I.R. No. 2009-1

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CHERRY HILL BOARD OF EDUCATION,

Respondent,

-and-

CHERRY HILL SUPPORTIVE STAFF ASSOCIATION,

Docket No. CO-2008-350

Respondent,

-and-

OFFICE and PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 153,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the Office and Professional Employees International Union, Local 153 ("Local 153"), certified on April 22, 2008 by the National Labor Relations Board to represent a unit of employees of Aramark Educational Services, Inc., performing, pursuant to a contract between Aramark and the Cherry Hill Board of Education, cleaning services at Board facilities.

Local 153 filed unfair practice charges alleging that the Board and the Cherry Hill Supportive Staff Association, violated the Act: when the Board did not renew, effective June 30, 2008, its contract with Aramark, thus terminating the employment of employees represented by Local 153; and when the Board and the Association, the representative of certain non-certificated Board employees, entered into a sidebar agreement, modifying, effective July 1, 2008, their existing collective negotiations agreement, by adding to the Association's unit employees being hired by the Board to perform the tasks formerly completed by the Aramark workers.

Based on the "successorship" doctrine, Local 153 sought an interim order: declaring the sidebar agreement to be illegal; restraining the Board and the Association from negotiating the

terms and conditions of employment of Board employees doing work performed by employees in Local 153's Aramark unit; that Local 153 be recognized as the exclusive representative for those new Board employees; and that the Board be ordered to immediately enter into collective negotiations with Local 153 concerning the terms and conditions of the employees.

The designee concludes that even if the successorship analysis could be used, given the facts and the law, particularly the "most appropriate unit" standard, and uncertainty as to whether a majority of the Aramark employees would be hired by the Board, Local 153 had not established a substantial likelihood that it would prevail on the merits of its charges. With respect to its claim to represent new Board employees hired to perform the tasks that were formerly the work of the Aramark employees it has been certified to represent, denying relief would not cause Local 153 irreparable harm as it could file a representation petition to pursue that claim.

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Appearances:

For Respondent Cherry Hill Board of Education, Lenox, Socey, Wilgus, Formidoni, Brown, Giordano & Casey, attorneys (Michael J. Heron, of counsel)

For Respondent Cherry Hill Supportive Staff Association, Selikoff & Cohen PA, attorneys (Steven R. Cohen, of counsel)

For the Charging Party, Adam Kelly, attorney

INTERLOCUTORY DECISION

On May 13, 2008, the Office and Professional Employees International Union, Local 153 ("Local 153") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the Cherry Hill Board of Education ("Board") and the Cherry Hill Supportive Staff Association ("Association") engaged in unfair practices proscribed by the New

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when: (1) the Board did not renew its contract for custodial services with Aramark Educational Services, Inc., ("Aramark") thus terminating, effective June 30, 2008, Aramark employees performing cleaning services at Board facilities who are represented by Local 153 pursuant to a National Labor Relations Board ("NLRB") certification of representative; and (2) entered into a "sidebar" agreement with the Association providing that it, rather than Local 153, would represent all persons hired as Board employees to provide the cleaning services formerly performed by Aramark. The charge alleges that the Board violated N.J.S.A. 34:13A-5.4a(1) (2) (3) and (5)[1/] and that the Association, by accreting into its unit employees represented by Local 153, violated N.J.S.A. 34:13A-Section 5.4b(1).[2/]

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (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; 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."

2/ This provision prohibits employee organizations their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

The charge was accompanied by an application for interim relief requesting that the Commission issue an order: declaring the sidebar agreement between the Respondents to be illegal; restraining the Respondents from engaging in discussions or collective negotiations concerning the terms and conditions of employment of Board employees doing work performed by employees in the unit Local 153 was certified to represent; that Local 153 be recognized as the exclusive representative for Board employees performing custodial and cleaning services pursuant to the NLRB certification; and that the Board be ordered to immediately enter into collective negotiations with Local 153 concerning the terms and conditions of employment of custodial and cleaning service workers employed by the Board.

An order to show cause was executed on May 21, 2008. I was assigned, as a Commission designee, to hear the interim relief application. The parties submitted briefs, certifications and exhibits. On June 9, testimony was taken,[3/] exhibits were introduced into evidence, and all parties argued orally. After stating my reasons on the record, I signed a written order denying Local 153's application. This written decision contains my findings and conclusions. N.J.A.C. 19:14-9.5(a).

