

MONROE TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-84-6-51

MONROE TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Monroe Township Board of Education did not violate the New Jersey Employer-Employee Relations Act when it subcontracted its cafeteria services and that the Board did not refuse to negotiate those aspects of its subcontracting decision which are mandatorily negotiable. The Hearing Examiner concluded that the Association was given an opportunity to meet and discuss or negotiate aspects of the Board's decision before it was implemented, and failed to do so.

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.

H. E. No. 84-66

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

In the Matter of

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Charging Party.

Appearances:

For the Respondent, Aron & Salsberg, Esqs.
(Richard Salsberg, of Counsel)

For the Charging Party, Klausner & Hunter, Esqs.
(Stephen B. Hunter, of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On July 5, 1983, the Monroe Township Education Association ("Association") filed an unfair practice charge against the Monroe Township Board of Education ("Board") with the Public Employment Relations Commission. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1), (3), (5) and (6), [1/] when it subcontracted all cafeteria services to a private contractor without first discussing this decision with the

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; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

Association or offering to the Association any justification for the decision. The charge also alleges that the sole reason for the Board's subcontracting decision was to punish negotiations unit members for exercising their protected rights. It is further alleged that the Board's decision to subcontract after completion of contract negotiations, relating in part to cafeteria employees, has made a sham of the entire negotiations process.

It appearing that the allegations of the unfair practice charge may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on December 5, 1983. On December 12, 1983, the Board filed an Answer. The Board admitted having subcontracted its cafeteria services, however it claims that its decision was a good faith exercise of an inherent managerial prerogative and further that it has granted the Association the opportunity to present its views on any economic issues implicated by its decision.

A hearing was held in this matter on March 12, 1984, in Newark, New Jersey, at which time the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence, and argue orally. Post-hearing briefs and reply briefs were received by June 14, 1984. 2/

An unfair practice charge having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing and consideration of the post-hearing briefs, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record the Hearing Examiner makes the following:

2/ The parties requested two extensions of time to file their briefs and another extension in which to file reply briefs.

Findings of Fact

1. The Monroe Township Board of Education is a public employer within the meaning of the Act and is subject to its provisions.

2. The Monroe Township Education Association is an employee representative within the meaning of the Act and is subject to its provisions.

3. There are approximately 240 unit members represented by the Association. Of these 240, approximately 20 are cafeteria employees.

4. The Board and the Association entered into negotiations for a successor agreement on December 7, 1982. The new agreement became effective on July 1, 1983. Formal negotiation sessions were held on January 13th and 27th, February 14th, April 28th, May 12th and 24th, and June 1st of 1983. Two informal sessions were conducted on June 6th and 13th. (Transcript "T" pp. 7, 50 144). The sessions conducted on February 14th and May 12th concerned the cafeteria employees exclusively. (T 159).

5. In the Fall of 1982 the Board Secretary and Business Administrator, Ronald Novak, with the consent of the Superintendent of Schools, Dr. Richard Marasco, asked Servomation, the managing company in charge of the cafeteria services, to prepare a cost benefit analysis. Mr. Novak wanted to see a cost comparison between continual employment of those employees by the Board or employment by an independent contractor. (T 96). The net savings to the Board in subcontracting its cafeteria services were $14,404, and these savings came primarily from medical insurance (T 98).

Sometime in either late December 1982 or early January 1983, Mr. Novak advised the Board of this labor cost comparison (T 98, 116).

Upon receipt of this information, the Board authorized Mr. Novak and Dr. Marasco to proceed further into the matter, however it gave no specific directions to them (T 99, 108, 139, 160).

6. On or about April 15, 1983, Mr. Novak advertised for bids (T 9). No formal Board action was taken authorizing Mr. Novak to receive these bids (T 117).

Alternate bids were solicited: one for a bid with the cafeteria employees as employees of the independent contractor and one for a bid with the cafeteria employees as employees of the Board, but managed by the contractor (T 10).

Two bids were received and opened on May 4, 1983 (9, 10). Service Dynamics offered the lowest bid, however Servomation was the lowest responsible bidder (T 119). 3/

7. On May 12, 1983, during a negotiation session concerning cafeteria employees, John Wilson, a Board member, stated that there was little need to negotiate concerning the cafeteria employees since they probably would not be employed by the Board in the following year (T 25, 49, 76, 141). 4/ Upon hearing this,

3/ Mr. Novak testified that although Service Dynamics was the lower of the two bids received, there were some inconsistencies in its bid which when advised of this by Mr. Novak, Service Dynamics chose not to correct. (T 119, 121, 122).

