

H.E. NO. 2017-10

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

In the Matter of

TEANECK BOARD OF EDUCATION,
Respondent,

-and-

Docket No. CO-2015-120

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 97,
Charging Party.

SYNOPSIS

A Hearing Examiner recommends that a Complaint alleging that a public employer, Teaneck Board of Education, violated section 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq., by negotiating in bad faith when it subcontracted second-shift custodial services in November, 2014, thereby causing the layoff of 23 unit employees represented by exclusive employee representative, Teamsters, Local 97, be dismissed.

The Hearing Examiner finds that the Board collectively negotiated a memorandum of agreement and collective negotiations agreement simultaneously with seeking to subcontract a portion of custodial services. The Board also engaged in "hard bargaining" by insisting on a provision that removed employer-provided prescription and dental benefits over a four-year term. The Hearing Examiner determined that the majority representative did not act within the prescribed time period in order to avoid outsourcing of custodial services. The Hearing Examiner finds that under the "totality of circumstances," the Board did not negotiate in bad faith. In re State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), af'd. 141 N.J. Super. 470 (App. Div. 1976).

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent
Kenny, Gross, Kovats & Parton, attorneys
(Douglas J. Kovats, of counsel)

For the Charging Party
Mets, Schiro & McGovern, LLP
(Peter Paris, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On November 24, 2014, International Brotherhood of Teamsters, Local 97 ("Local 97") filed an unfair practice charge against Teaneck Board of Education ("Board"). The charge alleges that on November 12, 2014, the Board voted in its regular meeting to subcontract negotiations unit work to "Aramark Education," a private contractor, causing projected layoffs of 23 negotiations unit employees. The charge alleges that the Board ". . . bargained in bad faith" with Local 97.

The charge specifically alleges that in June, 2014, despite the parties having recently entered a collective negotiations agreement extending from July 1, 2013 to June 30, 2016, the Board sought additional concessions from Local 97, notwithstanding its December, 2013 written representation that it would not seek them if Local 97 ratified the proposed agreement.

The charge alleges that on September 25, 2014, Board Business Administrator Robert Finger issued an email to Local 97, advising that, ". . . in order to preserve their jobs [i.e., 23 custodians who would be laid off as a result of subcontracting] your members must agree to reopen the contract and provide concessions of \$1.3 million as follows: [the email delineates the specific concessions sought by the Board]." The charge alleges that sometime after October 23, 2014, Local 97 agreed to concessions totaling about \$1.5 million over four years, exceeding Finger's September 25th demand. The Board nevertheless, ". . . made additional demands" to which Local 97 could not accede. The charge alleges that on November 5, 2014, the concessions offered by Local 97 were not presented to the Board at its "workshop meeting." Instead, it approved for its consideration on its regular meeting agenda the awarding of a contract to Aramark Education to provide custodial services then-performed by unit employees at a projected four-year savings of \$1.9 million. On November 12th, Local 97's offered concessions

were again not presented to the Board but the estimated savings by subcontracting had increased to \$2.4 million over four years. The Board voted to subcontract by a vote of 5 in favor, 3 opposed and 1 abstained, resulting in an anticipated layoff of 23 unit employees.

The Board's conduct allegedly violates section 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq.

On October 1, 2015, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On October 27, 2015, the Board filed an Answer admitting that it outsourced "a portion of unit work" for financial reasons and denying that it violated the Act. In January, 2016, Local 97 Counsel wrote a letter informing me that its primary witness will be unavailable until late April, 2016. On June 1, 2016, July 28, 2016 and October 5, 2016, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs and replies were filed by February 1, 2017.

^{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. (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."

Upon the record, I make the following:

FINDINGS OF FACT

1. Local 97 is the exclusive representative for purposes of collective negotiations of about 45 to 50 non-certified laborers, landscapers, custodial employees and maintenance mechanics employed by the Board (J-1).^{2/} Unit employees clean schools, maintain outside premises, including fields, perform maintenance work and repair HVAC and electrical systems (1T26). John Gerow is President of Local 97. Jill Pitman is a Local 97 business agent/organizer who also was Local 97's principal spokesperson during collective negotiations for both the 2010-2013 and 2013-2016 agreements with the Board (1T25, 26, 120, 121).

2. In the 2010-2011 school year, State financial aid to the Board was more than halved to \$3.5 million from its full funding of \$7.6 million. The Board receives about 6% of its budget from State aid, with 94% paid by local taxpayers (2T47-48). For the 2011-2012 school year, State funding was restored to \$5.2 million (2T48). Other drags on the Board's annual budget include a \$5 million allocation (of a \$90 million overall budget) for a charter school and a \$2.3 million expenditure to bus about

^{2/} "J" refers to this joint exhibit; "U" represents Union or Charging Party exhibits; "B" represents Board or Respondent exhibits; "T" represents the transcript, preceded by a "1", "2", or "3," signifying the first, second or third day of hearing, followed by the page number(s).

2200 non-public school students (compared with about 1200 public school students) (2T49-50).

3. In negotiations with the Board for the 2010-2013 agreement, Local 97 agreed to three consecutive years of no wage increases and to concessions in personal time-off, uniform allowance and healthcare benefits (1T28, 2T45). In April and May, 2011, the Board solicited and rejected three received bids for subcontracting custodial services. The bids were rejected because Board representatives, including the Superintendent, Facilities Director and Business Administrator Robert Finger were directed by the Board to present to it a competitive proposal, significantly comprised of unit employee attrition savings and other savings. The Board consequently agreed not to outsource unit work (1T28; 2T46; 3T41-42, 49-50).

4. In or around fall, 2013, the Board prioritized (or maintained as a priority) the retention of as many teachers as possible to lessen or offset an "achievement gap," as evidenced in discrepancies in private/parochial v. public school student test results in a municipality whose populace is 80% Caucasian and whose public school students are 60% Black and Hispanic (2T61-62). The Board's immediate goal was keep class size as small as possible (2T63). The Board sought to reduce costs in part by seeking concessions in health benefits from all four of its collective negotiations units, separately comprised of

teachers, administrators, computer technicians, and custodial and maintenance employees (2T64-66, 68). At that time, the Board's employees were insured under the State school employee health benefits plan, the annual cost of which increased by 10%. The Board was disadvantaged in seeking an alternative, less-costly provider, "because for each dollar paid to Blue Cross, it paid out \$1.20." The consequence was that the Board was "stuck" in the State plan and its unit employees were contributing the legislated maximum amount of money (2T66-67). By 2012-2013, the Board's "surplus" fund had eroded significantly, owing to a ceiling imposed by the 2% "cap law" and "frozen" state aid (2T58-59). The Board looked for savings in prescription and dental care plans that were "unbundled" from the State plan (2T69-70). It also sought savings from disability plans and in moving to "Direct 15" from "Direct 10" under the health insurance plan for all Board employees (2T74-75). By 2014-2015, the Board was obligated to use its "banked" monies from 2010-2011, that is, increase over 2% a tax levy to compensate for previous years in which the levy was less than 2% (2T54-55).

5. Negotiations for the 2013-2016 agreement began within two to six months of its predecessor's mutual ratification, with Local 97 hoping ". . . to get some things back" (1T29-30). On October 29, 2013, Local 97 filed a Notice of Impasse with the Commission, reporting that the parties had six negotiations

sessions from May through July, 2013 (Docket No. I-2014-091). In the 2013-2014 school year, the Board outsourced classroom and lunchroom aide services to Mission One/Source for Teachers, a private contractor (2T61-62). In unspecified previous years, the Board subcontracted bussing and security services. It had also subcontracted the "cafeteria operations" to Aramark (2T63).

