P.E.R.C. NO. 93-81

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RIDGEWOOD BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-93-19

RIDGEWOOD BUILDING SERVICE
STAFF ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Ridgewood Building Service Staff Association against the Ridgewood Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act by terminating unit members during the term of a collective negotiations agreement after subcontracting their work to a private contractor. The Commission holds that the decision to subcontract during the life of a collective negotiations agreement is not a per se violation of the Act.

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STAFF ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys (James L. Plosia, Jr., of counsel)

For the Charging Party, Springstead & Maurice, attorneys (Alfred F. Maurice, of counsel)

DECISION AND ORDER

On July 14, 1992, the Ridgewood Building Service Staff Association filed an unfair practice charge against the Ridgewood Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3), (5) and (7),[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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the

Footnote Continued on Next Page

by terminating unit members during the term of a collective negotiations agreement after subcontracting their work to a private contractor. The charge further alleges that the Board sought to destroy the union, refused to negotiate over recall rights, and unlawfully encouraged unit members to work for the subcontractor.

On August 13, 1992, a Complaint and Notice of Hearing issued. On September 4, the Board filed its Answer admitting that it terminated these employees during the term of the contract but denying that it violated the Act. It claims that it subcontracted for economic reasons, never refused to negotiate over any issues related to the subcontracting decision, and entered into a Memorandum of Agreement with the Association whereby the Association agreed that its members would cease to be Board employees effective June 30, 1992.

On October 27 and 28, 1992, Hearing Examiner Alan R. Howe conducted a hearing. At the conclusion of the charging party's case-in-chief, the Board moved to dismiss. After oral argument, the Hearing Examiner requested additional briefs.

1/ Footnote Continued From Previous Page

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. (7) Violating any of the rules and regulations established by the commission."

On November 25, 1992, the Hearing Examiner dismissed the Complaint. H.E. No. 93-12, 19 NJPER 20 (¶24010 1992). He found that the Board had a managerial prerogative to subcontract custodial and maintenance services and that there was no evidence that the Board acted in bad faith or that its decision was arbitrary or capricious.

On December 8, 1992, the Association requested review of the Hearing Examiner's determination. It accepts the Hearing Examiner's findings of fact but disagrees with his interpretation of those facts and his legal conclusions. It claims that the unilateral termination of a collective negotiations agreement is a per se violation of the Act. It argues that nothing can be more arbitrary, capricious or unreasonable than the unilateral termination of a contract during its term without compensation to the other party for all its losses. It further argues that the Hearing Examiner should have analyzed the Board's failure to present a proposal or counterproposal that would have provided an alternative to subcontracting. The Association also relies on its brief before the Hearing Examiner.[2/]

On December 17, 1992, the Board filed a reply supporting the Hearing Examiner's determination and incorporating its brief to him. It claims that the Association has failed to take issue with the Hearing Examiner's findings on a number of allegations in the

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2/ We deny the Association's request for oral argument. The legal issues have been fully briefed.

Complaint and that those findings should be affirmed. The Board asserts that the Association's sole argument, already rejected by the Supreme Court, is that a public employer does not have a prerogative to subcontract during the life of a contract.

We have reviewed the record. We incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 3-9).

The Association's primary contention is that a public employer does not have a prerogative to subcontract during the life of a collective negotiations agreement. Supreme Court caselaw compels us to reject that contention.

In State of New Jersey and Local 195, IFPTE, P.E.R.C. No. 80-85, 6 NJPER 32 (¶11017 1980), the Chairman relied on our earlier cases and concluded that subcontracting was a mandatorily negotiable issue, in part because:

> a decision to subcontract would effectively terminate the employment relationship vis-a-vis the employees in a negotiations unit and would have a "cataclysmic effect on wages, hours, and working conditions." [Id. at 33]

The Appellate Division reversed, 176 N.J. Super. 85 (App. Div. 1980), and the Supreme Court affirmed the Appellate Division, 88 N.J. 393 (1982). The Supreme Court stated that:

> The decision to contract out work or to subcontract is...an area where managerial interests are dominant. ...We therefore hold that to the extent the contractual provision at issue...includes negotiation on the ultimate substantive decision to subcontract, it is a non-negotiable matter of managerial prerogative. [Id. at 408]

The Association claims that the Supreme Court's instruction applies only to subcontracting at the end of a collective negotiations agreement, not to subcontracting during the life of a contract. But that argument incorrectly presupposes that the public employer may agree to restrict its prerogative during the life of a contract. There is no permissive category of negotiations for school board employees. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978). Contrast Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981) (permissive category for police and firefighters). Given that subcontracting is not a mandatorily negotiable subject and given that there is no permissive category of negotiations for these employees, we cannot conclude that this subcontracting decision was a per se violation of our Act.