3/ Some of Local 153's witnesses testified in Spanish. Their testimony was translated by John Matt, who has been approved by the New Jersey Administrative Office of the Courts as a Registered Court Interpreter.

1. The Board is a public employer within the meaning of the Act. N.J.S.A. 34:13A-3(c). The Association and Local 153, are, in the context of this proceeding, employee organizations within the meaning of the Act. N.J.S.A. 34:13A-3(e).

Local 153's Organizing Drive

2. For at least ten years prior to June 30, 2008, the Board subcontracted custodial services to private firms, including Aramark Educational Services, Inc. ("Aramark").[4/]

3. On October 29, 2007, Local 153 filed a petition with the NLRB (Docket No. 4-RC-21364) seeking to be certified as the exclusive majority representative of cleaning and custodial personnel employed by Aramark at the Cherry Hill Public Schools. Aramark had a contract with the Board to provide these services.

4. On December 6, 2007, the NLRB conducted a representation election on the Board's premises.[5/] Local 153 won by a vote of 46 to 42.

5. Aramark filed objections to the election. However, on April 22, 2008, the NLRB, adopting the recommendation of its hearing officer, issued a two-page, unpublished decision

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4/ The Commission lacks jurisdiction over private employers. See ARA Services, Inc., E.D. No. 76-31, 2 NJPER 112 (1976).

5/ Labor relations agencies, including the NLRB, commonly require the posting of election notices. There is no allegation that the notices were not posted, but witnesses called by Local 153 testified that they could not recall seeing election notices (T35-19 to T36-9; T55-24 to T56-1).

rejecting the objections. The NLRB certified Local 153 as the exclusive majority representative of:

> All full-time and regular part-time custodians, including lead custodians, head custodians and floaters employed by the Employer at Cherry Hill Public Schools excluding all other employees, office clerical employees, guards and supervisors as described in the [National Labor Relations] Act.

The Termination of the Board-Aramark Relationship

6. In February or March 2008, Local 153 Staff Agent Seth Goldstein, who had led the effort to organize Aramark's Cherry Hill employees, spoke with Assistant Superintendent/Business Administrator Lisa Palmer. She told Goldstein that the Board was dissatisfied with the quality of Aramark's services.

7. At its regular meeting on April 29, 2008, the Board adopted a resolution stating that it would not re-bid custodial and cleaning services for the 2008-2009 school year. The resolution directs the Administration take the necessary action to implement a plan to hire employees so that the work would be performed within the district. A notice of this action appeared in a Board-issued news release (Ex. U-4).

8. In early May 2008, Aramark issued a multi-page document, in accordance with N.J.S.A. 34:21-1 et seq., to Local 153 and the 93 employees working for it at the Board's facilities advising that, effective June 30 Aramark would be terminating its operations there. The advisory, known as a "WARN" notice (Ex. U-

3) lists other facilities in New Jersey, Philadelphia and Southeastern Pennsylvania where Aramark might have jobs for the employees who were about to lose their positions in Cherry Hill.[6/] It also lists the names and job titles of all of the affected Aramark employees and contains information regarding final paychecks, severance pay and other benefits and assistance.

9. In May 2008, Aramark distributed employment applications to its soon to be terminated Cherry Hill workers so they could seek jobs as Board employees (T49-11 to T49-22). Some Aramark workers obtained applications from the Board (T55-11 to T55-21).

10. As of June 9, 2008, several Aramark employees working in Cherry Hill had filed applications. Some were sent directly to the Board's office, others were handed to a faculty member to submit. Some applicants, who had been working as Aramark employees, had been contacted by the Board, but others, who had submitted applications, were still waiting for a response (T49-25 to T51-2; T53-10 to T53-21).[7/]

11. None of the witnesses called by Local 153 testified that they had sought employment at any of the other Aramark

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6/ The list includes municipalities, public and private schools, hospitals, retirement homes, a convention center, sports and entertainment arenas.

7/ Among the applicants who had been contacted by the Board was a head custodian on the day shift who had testified on behalf of Aramark during the NLRB election objection hearings (T64-5 to T65-25).

operations listed on the WARN notice (T52-16 to T52-21). Goldstein testified that he had not assisted employees with any applications to work for Aramark at either the Philadelphia Convention Center or in Burlington Township (T85-2 to T85-6). Goldstein said that the Aramark employees told him that the application deadline was May 30, 2008, and that a Board web site listed the same deadline. However, he admitted that he had not contacted any Board official to see if Aramark workers could still apply after that date (T88-12 to T89-4).

