P.E.R.C. NO. 2000-24

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLETOWN TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-96-251

MIDDLETOWN TOWNSHIP
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses as moot, an unfair practice charge filed by the Middletown Township Education Association against the Middletown Township Board of Education. The charge alleged that the employer violated the New Jersey Employer-Employee Relations Act when, during negotiations over stipends for Board employees who would work in an after-school intramural program, the Board unlawfully ceased negotiations and subcontracted the program to the Middletown Township Parks and Recreation Department. After two years, the program was discontinued. The Commission finds that this is a past dispute that cannot, and given the unfolding of events, need not be resolved.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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MIDDLETOWN TOWNSHIP
EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Kenney & Gross, attorneys (Malachi J. Kenney, of counsel)

For the Charging Party, Zazzali, Zazzali, Fagella & Nowak, attorneys (Kenneth I. Nowak, of counsel)

DECISION

On March 4, 1996, the Middletown Township Education Association filed an unfair practice charge against the Middletown Township Board of Education. The Association alleged that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) and (5),[1/]

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit...."

when, during negotiations over stipends for Board employees who would work in an after-school intramural program, the Board unlawfully ceased negotiations and subcontracted the program to the Middletown Township Parks and Recreation Department. The Association contended that the contract with the Township was a pretext to avoid negotiations and that the program employees were effectively Board employees. The Association also alleged that the Board unlawfully refused to provide information regarding the names of coaches in the program and whether each was certified as a teacher. Finally, the Association alleged that the Board's actions were taken in retaliation for the Association's invoking its right to negotiate.

On May 8, 1996, a Complaint and Notice of Hearing issued. On November 5, the Board filed an Answer. The Board asserted that after failing to reach an agreement with the Association over stipends for operating an intramural athletic program, it resolved to enter into an interlocal services agreement with the Township to provide an "after-school recreation program for middle school students." The Board asserted that the program was a new one for middle school students and that its decision was made for financial reasons. The Board denied that it acted in bad faith.

On November 7, 1996 and January 14 and 16, April 28 and May 12, 1997, Hearing Examiner Jonathon Roth conducted a hearing. The parties examined witnesses, introduced exhibits and filed

post-hearing briefs. At the hearing, the Association specified that it sought, by way of remedy, a return to the status quo, negotiations over salary, and compensation for time other people did unit work.

On November 24, 1997, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 98-15, 24 NJPER 61 (¶29038 1997). He rejected the Association's contentions that this case was governed by the unit work doctrine and that the after-school recreation program employees were "effectively Board employees." The Hearing Examiner found that the Township, not the Board, employed the program workers. Moreover, he found that the Association had not proved that the Board had shared or joint control over the employees. The Hearing Examiner concluded that because the Township became the employer, the Board was not required to negotiate with the Association before executing the interlocal services agreement with the Township.

On December 19, 1997, the Association filed exceptions. It argues that the Hearing Examiner erred by:

> 1. concluding that the Board and Township were separate employers;
>
> 2. failing to apply the unit work doctrine;
>
> 3. failing to find that the interlocal services agreement, by operation of law, conferred joint employer status on the Board and Township;
>
> 4. concluding that the Board's decision to enter into the interlocal service agreement was not motivated by anti-union animus.

On January 5, 1998, the Board filed an answering brief urging adoption of the Hearing Examiner's recommendations.

On April 21, 1998, the Association filed a supplemental letter advising us of Kenney v. Meadowview Nursing and Convalescent Ctr., 308 N.J. Super. 565 (App. Div. 1998). The Association contends that the case demonstrates that the interlocal services agreement confers joint employer status on the Board and Township.

We have reviewed the record. We incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 3-24). We add that the Board discontinued the after-school recreation program after two years and no longer provides the program to students (4T64).

N.J.S.A. 34:13A-5.3 requires a public employer and a majority representative to negotiate over "terms and conditions of employment." Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets forth these tests for determining whether a subject is a "term and condition of employment" under section 5.3:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to

> determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

No statute or regulation preempts negotiations. Unfair practices may occur when an employer refuses to negotiate over a mandatorily negotiable subject or when an employer discriminates against employees because they seek to negotiate over negotiable subjects. N.J.S.A. 34:13A-5.4a(3) and (5).

The employer does not contest the negotiability of extracurricular stipends in the abstract. However, it argues that under Local 195, it did not need to continue negotiations over the stipends because it had a managerial prerogative to contract with the Township for the after-school recreation program.

Under the Supreme Court's holding in Local 195, a public sector employer need not negotiate over a decision to subcontract with a private sector company to have that company take over governmental services. However, this is not a case where the public employer decided that services should no longer be delivered by public employees. In this case, public employees continued to staff the after-school program. Also, this is not a typical contract because the Board continued to exercise control over employees in the program. Through the interlocal services agreement, the Board exercised joint control over the specific activities to be provided, staffing levels, the number of sessions, the length of the sessions, and the salaries. The Board

also paid for supplies, insurance and, for 1996, bus transportation. The Board continued to pay the salaries and associated taxes through the Township.

In Cape May Cty. Bridge Commission, P.E.R.C. No. 92-8, 17 NJPER 382 (¶22180 1991) and Borough of Teterboro, P.E.R.C. No. 92-108, 18 NJPER 265 (¶23111 1992), we announced that in cases where a public employer contracts with another public employer to provide government services, we will apply the Local 195 balancing test to determine whether the decision to transfer work to the employees of another public employer is mandatorily negotiable. See also Jersey City and POBA and POSA, 154 N.J. 555 (1998). However, in this case, we decline to resolve that question or review the Hearing Examiner's analysis because the dispute has since become moot. After two years, the after-school recreation program was discontinued and, to our knowledge, it has not been reactivated. There is no longer a program. Any claim for backpay from the Board would be speculative and inappropriate. It is impossible to identify the employees who might have worked for the Board had it remained the sole employer. In addition, the Board alone was not the sole employer of the employees who actually worked in the program and the Board is not in a position to negotiate retroactive compensation for those employees. This is a past dispute between the Board and Association that cannot and, given the unfolding of events, need not be resolved.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn and Ricci voted in favor of this decision. Commissioner Muscato was not present.

