P.E.R.C. NO. 84-53

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Respondent,

-and-

Docket No. CO-82-126-3

JERSEY CITY PUBLIC
EMPLOYEES, INC., LOCAL
NO. 245,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, dismisses a Complaint based on an unfair practice charge that the Jersey City Public Employees, Inc., Local No. 245 had filed against the City of Jersey City. The charge had alleged that the City violated the New Jersey Employer-Employee Relations Act when it unilaterally sub-contracted certain functions from City employees represented by Local 245 to Jersey City Incinerator Authority employees not represented by Local 245, but a Hearing Examiner found that Local 245 had not proved this charge by a preponderance of the evidence. No exceptions were filed to the Hearing Examiner's recommended decision. Based on his review of the record, the Chairman adopts the Hearing Examiner's recommendation.

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JERSEY CITY PUBLIC EMPLOYEES, INC., LOCAL NO. 245,

Charging Party.

Appearances:

For the Respondent, Paul W. Mackey, Esq.

For the Charging Party, John W. Yengo, Esq.

DECISION AND ORDER

On December 3, 1981, the Jersey City Public Employees, Inc., Local No. 245 ("Local 245") filed an unfair practice charge against the City of Jersey City ("City") with the Public Employment Relations Commission. The charge was amended on December 29, 1981, and again on January 18, 1982. The charge, as amended, alleged that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. ("the Act"), specifically subsections 5.4(a)(1), (2), (3), (5), and (7) [1/] when it

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." "(2) Dominating or interfering with the formation, existence or administration of any employee organization." "(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 "(7) Violating any of the rules and regulations established by the commission."

unilaterally subcontracted certain functions from the Department of Public Works ("DPW"), whose employees were represented by Local 245, to the Jersey City Incinerator Authority ("Authority"), whose employees were not represented by Local 245. Local 245 further alleged that the subcontracting of these functions had resulted in the "shifting" of 30 unit employees from the DPW to the Authority.

On July 7, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1.

On August 13, 1982, the City filed an Answer. It denied Local 245's allegations and alleged that it had subcontracted the functions and laid off DPW employees in good faith due to economic constraints and that the Authority, an independent governmental entity, had rehired these employees.

On March 10, April 22, April 29 and August 15, 1983, Hearing Examiner Alan R. Howe conducted hearings.[2/] The parties examined witnesses, presented evidence, and argued orally. The City filed a post-hearing brief.

On September 12, 1983, the Hearing Examiner issued his report and recommended decision, H.E. No. 84-17, 9 NJPER 579 (¶14241 1983) (copy attached). He recommended dismissal of the Complaint. He found that the City subcontracted the DPW functions and laid off employees in good faith due to economic constraints.

2/ After the April 29, 1983 hearing, Local 245 asked the Chairman of the Commission to appoint a new Hearing Examiner; this request was denied and the hearing resumed on August 15, 1983.

Additionally, he concluded that the City had a non-negotiable prerogative to subcontract work under Local 195, IFPTE v. State of New Jersey, 88 N.J. 393 (1982).

The Hearing Examiner served the parties with a copy of his Report and advised them that exceptions were due by September 26, 1983. Neither party filed exceptions or requested an extension of time.

Pursuant to N.J.S.A. 34:13A-6(f), the full Commission has delegated authority to me to review this case. I have reviewed the record. The Hearing Examiner's findings of fact are accurate and I incorporate them here. Based upon my review of the record, I agree with the Hearing Examiner that Local 245 has failed to prove by a preponderance of the evidence that the City violated the Act.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: TRENTON, NEW JERSEY
November 2, 1983

H.E. No. 84-17

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

In the Matter of

CITY OF JERSEY CITY

Respondent,

-and-

Docket No. CO-82-126-3

JERSEY CITY PUBLIC EMPLOYEES, INC.,
LOCAL 245,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent City did not violate Subsections 5.4(a)(1), (2), (3) and (5) of the New Jersey Employer-Employee Relations Act when by resolution on December 10, 1981 it transferred 30 employees of the Department of Public Works to the Jersey City Incinerator Authority without notice to or negotiations with the Charging Party. The Hearing Examiner concluded that the matter was governed by a decision of the New Jersey Supreme Court in Local 195, IFPTE v. State of New Jersey, 88 N.J. 393 (1982). That case held that a public employer's decision to subcontract is a non-negotiable managerial prerogative. Although the Supreme Court also held that a contract may include a provision to "discuss" a decision to subcontract, there was no provision in the agreement between the Respondent and the Charging Party which obligated the Respondent to "discuss" its December 1981 decision to subcontract to the Incinerator Authority before implementation.