6. On December 3, 2013, Board Counsel issued an email to Pitman listing nine items in a Board "settlement offer" to Local 97, provided that it "approve" them before proceeding to mediation (U-3). Among the items were a 1% salary increase (inclusive of increment) in each year of a proposed three-year agreement; limitations on vacation benefits; a cap on unused sick leave reimbursement on retirement; adjustments in medical contributions to P.L. 2011 c. 78, and "new language for overtime to reflect provisions of FLSA" (U-3).

Pitman credibly testified that at or around the time of the Board's proposal, Local 97's negotiations team was informed that the Board, ". . . was still looking into outsourcing" (1T33). Local 97's team rejected the proposed changes in overtime calculations and did not agree to the December 3rd proposal (1T33, 35).

7. On December 11, 2013, the Board conducted its regular monthly public meeting at which it authorized Business Administrator Finger, ". . . to prepare, advertise and solicit

bids for facilities services for the 2014-2015 school year." The vote was 8 in favor and 1 abstention (2T100; U-4).

8. Around 4 p.m. on December 11th and before the Board meeting that night, Pitman emailed a "response to proposal" to Board Counsel (U-5). Pitman wrote of ". . . a very strong possibility [that] we can ratify the proposal of December 3, 2013" (finding no. 6). She requested another meeting within one week to "clarify certain proposals," including ones regarding "health care" and "FLSA." Pitman wrote her assurance that ". . . neither of these proposals will stop a ratification or impede the movement toward ratification." Pitman also wrote:

In return for our willingness to meet and settle, we humbly request that any talk about outsourcing our departments be tabled until after we meet to discuss and hopefully sign off on the new agreement. If this talk were to get out to our members, we are afraid that it may cause unnecessary panic and will make reaching an agreement difficult. Once we meet, if the Board feels that our signing of this last offer is not enough to satisfy their need to explore options, they can present it at their next meeting.

We are just asking for a chance to settle this. [U-5]

Pitman admitted that the Board has the prerogative, ". . . to go out for bids" (1T125). She admitted that Local 97's negotiations committee wanted the prospect of outsourcing "tabled" because it was a "tactic" the Board used as the parties were entering mediation, creating "leverage" against Local 97,

nevertheless (1T42, 125, 144). Presuming that the Board would clarify certain "language," Pitman admitted that her response to Board Counsel was her effort, ". . . [to] sell the deal, bring it to a ratification vote and let the [subcontracting] bid stuff to go away. Enough." (1T41-42).

Business Administrator Finger admitted that the Board negotiations committee was "fairly confident" that Local 97 would ratify an agreement, despite questions regarding health insurance and FLSA (2T80-81).

9. On December 12, 2013, Finger sent a letter to Local 97 President Gerow, notifying him of the Board's "intent to solicit bids for the outsourcing of custodial, maintenance and groundskeeping services for the 2014-2015 school year." He wrote that the Board's decision was based, ". . . solely on financial and budgetary considerations," with the Board reportedly "acting in good faith." Finger wrote:

[T]he union is encouraged to submit recommendations regarding wages, hours, terms and conditions of employment that will meet the financial goals of the bid. A copy of the bid specifications will be forwarded to you for review. [U-6]

10. On December 20, 2013, Local 97 Counsel Kevin McGovern wrote a letter to Board Counsel recapping correspondences of December 3rd and 11th (finding nos. 6 and 8). He wrote of Finger's December 12th notice of possible outsourcing sent to Local 97 President Gerow (finding no. 9). He also wrote of

Pitman's request to Board Counsel, ". . . that any effort to subcontract or outsource bargaining unit work be held in abeyance pending ratification of the new agreement" (U-7). McGovern wrote in a pertinent part:

We assume that the notice to Mr. Gerow was issued prior to the Board being notified that Local 97 had accepted the Board's most recent offer, and that as such, the District will not be moving forward with its stated intent to subcontract unit work. In terms of the union's 'recommendations' for prospective wages and hours, the union is recommending those terms and conditions proposed by the Board-authorized settlement proposal of December 3, 2013. Since those terms were accepted by the union on December 11, 2013, we are of the view that the parties have entered into a binding agreement along those terms sought by the employer. As such, kindly confirm that the Board's notice to Gerow dated December 12, 2013 has been or will be rescinded. [U-7]

McGovern admitted that in writing the letter, he was concerned about the FLSA "language" and the impact of Chapter 78. "[His] objective was to secure a written agreement from the Board that in the event [Local 97] ratified the agreement the existing effort to subcontract unit work would be rescinded" (1T150-151).

11. On December 23, 2013, Board Counsel wrote a letter to McGovern acknowledging his December 20th letter and a recent phone conversation. The letter included proposed contract provisions regarding limitations on both overtime eligibility and medical insurance benefits. Board Counsel concluded his letter:

As I indicated during our telephone conversation, in the event we are able to ratify the agreement between the parties, I do not, at this point in time, believe that the Board will proceed further with regard to outsourcing of bargaining unit work. I trust that this clarification is fully responsive to your request . . .
[U-8]

Asked on direct examination if Board Counsel's letter "accurately reflected" their earlier phone conversation, McGovern agreed. He testified of their conversation:

I requested that Mr. Kovats confirm my request and my understanding that in the event Local 97 ratified the contract, the Board would not move forward with subcontracting. And Mr. Kovats did in fact confirm that understanding. I asked, as lawyers do, that he provide me with written confirmation of our conversation and he did so later in the day. And that's what [his December 23rd letter] is. . . [1T152).

He also testified:

. . . When you ask a fellow attorney, an officer of the court, to confirm an understanding and you get a response of the nature that Mr. Kovats provided me with here, I trusted that response to be accurate and correct. And I read his response, particularly the last paragraph as confirming our conversation and my understanding in the event of ratification, the Board would not subcontract unit work. [1T153-154]

McGovern testified that his only request of Board Counsel, other than asking for "language" on "open [contract] items," was:

Hey, Doug, if we do this, if we ratify, we're done with subcontracting. Right? And this was the response I got, and that is the response we discussed on the phone.
[1T154]

I credit McGovern's testimony.

12. Pitman also read Board Counsel's letter on or around December 23rd, and believed that if Local 97 agreed, ". . . to this thing, there was going to be no outsourcing. That the bid would go away" (1T50-51). I infer that "this thing" refers to the terms of a proposed successor agreement, including provisions in Board Counsel's letter.

Pitman assembled for the membership's review a "packet" comprised of the Board's December 3, 2013 list of proposals (finding no. 6) and Board Counsel's December 23rd letter (1T51). On an unspecified date in January, 2014, Pitman discussed proposed successor contract terms in a membership meeting at which she read aloud the last paragraph of Board Counsel's December 23rd letter (1T52, 54). She read it aloud because,

That was the main question everybody had -- if we agree to the 1% [annual] raises and [concessions] on overtime under FLSA -- why should we take this if they're still going to outsource? And so that's why I read that out loud just to tell them, look, we have it in writing. [1T52]

In the January, 2014 Local 97 meeting, the membership voted to ratify a "memorandum of agreement" setting forth terms and conditions of employment from July 1, 2013 through June 30, 2016

(1T52-54; U-9). Among the terms are a 1% annual wage increase, inclusive of increments and concessions in eligibility for overtime compensation, sick leave "cash out," vacation leave "buy back," and medical insurance benefits (U-9). Nothing in the memorandum references or precludes subcontracting (U-9; 2T98). In another meeting attended by Board negotiations team members (who verbalized their support for the memorandum) and Local 97 representatives, Pitman believed that Local 97 had again prevailed over a threat of privatization (1T55).