4/ Dr. Marasco testified that he had mentioned the possibility of subcontracting the cafeteria services as early as February 14, 1983 (T 139) and that May 12th was the second time it was mentioned (T 141). He stated as well that he did not fully present the possibility of subcontracting to the Association on February 14th because it was only in the early stages (T 162).

None of the Association's witnesses have any recollection of a subcontracting possibility being mentioned on February 14th (T 38, 55) and I conclude that even if Dr. Marasco mentioned the possibility on that date, no member of the Association's negotiating team heard the remark.

members of the Association's negotiation team questioned the Board about the possibility of subcontracting the cafeteria services and were told by Dr. Marasco that no decision had been made by the Board and that the situation was merely under consideration (T 143). The Association requested that it be kept informed (T 41) and it made no requests to negotiate any aspect of the subcontracting decision (T 41). 5/ There was no mention by any member of the Board's team

5/ There is some confusion as to what actually was said by Dr. Marasco at the May 12th meeting. Both parties agree that after Mr. Wilson made his comment, Dr. Marasco conveyed the idea that the subcontracting decision was only in its initial stages and that the Board had had little or no discussion on the topic (T 27, 39, 143), however they disagree as to whether Dr. Marasco made any further comments. The Association witnesses claim that Dr. Marasco stated that he would keep them informed of the Board's decision (T 34, 40, 46, 49, 79) and that its failure to pursue the matter further was based on their belief that before a decision was made, the Association would be informed (T 29, 40, 45, 46, 49). Dr. Marasco testified however that he had no recollection of ever telling the Association that he would keep them informed (T 143).

The undersigned is not persuaded that either party's version is important to the decision of this case. The fact remains that as of May 12th, the Association knew that subcontracting the cafeteria services was a possibility and had the opportunity to make inquiries about that possibility.

Arline Friscia, N.J.E.A. field representative and Association negotiation team member, testified that in every subsequent formal negotiation session the Association requested that it be kept apprised of the Board's subcontracting decision and that there was discussion to this effect (T 33). Association negotiation team member William Hoolihan, however, testified that there was no further discussion concerning the issue of subcontracting at either of the final two formal negotiation sessions (T 50). He further testified that there was no further mention of the subcontracting possibility at either of the informal sessions as well (T 51). Mr. Hoolihan's testimony is also supported by that of Dr. Marasco who stated that the subcontracting issue was never raised by any Association team member (T 144).

It is readily apparent that neither party believes there was negotiation on any aspect of the subcontracting decision. Whether there was any discussion is unclear. The undersigned credits the testimony of Ms. Friscia when she stated that inquiries were made to the Board. The testimony of the other two witnesses merely establishes that no discussion ensued and that the Association's inquiries were brief at best.

that bids had been advertised or received (T 27, 50, 77, 142, 164).

Following the May 12th meeting, there were four more negotiation sessions, both formal and informal.

8. On June 15, 1983, the parties signed a Memorandum of Agreement which was later ratified by the Association (T 82). In that memorandum there was the following language pertaining to cafeteria employees:

> 13. The following articles are agreed to conditionally upon the Board maintaining the present type [of] cafeteria operation. Nothing contained herein shall restrict the Board's ability or right to restructure its cafeteria operation (e.g. full service operation with cafeteria workers employed directly by management company) in any way it (the Board) deems in the best interests of the school district. Therefore, the following are agreed to if the 1982-83 cafeteria operation continues in its present format for 1983-84:
>
> > (a) A regular cafeteria employee substituting for another employee who receives a premium, will receive such premium pay beginning 3 days after the substituting duty commences.
> >
> > (b) Cafeteria employees shall receive 1-1/2 times the hourly rate for any work performed beyond 40 hours in a given week.
> >
> > (c) Uniform allowance (Article XXIII, A.) language intact -- change dollar amount to $80 for 1983-84 and $90 for 1984-85. (C-1 in evidence).

The Memorandum of Agreement was reviewed by various Association members three days prior to its execution (T 59, 78), and on June 15th, no questions were raised by the Association concerning the subcontracting issue (T 64).

9. The bid of Servomation Corporation was accepted by the Board at a public meeting on June 22, 1983. The Board requested that Servomation offer contracts to all cafeteria employees who had been regularly employed by the Board during the 1982-83 school year (T 11).