DATED: September 30, 1999
Trenton, New Jersey
ISSUED: October 1, 1999

H.E. NO. 98-15

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

In the Matter of

MIDDLETOWN TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-96-251

MIDDLETOWN TOWNSHIP
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint alleging that the Board "unlawfully ceased" negotiations over salaries for stipended positions and entered an interlocal services agreement with the Township department of parks and recreation for the performance of the disputed work (after-school supervision of a middle school intramural program).

The Hearing Examiner also recommends that the employment action was not in retaliation for the exercise of protected rights.

Accordingly, he recommended that the Complaint, alleging violations of 5.4a(1), (3) and (5), be dismissed.

H.E. NO. 98-15

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

In the Matter of

MIDDLETOWN TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-96-251

MIDDLETOWN TOWNSHIP
EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Kenney & Gross, attorneys (Malachi Kenney, of counsel)

For the Charging Party, Zazzali, Zazzali, Fagella & Nowak, attorneys (Kenneth I. Nowak, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On March 4, 1996, the Middletown Township Education Association filed an unfair practice charge against the Middletown Township Board of Education. The charge alleges that in the fall of 1995, the Board unlawfully ceased negotiations over salaries for an "intramural program" and on December 21, announced it had subcontracted the program to the Middletown Township parks and recreation department. The charge alleges that the "subcontracting" is really a "device to avoid collective bargaining" and that the intramural program employees are not "independent contractors but actually are effectively employees of

the Board." The charge also alleges that the Board unlawfully refused to provide information requested by the Association; specifically, the names of coaches in the intramural program and whether each was certified as a teacher. Finally, the charge alleges that the Board's actions are retaliation for the Association invoking its right to negotiate collectively, violating provisions 5.4a(1), (3) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13a-1 et seq.

On May 8, 1996, a Complaint and Notice of Hearing issued.

On November 6, 1996, the Board filed an Answer, relying on a letter it had filed previously. The Board denies subcontracting an intramural program to the Middletown Township parks and recreation department. It asserts that on December 21, 1995, after failing to reach an agreement with the Association over stipends for operating an intramural athletic program, it resolved entering an interlocal services agreement with the Township to provide an "after-school recreation program for middle

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

school students."[2/] The Board maintains that the program had never before been provided to students at the middle schools and that its decision was for "financial reasons." The Board denies that it acted in bad faith.

On November 7, 1996, January 14 and 16, April 28 and May 12, 1997, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed by September 29, 1997.

Based on the record, I make the following:

FINDINGS OF FACT

1. The Middletown Township Board of Education is a public employer within the meaning of the Act. The Board operates 17 schools, including elementary, middle, and high schools with about 10,000 students and more than 1,000 employees (1T19, 1T21).[3/] Sometime in the middle 1980's, junior high schools, which housed 7th, 8th and 9th grade students, became middle schools for grades 6-8, and 9th grades reported to high schools (1T21; 2T45). The Board operates three middle schools (1T36; J-1, B-1).

2/ The Board relies upon N.J.S.A. 18A:20-22 of the Education Law and N.J.S.A. 40:8A-1 et seq., the Interlocal Services Act, as conferring authority for its actions.

3/ "1T" represents the transcript of the first day of hearing, followed by the page number. "2T" is the transcript of the second day of hearing, etc. "J" represents joint exhibits; "CP" represents charging party exhibits; and "R" represents respondent exhibits.

2. The Middletown Township Education Association is a public employee representative within the meaning of the Act and has represented certificated personnel for many years (2T46). The Association negotiates terms and conditions of employment, including stipends for extra-curricular, intramural and athletic activities (CP2-11).

3. N.J.S.A. 18:20-22 permits any board of education to

> join with the governing body of any municipality, or board of chosen freeholders of the county in which the district is located, in acquiring, improving, equipping, operating and maintaining playgrounds, playfields, gymnasiums, public baths, swimming pools and indoor recreations centers and may appropriate money therefor and may pay over to the said body or board such money as may be so appropriated to be disbursed for any such joint purposes.

N.J.S.A. 40:8A-1 et seq. ("Interlocal Services Act") permits

> any local unit of [the] State to enter into a contract with any other local unit or units for the joint provision within their several jurisdictions of any service which any party to the agreement is empowered to render within its own jurisdiction. An autonomous authority, board, commission or district...may become a party to such contract with the consent of the governing body of the local unit, by ordinance or[4/] resolution [N.J.S.A. 40:8A-3].

N.J.S.A. 40:8A-6 enumerates several requirements of all interlocal services contracts, and provides:

> For purposes of this act, any party performing a service under such a contract is the general agent of any party or parties on whose behalf

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4/ "Ordinance" was deleted from the statute, effective January 5, 1996.

> such service is performed pursuant to the contract, and such agent party shall have full powers of performance and maintenance of the service contracted for and full powers to undertake any ancillary operation reasonably necessary to carry out its duties, obligations and responsibilities under the contract...except as such powers are limited by the terms of the contract itself.
> [N.J.S.A. 40:8A-6(c)].

4. Historically, intramurals are informal after-school athletic activities for interested Middletown junior high and (later) middle school students conducted under Board auspices. Certificated personnel were paid negotiated stipends to "advise" and to coordinate activities over three ten-week seasons each school term from before 1980-81 through 1988-89. (1T102-1T109; CP2-CP11). Students were encouraged to seasonally select soccer, field hockey, basketball, kickball, softball, etc. (1T98-1T100). Contests in basketball shooting and ping-pong resulted in trophies for the winning students (1T98-1T99). In a season, students played about twice per week for 40 minutes each session (1T105). Participants could board late-running school buses that were deployed to take home other students who stayed late for clubs, detention, etc. (1T100). Intramurals required no tryouts and no continuing attendance (1T24-1T25, 1T97). Sometimes when intramural activities moved indoors, the fall and winter seasons were conducted 4 days per week for five weeks to avoid facility conflicts with interscholastic teams (2T28-2T31).

In expired agreements, "intramurals" received stipends "per season"; in the 1985-87 agreement, intramural "head" was stipended; and in the 1987-1990 agreement and all subsequent agreements through 1996, both "intramural" stipends and higher-paid "intramural coordinator" stipends appear (CP4-CP11). Intramural positions were not filled after the 1988-89 term (1T111). The coordinator was responsible for collecting permission slips, overseeing equipment, directing intramural "advisors," etc. (1T102). Generally, two advisors directed the activities and did not teach skills (1T97; 2T30).

5. Interscholastic sports are formal competitive sporting events between Middletown Township public school student teams and student teams from other districts. Tryouts, daily practices and attendance are required. Skills are taught by certificated stipended coaches (1T24, 1T97; CP3-CP5).