13. On December 31, 2013, Finger emailed a "bid notice" of specifications for outsourcing custodial services in the 2014-2015 school year to "The Record," authorizing the newspaper to advertise in its January 9, 2014 edition, together with notice of a February 20, 2014 deadline for responses (2T94, 105; 3T54; U-13). On December 31, Pitman was unaware of a Board bid solicitation for custodial services (1T61). Finger testified that a copy of the bid specifications was sent to Gerow and Pitman (2T105). Asked on cross-examination if she recalled receiving meeting minutes reporting that the Board was considering subcontracting, Pitman testified:

No. The only thing we got was the notice that they were going out for bid. That was sent to John Gerow after it had gone out.
[1T138]

I find that Pitman's answer corroborates Finger's testimony and his December 12, 2013 letter to Gerow in part representing that the specifications will be sent to him (finding no. 9).

14. On February 12, 2014, the Board unanimously approved in its monthly public meeting the memorandum of agreement ratified by Local 97 the previous month (2T99; U-10).

15. On March 12, 2014, the Board acknowledged in its public meeting that no bids were received for "facilities staffing services for the 2014-2015 school year on Thursday, February 20, 2014 at 11 a.m." "Facilities staffing services" includes Local 97's unit work, select supervisory work and secretarial work (2T108). It immediately directed Finger, ". . . to prepare specifications, advertise and re-bid" (U-14). Finger informed Pitman and Gerow of the Board's action (2T107, 115).

In the same meeting, the Board unanimously approved the 2013-2016 collective negotiations agreement and salary guides with Local 97, authorizing its representatives' signatures on the document (U-12). Local 97 representatives had signed the agreement on February 28, 2014, not having collectively negotiated with Board representatives since approving the memorandum of agreement in January (1T57).

16. On March 18, 2014, Finger issued an email to a named Aramark representative regarding the "facilities outsourcing bid," for the 2014-2015 school year, with an attached

"solicitation for bids" of "facilities staffing services." The solicitation specifies that the deadline for bids is 11 a.m. on April 17, 2014. The email provides:

Attached is a revised bid package advertised in today's 'Bergen Record.' The Board approved to re-bid the facilities outsourcing as no bids were received the first time. A copy of the bid notice is attached. Bids are due April 17, 2014. [U-15]

Finger had interacted professionally with Aramark representatives from 2008 to 2010, when he was employed as Business Administrator of Lakewood, New Jersey Board of Education and the company had successfully bid on vendor services for that board (3T15-16, 38-41). Finger also sent the specifications to two other companies that previously subcontracted with the Board. Finger testified without contradiction that business administrators commonly send specifications to companies with which they previously contracted (3T55).

17. On April 17, 2014 at 10:27 a.m., Madelyn Davis of Aramark Education issued an email with an attached letter to Finger, declining to submit a proposal. The attached letter on Aramark letterhead, to the same effect, was signed by Merrie Bernstein, Senior Director of Business Development (U-16).

At 11:15 a.m., Finger emailed Bernstein, informing her that no bids had been received, permitting the Board to negotiate directly with a vendor. He inquired if Aramark was interested in meeting to negotiate for facilities services outsourcing (U-18).

At 12:00 p.m., Bernstein emailed Finger inquiring if he was interested in outsourcing only "night custodial" services. At 12:01 p.m., he replied, writing, "primarily night shift, but having option to outsource other components over term of a contract."

At 12:13 p.m., Bernstein emailed Finger, writing, "We would like to negotiate a contract with you. Available next Thursday?" Finger soon replied: "That's great, but a little premature. The Board has to approve it first and that won't happen until the May 14th Board meeting. After that we can set a date" (U-18).

On cross-examination, Finger was asked if the original or first specifications issued sought outsourcing of all facilities staffing (3T65). Finger replied:

Yes and no. We put out a bid with a 'base bid' and then some additional bids within the entire package. The 'base bid' was to outsource the second shift. But we also had items in there and say, 'Ok - you could also give us a price on outsourcing the day shift; outsourcing the maintenance; outsourcing grounds and even outsourcing management. The goal was to have the entire package and say - 'do 'A'; do 'B'; do 'C'; and make a decision - do they want all of them; do they want only one of them. But the initial, the base bid was for the second shift. And everything else was additional bids within the bid package. [3T66]

Finger's testimony is corroborated by his 12 p.m., April 17, 2014 email reply to the Aramark representative. I credit his testimony. Finger was also asked on cross-examination why

Aramark, within one hour of reading that no bids had been received was "so eager" to negotiate a contract (3T69). Finger replied: "You have to ask her [Bernstein of Aramark]. I have no idea." He also denied having "any further discussions or meetings of any kind until the Board took action on May 14" (3T69). In the absence of any rebuttal or conflicting evidence, I credit Finger's testimony.

18. On May 14, 2014, the Board in its public meeting acknowledged -- as set forth in the meeting minutes -- that no bids for "facilities staffing services for the 2014-2015 school year" were received by the April 17th deadline. The minutes provide: "The Board directs the School Business Administrator to negotiate a contract with a vendor to provide the services requested in the bid specification, in accordance with N.J.S.A. 18A:18A-5c." (This provision requires that such a contract match the specifications originally advertised). The Board voted unanimously in favor of that negotiation (U-17). Asked on cross-examination whether his task is made easier by having to negotiate a contract with one company, Finger denied that it is. He explained that it is ". . . a lot simpler when [subcontractors] say, 'I want to charge x for this, for this, and for this' than to have to sit down and to negotiate" (3T62). Finger also testified that that was the only instance of his having to negotiate such a contract for services as a business

administrator (3T63). In the absence of any rebuttal or conflicting evidence, I credit Finger's testimony.

Pitman admitted that on an unspecified date, a Local 97 member informed her that no bids were received again and that she soon learned from the minutes that the Board will seek to negotiate a contract with a vendor (1T63-65).

19. On an unspecified date in June, 2014, the Board and the exclusive representative of the unit comprised chiefly of teachers and other certificated employees reached a five-year collective negotiations agreement, retroactive to July 1, 2011. The negotiated and consecutive annual wage increases were 0%, 0%, 2.3%, 2.3%, and after a several-month postponement in the fifth and final year, 2.3% (costing the Board 1.8%) (2T121-123). Certificated employees under the terms of the agreement surrendered disability insurance coverage (2T74).

In the Board's public meeting on June 26, 2014, Aramark representative(s) formally presented its proposal, ". . . for taking over the second shift, the night shift" (2T117; U-21). The Board elected to retain day shift custodial services and custodians because of the beneficial familiarity of students, parents and teachers with day shift custodians. By comparison, night shift custodians, with the exception of those assigned to the high school, do not interact with many people (2T118). The Board represented at that time that it would consider the

proposal and that its next regular meeting would not occur until August, 2014 (2T129).