We also reject the Association's claim that the Board terminated the collective negotiations agreement. The subcontracting took place one year before the expiration of the collective negotiations agreement. The Association presented no evidence that the Board unilaterally terminated the agreement itself. In fact, although the Board sought the Association's agreement to terminate the contract, the parties agreed on a clause recognizing that the Association did not consent to such a termination.[3/]

3/ In the absence of specific exceptions, we dismiss any other allegations that subsections 5.4(a)(1), (2), (5) or (7) were violated.

There are, however, some restrictions on a public employer's right to subcontract. In Local 195, the Supreme Court emphasized:

> [O]ur holding today does not grant the public employer limitless freedom to subcontract for any reason. The State could not subcontract in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers. State action must be rationally related to a legitimate governmental purpose. Our decision today does not leave public employees vulnerable to arbitrary or capricious substitutions of private workers for public employees. [Id. at 411]

In particular, we have jurisdiction to determine whether a decision to subcontract has been illegally motivated by hostility toward the employees' protected activity.

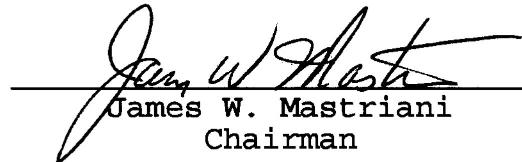
In determining whether subcontracting was illegally motivated, we apply the standards established in In re Bridgewater Tp., 95 N.J. 235 (1984), for considering allegations of discriminatory personnel actions. Here, the Association does not except to the Hearing Examiner's finding that there was no proof of illegal motivation. The undisputed facts show that the employer engaged in collective negotiations, entered into a collective negotiations agreement, later decided to explore subcontracting, negotiated over the subcontracting, and entered into an agreement over severance terms for unit employees. Given those undisputed facts, we cannot find that this employer subcontracted to avoid the collective negotiations process. See Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985).

We conclude that the decision to subcontract during the life of a collective negotiations agreement is not a per se violation of the Act. We therefore sustain the Hearing Examiner's decision to dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo and Wenzler voted in favor of this decision. Commissioner Smith voted against this decision. Commissioners Bertolino and Regan abstained from consideration.

DATED: March 29, 1993
Trenton, New Jersey
ISSUED: March 30, 1993

H.E. NO. 93-12

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

In the Matter of

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Respondent,

-and-

Docket No. CO-H-93-19

RIDGEWOOD BUILDING SERVICE
STAFF ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner, in granting a Motion to Dismiss at the conclusion of the Charging Party's case, recommends that the Public Employment Relations Commission find that the Respondent did not violate Sections 5.4(a)(1), (2), (3), (5) or (7) of the New Jersey Employer-Employee Relations Act when the Respondent subcontracted its custodial and maintenance services, involving 62 employees, all of whom were terminated as of July 1, 1992. At that time the collective negotiations agreement had one additional year to run prior to termination.

The Charging Party urged that because the subcontracting occurred _during_ the contract term and not at its conclusion, the Board was barred from the subcontracting under _Local 195 v. State_, 88 _N.J_. 393 (1982), in particular, the Court's caveat with respect to "bad faith" and "arbitrary" or "capricious" conduct. The Hearing Examiner's conclusion was that the Charging Party failed to adduce even a scintilla of evidence sufficient to meet the standards of violation for either an independent subsection (a)(1) or (2) or (3) or (5) or (7) of the Act.

A Hearing Examiner's Decision to Dismiss upon motion of the Respondent at the conclusion of the Charging Party's case is not a final administrative determination of the Public Employment Relations Commission. The Charging Party has ten (10) days from the date of the decision to request review by the Commission or else the case is closed.