Ninth grade students in the junior high schools were offered interscholastic competition throughout the 1980's. When middle schools replaced the junior high schools in the middle 1980's, interscholastic competition was also offered to seventh and eighth grade students (1T97-1T98; CP3-CP5). Cheerleading was considered an interscholastic activity (1T90).

6. In the fall of 1989, the Board terminated the intramural program, pursuant to budgetary constraints (2T46).

7. In 1994, the superintendent asked a director of physical education to produce a comparative report on middle school

interscholastic costs and projected costs for intramurals (1T31). The request anticipated another budgetary squeeze in the 1995-96 term (4T72).

The "Haines report" was issued to the superintendent on December 29, 1994 (J-1, B-13). This four-page report is a "breakdown for middle school athletic costs and a breakdown for a middle school intramural program" (J-1, B-13). According to the cover page memorandum, replacing middle school athletics with intramurals is both "philosophically" and economically advantageous, reducing the 1994-95 $121,000 allotment to an estimated $80,700.

The memorandum states that a "well run intramural program can accommodate a far greater number of students and would also attract those students who want to play, but not compete on a competitive basis" (463 middle school students competed interscholastically).

The estimated cost was based on itemized costs of 1) three ten-week seasons held four times per week; 2) an intramural coordinator at step 4 in each school; 3) two instructors per season per school at step 4; and 4) seven late buses per day at $70 per run (J-1, B-13).

Attached to the memorandum were three charts detailing current and projected costs of interscholastic competition, intramural coach and coordinator salaries ("based on 1995-96 MTEA contract") and intramural busing.

Projected annual bus transportation costs under the Haines report were $58,800 (5T12; J-1, B-13). James Moran, assistant superintendent for business and human resources, and responsible for Board labor relations and contract administration, acknowledged that the report's calculations for "two instructors per season per school at step 4" are wrong; the calculations accounted for only one instructor per school (5T13-5T14). Accordingly, Moran further conceded that the intramural program could not be operated for $80,700 annually, using Haines's financial assumptions (5T15).

8. In May 1995, the Board voted to cease interscholastic competition at the middle schools, pursuant to budgetary constraints (4T73-4T74). The Association was aware that an intramural program was likely to replace interscholastic competition, and it requested job descriptions (1T113).

Earnest consideration of an intramural program began in July or August 1995 (1T43). On August 10, the Board posted an "administrative bulletin" to all certificated staff seeking three "middle school intramural coordinators" to be paid "stipend[s] as per negotiated agreement." Copies of the bulletin were delivered to the Association (CP-1; 1T114; 2T47).

9. Association vice president Bette Schreiber promptly called Moran for the intramural coordinator job description but it was not ready (1T114-1T115). Moran had participated in the Board's decision to eliminate the middle school interscholastic program and had seen the Haines report before April 1995 (4T22, 4T23, 4T3).

Schreiber was advised however, that intramurals were being scheduled to run from 2:45-4:15 p.m. Schreiber had been an intramural advisor and coordinator (and an interscholastic middle school coach) and knew that the planned schedule more than doubled the previous 40 minute sessions (1T115).

10. Also in August 1995, the Township director of parks and recreation discussed an "after school recreation program" for the middle schools with the outgoing superintendent (3T19). The director had read article(s) about the termination of the interscholastic program in the local newspaper (3T20).

The Township department of parks and recreation operates 35 parks, 2 community centers and a senior citizen center (Croyden Hall) on an annual budget of more than $1,000,000 (3T11, 3T100). The Board is a leasee of classrooms for instruction at Croyden Hall. The department also runs athletic programs and leagues for Middletown residents and provides instructors in music, dance, crafts, billiards, etc. (3T15). Some of the activities are conducted in Board facilities (3T56). The department does not pay a rental fee but does pay a custodial fee, if necessary (3T57). The department charges fees for some programs to keep them "self-sustaining" (3T22).

The department has about 30 full-time employees and an even larger number of part-time employees (3T16). The full-time employees are represented for purposes of collective negotiations in blue collar, white-collar, and supervisory units (3T18). The

department also has seasonal employees, such as lifeguards and tennis instructors. Part-time employees are paid between $5.05 per hour and $15 per hour, depending on qualifications, and they are not included in any negotiations unit (3T16-3T17, 3T19). Some department employees are paid a $20 or $40 per diem to supervise adult basketball, volleyball, etc., and a "teen open gym program" (3T85). No department employees were terminated in 1995 (3T77).

The department operates a four season year, divided into ten-week or twelve-week periods. Breaks usually occur at the time of school closings, inasmuch as the facilities would most likely be closed (3T86).

11. On an unspecified date, the Board and Association agreed to negotiate on September 11 concerning the intramural program but Moran cancelled the meeting because the job descriptions were not prepared (1T115).

On September 19, 1995, Moran faxed "tentative job descriptions" for "intramural coach" and "intramural coordinator" to Schreiber (CP-12; 4T31). He had not discussed the terminated intramural program or its personnel with either the interim superintendent or the physical education director who prepared the report (see finding 7) (4T78). Listed among the functions of both titles are, "available for the entire duration of the season (three ten-week sessions, four days per week)"; and "will work from 2:45-4:15 or until all students leave on buses." A shared "job goal" is to "provide leadership in the ongoing development and

improvement of activity area by developing skills, attitudes, loyalties, and positive motivation." The descriptions also state that "compensation and duration of activity to be negotiated by the Board" (CP-12).

12. On September 20, 1995, the parties met to negotiate about the two positions (2T49). Moran and a secretary attended for the Board and Association president Diane Swaim and Schreiber appeared for the Association (1T117; 4T102).

The Board proposed stipends matching those in the final year of the 1993-96 agreement (4T35-4T37).

The Association asked about specific job duties; would coordinators also coach?; what was intended by the phrase 'developing skills'?; what is the approximate ratio of students per coach?; how many male and female coaches were needed?; what other Board personnel would be present?, etc. (1T118-1T119; 4T35). The Association also proposed salaries based on the descriptions it received the previous day (2T50; CP-13).