Finger testified without contradiction that he emailed the Aramark proposal to Gerow and Pitman (2T118-119). I credit his testimony.

20. On July 1, 2014, Local 97 President Gerow emailed a response to Finger. It provides at the outset:

How in the name of God am I going to compete with Aramark's offer to your Board? Aramark has reduced the yearly pay to \$32,000. Compared to our present pay scale, ours are almost double. Their medical package offer appears to be around \$11,400 per member (25 members) per year.

What do you want me to tell you, we will take a 50% cut in salary and a \$12,500 reduction in medical insurance? If the teachers were up for outsourcing would they agree to those terms? You know the answer to that question and the Board members adore the teachers. None of you take the taxpayers in Teaneck into consideration or you would never have made the outrageous offer to the teachers that you have . . . [B-2]

Gerow then wrote his calculations of the projected cost of negotiated teacher salary increases, which Finger contested in his testimony as mistakenly too high (B-2; 2T125). Gerow concluded his reply:

I am committed to perform my responsibilities to the members that will include going into Teaneck where ever it takes to tell the taxpayers that you are a part of giving the store away to the teachers and have done nothing but stick it to the Teamsters Local 97's members. [B-2]

21. Also in July, 2014, Gerow suggested to Finger the possibility of Local 97 unit employees enrolling in Teamsters union health plan(s) for "[medical], dental and prescription" (2T127). Finger was receptive to the notion and spoke with an actuary hired by Local 97 about projected savings. In that same period, the Board learned that an underwritten State health benefits plan does not simultaneously allow medical insurance coverage by another provider for some of an employer's employees (2T127-128). Finger then suggested to Local 97 that savings remained possible from prescription and dental plans, which, ". . . weren't in the State health benefits plan" (2T128). The estimated and actuarially-computed savings under the Teamster plan for those coverages over four years was \$140,000 (2T128).

22. On August 14, 2014, Gerow sent an email to Finger regarding Local 97's "proposals." Among them were:

1. Lay 5 teachers off; they will be in all likelihood the same 5 teachers whose jobs were saved by my members' generosity because of the givebacks extracted by the Teaneck Board of Ed. that took place 5 years ago.
2. Attrition (do not replace retiring members from both groups of the workforce-teachers and custodian/maintenance); you spoke to me about this before. The value of the laid-off teachers exceeds the \$500,000 you had spoken to me about originally. Teachers old salary \$82,600 plus medical benefits, \$24,000 (minus your pension contribution) gives you \$106,600 x 5 = \$533,000. Which could insure those 26

jobs I am concerned about for at least 3 years to come.

As to the student class size presently 25 per classroom. You would still have 835 teachers. The classroom would grow to 28 students still very manageable.

Gerow also wrote of his intention to advertise in a local newspaper that the Board's agreement with the teachers' unit cost \$854,000 in 2013 and the negotiated subsequent wage increases will "improve" the teachers compensation, ". . . to the sixth highest-paid [in the State]." He also wrote of his intention to advertise that his membership's jobs were "contracted out to Aramark" and parents will not know those employees. Finally, he wrote of his intention to invite parents to attend the August 20, 2014 Board meeting (B-3).

Finger promptly forwarded Gerow's email to Board Counsel and the Board Superintendent, with this note:

We now have a written response from Mr. Gerow. He does not address anything that we asked him, i.e., health insurance change to Direct 15, elimination of short-term disability plan, change prescription and dental coverage to Teamster Health Fund.
[B-3]

Finger testified that Board representatives did not speak of teacher attrition and that the Board's maintenance employees - plumber, electrician and refrigeration mechanic - were economically efficient and the Board did not intend their layoffs (2T131-132). Finger also disputed in his testimony the veracity

of Gerow's calculations of average teacher salary and benefits, classroom size and doubted his demographic assessment, and conclusion that Local 97 unit employee (possible) layoffs were "paying for" teacher salary increases (2T134-137). Local 97 did not rebut Finger's testimony; I do not find as facts those representations set forth in Gerow's August 14th email.

On August 20, 2014, Gerow attended the public Board meeting and advocated that Board members vote to lay off teachers and increase class size to avoid layoffs of Local 97 unit employees (2T137).

23. On September 3, 2014, the Board resolved in executive session to solicit a proposal from Local 97 that included concessions in health insurance, prescription and dental plans, and short-term disability costs to offset projected savings from outsourcing (2T145). The Board also determined to review any Local 97 proposal in its next executive session on October 3, 2014 and vote at its next regular meeting on October 10, 2014 to either outsource night shift custodial services to Aramark or accept concessions from Local 97 (2T145).

On September 11, 2014, Finger wrote a letter to Gerow memorializing the Board's decisions and schedule. Finger wrote:

As you are aware, Aramark has made a proposal to the Board that will reduce costs over the four-year contract term by approximately \$1.9 million.

Prior to your [August 20] proposal you had indicated that you would consider changing the prescription and dental coverage from the Board's carriers to the Teamsters Benefit Fund. You also indicated that you would be willing to discuss concessions to the current health plan and short-term disability plan. If concessions were agreed upon for those items this would reduce costs over the next four years by approximately \$1.3 million. While substantially less than the Aramark proposal, the Board would consider it in lieu of outsourcing the second shift custodians.
[U-19]

Finger wrote that Local 97's written response must be received not later than September 29, 2014 to permit the Board's subsequent discussion and vote (U-19).

24. On September 19, 2014, McGovern wrote a letter to Finger, acknowledging his September 11 correspondence to Gerow and the Board's willingness "to consider alternatives to outsourcing . . . provided that the union is able to identify areas of savings for the Board" (U-20).

McGovern opposed the deadline for Local 97's reply and protested that the Board, ". . . never provided the union with a specific proposal as to the nature of the concessions sought in health care and short-term disability." He wrote that the union was "unaware" of the precise concessions sought and requested an informational meeting. He also wrote of the need for the membership's approval of "changes in coverage" and sought a 30-day extension of time -- until November 12, 2014 -- for any Board action (U-20).

McGovern admitted that he first learned of the Board's continuing solicitation of outsourcing in September, 2014 and that such efforts were ongoing since June, 2014 (1T155). He admitted his mistaken belief that subcontracting discussions had ended when Local 97 ratified the memorandum of agreement (2T157; finding no. 12). He also learned belatedly that the Board never ceased its subcontracting effort between December, 2013 and June, 2014 (1T158).

25. On September 24, 2014, Finger wrote a reply to McGovern eschewing both his request to postpone Board action and his representations that Local 97 was "unaware" of the concessions sought (U-21). In six "bulleted" paragraphs, Finger recounted chronologically that from June 16, 2014 through September 3, 2014, the Board apprised Local 97 of its proposal to change health insurance coverage from "Direct 10" to "Direct 15;" provided it a printed copy of the Aramark outsourcing proposal, together with a copy of the Board-ratified memorandum of agreement with the Teaneck Township Education Association; and provided a document soliciting Local 97's concessions on health insurance, prescription, dental and short-term disability coverages (finding no. 23). Finger also wrote [sardonically] of Gerow's suggestion to the Board to "increase class size and eliminate teachers." Finally, Finger wrote that the Board has "attempted to encourage Local 97 to submit proposals" that could

obviate outsourcing but no "meaningful proposal" has been submitted (U-21).