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Appearances:

For the Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys
(James L. Plosia, Jr., of counsel)

For the Charging Party, Springstead & Maurice, attorneys
(Alfred F. Maurice, of counsel)

HEARING EXAMINER'S RECOMMENDED DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on July 14, 1992, by the Ridgewood Building Service Staff Association ("Charging Party" or "Association") alleging that the Ridgewood Board of Education ("Respondent" or "Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that the Board subcontracted and thereby terminated the employment of all members of the unit as of June 30, 1992; this occurred during the term of

the current agreement, which was executed on July 22, 1991, and does not expire until June 30, 1993; the Board acted in bad faith since it had by September 1991 invited the submission of bids to subcontract its custodial/maintenance services; following the award in May 1992, the Board refused to negotiate as to recall rights in the event that privatization is abandoned; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (5) and (7) of the Act.[1/]

A Complaint and Notice of Hearing was issued on August 13, 1992. Pursuant to the Complaint and Notice of Hearing, hearings were held on October 27 and October 28, 1992 in Newark, New Jersey, at which time the Charging Party was given an opportunity to examine witnesses and present relevant evidence. At the conclusion of the Charging Party's case on October 28th, the Respondent moved to dismiss and both parties argued upon the record. After hearing oral argument, I deferred decision on the motion and adjourned the

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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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

hearing in order to consider more thoroughly the legal issue as to whether or not a public employer can subcontract unit work during the term of a collective negotiations agreement. I requested the parties to submit an additional brief and these were received on November 2, 1992.[2/]

Upon the record made by the Charging Party only, I make the following:

RELEVANT FINDINGS OF FACT[3/]

1. The Board is a public employer and the Association is a public employee representative within the meaning of the Act, as amended.

2. The Association has been the exclusive collective negotiations representative for a unit of custodians, drivers, groundskeepers and mechanics for upwards of 20 years. The most recent collective negotiations agreement between the parties is effective during the term July 1, 1990 through June 30, 1993 and was executed on July 22, 1991. [J-1; Article II, "Recognition," and Article V, "Position Classification" (pp. 1, 3, 26)]. Prior to June 30, 1992, the collective negotiations unit represented by the Association numbered approximately 62 employees.

2/ To some extent, these submissions were duplicative of those submitted at the interim relief proceeding on July 14, 1992. However, they proved most helpful in this proceeding. [See I.R. No. 93-3, 18 NJPER 408 (¶23187 1982].

3/ These Findings are made without benefit of transcript. This presents no obstacle since the essential facts are found in the documentary evidence received and in admissions made by the Respondent.

3. The 1990-1993 collective negotiations agreement (J-1) was preceded by a Memorandum of Agreement, executed February 28, 1991 (J-2). Representatives of the Board neither raised nor discussed the possibility of subcontracting unit work during the negotiations, which preceded the execution of J-1 or J-2.[4/]

4. During the last week of August 1991, Eugene Prentice, the Supervisor of Buildings and Grounds, mentioned the possibility of the subcontracting of the Association's unit work in the presence of Kearns, who passed it on to John Biondi, the NJEA UniServ Field Representative for the Association.

5. Early in September 1991, the Superintendent, Frederick J. Stokley, attended an Association meeting where about 45 unit members were present, including Kearns and Biondi. Stokley stated that the Board was considering the subcontracting of unit work in order to economize.

6. At a regular meeting of the Board on September 12, 1991, a representative of the Marriott Corporation made a presentation regarding its "facilities management services." The Board authorized Marriott to perform a "needs assessment of management of the district's custodial and maintenance services..."

4/ The hiatus between the execution of J-2 on February 28, 1991, and the execution of the actual collective negotiations agreement on July 22, 1991 (J-1) was explained by the Association's President, Brian P. Kearns. He had sought to eliminate certain discrepancies in language, which caused the delay and now appear on the inside cover of J-1. However, the content of these corrections is not material to the instant proceeding.

[J-3]. Marriott made its inspection of the facility on October 18, 1991.

7. At a regular meeting of the Board on February 24, 1992, the Superintendent recommended that the Board authorize its Secretary to advertise for bids from private contractors to provide custodial and maintenance services for the district. The Board did so unanimously (J-4).

8. On March 10, 1992, Biondi wrote to the Board collectively and reminded them of their obligation to discuss with the Association the impact of the pending subcontracting decision. He added that the Association needed at least four weeks to review any bids submitted and an additional four weeks to meet and discuss with the Board the ramifications of such bids. [J-5].