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. 84-17

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

In the Matter of

CITY OF JERSEY CITY,

Respondent,

-and-

Docket No. CO-82-126-3

JERSEY CITY PUBLIC EMPLOYEES, INC.,
LOCAL 245,

Charging Party.

Appearances:

For the City of Jersey City
Paul W. Mackey Esq.

For the Charging Party
John W. Yengo, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on December 3, 1981, and amended on December 29, 1981 and January 18, 1982, by the Jersey City Public Employees, Inc., Local 245 (hereinafter the "Charging Party" or "Local 245") alleging that the City of Jersey City (hereinafter the "Respondent" or the "City") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent by resolution of December 10, 1981 acted to transfer 30 employees from the Department of Public Works, represented by the Charging Party, to the Jersey City Incinerator Authority without notice to or negotiations with the Charging Party, contrary to the provisions of the recognition clause in the current collective negotiations agreement between the parties, all of which is alleged to be a violation of N.J.S.A. 34:13A-

5.4(a)(1), (2), (3) and (5) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on July 7, 1982. Pursuant to the Complaint and Notice of Hearing, hearings were held on March 10, April 22, April 29 and August 15, 1983[2/] in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the Respondent only filed a post-hearing brief by September 8, 1983

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing brief of the Respondent, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The City of Jersey City is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Jersey City Public Employees, Inc., Local 245 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

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.
"(2) Dominating or interfering with the formation, existence or administration of any employee organization.
"(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."

2/ The delay in the commencement of the hearing was due initially to the unavailability of the Hearing Examiner in the Fall of 1982. The subsequent delay is attributable to the unavailability of counsel for the parties until March 1983.

The delay between the hearing of April 29 and August 15, 1983 was due to the effort of counsel for the Charging Party to have the matter heard before another Hearing Examiner, which is reflected in Exhibits C-3 through C-8.

3. The most recent collective negotiations between the parties, submitted in evidence, was effective during the term January 1, 1980 to December 31, 1981 (J-1).

4. Article I, Recognition, of the above agreement provides that the Respondent recognizes Local 245 as the collective negotiations agent for all non-supervisory blue and white collar employees in the following departments of the City: the Department of Public Works including "engineering," the Department of Human Resources, the Division of Parks and Recreation, and bus drivers in the Division of Transportation. (J-1, p.2).

5. Article II, Maintenance of Standards, in the same agreement provides as follows:

> "A. All conditions of employment contained in this Agreement relating to wages, hours of employment and general working conditions presently in effect for employees included in this bargaining unit shall be maintained at not less than the standards now in effect, and the conditions of employment shall be improved wherever specific provisions for improvement are made in this Agreement.
>
> "B. Proposed new rules or modifications of existing rules governing working conditions as stated above, shall be negotiated with the Union before they are established." (J-1, p.3)

6. At all times material hereto there were approximately 550 employees covered by the recognition clause in the collective agreement (J-1).

7. Since about 1955 there has been in the City of Jersey City an autonomous body known as the Jersey City Incinerator Authority (hereinafter the "Authority"), which was created by ordinance of the City pursuant to the provisions of the Incinerator Authorities Law (N.J.S.A. 40:66A-1 et seq.). Among the powers conferred upon the Authority is that of entering into contracts for the purpose of disposing of refuse.

8. Commencing in October 1981 the Executive Director of the Authority, Leonard E. Greiner, Frederick J. Tomkins, the City's Business Administrator, John R. James, the Director of Public Works (DPW), and John M. Yurchak, the Director of Sanitation, entered into discussions regarding the Authority's taking over certain enumerated sanitation services then being performed by the City. The reason for these discussions was that the City was having problems staying within the "Cap" law for the calendar year 1982 while the Authority had a surplus in excess of $1 million dollars in 1981 and was not governed by the "Cap" law.

9. On December 2, 1981 Tomkins prepared a resolution, which, upon adoption, authorized him to execute an agreement with the Authority for the performance of sanitation services (CP-1). This resolution was adopted by the City Council on December 10, 1981 and Tomkins was authorized to enter into an implementing agreement as of that date (CP-1).

10. On December 18, 1981 a formal agreement was entered into between the City and the Authority (CP-2) wherein the Authority agreed to perform enumerated sanitation services within the City, which included snow removal, refuse collection and disposal, the sweeping and cleaning of streets, etc. Further, the City transferred title to the Authority as to certain equipment of the DPW such as sweepers, salters, bombardiers and compactors (see CP-2, Exhibit "A"). Finally, the Authority agreed to offer positions of employment to 30 named City employees in the DPW (see CP-2, Exhibit "B"), who were in the unit represented by Local 245.