The Composition of the Association's Collective Negotiations Unit

12. Before the Board subcontracted cleaning and custodial work, employees represented by the Association performed these tasks. The recognition clause of the July 1, 1992 to June 30, 1995 contract between the Board and the Association reads:

> The Board recognizes the Association as the exclusive bargaining agent . . . for a unit of non-professional employees consisting of elementary head custodians, janitors, high school stock clerks-athletics, groundskeeper, crew leader, warehouse person, shift foreman, senior maintenance person, cafeteria-janitors, maintenance person, utility person, maintenance helper, grounds crew leader, maintenance assistant, transportation mechanics, utility mechanics, senior mechanics and inter-school messengers; excluding head custodians at the high schools and junior high schools, engineers, cafeteria workers, printers, security men, special

> police and bus drivers, supervisory and clerical employees.[8/]

13. On or about July 1, 2007, the Board and the Association entered into an agreement covering the period from July 1, 2007 through June 30, 2010 (Ex. U-2). Its recognition clause reads:

> The Board recognizes the Association as the exclusive bargaining agent . . . for a unit of non-professional employees consisting of elementary head custodians, high school stock clerks, groundskeeper, grounds crew leader, grounds crew leader-athletics, Warehouse/Inventory (Central), maintenance person, maintenance assistant, mechanics, inter-school messengers; excluding head custodians at the high schools and junior high schools, engineers, cafeteria workers, printers, security personnel, special police and bus drivers, supervisory and clerical employees.

14. On April 11, 2008, representatives of the Board and the Association signed a "sidebar" agreement (Ex. U-1) modifying their 2007-2010 contract. The Board approved this document at its April 29 public meeting. The sidebar alters, effective July 1, 2008, several sections of the main contract including the Recognition clause by adding "Cleaner," "Cleaning Lead - Elementary/Middle School," and "Cleaning Lead - High School" to the titles included in the Association's unit.[9/] Neither the

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8/ The 1992-1995 Board-Association agreement has been filed with the Commission and is on the agency's web site. See N.J.S.A. 34:13A-8.2.

9/ Though not listed as a formal title, the sidebar agreement also refers to cleaners used as "floaters." The title

(continued...)

original recognition clause of the 2007-2010 contract, nor the recognition clause of the 1992-1995 agreement refers to the title "Cleaner." No testimony was provided whether the duties of those titles differed in any way from the Aramark jobs.

ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

Local 153 is asserting that under the "successorship" doctrine established by the NLRB and as recognized by the United States Supreme Court in Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987) and NLRB v. Burns Int'l Sec. Servs., 406 U.S. 272 (1972), the Board is obligated to honor the NLRB

9/ (...continued)
"floater" is included in the unit certified by the NLRB, but the WARN notice lists only three titles; Head Custodian, Lead Custodian and Custodian.

certification and treat Local 153 as the majority representative of the employees it hires to do the work that had been performed by Aramark employees up until June 30, 2008.

Under the successorship doctrine, the new employer must be the old employer's successor in fact and the majority of the predecessor's employees must be employed by the successor. Only if both requirements are met may successorship liability, here the obligation to negotiate with and process grievances filed by the majority representative of the predecessor's employees, be imposed on the successor employer. See M.E.A. v. N. Dearborn Heights School Dist., 169 Mich. App. 39, 425 N.W.2d 503, 507 (Mich. Ct. App. 1988).

Fall River and Burns involved predecessor and successor private employers. N. Dearborn Heights involved predecessor and successor public employers.[10/] The NLRB has also applied the successorship doctrine where a facility previously owned and operated by a governmental entity was sold to a private corporation. See Morris Healthcare & Rehabilitation Center, LLC, and Prism Healthcare Group, Inc. 2006 NLRB LEXIS 540; 191 L.R.R.M. 1279; 348 NLRB No. 96 (2006). However, research

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10/ Cf. In re Closing of Jamesburg High School, 83 N.J. 540 (1980) (Order of Commissioner of Education directing that tenured teachers, formerly employed at closed high school, be transferred to faculty of two districts receiving closed district's students, was invalid absent agreement of the two receiving districts).

uncovered only one case involving an attempted application of the successorship doctrine where the predecessor employer was a private entity, the successor was a public body and two different labor organizations claimed to represent the formerly private employees. In Hospital and Health Care Workers, Local 250, SEIU, AFL-CIO, v. Regents of the University of California, 18 PERC (LRP) (¶25053 1994), 1994 PERC LEXIS 107 (1994), the California Public Employment Relations Board adopted the successorship analysis, noting:

> The purpose of successorship is to require a successor employer to bargain in good faith with the labor organization that represented its predecessors work force where a majority of the work force becomes a part of the successor entity and retains substantially its identity and it remains an appropriate unit under the applicable law.