9. The President of the Board responded on March 24th and stated that the Association had previously received copies of the bid specifications. He invited the Association to attend the opening of bids on April 6th, following which the Board would agree to meet with the Association, but only within the time frame of awarding the successful bid. [J-6].

10. On April 2, 1992, Biondi wrote to the Board Secretary, Thomas R. Burgin, and asked for a cost breakdown for the various fringe benefits currently provided to the custodial and maintenance employees in the unit (CP-7). On April 3rd, Burgin replied with the requested cost breakdown (CP-1).

11. The opening of bids for "Privatization of Buildings and Grounds Services" occurred on April 6, 1992, and Marriott was the low bidder (CP-6).

12. The parties met on April 22, 1992, where the Association proposed to the Board the granting of certain concessions in order to meet the savings proposed by Marriott. The only response of the Board's representatives was that they would "consider" the Association's proposal. More specifically, Biondi recalled that Board member Charles V. Reilly may have said that the Association's proposal was "not enough."

13. The parties next met on May 6th where the Board representatives indicated that no final decision had been made on the subcontracting of the Association's unit work and that the Board was still checking on other Marriott projects. This meeting lasted only about 30 minutes.

14. A third meeting was held on May 13th, where the Association was informed that the visitations to Marriott sites had been concluded. However, the Association received no response from the Board regarding its proposed concessions. No further meetings were scheduled.

15. At a regular meeting on May 18, 1992, the Board by a vote to three-to-two awarded the subcontract to the Marriott Corporation for the provision of custodial and maintenance services, commencing July 1, 1992, and continuing through June 30, 1994. The Board stipulated at the same time that it would negotiate with the

"bargaining unit" a transition payment schedule for current employees of the Board who became Marriott employees. [J-7].

16. Thereafter, on May 19th, Superintendent Stokley sent an identical letter to all unit members, notifying them that their services would be terminated on June 30, 1992, and stating, additionally, that fiscal constraints were the reason for the Board's action in subcontracting and not dissatisfaction with the services of its present employees. Finally, Stokley stated that Marriott has promised to interview all of the unit employees for employment with it and if any given employee is hired by Marriott "...the Board will make an offer to supplement your wages for two years..." [J-8].

17. The parties next met on May 20, 1992, where the Board presented a proposal in writing for severance benefits to unit employees. The Association made a counter proposal with respect to "recall rights" since J-1 did not expire until a year later, on June 30, 1993. The Association anticipated the possibility of Marriott failing to perform in its subcontract. Biondi's testimony was clear that the Board never "bargained" on the Association's "recall rights" demand. In fact, Biondi testified that Board member Reilly said that the Board would not discuss "that issue," referring to the recall rights issue.

18. The final act of the parties was the negotiation of a Memorandum of Agreement, outlining the severance benefits to be paid to Association unit members, which was executed on June 15, 1992

(J-9). The Association sought and obtained in ¶8 of this Agreement a provision that nothing in the Memorandum shall be deemed a consent by the Association to a termination of the agreement [J-1] on June 30, 1992, or the modification or termination of other terms of that agreement prior to its termination date [June 30, 1993]. The Association's objective in obtaining this language in ¶8 was consistent with its demand for "recall rights" and having an operative agreement in place at the expiration of the term of J-1 on June 30, 1993.

19. The Board's counterpart to the Association's demand for the inclusion of ¶8 in J-9 was ¶9 thereof. This paragraph recited that on May 19, 1992, the employees received notification that their contracts were to be terminated as of July 19th. Thus, as of June 30, 1992, they would no longer be employees of the Board except for employees who had been offered continued employment by the Board.[5/]

20. Although the figures may not be exactly correct, it was stipulated that of the 62 unit employees who were terminated by the Board: 50 of these applied for employment with Marriott; 37

5/ The evidence adduced on this matter was that certain employees whose retirement was close at hand would be continued in the Board's employment for that purpose only.

were offered employment by Marriott; and 23 individuals accepted employment with Marriott.[6/]

ANALYSIS

The Applicable Standard On A Motion To Dismiss.