The Association proposal doubled the stipends for intramural coach and coordinator at each of four steps memorialized in the final year of 1993-96 collective agreement and repeated in the "Haines report" (CP-13; CP-10, 11; J-1; B-13). Intramural coach was paid a per-season stipend of $815, $856, $899 and $934, respectively, in the final contract year. The Association proposal sought increases to $1,630, $1,712, $1,798 and $1,868. Intramural coordinator was stipended at $1,465, $1,538, $1,615 and $1,696 in

1995-96. The Association proposed increases to $2,930, $3,076, $3,230 and $3,392, respectively (CP-11; CP-13). The asserted justification for the increases was that "the responsibilities and time involved are twice those of the past" (CP-13).

Moran was unable to answer all Association questions. The Association was especially concerned about not knowing the number of staff to be employed in intramurals (2T51). In answering the question about "skill development," Moran advised that if a coach saw a student "doing something incorrectly, [he or she] would probably say something to be helpful--might set up some small activity" (4T78-4T79). The Association replied that teaching skills had not been required of previous intramural coaches or "advisors" (1T124). Moran also advised that one person could not be coordinator and coach simultaneously, indicating another change from the previous intramural program (1T125).

The parties met separately, after which the Association advised that in light of the greater responsibilities demanded, its "offer was now off the table" (1T125; 2T40, 2T52). Instead, it proposed increasing the coach stipend per season to the amount (about $2,100 at step 1) negotiated for an interscholastic middle school coach. And it proposed that if the coordinator did not have to attend intramural activities everyday, it would agree to the current contractual stipend (2T42, 2T52; 1T126; 4T88-4T89).

The meeting ended without a substantive agreement. Moran was expected to find more answers to Association questions and to suggest another date for further negotiations (1T127).

13. On September 27, 1995, Moran reported to the Board at its closed session meeting that "his attorney may take the position necessary to implement the program. All options to be explored" (R-1, 9/27/95 closed workshop minutes). The next day the Board posted a notice to certificated staff seeking intramural coaches having "ability and knowledge of activity area" to be paid a "negotiated" amount, but "not less than $815 per season" (J-1, B-4). It also posted a notice for intramural coordinator to be paid "not less than $1,465" (J-1, B-3; 4T32).

14. On unspecified date(s) in October, the Board superintendent met with the Township director of the department of parks and recreation to discuss an after school program. Meetings were also held with the three middle school principals (3T24, 3T35-3T36). I find that the department's meetings with the principals resulted in their issuing a memorandum to Moran (see finding 16).

15. On October 18, 1995, the parties met again. Also attending were the Board president and Board counsel and an NJEA representative (1T128; 4T41). The Association asserted that if the coordinator was required to attend all sessions, it should be paid an annual stipend equal to athletic coordinator (i.e., $3,307, $3,472, $3,646 and $3,828 at steps 1-4 in 1995-96) (2T58, 2T77;

CP-11).[5/] If the coordinator was not required to attend all sessions, then the current stipend would suffice (2T70). The Association repeated that the "coach" should be paid a stipend equal to that of middle school interscholastic coach (2T58). The Board reiterated that the coordinator(s) had to attend all sessions and could not simultaneously hold a coach position (1T129). The Board was unable to specify a number of coaches needed (4T97).

The Board met separately and then offered to pay intramural coaches $815 to $934 per season,[6/] based on four days per week, and 1 1/2 hours each day (4T44, 4T121; 2T62). The Board's offer for intramural coordinator(s) is not clear.

Moran testified that he offered an annual $2,200 coordinator stipend, and on cross-examination stated that that amount was simply an attempt to "enlarge the original proposal," though it was not linked to an amount on the salary guide (4T44; 4T122-4T123). Swaim and Schreiber testified that the Board offered $2,800 to $3,200 (1T131; 2T77). On her cross-examination, Swaim

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5/ The first Association proposal for intramural coordinator (CP-13) on September 20 was lower than its proposal on October 18 (2T77; CP-11). The Association evidently deemed the position described by the Board to be closer to "athletic coordinator" than "intramural coordinator" as stipended in the 1993-96 collective agreement (CP-11).

6/ The closed session minutes of the October 24, 1995 Board meeting states that "Board of Education stipend [for coaches] would be from $934 to $1,868 per season" (R-1). No testimony corroborates that the Board proposed that range at either negotiations session. I rely on the consistent testimonies of Board and Association witnesses.

consulted her negotiations notes and repeated the amount, arguing that only $100 separated the parties, if one considered the low end of the Association proposal ($3,300) and the high end of the Board proposal ($3,200). Swaim was challenged concerning only her characterization of the difference, not its substance (2T76-2T77, 2T85-2T86). On October 24, 1995, the Board conducted a "closed workshop meeting" before its public meeting later that night. The minutes of the closed session state that the "Bd. of Ed. coordinator would go from the current $2,800 to $3,200. The MTEA would be from $3,300 to $3,828" (R-1, 10/24/95).

This Board document corroborates Association testimony and is an admission. Accordingly, I find that the Board proposed a $2,800 to $3,200 annual stipend for intramural coordinator at the October 18 negotiations session.

Neither party modified its proposals (4T44). Discussion turned to possible dates to continue negotiations (2T60). The Board expressed "urgency" to meet as soon as possible because of promises made to students and parents to "go forward with the intramural program" (4T45). (The Board had been criticized by citizens for delaying the program. Swaim conceded that some of the criticism was publicly voiced by the Association (2T79).) The Board suggested two dates in the following week but the Association had a "prior commitment." The Association offered another date that week but the Board was unavailable (1T131; 2T60; 4T46; CP-14). The parties agreed to communicate about alternate dates (2T64).

16. The parties exchanged letters over the next two weeks about alternate dates (CP-14). On October 24, Moran offered October 27; on October 25, Swaim wrote back that the Association was unable to meet that date and asked Moran to provide "several additional dates covering the next two weeks and we'll check our availability" (CP-14). On October 30, Moran wrote back that since the dates he suggested were "unsatisfactory," would the Association propose dates. On November 3, Swaim wrote back, offering November 21 and November 27 (CP-14).

17. On October 23, the "middle school principals" sent Moran a memorandum "advocating a comprehensive after school student program divided into three categories--intramurals, co-curriculum activities and extra-curricular activities." The memorandum listed activities in each category (J-1, B-5).

18. On October 24, the Board discussed "the potential for the Parks and Recreation Commission to actually administer the program" at its closed session meeting (R-1). "Rates for the coaches and coordinators under the jurisdiction of the Township [were] discussed." The minutes report several exchanges among Board members on this topic. A course of action was described: "The administration will go ahead with a survey on the subject of the middle school athletic program. The administration is to proceed in discussion of an agreement with the Township regarding the after school program which possibly would be administered by Township Parks and Recreation" (R-1, 10/24/95).