Pitman admitted that the dates of Board emails to Local 97 set forth in "the bulleted" paragraphs of Finger's September 24th letter are correct, though Gerow had not shared with her all of Finger's communications (1T74).

26. In the morning of September 25, 2014, Pitman emailed Finger her request for "details" of unit employees' current prescription, dental and short-term disability plan coverages, together with anticipated, itemized savings from concessions. She also wrote of her need for a "window of time" of about 5 calendar days to allow the membership to vote on proposed concessions (U-22).

Later, on September 25th, Finger replied to Pitman (with a copy to McGovern), reiterating that Local 97 has had, ". . . plenty of time to prepare a proposal for the Board." He then wrote:

Here is the bottom line. In order to preserve their jobs your members must agree to reopen the contract and provide concessions of \$1.3 million as follows:

1. Change from Direct 10 to Direct 15;
2. Change prescription/dental plan from the [Board]'s plan to the Teamsters Benefit Fund (that was suggested by Mr. Gerow and confirmed that the cost is less by the fund actuary);

3. Pay for the short-term disability plan through payroll deduction.

The balance of the savings will come from attrition by not filling two currently vacant positions. This is an all or nothing proposal. If your members do not agree to the concessions for the health, dental, prescription and disability plans, the savings from attrition alone will not even come close to the savings offered by Aramark of approximately \$1.9 million.

Here is the breakdown of savings proposed over the next four years:

1. Attrition	\$1,000,000
2. Direct 15	\$ 100,000
3. Disability	\$ 80,000
4. Prescription/ Dental	\$ 150,000

I look forward to receiving your proposal on September 29th. [U-22]

McGovern understood Finger's response to mean ". . . that if we find \$1.3 million in savings, that will be enough for us to save member jobs" (1T162-163). Asked on cross-examination if Finger's reply specifically identifies concessions in health, dental and prescription coverage, McGovern answered, ". . . while you are correct that it says that, I do not read it to mean what you read it to mean" (1T202). On re-direct examination, he explained that on September 25th Finger was aware of attrition savings of only \$1 million and that the other "components" were needed to get close to the demanded \$1.3 million (1T204). Asked on direct examination if \$1.3 million was "all the money the Board was looking for," Finger replied:

At that moment in time, \$1.3 million was the number we were looking at. It eventually, the \$1.3 million and the possible attrition-- again, this is the Teamsters proposal, what could the Teamsters give back? The \$1 million in attrition didn't become more because of the fact we left out those two [named unit employees], which brought that up to . . . close to \$1.3 million. The Direct 15 . . . the disability . . . prescription and dental got tweaked. . . But then [Local 97] said it wouldn't agree to that. [2T157-158]

I infer that Finger's testimony signifies that the Board was interested in "taking back" as much as Local 97 was "giving back" and that savings from attrition was but one--albeit, the most economically significant--source of concessions competing with Aramark Education's \$1.9 million-in-savings proposal.

27. On September 29, 2014, Pitman conducted a Local 97 membership meeting at which the members refused coverage under Teamsters-sponsored prescription and dental plans (1T85). She informed the members of the Board's demands for concessions, specifically those set forth in Finger's September 25th responsive email to her, including the total of \$1.3 million in savings (1T82-83; finding no. 26). She also learned that the Board's ". . . attrition numbers were off," that is, greater savings than anticipated would offset costs associated with unit employees remaining in the Board-provided prescription and dental plans (1T84).

On September 30, 2014, McGovern emailed a letter to Finger, informing him that, ". . . [Local 97] is willing to reopen its agreement in order to negotiate over the requested concessions."

"However," he continued:

[W]e are of the view that \$1.3 million in savings can be derived from areas of the contract other than those identified by the employer. For example, the union believes that more than \$1 million in savings can be attained through attrition, which is in excess of the Board's projection. [U-23]

McGovern requested Finger to share his attrition analysis with Local 97 so that the parties will share a "common frame of reference." He wrote of Local 97's willingness to negotiate changes in its health care plan over the next four years to provide "significant savings to the Board" (U-23). McGovern also wrote of "reminding" the Board of Local 97's "series of concessions" in the collective agreement, saving the Board significant costs, after Board Counsel represented that such concessions, ". . . would obviate the need for outsourcing," a prospect that it continues to entertain (U-23).

McGovern testified that Local 97 believed that Finger's assessment of attrition savings in his September 25th email was "low" and that it could achieve the "package of \$1.3 million in savings" the Board desired (1T167). I credit his testimony.

28. On October 3, 2014, Finger asked Aramark Education about a deadline for signing the outsourcing contract and was

told that November 12, 2014 was the "drop dead" date, i.e., the Board would have to award the contract to Aramark Education or not. A postponement would result in the company's withdrawal of its offer (2T147-148). The consequence of the interim delay meant that Aramark Education, if awarded the contract, would commence performance not earlier than January, 2015 (2T147).

29. On October 7, 2014, McGovern emailed Finger his request to review the Board's attrition calculation(s) at their upcoming October 9th meeting in addition to "potential changes to the Local 97 collective bargaining agreement to effectuate savings for the Board and in the process, avoid subcontracting of union work" (U-24).

Finger soon replied, writing that he and not Local 97 prepared the proposal to "preserve as many positions as possible from outsourcing." He wrote that Local 97's only "input" was its actuarial estimate of savings from the Teamsters prescription/dental plan and that he, in September 2014, convinced the Board to give Local 97 "one more chance" before outsourcing (U-24). He wrote:

Also, to clear up any confusion prior to our meeting on Thursday, the Board is willing to consider concessions and attrition that add up to at least \$1.3 million. In other words, the \$1.3 million is the minimum they will accept, not the maximum. If the attrition and benefits concessions add up to more than \$1.3 million that will make it easier for the Board to justify to the taxpayers of Teaneck their decision not to outsource as the

savings will be closer to the amount Aramark could save the district. There will be no discussion on Thursday regarding eliminating any concessions for medical, dental, prescriptions or short-term disability if attrition alone could save the \$1.3 million. Remember, the Aramark proposal could save the district \$1.9 million, a difference of \$600,000 over four years. [U-24]

McGovern testified that in his view, Finger's email marked, ". . . the first significant shift in position," meaning that if \$1.3 million was savable through attrition alone, that amount became the "minimum" and was no longer "the goal" (1T169). On cross-examination, McGovern admitted that concessions in the prescription/dental plan, ". . . was a consistent part of the Board's proposal" (1T201).

30. On October 9, 2014, Finger met with Pitman, McGovern, and two Local 97 shop stewards and learned that Local 97's membership had rejected prescription and dental coverage under the Teamsters plan (1T91,132,201; 2T172). The attendees discussed additional attrition savings totaling about \$1.3 million. They also discussed short-term disability plan savings and savings from the "Direct 15" medical insurance plan (1T94, 133, 170). Finger explained that "the numbers" should next be provided to the Board through Board Counsel (1T172). He did not warn that unless Local 97 conceded the prescription and dental coverage, ". . . there was no deal" (1T171). Finger testified credibly that the Board's team was "not happy" about Local 97's

unwillingness to opt for Teamster prescription/dental coverage and said repeatedly, "We need you to get as close to this number [\$1.9 million in savings] as you can. You should certainly reconsider" (3T101-102). In the absence of any conflicting evidence, I credit Finger's testimony.