The Commission in N.J. Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979) restated the standard that it utilizes on a motion to dismiss at the conclusion of the Charging Party's case, namely, the same standards used by the New Jersey Supreme Court: Dolson v. Anastasia, 55 N.J. 2 (1969). The Commission noted that the courts are not concerned with the worth, nature or extent, beyond a "scintilla," of the evidence, but only with its existence, viewed most favorably to the party opposing the motion. While the process does not involve the actual weighing of the evidence, some consideration of the worth of the evidence presented may be necessary. Thus, if evidence "beyond a scintilla" exists in the proofs adduced by the Charging Party, the motion to dismiss must be denied.

6/ At the Board meeting prior to June 15, 1992, either the Board or a Marriott representative stated that if a majority of the unit employees hired by Marriott designated the Association as their representative then Marriott would recognize it.

Under The Charging Party's Evidence And The Applicable Law, The Respondent's Motion To Dismiss Must Be Granted.

I.

Alleged Violation Of Sections 5.4(a)(1) & (2):

The Association alleges that the Board's decision to subcontract and to terminate the employment of all unit employees as of June 30, 1992, interfered with the effectuation of their rights under the Act since the collective negotiations agreement did not by its terms expire until June 30, 1993. Further, this conduct of the Board interfered with the existence of the Association by seeking to destroy it through the subcontracting of all unit work during the term of the agreement.

The question is whether or not this conduct of the Board violated Sections 5.4(a)(1) and/or (2) of the Act. There is plainly no competent evidence to support a finding that the Board violated Section 5.4(a)(2) of the Act in this case, since the conduct of the Board would have to have been such that it constituted "...pervasive employer control or manipulation of the employee organization itself...": Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 87-3, 12 NJPER 599 (¶17224 1986). The conduct of the Respondent herein constituted at most the exercise of a managerial prerogative, i.e., a decision to subcontract. I do not concur with the statement by the Charging Party in its post-hearing brief that Section 5.4(a)(2) was violated when the unit ceased to exist, following the termination of all of its members, which made the continuing viability of the unit impossible. [Brief, p. 3]. What the Charging Party has failed to

recognize is that a properly exercised managerial prerogative, that of subcontracting, necessarily results in a "decimation" of the unit. However, because of the legitimacy of the action taken, there can be no violation of Section 5.4(a)(2) because there has been no "...pervasive employer control or manipulation of the employee organization..." This essential element of a violation of the Act has not been satisfied by the Charging Party's proofs herein.

It is clear that not even a scintilla of evidence exists that the Board violated Section 5.4(a)(1) or (2) of the Act.

II.

Alleged Independent Violation of Section 5.4(a)(1):

A public employer independently violates Section 5.4(a)(1) of the Act if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification: Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988), adopting H.E. No. 88-49, 14 NJPER 293, 303 (¶19109 1988); UMDNJ--Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); Gorman, Basic Text on Labor Law, at 132-34 (1976). Also, the Charging Party need not prove an illegal motive in order to establish an independent violation of Section 5.4(a)(1) of the Act: Morris, The Developing Labor Law, at 75-78 (2d ed. 1983).

The mere recital of the above standard, and the corroborating Commission decisions, make clear that there is not on

this record a "scintilla" of evidence that an _independent_ violation of Section 5.4(a)(1) of the Act occurred as a result of the Board's conduct herein.

III.

Alleged Violation Of Sections 5.4(a)(1) & (3):

Notwithstanding that a public employer appears to have a clear right to subcontract services based on _Local 195 v. State_, 88 _N.J_. 393 (1982), our Supreme Court recognized certain limitations upon this right, namely, that there may not be a subcontract "...in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers..." Additionally, public employees are not vulnerable "...to arbitrary or capricious substitutions of private workers for public employees..." [88 _N.J_. at 411].

The Commission has had occasion to apply this limitation upon the right of a public employer to subcontract unit work in the case of _Glassboro Housing Authority_, P.E.R.C. No. 90-16, 15 _NJPER_ 524 (¶20216 1989). There the Commission found a violation of Section 5.4(a)(3) of the Act where it was demonstrated that when the public employer subcontracted bargaining unit work it was motivated by the desire to avoid negotiations with the collective negotiations representative: _Bridgewater Tp. v. Bridgewater Public Works Ass'n_, 95 _N.J_. 235, 244 (1984).

However, it is clear that in the case at bar there have been no proofs of illegal motivation on the part of the Board in reaching or implementing its decision to subcontract its maintenance and custodial services as of June 30, 1992. In fact, I note the evidence that the contractor, Marriott Corporation, offered to recognize the Association as the exclusive representative of the custodial and maintenance employees formerly employed by the Board if the organization was able to demonstrate majority status. Although the actions of Marriott, which admittedly is not a party to these proceedings, is largely tangential, it does add to the overall climate in which the decision of the Board to subcontract occurred.