Later that evening in the public session, Board counsel reported that "the Board has developed job descriptions and we are in discussions with MTEA in an effort to work out compensation arrangements. Unless and until that is worked out, the Board cannot move forward with the program. It is anticipated the program would be up next month" (J-1, B-29, 10/24/95 minutes). Board counsel answered a question about the program, reportedly stating, "[negotiations] have not been productive yet and we were hoping to move it further. The MTEA was unable to meet with the Board's negotiating team yesterday or today." The minutes continued:

> [O]ther options are being explored and he [Board counsel] anticipated that within the next week or ten days, surveying [sic] the students as to what activities they would prefer. We can't implement a program unless we have an agreement with the MTEA on compensation.
> [J-1, B-29, 10/24/95 minutes]

19. Near the end of October 1995, Board superintendent Dennis Jackson directed Moran to contact Township department of parks and recreation director Greg Silva about a "possible alternative" after school program (4T49; 1T49). Jackson was familiar with the Haines report (see finding 6) in December 1994, though he was assistant superintendent at that time (1T33-1T34). Moran had advised Jackson of the "difficulties in coming to a conclusion" concerning the stipends for intramural coach and coordinator (1T51-1T52). Moran called Silva and arranged a meeting (3T70; 4T49).

20. On November 2, 1995, the Board superintendent, Board counsel and Moran met Silva and his superintendent of recreation, Ben Curci, to discuss "what the parks and recreation department could offer in the lines of an after-school recreation program" (3T25; 4T50-4T51). Silva believed or was told that the Association had no interest in staffing the program (3T32, 3T34). Silva described various programs his department administered (5T9). "Recreation" was distinguished from "intramural"; the former encompassing the latter and adding arts, crafts, cheerleading, etc. The Board representatives were "enthusiastic" about a recreation program (4T52; 5T8-5T9). Moran and Jackson mentioned that each school should have a "supervisor" and a number of coaches or "leaders," depending on the number of students enrolling (1T65). Costs were discussed. Despite their admitted uncertainty about the number of students participating, Silva and Curci provided "[rough] estimates of what [they] felt would be the cost needed to operate the program" (3T26). Moran advised Silva that the Board was trying to reach agreement with the Association but was also "seeking alternatives" (4T110, 4T112). Moran did not give Silva or Curci the intramural coach and coordinator job descriptions (3T54; 4T115). Moran and Jackson described "what the Board would pay...and what costs they would absorb, such as in the first year... [it] provided some busing" (3T27). Silva was asked to present a detailed breakdown of projected costs (3T52).

21. No Board representative contacted any Association representative about the possibility of contracting with the Township parks and recreation department (3T123-3T124). Moran conceded that the need for "alternatives" became "particularly evident" when he received the Association's November 3 letter offering late November negotiations dates (see finding 15) (3T126). Moran described the Association offer as "stalling" (3T63, 3T126).

22. On November 8, 1995, Silva delivered a thirteen-page "proposal for instituting an after-school recreation program in the three middle schools" to the Board superintendent. Except for Silva's cover page, Curci prepared the entire document (3T45-3T46) (J-1, B-2; 4T52). Included were cost estimates for operations and administration, and proposals for staffing, facilities to be used, advertising, and job descriptions for "site supervisor" and "recreation leader."

The "program" was projected to run 89 days beginning December 4, in three "sessions", the first two being ten weeks each (for 40 days at 4 days per week). The third session was estimated to be nine days. Ascending costs were given for five "scenarios," varying only in the number of assigned "recreation leaders" per school at all three middle schools. For example, "scenario number 1" listed one "site supervisor" per school (a constant, throughout) and four "recreation leaders" per school at an estimated total cost at the three schools of $29,370. Each site supervisor was to be paid $30 per day (about $15 per hour) and each recreation leader was

to be paid $20 per day (about $10 per hour). The amounts were determined by the parks and recreation department (3T60). Scenarios 2, 3, 4 and 5 projected increasing costs for employing 5, 6, 8 and 10 recreation leaders per school, respectively. The cost of "scenario number 5" was $61,410. Another $6,000 was equally divided for administrative and supply costs (J-1, B-2).

The recreation leader job description required the applicant to "supervise" daily sports activities; "set up" teams and weekly tournaments; maintain control so that every student can participate; get everyone on the buses, etc. The supervisors were required to "monitor and oversee...", inventory equipment, survey facilities for damage, etc. All staff was to work from 2:45-4:45 p.m., Monday thru Thursday, and was expected to report no later than 2:30 p.m. The application form (on Township department of parks and recreation letterhead) asked students to check-off their interests in various sports, arts and crafts, music, and "miscellaneous" (i.e., aerobics, physical fitness, first aid, etc.).

A Township "middle school employment application" asked the applicant whether he or she "had ever been convicted of a crime other than a minor motor vehicle violation." An accompanying advertisement on Township parks and recreation letterhead solicited "Middletown Township school staff" to apply for "supervisor" and "recreation leader" positions at "good pay and short hours" (J-1, B-2).

23. After reviewing the parks and recreation department proposal, Moran considered meeting with the Association again but demurred. He decided that "in view of the fact that the Township proposal was lower than proposals we already had on the table with the Association, that it would be simply an exercise in futility to try to do this and we would be subject to the Association holding up the program by stalling" (4T56-4T57). Asked to explain his sense of "futility", Moran testified that since his hiring in 1994, the Board's relationship with the Association was futile (4T57). He characterized Association tactics as "anachronistic" and little more than "blatant attempts to intimidate," based upon "principles propounded by Saul Alinsky"[7/] (4T58). For Moran's view on "stalling," see findings 16 and 21.

Moran nevertheless maintained that a "window of opportunity" remained open to the Association until middle to late November (4T146-4T150). On cross-examination, he conceded that he never communicated that fact to the Association in part because it was "common knowledge" that the Board had entered discussions with the Township (5T26).

7/ Saul David Alinsky (1909-1972), union and community organizer and tactician; developed "Alinsky method" of organizing; 1) promote "trade union in social factory," where peple in a neighborhood bargain, strike, etc., to advance their interests; 2) create power-oriented community organization willing to use militant, conflict tactics; 3) promote democratic organization where organizers do not lead but develop indigenous leaders. Wrote Reveille for Radicals, Univ. of Chicago Press, 1946 and Rules for Radicals, Random House, Inc., 1971.