However, PERB ruled that successorship did not apply despite 18 years of a harmonious collective bargaining history under the prior unit structure. It held that maintenance of the bargaining unit structure, that existed while the facility was privately owned, would have resulted in a proliferation of bargaining units and undue fragmentation, violating a state law requiring that public employees be grouped in the "most appropriate" units.[11/]

11/ Section 3579 of California's Higher Education Employer-Employee Relations Act provides in relevant part:

> (a) In each case where the appropriateness of a unit is an issue, in determining an appropriate unit, the board (continued...)

Even assuming that the Board should have considered the interests of Local 153 when it made a determination that the cleaning and custodial staff it planned to hire should be part of the collective negotiations unit represented by the Association, I cannot say that Local 153 has demonstrated that it is substantially likely to prevail on its claim that the Board has

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11/ (...continued)
shall take into consideration all of the following criteria:

* * *

(2) The effect that the projected unit will have on the meet and confer relationships, emphasizing the availability and authority of employer representatives to deal effectively with employee organizations representing the unit, and taking into account factors such as work location, the numerical size of the unit, the relationship of the unit to organizational patterns of the higher education employer, and the effect on the existing classification structure or existing classification schematic of dividing a single class or single classification schematic among two or more units.

(3) The effect of the proposed unit on efficient operations of the employer and the compatibility of the unit with the responsibility of the higher education employer and its employees to serve students and the public.

* * *

(5) The impact on the meet and confer relationship created by fragmentation of employee groups or any proliferation of units among the employees of the employer.

* * *

(c) There shall be a presumption that all employees within an occupational group or groups shall be included within a single representation unit. However, the presumption shall be rebutted if there is a preponderance of evidence that a single representation unit is inconsistent with the criteria set forth in subdivision (a) or with the purposes of this chapter.

violated N.J.S.A. 34:13A-5.4a(5). That law prohibits a public employer from:

> (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. . .
> [emphasis supplied]

The Commission has been directed, by case law and statute, to apply the most appropriate unit standard to resolve disputes over unit definition in order to avoid a proliferation of negotiating units. See State of N.J. and Professional Ass'n of N.J. Dept. of Education, 64 N.J. 231, 251 (1974) (Commission is under a duty to make a determination as to the most appropriate unit); N.J.S.A. 34:13A-5.10 (limiting the number of collective negotiations units for executive branch employees).[12/]

Given the most appropriate unit standard, I cannot say it is likely that the Commission would approve of separate representation for the titles in the Association's unit (prior to July 1, 2008) and the jobs listed in the NLRB certification now that those tasks are again being performed by Board employees. As the appropriateness of the unit Local 153 claims to represent is unclear, I cannot conclude that the Board's refusal to

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12/ But, when formerly private railroad and bus lines became publicly owned, legislation expressly provided that the bargaining relationships should be preserved and altered only in accordance with the National Labor Relations Act and the Railway Labor Act. See N.J.S.A. 27:25-14e.

negotiate with Local 153 violates N.J.S.A. 34:13A-5.4a(5), as a public employer is only obligated to negotiate with the majority representative of "an appropriate unit," because that concept is applied differently in public employment in New Jersey than it is in private employment. In addition, as of the date of the interim relief hearing, the number of former Aramark workers represented by Local 153 hired by the Board was not known. Thus, even absent a unit definition dispute, Local 153 has not shown that a majority of former Aramark employees will be hired.