The Association in its Unfair Practice Charge, under the heading "Violations," urges in ¶3 that the Board discriminated within the meaning of Section 5.4(a)(3) of the Act in part by "...encouraging members to be employed by the subcontractor, Marriott Corp...." [C-1]. There is not a scintilla of evidence that the Board "encouraged" its custodial and maintenance employees to become employed by Marriott. The record is totally unclear as to how 50 of the 62 unit employees came to apply to Marriott for employment. The same is true as to how 37 were offered employment and, finally, how 23 employees came to accept employment with Marriott. Thus, it would be sheer speculation to conclude under the "scintilla" standard that the Board encouraged some 50 of its custodial and maintenance employees to apply to Marriott.

Further, I have great difficulty in grasping just how our statute would be violated if the Board had assisted some 50 of its 62 unit employees to gain employment with the subcontractor AFTER the Board had legally decided to subcontract the unit work to Marriott. This alleged "encouraging" occurred after the fact and could, therefore, not arise to a violation of Section 5.4(a)(3) of the Act.

There is on the instant record not even a scintilla of evidence that the Board violated Section 5.4(a)(1) or (3) by its conduct in effectuating the subcontracting of unit work.

IV.

Alleged Violation of Sections 5.4(a)(1) & (5):

The thrust of the Association's allegations in its Unfair Practice Charge under Section 5.4(a)(5) of the Act is that the Board bargained in bad faith when, after the execution of the 1990-1993 agreement on July 22, 1991, it invited contractors to review its custodial and maintenance services in September 1991 preparatory to sending out bids to subcontract these services as of July 1, 1992. Additionally, the Association has alleged that the Board refused to negotiate as to recall rights in the event that privatization was abandoned and, additionally, that it has refused to negotiate in good faith over post-employment rights. [C-1].

The Charging Party relies, as it must, on the concluding observations of our Supreme Court in Local 195 v. State, previously

cited. To repeat again, the Court stated that a public employer does not have unlimited freedom to subcontract for any reason and would be limited in so doing if it did so "...in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers." Additionally, public employees are not vulnerable "...to arbitrary or capricious substitutions of private workers for public employees..." [88 N.J. at 411].

The Charging Party next seeks to distinguish three cases cited by the Board in the course of these proceedings, namely: Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 88-143, 14 NJPER 465 (¶19194 1988);[7/] So. Brunswick Bd. of Ed., P.E.R.C. No. 83-3, 8 NJPER 429 (¶13199 1982);[8/] and So. Amboy Bd. of Ed., P.E.R.C. No. 82-10, 7 NJPER 448 (¶12200 1981). Unfortunately for the Charging Party, none of these decisions stand for the proposition that a decision by a public employer to subcontract during the term of an existing collective negotiations agreement is any different than a decision made at the end of the agreement.

Thus, the basic holding of the New Jersey Supreme Court in Local 195 v. State is applicable here unless either the "bad faith" or the "arbitrary or capricious" exception is applicable. I find that neither is applicable to the instant case.

7/ This was a scope decision on the right to arbitrate subcontracting which is, at best, marginally relevant to the case at bar.

8/ This was a case where subcontracting allegedly occurred in retaliation for the union's filing of an unfair practice charge but, since the parties continued to negotiate, there was no finding of bad faith.

First, the "bad faith" exception: notwithstanding that the Charging Party has strenuously urged that the action of the Board constituted "bad faith" within the meaning of Section 5.4(a)(5) of the Act, I cannot agree with this contention, based upon the record before me. The Board took every conceivable step, over a substantial period of time, to demonstrate that its subcontracting decision and implementation were made without a taint of bad faith. For example, the Board was "up front" when Prentice first disclosed the possibibility of subcontracting in August 1991. This was promptly followed by Stokley's appearance at an Association meeting in September 1991 where he explained that economic factors were at work in a possible decision to subcontract.

Thereafter, the actions of the Board were openly dealt with at its regular meetings. Marriott and other contractors surveyed the operation in October 1991. At a regular Board meeting on February 24, 1992, Stokley recommended advertising for bids and on March 10th, Biondi reminded the Board of its obligation to "discuss" with the Association the impact of the pending decision to subcontract (J-4 & J-5). Bids were opened on April 6th and the award was made to Marriott on May 18, 1992.