10. On June 27, 1983, Ronald Novak sent a letter to all of the cafeteria employees advising them of the Board's decision to subcontract the cafeteria operation. The letter further stated that Servomation would offer employment to all of the cafeteria staff (T-1 in evidence.) 6/

A meeting was held between Arline Friscia and the cafeteria employees on June 27, 1983, at which the Board's subcontracting decision was discussed. The employees had not yet received Mr. Novak's letter and Ms. Friscia requested that she be informed as soon as they received notification that their contracts would not be renewed. It was at this meeting that the decision to file the instant unfair practice charge was made (T 44). Aside from the filing of the unfair practice charge, no other action was taken by the Association when it received word of the Board's decision. 7/

11. On July 5, 1983, the Association filed the present charge. In response to the charge, Dr. Marasco sent a letter to the Association's attorney, Stephen B. Hunter (R-2 in evidence). In that letter, Dr. Marasco stated that the Board did not believe that unfair practices had been committed. He further stated that:

6/ All of the cafeteria employees were hired by Servomation (T 41).

7/ Ms. Friscia testifed that after she found out about the subcontracting, she did not write any letters to the Board or have any meetings with any Board representative (T 44, 45). Mr. Hoolihan testified that he did not question whether the Board was going to subcontract when he signed the Memorandum of Agreement and that once he knew of the Board's decision, he did not request negotiations on any aspect of the decision nor offer any alternatives for the Board to consider. He testified as well that he did not tell the Board that it was violating the memorandum (T 64, 65). Joan Zausmer, another member of the Association's negotiation team also testified that the Association never requested negotiations over any aspect of the subcontracting decision or over severance pay (T 83).

> Since, however, the Board's decision to subcontract its cafeteria services has obviously concerned your clients enough to ask you to file an unfair practice charge, the Board has authorized me to meet with the [A]ssociation again, at any reasonable time, in order to answer any questions it may have and to discuss the matter in full to any further degree that the [A]ssociation may care to. The Board stands ready and willing as it has in the past to explore any viable alternatives that the [A]ssociation may provide.

12. On August 9, 1983, Dr. Marasco sent a letter to the cafeteria employees informing them that Servomation would be offering them employment and that Servomation had expressed a willingness to retain the salary rates that had been conditionally agreed upon during negotiations (R-3 in evidence).

13. On August 17, 1983, the parties met with representatives of Servomation (T 8, 53, 54). The meeting centered around a discussion by the cafeteria employees about the benefits they would be receiving from Servomation (T 70, 111, 134, 152). There was no request by the Association to negotiate either substantive or procedural aspects of the subcontracting decision (T 66, 80, 110, 152).[8/]

8/ At one point in his testimony, William Hoolihan, in describing the August 17th meeting stated that the Association raised the issue of severance pay and reemployment rights (T 67,69, 70). Prior to these statements, however, he said that there were no requests made to negotiate severance benefits during the meeting (T (T 66). When asked to explain his inconsistency, the transcript reads:

> Q A few minutes ago I asked you a question if severance pay came up at all and you said no. And now you're saying that it did?
>
> A At that meeting. [the August 17th meeting]
>
> Q Well I just asked you that a few minutes ago.
>
> A I had forgotten about that meeting. [the August 17th meeting]

It is apparent that Mr. Hoolihan was confused during this part of his testimony, and the undersigned does not credit his testimony as it concerns the topics raised during the meeting. The undersigned is further convinced of the appropriateness of this conclusion in that another Association witness, Joan Zausmer, who was also present at the meeting, testified that the Association made no demands or proposals (T 80).

Analysis

The undersigned has reviewed the record in this matter and finds that the Board did not violate the Act when it subcontracted its cafeteria services. The undersigned further finds that the Board did not refuse to negotiate those aspects of its subcontracting decision which are mandatorily negotiable.

This case is controlled by Local 195, IFPTE v. State of New Jersey, 88 N.J. 303 (1982). In that case the Supreme Court held that a public employeor is not obligated to negotiate over its decision to subcontract. It further held however that the parties are free to discuss a public employer's decision to subcontract when that decision is based on purely economic reasons and when the subcontracting will result in layoffs or job displacements. 9/ The Court also held that procedural aspects, such as notice to employees who are going to be laid off, are negotiable. 10/

The Association claims that under the Local 195 decision, the Board had several obligations which it failed to meet. It first claims that the Board had an obligation to make full and timely disclosures concerning each and every aspect of its subcontracting decision, and to give its reasons for the decision before it was made. It also claims that the Board was obligated to advise the Association of whether it had advertised for bids and to keep the Association apprised of the status of the bidding process. It finally claims that the Board was obligated to negotiate over severance pay

9/ See also subsequent Commission decisions relying on past precedent: In re Camden County, P.E.R.C. No. 83-133, 9 NJPER 272 (¶14124 1983); In re South Amboy Bd. of Ed., P.E.R.C. No. 82-10, 7 NJPER 448 (¶12200 1981); In re Jersey City, P.E.R.C. No. 84-53, 9 NJPER 679 (¶1429 1983).