In University of California, PERB additionally concluded that, by telling employees they would now be part of broad-based, bargaining units represented by the American Federation of State County and Municipal Employees, rather than their current representative, Local 250 of the Service Employees International Union, the employer did not render unlawful assistance to AFSCME and that the accretion of those employees into the larger units was appropriate. Here, the number of employees in the unit Local 153 was certified to represent is asserted to be larger than the unit represented by the Association up until June 30, 2008. But, at the time Local 153 filed its charge, it was unknown how many employees in its Aramark unit were being considered for employment by the Board. Where an employer's actions are alleged to favor an incumbent union, such as the Association, or where (because of the creation of new jobs or the reestablishment of

old ones) majority status is not known, an employer that assists a particular union, as against a competing organization, may or may not violate N.J.S.A. 34:13A-5.4a(2). See Higgins, The Developing Labor Law, Fifth Edition at 453 to 456. Thus, given the novel legal issues presented, Local 153 has not shown that it is substantially likely to prevail on its claim that the Board violated N.J.S.A. 34:13A-5.4a(2).

Although in University of California all employees of the predecessor private employer were retained, the number of former Aramark employees who are to become Board employees is unknown. However, neither this uncertainty nor the other events surrounding Local 153's organizing efforts establish that Local 153 is substantially likely to prevail on its claim that the Board engaged in anti-union activity in violation of N.J.S.A. 34:13A-5.4a(3). Local 153 speculates that, in filling the new in-house positions, the Board, absent the issuance of the requested interim relief, could base its hiring decisions on the pro or anti-union attitudes of applicants or could refuse to hire any of the Aramark employees. But, Local 153's witnesses acknowledged that they had received employment applications for Board jobs. Local 153 also points to the timing of the Board's decision not to renew the Aramark contract, coming on the heels of the NLRB certification.

Even if the Board knew of Local 153's efforts to organize Aramark, the timing of the non-renewal may not be sufficient to show that the Board was hostile to Local 153's organizing efforts.[13/] Local 153 representative, Seth Goldstein, admitted that in February 2008 Board officials told him that they were unhappy with the quality of work performed by both Aramark employees and its managerial personnel and was considering ending its relationship with the firm when the current contract expired. That evidence could support a showing that the Board had a legitimate business justification for ending its Aramark contract. But, at the very least, it precludes me from holding that Local 153 has shown that it is substantially likely to prove that the Board violated N.J.S.A. 34:13A-5.4a(3).

The Board and the Association, by entering into the sidebar agreement to accrete cleaning and custodial titles into its collective negotiations unit, are alleged to have respectively violated N.J.S.A. 34:13A-5.4a(1) and N.J.S.A. 34:13A-5.4b(1). Because of the issue of unit appropriateness and the uncertain number of Aramark employees that the Board will hire, Local 153

13/ The refusal of a public employer to hire an individual who had, while in private employment, engaged in protected activity arguably violates the Act. Cf. Ocean Cty. Coll. and Corbett, et al., 204 N.J. Super. 24, 39 (App. Div. 1985), certif. den. 102 N.J. 327 (1985) (although reversing Commission finding of discrimination by public employer, court acknowledged that refusal to hire based on organizing activity while a private employee could violate N.J.S.A 34:13A-5.3).

has failed to establish a substantial likelihood that the Board violated N.J.S.A. 34:13A-5.4a(5) when it did not recognize it and negotiate concerning the terms and conditions of employment of persons being hired to perform the work in-house that had been previously subcontracted to Aramark.

However, the issue of what unit is appropriate is separate from the question of whether one of two competing employee organizations is the majority representative of the most appropriate unit, or whether their respective claims have raised a question concerning the representation of public employees that should be resolved through the Act's statutory procedures. In University of California, the union that represented the employees when the facilities were privately owned, filed not only an unfair practice charge, but also representation petitions with California PERB to pursue its claim to represent the workers after their move into the public sector. That option is also available to Local 153. Accordingly, I find that Local 153 will suffer no irreparable harm if it is denied a preliminary declaration, in this interlocutory proceeding, that it has the right to represent Board employees hired to do the work formerly performed by the Aramark bargaining unit it was certified to represent.[14/]

14/ The Association argues that the Commission's contract bar rule, N.J.A.C. 19:11-2.8(c)(3), would prevent Local 153 from (continued...)

ORDER

Local 153's application for interim relief is denied.

BY ORDER OF THE COMMISSION

Don Horowitz
Commission Designee

DATED: July 9, 2008
Trenton, New Jersey

14/ (...continued)
filing a representation petition. Whether that rule would preclude Local 153 from competing with the Association to represent the employees in the Association's unit as of July 1, 2007, and/or the titles added to the Board's work force as of July 1, 2008, is not before me in this application for interim relief in an unfair practice proceeding.