24. Sometime between November 8th and 15th, 1995, Association president Swaim learned of the Township department of parks and recreation program when surveys were distributed to students at her middle school (2T66; 1T132). The "intramural survey", distributed at all three middle schools, asked parents to authorize their children's participation in one or more of five activities listed and to indicate whether bus transportation home was needed. The surveys were to be returned to homeroom teachers by November 17 (J-1, B-6). Recreation superintendent Curci reviewed the tallied results from at least two middle schools (3T73; J-1, B-7(a)(b)).

25. On November 14, Board counsel "reported a productive discussion on the middle school intramural program with Parks and Recreation," as transcribed in the Board's closed workshop minutes (R-1). On November 28, Board counsel reviewed "the agreement for interlocal services for the recreational program at the three middle schools" at another Board closed workshop meeting (R-1, 11/28/95). He explained that the "amount to be paid" was undetermined and that the program could not be implemented until January 1996. Moran noted that flyers were disseminated with the December 4 start date "after agreement with Parks and Recreation" (R-1).

26. On December 27, 1995, the Township passed an ordinance authorizing an interlocal services agreement with the Board to provide "recreational program services" (C-2; J-1, B-1). An administrative fee of $2,750 is noted and the ordinance incorporates

the "Interlocal Government Services Agreement for a Recreation Program at Bayshore, Thompson and Thorne Middle Schools."

The agreement was to run from January to May 1996 and by its terms, the parks and recreation department was to provide "five to nine qualified staff members" at each school four days per week.8/ Each session was to be ninety minutes. Recreation leaders were to be paid "$20 per diem" and site supervisors, "$30 per diem." The department retained "authority to discipline pupils" in the program. The agreement also stated: "It is understood and agreed by the parties that the staff provided by the department shall be considered employees of the department." The cost to the Board excluding the administrative fee and up to $3,000 for supplies, was not to exceed $80,000. The Board agreed to provide bus transportation to participating middle school students.

The agreement was signed by the Board on January 11, 1996 and by the Township mayor on January 16.

27. Fifteen of the sixteen recreation leaders in the program were teachers and substitute teachers employed by the Board. The other leader was a teacher employed in a different district. Fingerprinting and security checks were completed by the

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8/ Moran conceded that in 1996, the Township assigned three recreation leaders at each of two schools and four at the third. One arts and crafts instructor jumped from school to school (5T16; J-1, B-12). Adding the three site supervisors still fails to reach the contractual minimum number of "qualified staff members." The Township nevertheless employed "substantially more staff than Haines contemplated" (5T16).

Board (R-2). Moran did not make the hiring of certificated staff a condition of contracting with the Township (5T53). Silva knew that certificated staff would probably have friendly relationships with custodians, an advantage when school facilities were being used (3T29-3T30). Activities conducted from January to May 1996 included basketball, touch football, ping-pong, soccer, softball, cheerleading, arts and crafts, etc. (R-3).

From January through May 1996, the department periodically billed the Board for (and was paid) salary costs, including social security taxes, totalling about $23,000 (J-1, B-16-B-23). In the same period, the department periodically billed the Board for (and was paid) supplies and administration (J-1, B-15-B-23). Bus companies periodically billed the Board directly for "late buses," totalling $19,000 (J-1, B-24).

The program was also conducted in the same manner throughout the 1996-97 term without busing (4T64).

ANALYSIS

A pivotal question in this case is whether the Board was required to negotiate in good faith with the Association before executing an interlocal services contract with the Township department of parks and recreation to perform after-school supervision of intramural or recreation activities.

N.J.S.A. 34:13A-5.3 requires a public employer and a majority representative to negotiate over "terms and conditions of

employment." Local 195, IFPTE v. State, 85 N.J. 393 (1982) sets forth these tests for determining whether a subject is a "term and condition of employment" under section 5.3:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

In Local 195, the Supreme Court held that a public employer need not negotiate over a decision to subcontract with a private sector company to have that company take over governmental services. Although the Court recognized the employees' vital interest in not losing their jobs, it held that this interest was outweighed by the employer's interest in determining "whether governmental services are provided by government employees or by contractual arrangement 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 designation is based solely on a desire to save money and even if employees will lose their jobs as a result. In such instances, employees can seek a contract

provision requiring the employer to discuss (rather than negotiate) economic issues. See Burlington Cty. Bd. of Social Serv., P.E.R.C. No. 98-62, __ NJPER ___ (¶_____ 1997). Following Local 195, the Commission has prohibited negotiations or arbitration over decisions to subcontract work to private sector companies. See esp. Ridgewood Bd. of Ed., P.E.R.C. No. 93-81, 19 NJPER 208 (¶24098 1993), aff'd 20 NJPER 410 (¶25208 App. Div. 1994), certif. den. __ N.J. ___ (1994). This case differs from Local 195 and other subcontracting decisions because it involves two public employers, thereby eliminating a potential "governmental policy" interest in having the work performed by private sector employees.

The Association contends that this case concerns the mandatorily negotiable subject of "unit work" (post-hearing brief at p. 21). In a related context, the charge alleges that the intramural program employees are "effectively Board employees."

The unit work rule enables employees to seek protection of such interests as preserving their jobs; maintaining salaries, benefits, and overtime opportunities; and not having their collective strength eroded. The rule also promotes labor stability since negotiations are premised on the expectation that unit employees will continue to perform and be paid for doing the same duties. Burlington Cty. Bd. of Social Serv. See City of Jersey City, P.E.R.C. No. 96-89, 22 NJPER 251 (¶27131 1996), aff'd 23 NJPER 325 (¶28148 App. Div. 1997), certif. granted; Rutgers, the State Univ., P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd NJPER

Supp.2d 132 (¶113 App. Div. 1983). Unlike subcontracting, "a decision to reduce labor costs by using one classification of employees rather than another to perform a particular function...does not implicate the same policy concerns." Monmouth Cty. Sheriff and Monmouth Cty., P.E.R.C. No. 93-16, 18 NJPER 447 (¶23291 1992).

The unit work rule arises in cases, different from this case, where the employer is the sole employer of both negotiations unit employees and the non-unit employees. See e.g., Bergen Cty., P.E.R.C. No. 92-17, 17 NJPER 422 (¶22197 1991);] [9/] City of Newark, P.E.R.C. No. 88-87, 14 NJPER 248 (¶19092 1988); Rutgers.