10/ The Commission has recently in a Scope of Negotiations Petition, determined that proposals concerning severance pay and recall rights for cafeteria workers are mandatorily negotiable. See In re Pennsville Twp. Bd. of Ed., P.E.R.C. No. 84-21, 10 NJPER ___ (¶ 1984).

and reemployment rights.

Simply because the Supreme Court has allowed for discussion of subcontracting between a public employer and a public employee representative when subcontracting is contemplated for purely fiscal reasons, this does not place a burden on the employer to make a full disclosure as the Association suggests, or even to discuss its decision. 10/ In any event, the undersigned is satisfied that the Board committed no unfair practices by its actions.

To begin with, in order for there to be any discussion whatsoever on the subcontracting topic, the decision to subcontract must be made only for reasons of economy. While the Board admits that absent the financial considerations, it never would have subcontracted (T 128), the record shows that there were other reasons. Aside from relieving the Board of having to hire, fire and discipline the cafeteria employees (T 100-106), Ronald Novak testified that there had been some problems concerning the cafeteria supervisor, employed by Servomation, and the employees. He testified that on several occasions the supervisor had asked employees to perform certain tasks and they refused, claiming that they were Board employees and not obligated to follow the directives of non-Board employees (T 100). While these additional reasons were not weighty enough in themselves for the Board to decide to subcontract, the undersigned is convinced that they played a part in the Board's consideration.

10/ In Local 195, the Supreme Court stated that discussion about the replacement of public employees with private employees solely for reasons of economy "would not significantly interfere with the determination of public goals," and would in fact be in the public interest. It furher states that employers, "would be derelict in their public responbilities if they did not pursue such discussions." While the undersigned reads the Court's language to suggest that discussion is strongly urged and highly recommended, I cannot interpret the Court's statements to include an obligation to discuss, and failure to do so, an unfair labor practice.

Even if this were not the case however, and the Board's decision to subcontract was based solely on economy, it appears from the record that the Association was made aware of the Board's interest in subcontracting its cafeteria services and that there was opportunity to discuss this subject with the Board. The Association alleges that the Board violated the Act in failing to give it an opportunity, prior to making its decision to subcontract, to present its views or proposals on any economic issues implicated by its subcontracting decision, and that the Board had unfairly kept it in the dark concerning all aspects of the decision. It further alleged that it would have introduced negotiations proposals regarding mandatorily negotiable components of the subcontracting issue had the Board not led it to believe that it would be kept informed concerning the status of its subcontracting considerations.

While it is true that the Association was only made aware of the subcontracting decision during a negotiations session on May May 12, 1983, and that no mention was made by the Board that it had either solicited or received bids for the cafeteria services, the fact remains that the Association was made aware of the subcontracting possibility more than a month before it executed a Memorandum of Agreement. 11/ In subsequent negotiation sessions the record indicates that the Association raised the issue of subcontracting but chose not to pursue the discussions any further when the Board continued to tell its team members that no decisions had been made and that it would be kept informed. At no time did the Board refuse

11/ It is suggested by the Association that but for the comment, made by Board member Wilson at the May 12th negotiation session, the Association would never have been made aware of the subcontracting possibility until after the decision was made. The undersigned cannot speculate as to what course of action the Board would have taken, had the comment not been made.

to discuss the issues relating to subcontracting and it was a risk assumed by the Association when it failed to pursue the discussion any further. 12/

The record further indicates that the language in the parties' Memorandum of Understanding leaves no question that the Board still was contemplating a subcontracting decision. It was signed by the Association after several days of review. Association team member William Hoolihan testified that he interpreted the conditional language in the memorandum to mean that the Board had the right to subcontract its cafeteria services and that if it did, those clauses concerning the cafeteria employees would no longer bind the Board (T 60). He further stated that he did not question the Board about whether it was going to subcontract when he signed the memorandum (T 64). There is no indication that the Board either refused to discuss any aspects of its subcontracting decision or that the Association requested negotiations on the procedural components of its decision at any time prior to or at the signing of the memoran-

12/ The undersigned is convinced that the Board never misled the Association into believing that it would not subcontract its cafeteria services and that there was no need to discuss the topic. Rather the Board notified the Association that it was considering subcontracting and each time the subject was raised by the Association at subsequent negotiation sessions, the Board negotiation team members informed the Association that no decision had been made. The fact that bids had been solicited and received is of no consequence to the Association other than with that information the Association might not have been as lax as it was in failing to pursue its discussion. As long as the possibility of subcontracting existed and the Association had notice of that possibility, it carried the burden of protecting its unit members should the Board actually decide to subcontract. Placing a burden on the Board would run contrary to the language of Local 195, supra. Perhaps if the Board had known all along that it was going to subcontract its cafeteria services and yet continued to negotiate clauses covering the cafeteria employees with no intention of revealing its decision until after it was made, the Board would have been negotiating in bad faith. This was not the case however.

dum. 13/ The undersigned is not convinced by the Association's argument that the reason for its silence was because it was never certain that the Board actually was going to subcontract and until it knew that for sure, the necessity to discuss and negotiate did not exist.