Soon after the meeting, Finger prepared a spreadsheet of "Teamsters Concessions to Offset Outsourcing" (1T90; U-25). The one-page document reports attendee names at the October 9th meeting; that the membership was not interested in changing its prescription and dental plans; that "Direct 15" will become the "base plan" and possible cost-reduction of the short-term disability coverage.

The document reports that Aramark Education's proposal will save the Board almost \$1,950,000 over four years. It also shows savings from Local 97 concessions in medical insurance, short-term disability, prescription and dental and attrition (under both the initial and subsequent estimates) for both one year and four years. It reports that all possible Local 97 concessions (including attrition) over four years total \$1,642,000 (about \$300,000 less than Aramark's proposal); the same concessions without a prescription/dental concession (\$146,250 over four years) yields \$1,495,750 in total savings over four years (about \$450,000 less than Aramark's proposal); and the same concessions without both prescription/dental and short-term disability

savings yields a savings of \$1,413,000 over four years (about \$534,000 less than Aramark's proposal) (U-25; 2T169-171). Pitman admitted that the estimates on the document, ". . . were a combination of us [Local 97 and Board] speaking that day" (1T92).

31. On October 23, 2014, representatives of both parties met (2T176). Finger produced another spreadsheet reporting substantially similar savings as those in his October 9 document (2T175; U-27). Specifically, Aramark's proposal was again reported to save the Board about \$1,950,000 over four years. Local 97's proposed savings, with the membership opting for Teamster prescription/dental coverage, was about \$1,620,000. This reported savings was slightly less than reported on October 9th because the membership agreed only to a \$15 per month contribution to offset short term disability coverage. Having elected to remain insured by the Board for prescription/dental coverage, Local 97 would save the Board \$1,473,000 over four years (U-27). The October 23rd document added a column entitled "Reduction in Force," together with "5.5" reported alongside Local 97's estimated savings of about \$1,620,000 and "7.9," alongside its estimated savings of \$1,473,000. The quoted numbers represent the number of non-tenured teaching personnel (each earning about \$60,000 in salary and benefits) that could otherwise be laid off (U-27; 2T176). (Divide by \$60,000 the net differences in savings between both Teamster proposals (i.e., the

rejected proposal without Board-provided prescription/dental coverage and the offered proposal with Board-provided prescription/dental coverage) and the Aramark contract proposal). Local 97 did not contest the veracity of this spreadsheet.

Board representatives caucused separately for about 30 minutes. Board Counsel and Finger returned to awaiting Local 97 negotiations representatives and informed them that no deal was possible without the concessions regarding the prescription and dental plans (totaling about \$146,000 over four years) (1T101). They reported that without that concession the Board could not justify the difference in costs [between Local 97's and Aramark Education's proposals] to the taxpayers (1T102).

Local 97 representatives were angry and frustrated, feeling that "the rug had been pulled out from them" (1T108). McGovern testified about Local 97's reaction:

We were stunned that the Board had once again changed its negotiating position to, 'we can't do this unless you agree to prescription and dental,' which is the one thing we had told the Board . . . we could not do. And we were astonished that the Board would take that position given what we believe to be a very small delta between what was on the table, which was \$1.5 million and what the Board would have saved with that [concession] which was \$1.65 million. See, we're not dealing with the difference between \$1.5 million and \$1.9 million. [1T179]

32. Board and Local 97 negotiations teams met that evening and Finger recorded the minutes (U-28). Finger wrote that the

Board sought these concessions from Local 97; accept "Direct 15" as the "base plan" for health coverage; change short-term disability coverage to contributory; change prescription/dental coverage to the Teamsters Fund and "savings from current/future attrition."

Finger wrote that McGovern asked the Board team to "guarantee" that the Board will not outsource unit services and employees during the balance of the contract term. He also asked for a 45-day notice ". . . before the issuance of a bid by the Board and the opportunity for the union to negotiate" (U-28). He also requested that if the Board determined to outsource unit work during the term, all Local 97 concessions "will be null and void." The Board negotiations team agreed only to provide a 45-day notice of outsourcing to Local 97.

Finger reported that Local 97 agreed to "Direct 15" as a "base plan" but refused Teamsters Benefits Fund prescription/dental coverage, ". . . because [members] may change their affiliation to a different union." Local 97 also proposed employee contribution toward short-term disability insurance coverage (U-28). The Board committee accepted a \$15 per month employee contribution to a short-term disability policy.

Finger wrote that the Board team suggested that Local 97 needed to change its prescription/dental coverage to provide added savings to the Board to offset the nearly \$500,000 savings

in Aramark Education's proposal. He wrote that the Board, ". . . needs the maximum amount of concessions to get as close to the saving offered by the Aramark proposal. Any reduced savings will have to be made up somewhere else in future budgets, including the possibility of eliminating teacher positions" (U-28). Local 97 was advised to provide the Board "a final decision" (and results of a ratification vote) by Monday, November 3, 2014.

The next day, October 24, 2014, Finger emailed McGovern and Pitman, advising that Local 97 must ratify or reject any "sidebar agreement" by the close of business, November 3, 2014 (U29).

33. On October 27, 2014, McGovern emailed Finger, reiterating that Local 97 members do not agree to subscribe to the Teamsters dental and prescription plan. He wrote of Local 97's "final offer," in five enumerated paragraphs matching its October 23rd offer (U-30). They are: 1) Unit employee attrition will save the Board \$1.3 million over the next four years; 2) Local 97 agrees to "Direct 15" as the "base plan," saving the Board about \$122,000 over four years; 3 and 4) Local 97 agrees to a new short-term disability plan that increases by one day the "waiting period" and requires for the first time a monthly payroll deduction of \$15; 5) 45-day notice to Local 97 if the Board issues a bid outsourcing unit work, during which period the parties would "meet and confer" regarding alternative(s) to subcontracting.

McGovern wrote that the offered concessions would save the Board about \$1.5 million over four years, exceeding the \$1.3 million the Board represented on October 7, ". . . in lieu of laying off existing employees" (U-30). Finally, McGovern wrote that if the Board agrees to the terms expressed, Local 97 would conduct a ratification vote on October 31, 2014. He asked for the Board's reply by the close of business the next day - October 28, 2014 (U-30).

34. On October 28, 2014, Board Counsel emailed McGovern regarding the "IBT Local 97 sidebar agreement" (1T185; U-31). Board Counsel first recounted and enumerated "the parties' tentative agreements subject to ratification," as substantially expressed in McGovern's October 27th email. Board Counsel next wrote:

Finally, though not agreed to, but from the Board's view necessary for the parties to reach an agreement:

5) Local 97 would change the current prescription/dental to the Teamsters Benefit Fund.

Though the Board understands the hesitancy on the part of Local 97 to make this change as commented on during the latter portion of our session, it was this item which was brought to the Board by union leadership, which initiated the Board's interest in engaging in the present dialogue.

Unless this item is also included for Local 97's consideration it would appear unlikely that a new agreement could be reached between the parties. [U-31]

As a consequence of Board Counsel's insistence that Local 97 change the provider of the prescription/dental plan to the Teamster plan, Local 97 did not conduct a ratification vote (1T186).