The allegation that intramural program employees are "effectively Board employees" is true in the sense that nearly all "recreation leaders" and "supervisors" are full-time certificated teachers or substitute teachers employed by the Board. And it is true that the same or similarly situated persons employed in the program would also be so employed if the Board reached an agreement with the Association over stipends.

But the Association has not proved that the Board has retained or even shared control over these employees while engaged as "recreation leaders" and "supervisors." Shared control or "joint employer" status exists when control over economic employment

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9/ The Association asserts that Bergen Cty. involved two public employers (post-hearing brief at p. 24). That case concerned two negotiations units of the same public employer.

conditions is vested in one employer while control over non-economic conditions is vested in another employer. See e.g., Association of Retarded Citizens, Hudson Cty. Unit, P.E.R.C. No. 94-57, 19 NJPER 593 (¶24287 1993); Morris Cty., P.E.R.C. No. 86-15, 11 NJPER 491 (¶16175 1985); Bergen Cty. Sheriff, P.E.R.C. No. 84-98, 10 NJPER 168 (¶15083 1984).

The record does not establish joint control by the Board and Township, though elements of such control exist. The Board admittedly is the funding source and owns the facilities used. I also find that the Township and Board "co-determine"[10/] hiring, in view of the Township's targeted advertising of the positions to Board employees, the Board's tacit acceptance of such promotion, the success of that advertising and the Board's control over the security checks and fingerprinting of applicants.

The Board's participation in hiring comes close to implicating N.J.S.A. 34:13-23. This statute provides that "all aspects of assignment to, retention in, dismissal from and any terms and conditions of employment concerning extracurricular activities

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10/ The federal sector definition of "joint employer" is, that "one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer... Thus, the joint employer concept recognizes that the business entities involved are in fact separate, but that they share or co-determine those matters governing the essential terms and conditions of employment." [NLRB v. Browning-Ferris Industries, 691 F.2d 1117, 1123 (3d Cir. 1982)]

shall be deemed mandatory subjects for collective negotiations between an employer and majority representative." N.J.S.A. 34:13A-22 defines "employer" as "any local or regional school district, educational services commission, jointure commission, county special services school district or board or commission under the authority of the commissioner or State Board of Education." While N.J.S.A. 34:13A-23 expands the scope of negotiable subjects concerning extracurricular activities (such as intramural program supervision), the "employer", for purposes of applying this provision to this case, could only be the Board.

But the interlocal agreement and record show that the Township department of parks and recreation controlled pay scales, assignments, hours of work, scheduling, supervision (of employees and students) discipline, equipment and supplies (see findings 20, 22, 26 and 27). Accordingly, I find that the Township department of parks and recreation, and not the Board, is the employer of the intramural program staff.

The Association also contends that under the Interlocal Services Act and caselaw, "the Township is and must be deemed the same employer as the Board for purposes of the after-school program" (post-hearing brief at p. 25). N.J.S.A. 40:8A-6(c) states that "any party performing a service under such a contract is the general agent of any party or parties on whose behalf such service is performed pursuant to the contract." The Association also cites McIntosh v. DeFillipo, 281 N.J.Super. 171 (App. Div. 1995), a dog

bite case (allegedly negligent conduct by a River Vale employee causing injury to an Old Tappan employee working within the parameters of an interlocal services agreement signed by the two public employers), which held that the statute precluded a cause of action under "fellow employee" tort immunity of the Workers' Compensation Act.

Determining the identity of an employer to assess tort liability is a different inquiry than determining who is an "employer" within the meaning of N.J.S.A. 34:13A-3(c). The answer to the latter question poses certain statutory duties on that employer in the context of collective negotiations and unfair practice litigation. See e.g. Morris Cty., P.E.R.C. No. 86-15, 11 NJPER 491 (¶16175 1985); Ocean Cty Pros'r, D.R. No. 82-29, 8 NJPER 60 (¶13024 1981), Bergen Cty. Freeholder Bd. v. Bergen Cty. Pros'r, D.R. No. 78-34, 4 NJPER 104 (¶4047 1978) req. for rev. P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110 1978), aff'd 172 N.J.Super. 363 (App. Div. 1980). "Agency" liability is not relevant in this context.

The Commission has restrained arbitration in two cases which, like this case, involved contracting out under the Interlocal Services Act. Cape May Cty. Bridge Commission, P.E.R.C. No. 92-8, 17 NJPER 382 (¶22180 1991); Bor. of Teterboro, P.E.R.C. No. 92-108, 18 NJPER 265 (¶23111 1992).

Facing dissolution, the Cape May County Bridge Commission signed an interlocal services agreement with Cape May County, conveying bridges and roadways to the County in exchange for payment

of annual subsidies. The Bridge Commission agreed to "discontinue its full-time maintenance department" and maintenance responsibilities were turned over to the County.

The union's grievance asserted that three employees were laid off, four others were displaced and two positions were eliminated, causing reductions in compensation, hours of work, etc.

The Bridge Commission filed a scope of negotiations petition, asserting its prerogative under Local 195 to abolish its maintenance operations and to have the County take them over. The union contended that the grievance is mandatorily negotiable under the "unit work" rule.

Our Commission disagreed that it was presented either a Local 195 case (because it concerned two public employers) or a unit work case (because it concerned two employers). The Commission wrote: "Since neither the subcontracting nor unit work line of cases applies, we will apply the traditional negotiability balancing test" Bridge Commission at 17 NJPER 384.

Applying the Local 195 test, the Commission found that the Bridge Commission and County decisions "predominantly involve governmental policy determinations about the Bridge Commission's existence, organization, size and services and these grievances would significantly interfere with those determinations. We therefore restrain binding arbitration." Id.

The Commission also restrained arbitration under less climactic circumstances in Bor. of Teterboro. There, a police

department with eight officers (as authorized by local ordinance) covering three shifts, employed three superior officers. One retiring superior officer took accrued leave, etc., and another became unavailable indefinitely due to illness. The Borough responded to this staff shortage by creating a schedule rotating the four patrol officers and the last superior officer. Having these five officers cover the three shifts resulted in overworking the employees and impairing their health. The Borough asserted that the personnel shortages required it to pay large amounts of overtime to cover the 11 p.m.-7 a.m. shift.