Following the above line of reasoning, it is important to review the actions of both parties after the decision to subcontract was made on June 22, 1983. William Hoolihan testified that he was first informed by the N.J.E.A., of the Board's decision. He stated that once he was made aware of the decision he did not ask the Board to negotiate either procedural aspects or severance pay nor did he offer any alternative plans for the Board to consider (T (T 64, 65). Arline Friscia testified that on June 27, 1983, she held a meeting with the cafeteria employees who told her of the subcontracting decision. She told them to call her as soon as they received written notification that their contracts would not be renewed. She did not request negotiations with the Board or communicate with them in any way. Rather, on July 5, 1983 the Association filed an unfair practice charge.

The Association alleges that the filing of its unfair practice effectively put the Board on notice concerning its negotiations obligations and that once the charge was filed there was no need to make a formal demand to negotiate. While it is true that the Commission has issued several decisions in which it has stated that when an employer unilaterally alters a term and condition of employment the employee organization is free to file an unfair practice charge and is relieved of its obligation to request negotiations on that subject, those cases are not controlling in this in-

13/ In its brief, the Board states that it does not contest that procedural aspect of subcontracting are negotiable as well as severance pay and reemployment rights. It states however that the Association never asked to negotiate these subjects.

stance. 14/ In those cases the Commission first of all found that the employers had violated the Act by their actions and in so doing relieved the employee representatives from its obligation to request negotiations. The changes which resulted from the employer's actions could not have been unilaterally made and the employers were obligated under N.J.S.A. 34:13A-5.3 to negotiate, prior to implementation, the proposed change. In the present instance, the Board had a managerial prerogative to subcontract its cafeteria services and was under no obligation to negotiate this decision. It engaged in several, albeit limited, discussions with the Association which it had no mandatory obligation to do, and never once refused to negotiate those aspects of the subcontracting decision which are mandatorily negotiable.

Although the undersigned is convinced that the Board has not violated the Act by its actions, it is important to note that the Board did respond to the Association's unfair practice charge and invited its attorney as well as the cafeteria employees to a meeting in which it welcomed the opportunity to discuss the subcontracting matter and listen to any proposed alternatives. If, as the Association suggests, it had no obligation to request negotiations after having filed its charge, it was under some obligation to pursue its negotiation interests at the meeting. 15/ Two Associa-

14/ See In re New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978); In re Hudson County, P.E.R.C. No. 78-48, 4 NJPER 87 (4041 1978).

15/ This is not a case where the actions of the employer placed it at a distinct advantage over the employee representative and where negotiations would be forever marred until the employer reinstated the status quo. See In re Hudson County.

tion witnesses testified that at the meeting on August 17, 1983, the Association did not request negotiations on any aspect of the subcontracting but merely sought to discern how the cafeteria employees would be treated under their new employer. Whatever obligations the Board may have had, never arose, either prior to the filing of the unfair practice charge or subsequent thereto.

With respect to the Association's (a)(3) charge, the undersigned is not persuaded that the facts show that the Board subcontracted its cafeteria services in order to discourage its employees in the exercise of the rights guaranteed by the Act, and that the manner in which the Board's decision was made was so "inherently destructively" that the Association is relieved from offering any proof as to the Board's underlying motive. There is no nexus between the Board's decision to subcontract and any exercise of employee protected activity, and the Association has failed to meet its burden of proof as established in In re Bridgewater Township, 95 N.J. 235 (1984). 16/

Accordingly, it is recommended that the Association's Unfair Practice Complaint be dismissed in its entirety. 17/

Nathaniel L. Fulk
Hearing Examiner

Dated: June 18, 1984
Trenton, New Jersey

16/ The undersigned also finds that the facts do not support the Association's charge of an (a)(1) violation. I do not interpret the Board's actions to have in any way interfered with, restrained or coerced its employees in the exercise of their protected rights.

17/ At the hearing, the undersigned granted the Board's Motion to Dismiss with regard to the Association's allegation of an N.J.S.A. 34:13A-5.4(a)(6) violation.