35. On November 5, 2014, The Board, in its "workshop" meeting, approved for its regular meeting agenda the awarding of a "negotiated contract" to Aramark Education to provide second-shift custodial services for the 2014-2015 school year for an amount not to exceed \$1,417,268. The minutes also provide that the contract is being awarded in accordance with N.J.S.A. 18A:18A-5(c), specifying prior (unsuccessful) advertisements for bids; efforts made to secure other and local governmental providers; and that specifications in the negotiated contract matched those in advertised bids. The minutes also specifies that the Aramark contract will save the Board \$250,000 in the 2014-2015 school year and \$1,900,000 over its four-year duration (U-32).

The minutes of this meeting and of the Board's regular meeting on November 12, 2014 omit any reference to Local 97's offer of concessions (3T77). Finger admitted that in the absence of a memorandum of agreement and a ratification vote, Local 97 had not provided anything "official" to place on the Board's agenda (3T78). Finger acknowledged that in an executive session, he informed Board members of ". . . things [that] were discussed

[with Local 97]" (3T79). He also testified that on November 12th during the Board's public meeting, Local 97's proposal was a subject of discussion, the recordation of which does not appear in the minutes (3T80). In the absence of conflicting evidence or testimony, I credit Finger's testimony.

36. On November 12, 2014, the Board in its regular meeting resolved to award the negotiated contract to Aramark Education for the 2014-2015 school year in an amount not to exceed \$1,417,268 by a roll call vote 5 in favor, 3 opposed and 1 abstained (U-33; U-34). An "explanation" of this agenda matter in part provides: "The contract will result in projected savings to the [Board] over the next four years of \$2,400,000" (U-33).

Finger testified that the Aramark proposal contemplated the subcontracting of second-shift custodial services beginning "mid-year" (i.e., January), and extending for three and one-half years. Local 97's proposal was based on four full years. After consulting with Board members during the November 5, 2014 executive session, Finger was directed to project savings from both proposals for four years, increasing projected savings from the Aramark contract to \$ 2.4 million (3T72-76). In the absence of rebuttal evidence, I credit Finger's testimony.

37. On January 21, 2015, the Board in its public meeting voted 8 in favor and 1 abstained to approve a contract with

Aramark to provide custodial services between January 1, 2015 through December 31, 2016 at an annual amount of \$1,417,268 (U-35). As a consequence of the Board's actions, 23 unit employees with salaries ranging from \$30,000 to \$58,000 were laid off (3T88; U-40).

ANALYSIS

A public employer need not negotiate over a decision to subcontract with a private sector company to have that company take over governmental services. In Local 195, IFPTE v State, 88 N.J. 393 (1982), the court recognized the employees' vital interest in not losing their jobs, but held that this interest was outweighed by the employer's interest in determining "whether governmental services are provided by government employees or by contractual arrangements with private organizations" and making "basic judgments about how work or services should be performed to best satisfy the concerns and responsibilities of government" Id. at 407. No negotiations duty attaches even if a subcontracting decision is based solely on a desire to save money and even if employees will lose their jobs as a result. In such instances however, public employees can seek a contractual provision requiring the employer to discuss (rather than negotiate) economic issues, thus giving them a chance to show that they can do the work at a price competitive with that charged by a private sector subcontractor.

Local 195's holding applies even if the subcontracting occurs during the life of a collective negotiations agreement. Ridgewood Bd. of Ed. and Ridgewood Bldg. Services Staff Assn', P.E.R.C. No. 93-81, 19 NJPER 208 (¶24098 1993), aff'd 20 NJPER 410 (¶25208 App. Div. 1994), certif. den. 137 N.J. 312 (1994). A public employer may negotiate in bad faith however, 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 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); Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984). More specifically,

[i]t is necessary to subjectively analyze the totality of the parties' conduct to determine whether an illegal refusal to negotiate may have occurred . . . A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and/or attitude of the party charged. The object of this analysis is to determine the intent of the respondent, i.e., whether the respondent brought to the negotiating table an open mind and a sincere desire to reach an agreement, as opposed to a pre-determined intention to go through the motions, seeking to avoid, rather than reach, an agreement. [State of New Jersey, 1 NJPER at 40]

Local 97 contends that the Board engaged in "three phases" of "surface bargaining."^{3/} The first was in or around December, 2013 when,

[the Board] made clear that if Local 97 ratified the contract as proposed, outsourcing would be off the table for the foreseeable future. The parties then ratified the contract . . . [b]ut the Board acted in bad faith by continuing to pursue outsourcing through Mr. Finger's connections with Aramark. [brief at 25]

The second "phase" assertedly continued in the summer of 2014, when the Board "renege[d] on its 2013-2016 agreement not to outsource by again threatening outsourcing without an additional \$1.3 million in concessions from the union." The third "phase" occurred in October, 2014, when Local 97 achieved, . . . the demanded \$1.3 million in savings, yet the Board suddenly changed

^{3/} A finding of "surface bargaining" results from a "totality of circumstances" review. In Atlanta Hilton and Tower, 271 NLRB 1600, 171 LRRM 1224 (1984), the NLRB set forth seven factors that signal a refusal to bargain in good faith: 1) delaying tactics; 2) unreasonable bargaining demands; 3) unilateral changes in mandatory subjects of bargaining; 4) efforts to bypass the union; 5) failure to designate an agent with sufficient bargaining authority; 6) withdrawal of already agreed-upon provisions; 7) arbitrary scheduling of meetings. See also, St. George Warehouse, Inc., 341 NLRB 904, 175 LRRM 1316 (2004), enf. on other grounds, 420 F 3d 294, 177 LRRM 3153 (3RD Cir. 2005); Altorfer Machinery Co., 332 NLRB 130, 171 LRRM 1029 (2000).

In Lullo v. Int'l Ass'n of Firefighters, 55 N.J. 409 (1970) the New Jersey Supreme Court approved the Commission's use of federal sector precedent in unfair practice litigation.

its 'bottom line' and demanded even more concessions" (brief at 26).

My review of the record in light of the "totality of circumstances" standard shows that the Board's conduct during negotiations did not constitute an illegal refusal to negotiate. The Board twice demonstrated simultaneously a desire to reach an agreement with Local 97 and an overt interest in subcontracting second-shift custodial services. It also twice offered terms that, if accepted, would have ended its option to outsource. Although Local 97 did not yield all that was demanded, it proposed an alternative that was rejected by the Board. The parties' efforts were then circumscribed by a calendar deadline.

The Board's desire to reach an agreement was initially manifested by its February 2014 signing of a memorandum of agreement for a successor contract for the period of 2013-2016, following Local 97's signing the previous month. Its interest in subcontracting in the 2014-2015 school year was revealed in its monthly public meeting on December 11, 2013, when Board members voted 8-1 in favor of directing Business Administrator Finger to advertise and solicit bids for custodial services. The next day Finger wrote a letter to Local 97 President Gerow notifying him of the Board's direction. That the Board was financially constrained during this negotiations period was uncontested.