11. Of the 30 employees whose names appeared in CP-2, supra, 24 were ultimately employed after being interviewed by Greiner. Greiner testified credibly that he did not discuss "union" with the employees interviewed and further, he credibly denied that he would not hire an employee if he was a member of the "union." Those employees hired by the Authority were employed at salaries in excess of that received from the City.

12. At no time from October 1981 until the implementation of the agreement between the City and the Authority (CP-2) did any representative of the City or the Authority give notice, discuss or negotiate the subcontracting of certain DPW functions, supra, with the Charging Party.

13. The Charging Party failed to adduce any evidence of anti-union animus by the City toward the Charging Party in the foregoing actions taken by the City.

14. Further, the Charging Party did not establish that the City had dominated or interfered with the existence or administration of Local 245.

THE ISSUE

Did the Respondent City violate Subsections(a)(1), (2), (3) and (5) of the Act[3/] when, by resolution of December 10, 1981, it acted to transfer 30 employees from the Department of Public Works, represented by Local 245, to the Jersey City Incinerator Authority without notice to or negotiations with the Charging Party, notwithstanding the recognition clause in the collective negotiations agreement?

DISCUSSION AND ANALYSIS

The Respondent City Did Not Violate Subsections(a)(1) And (5) Of The Act When, By Resolution Of December 10, 1981, It Acted To Transfer 30 Employees From The DPW, Represented By Local 245, To The Incinerator Authority Without Notice To Or Negotiations With The Charging Party, Notwithstanding The Recognition Clause In The Collective Negotiations Agreement

The decision in this case is governed by Local 195, IFPTE v. State of New Jersey, 88 N.J. 393 (1982). In that case the New Jersey Supreme Court held, inter alia, that a contractual provision requiring the State (public employer) to negotiate all incidents of contracting or subcontracting whenever a layoff or job displacement might result was a non-negotiable matter of managerial prerogative. On the other hand, the Court held "...that a public employment contract may include a provision reciting an agreement... to discuss decisions to contract or subcontract whenever it becomes apparent that a layoff or job displacement will result, if the proposed subcontracting is based on solely fiscal considerations" (88 N.J. at 409). While the Supreme Court emphasized that discussion with the public employee representative before subcontracting was "altogether appropriate," a necessary implication from the above-quoted provision of the Court's opinion is that the contract must contain a provision requiring that such discussion occur.

3/ The Hearing Examiner will recommend dismissal of the allegations that the Respondent violated Subsections(a)(2) and (3) of the Act by its conduct herein since the Charging Party failed to adduce any evidence, which would support a finding of a violation by the Respondent of these Subsections (see Findings of Fact Nos. 13 & 14, supra).

An examination of the instant agreement (J-1) discloses that there is no provision which required the City to discuss with Local 245 its December 10, 1981 decision to subcontract. This conclusion is buttressed by the testimony of John E. O'Brien, the Acting President of Local 245, who, when asked on cross-examination what provisions of the agreement obligated the City to negotiate before subcontracting, pointed to Article I, Recognition, and Article II, Maintenance of Standards (see Findings of Fact Nos. 4 and 5, supra). These provisions in no way, expressly or impliedly, create an obligation requiring the City to negotiate or discuss with the Charging Party a decision to subcontract for fiscal reasons.[4/] Concededly, J-1 was drafted before the Supreme Court decision in Local 195, supra. However, before an enforceable obligation to discuss could exist, there would have to be appropriate language in J-1 creating such an obligation.

There being no obligation to negotiate with Local 245 before subcontracting under Local 195, and the agreement (J-1) containing no provision obligating the City to discuss before subcontracting, the Charging Party has failed to prove by a preponderance of the evidence that the City violated Subsections(a)(1) and (5) of the Act by its actions in December 1981. Accordingly, the Hearing Examiner must recommend dismissal of all allegations in the Complaint.

* * * *

Upon the entire record in this case, the Hearing Examiner makes the following:

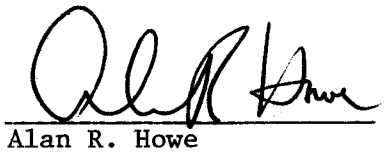
CONCLUSION OF LAW

The Respondent City did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) when, by resolution of Decmeber 10, 1981, it acted to transfer 30 employees from the Department of Public Works to the Jersey City Incinerator Authority, notwithstanding the provisions of the collective negotiations agreement in effect at that time.

4/ Clearly, the City's motivation in deciding to subcontract was for fiscal reasons (see Finding of Fact No. 8, supra).

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: September 12, 1983
Trenton, New Jersey