The Borough signed an interlocal services agreement with Bergen County, agreeing to pay $4,000 per month for a finite period in exchange for police services between 11 p.m. and 7 a.m. The agreement specified that the County was responsible for the control and discipline of its officers.

The PBA grievance asserted that various contract articles were violated and that the agreement was violated by "using non-unit personnel to provide police services."

The Commission restrained arbitration. It wrote:

> Patrol officers have an interest in preserving their unit work. The Borough has an interest in deciding how best to cover for superior officers. Here, the Borough eliminated overtime opportunities for patrol officers created by a shortage of non-unit superior officers. Instead of patrol officers working overtime to cover for absent superiors, County police under contract patrol the 11 p.m. to 7 a.m. shift. This action has not resulted in any layoffs or reduced the number of weekly work hours below that specified in the contract. Police officers have lost

> overtime opportunities, but we do not believe under these facts that guaranteed overtime is a negotiable subject (citations omitted). Under these circumstances, we conclude that the Borough's decision to contract for County police coverage on the 11 p.m. to 7 a.m. shift rather than to provide coverage by paying overtime or increasing its own workforce is neither negotiable nor arbitrable. [Teterboro at 18 NJPER 266]

Applying the Local 195 test to this case, I first consider the employees' interests. The disputed positions were formerly stipended; no Board employees have been laid off or displaced; nor have they suffered a reduction in regular work hours as a result of contracting out the after-school program to the Township department of parks and recreation. Nor have any full-time certificated positions normally filled by Association-represented personnel been occupied by Township employees. That almost all employees hired by the Township to staff the program are included in the negotiations unit complaining of the lost work factually distinguishes this case from Bridge Commission and Bor. of Teterboro. Although these employees had not performed the work during the five-year intramural hiatus, the Association continued to negotiate wage increases for the positions.

The Board has an interest in reducing compensation costs as part of overall budgetary constraints. In 1995, this constraint was demonstrated by the elimination of the $120,000 per year middle school interscholastic sports program. The Board exercised a prerogative to replace it with intramurals at an estimated $40,000

savings. About two-thirds or $60,000 of the Haines report budget was allocated to busing costs.

The Haines report underestimated coach staffing and the attendant personnel costs. (Why else would the Board later agree to reimburse the Township parks and recreation department for up to $80,000 in personnel costs?) The Board decided to double both the length of each intramural session (from 45 to 90 minutes) and number of sessions per week (from 2 to 4).

The only rational explanation for quadrupling what had been stipended work while offering no wage increase to coaches is that before the first negotiations session on September 20, the Board already had a fair idea what the Township would pay employees for the same work. Even if the Board first "knew" on November 8 that "recreation leaders" would be paid $10 per hour, that amount was about one half of the Association's low-end demand on September 20 ($1,630 divided by ten weeks, divided by eight hours per week equals about $20 per hour).11/ The Township rate was even marginally lower than the $815 per season which the Board offered to the Association.

Unlike Bridge Commission, this case involves no governmental policy decisions. I am not persuaded that extending the program to include arts and crafts implicates a meaningful

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11/ The Association asserted that nine recreation leaders were employed in 1996 for a total of $14,670. The Board employed ten recreation leaders (J-1, B-12).

policy concern. Nor does the record show that "skills" were taught to students in 1996 or 1996-97. As Moran testified, negotiations were not renewed because the Township department of parks and creation proposed to do the job for even less money than the Board offered to the Association.

In principle, this case resembles Bor. of Teterboro, where the Commission determined that a fiscal reason to contract out work to another public employer which did not result in layoffs or a reduction in work hours was not mandatorily negotiable. Even allowing that the ultimate funding source in this case is the same taxpayer(s), I must find that the Township is both a different employer than the Board and the employer of intramural program employees. Accordingly, I recommend that the Board had no duty to negotiate with the Association before contracting out intramural program supervision and did not violate 5.4a(5) and (1) of the Act.

Our Supreme Court in Local 195 warned that public employers do not have "limitless freedom to subcontract for any reason" and cannot "subcontract in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers." Employees, the Court wrote, "will not be vulnerable to arbitrary or capricious substitutions of private workers for public employees." Id. at 88 N.J. 411.

In determining whether contracting out is illegally motivated, the Commission applies the test set forth in In re Bridgewater Tp., 95 N.J. 235. See Dennis Tp. Bd. of Ed., P.E.R.C.

No. 86-69, 12 NJPER 16 (¶17005 1985). Under Bridgewater, the charging party must prove, by a preponderance of evidence on the entire record, that protected conduct was a substantial or motivating factor in the disputed personnel decision. This may be done by direct or circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action.

Applying these tests, I find that the contracting out of intramural program supervision was not motivated by animus towards the Association. Which is not to suggest that the Board was free of animus.

The Board openly railed at the "Alinskyites" filing meritless litigation and prolonging negotiations. The Board's refusal to inform the Association directly of its discussions with the Township department of parks and recreation is troublesome, as is its hypocritical contention that Association "stalling" forced it to sign the interlocal agreement. (The Board had decided in May 1995 to reinstate intramurals and did not create job descriptions for the program until September 19, 1995. The Association had requested the job descriptions during that interim).

I have found however, that the Board was not required to negotiate in good faith before contracting out intramural program supervision. That the Board started discussions with the Township in August 1995 and then proceeded to negotiate with the Association in September and October 1995, where it learned the Association's compensation demands, strongly indicates that reasons of economy and not animus motivated the employment decision.

Whether the Board saved money in 1996 by contracting with the Township is problematic and largely besides the point. The "ceiling" on the Board's estimated costs is elusive because the Haines report inaccurately fixed it at $80,000 annually. While overestimating busing costs, the report underestimated personnel costs. The program operated for only one-half of the term and cost about $43,000, only slightly more, pro-rated, than the mistaken estimate.

On the date the Board signed the agreement with the Township, it did not know the gross amount it would have to pay for busing. It did know that it would be paying the Township about one-half the compensation rate per coach or more specifically, per "recreation leader" than it would have paid under the least expensive agreement possible with the Association. The Board was unwilling to negotiate a higher stipend with the Association and lawfully chose to enter the interlocal services agreement.

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.[12/]

Jonathon Roth
Hearing Examiner

Dated: November 24, 1997
Trenton, New Jersey

12/ The Association did not present evidence of an alleged unlawful refusal to provide information. I dismiss that allegation.