I disagree with Local 97's characterization of Board's Counsel's December 23, 2013 letter as assuring Local 97 that "outsourcing would be off the table for the foreseeable future" if its membership ratified terms set forth in his December 3 letter to Pitman. In writing that if the parties ratified the agreement, he ". . . did not [believe] at this point in time" that the Board would proceed to subcontract, Board Counsel represented a tentative and contemporaneous state of mind, begging the question of the Board's future interest in subcontracting in the 2014-2015 term, as expressed in the Board's December 11, 2013 meeting. McGovern's testimony only confirms the substance of Board Counsel's letter while revealing a broader or absolutist interpretation:

And I read his response, particularly the last paragraph, as confirming our conversation and my understanding in the event of ratification the Board would not subcontract unit work. [finding no. 11]

Even if Local 97 properly understood Board Counsel's December 23 letter as an assurance that the Board would not subcontract in the "foreseeable future," its early January 2014 receipt of a copy of Finger's advertised bid notice with a February 2014 deadline should have undermined any such belief. Nor is the record clear whether Local 97 membership ratified the memorandum of agreement before or after it was apprised of the bid notice (finding nos. 12 and 13). Regardless, the Board's advertisement doesn't

demonstrate "bad faith" as alleged by Local 97; Finger merely implemented the directive he had received at the December 11, 2013 Board meeting and no facts indicate a Board rescission (or representation of rescission) of that directive.

The second instance of the Board's interest in reaching an agreement was its March 12, 2014 unanimous approval of the 2013-2016 collective negotiations agreement and salary guides based on the memorandum of agreement. On the same date and in the same meeting, the Board also directed Finger to advertise and "re-bid" specifications for the outsourcing of custodial services. Local 97 was informed of the Board's actions.

No one disputes the negotiations leverage created by a public employer's openly expressed (and in this case, continuing) interest in subcontracting services for reasons of economy that threatens the employment of unit employees. In balancing interests, our courts and case law have at least implicitly approved of such leverage. See Ridgewood Bd. of Ed.

Business Administrator Finger promptly sought to advertise the bid, as he had done in January, 2014 and he emailed the bid to three companies that had previously subcontracted services with the Board, including Aramark. No evidence suggests that Finger gave any advantage or preferential regard to Aramark.

In May, 2014, the Board unanimously instructed Finger to negotiate outsourcing of second shift custodial duties directly

with a vendor, having received no bids on its second advertised solicitation. Local 97 was apprised of the Board's instruction. In June, 2014, in a public Board meeting, Aramark offered a four year contract performing second shift custodial services that would save the Board \$1,950,000 over the term.

In July and August 2014, Local 97 President Gerow's response to Aramark's proposal was incredulous, deflective and not substantive except for his (apparently spontaneous) suggestion that unit employees could enroll in the Teamster health insurance plan to save the Board those associated costs (finding nos. 20 and 22). Projected term savings for prescription and dental insurance were soon actuarially confirmed at \$140,000. By mid-August, 2014, Finger complained to Board Counsel and the Board Superintendent that Gerow had "not addressed" his requests for cost-saving changes in health insurance and short-term disability coverage.

In early September, 2014, the Board resolved to solicit a competitive price for custodial services from Local 97 that sought specified concessions in health insurance, prescription and dental plans and short-term disability coverage. It also set an October 3, 2014 deadline for reviewing Local 97's proposal. Finger soon relayed the Board's resolution and schedule to Gerow, reminding him that all such concessions and attrition would reduce term costs by \$1.3 million, an amount that the Board,

". . . would consider in lieu of outsourcing the second shift custodians." This communication represents another instance of the Board seeking an agreement with Local 97; this time, an agreement that could avoid outsourcing for the contractual term.

On September 25, 2014, upon Local 97's request for "details," Finger replied to Pitman and McGovern, providing a "bottom line" on how to "preserve member jobs," specifically, three enumerated concessions, including Local 97's suggested change to the Teamster prescription and dental plan, totaling \$330,000 and \$1 million in attrition. Finger cautioned:

This is an all or nothing proposal. If your members do not agree to the concessions for the health, dental, prescription and disability plans, the savings from attrition alone will not even come close to the (\$1.9 million in) savings offered by Aramark.
[finding no. 26]

By understanding Finger's communication to mean that \$1.3 million in savings was the "goal" that would "save member jobs," McGovern looked past the self-described "all or nothing proposal." Finger correctly noted in his testimony that at that time, \$1.3 million represented all that Local 97 could "give back," while acknowledging the substantial gap between Local 97 and Aramark proposals.

The day after the Board's imposed deadline for Local 97's proposal, McGovern, knowing that the membership had refused the Teamster prescription and dental plan, wrote to Finger,

identifying more than \$1 million in savings from attrition, alone. On the strength of that communication, Finger obtained from Aramark an extended deadline for a "deal" to November 12, 2014. This fact signifies the Board's continuing interest in reaching an agreement with Local 97.

In October, 2014, having been informed of an unspecified savings of more than \$1 million in attrition, Finger wrote to McGovern, advising that attrition savings of \$1.3 million is the "minimum [the Board] will accept, not the maximum," the latter derived from, "concessions in medical, dental, prescriptions or short-term disability." Anticipating the Board's response, Finger cautioned that concessions, ". . . adding up to more than \$1.3 million will make it easier for the Board to justify their decision not to outsource." Finger reiterated that ". . . there will be no discussion [in their upcoming meeting] regarding eliminating any of [those] concessions." He again noted a \$600,000 difference between Local 97 and Aramark proposals. Finger was essentially repeating that the Board's proposal in exchange for not subcontracting was "all or nothing" and that it was taking as much as Local 97 was giving--a blunt, accurate reflection of the parties' relative strength and weakness in negotiating positions.

I do not find that the Board's insistence on the prescription/dental concession in addition to the \$1.3 million in

attrition savings is a refusal to negotiate in good faith. The Board had demanded the prescription/dental concession -- as suggested by Local 97 -- before it learned of the added attrition savings, while noting in its communications to Local 97 on both September 25th and October 7th the \$600,000 discrepancy between Local 97 and Aramark proposals. As the Commission also wrote in State of New Jersey:

It is well established that the duty to negotiate in good faith is not inconsistent with a firm position on a given subject. 'Hard bargaining' is not necessarily inconsistent with a desire to reach an agreement. An adamant position that limits wage proposals to existing levels is not necessarily a failure to negotiate in good faith. [Id. at 40]

I find that the Board was "adamant" about the prescription/dental concession because it reduced by almost one-quarter the difference between Local 97's "proposal" and the savings generated by the Aramark proposal. (By October 23, 2014, the Aramark (3 and 1/2 years) proposal would save the Board about \$477,000, compared with Local 97's (4 years) proposal). It may also be true that its justification for insisting or being "adamant" was fueled by the proposal having been [precipitously] "floated" by Local 97.

The Board first learned on October 9, 2014 that the membership rejected Gerow's offer to Finger because it did not wish to be irrevocably tied to the Teamsters to otherwise avoid

the prospect of either paying for prescription and dental benefits or having to yield even more concessions in the future for Board-paid benefits. I do not find that the Board's knowing insistence on the prescription/dental plan concession shows unreasonableness or an intention to frustrate agreement. The Board's position must inexorably be measured against the comparative savings achievable under the Aramark contract. On October 28, 2014, about one week before the Board's executive session at which it approved for the public agenda the awarding of a contract to Aramark, Board Counsel reiterated to Local 97 the necessity for a ratification of all concessions, including the prescription and dental plan concession. Local 97 did not respond. The Board's November, 2014 revision of savings under the Aramark contract merely equalized (to Local 97's detriment) the terms -- four full years -- for which savings were projected.

For all of these reasons, I find that the Board did not negotiate in bad faith. I recommend that the Complaint be dismissed.

/s/Jonathan Roth
Jonathan Roth
Hearing Examiner

DATED: June 21, 2017
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by July 3, 2017.