During this time, the parties had met to "discuss" and/or "negotiate" the conditions under which the severance of all unit employees was to occur as of July 1, 1992. The end point, after meetings in April through June 1992, was a Memorandum of Agreement of June 15th, which set forth the terms of the severance of the 62

unit employees with the paragraph 8 provision requested by the Association. [J-9, ¶8]. The Board did, however, refuse to discuss and/or negotiate the Association's claim for "recall rights" in the event that the subcontract failed.

Upon the summary of the record above [as set forth more fully in Findings of Fact Nos. 3-19, supra] there is no way that I can conclude that the Respondent Board manifested "bad faith," either within the meaning of the Act or the Local 195 decision, by its course of conduct in the implementation of its decision to subcontract the Association's unit work. None of the usual indicia of bad faith are present here. The Association was given an adequate opportunity to "discuss" the Board's decision to subcontract. Ultimately, the Association was able to "negotiate" a substantial severance package for those of its 62 members who were terminated as of July 1, 1992.[9/]

I refer here to Bogota Bd. of Ed., P.E.R.C. No. 91-105, 17 NJPER 304 (¶22134 1991) where the Commission, in a similar subcontracting of custodial services case, affirmed this Hearing

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9/ Although there is no provision in the collective negotiations agreement between the parties (J-1) obligating the Board to "discuss" its contemplated decision to subcontract unit work, the Board did enter into such discussions with the Association in the early part of 1992. The Board did so notwithstanding that the decision of the Supreme Court in Local 195 v. State and that of the Commission in City of Jersey City, H.E. No. 84-17, 9 NJPER 579 (¶14241 1983), adopted P.E.R.C. No. 84-53, 9 NJPER 679 (¶14297 1983) hold that a contractual provision to "discuss" a subcontracting decision is a prerequisite to the obligation of a public employer to do so.

Examiner, in relevant part, with respect to my conclusion that the Board had not engaged in "bad faith" negotiations. The Association there had alleged "bad faith" because, according to the Association, the Board had concealed its intent to subcontract custodial services. However, the evidence failed to support this claim. Thus, when the Board's actions were viewed in their totality, a good faith finding was warranted.

The only remaining area of inquiry is whether or not the conduct of the Respondent Board meets the "arbitrary" or "capricious" exception as postulated by the Supreme Court in _Local 195_, _supra_. Once again, beginning in August 1991, _supra_, I am unable to conclude that the Board's conduct can be deemed "arbitrary" or "capricious" as those terms of art are used in our case law. The Board's conduct was at all times open and above board and completely straightforward. It discussed the matter of its pending _decision_ to subcontract with the Association on several occasions over many months. It engaged in substantive discussions on the terms of severance during three or four meetings in April and May 1992. A formal agreement was entered into by the parties on June 15th. The Association's sole dissatisfaction was with the Board's refusal to negotiate "recall rights" in the event that the decision to subcontract proved to be a failure.

Given the overall conduct of the Board, and its having undertaken the payment of a substantial sum of money to its former employees, I can find no basis for concluding that its action in so doing was arbitrary or capricious.

* * * *

I cannot find upon this record even a scintilla of evidence that the Board violated Section 5.4(a)(1) or (5) of the Act by its decision to subcontract unit work as of July 1, 1992, this decision having been untainted by "bad faith" or "arbitrary" or "capricious" conduct.

* * * *

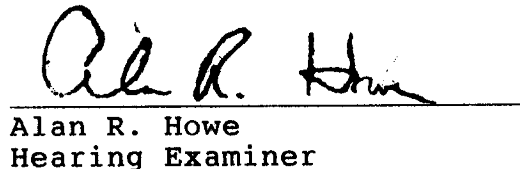
Additionally, not a scintilla of evidence was adduced that the Board's conduct herein constituted a violation of Section 5.4(a)(7) of the Act.

* * * *

Accordingly, upon the foregoing, and upon the testimony and documentary evidence adduced in this proceeding by the Charging Party only, I make the following:

RECOMMENDED ORDER

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (5) or (7), as alleged and litigated in this proceeding. Therefore, the Motion to Dismiss at the conclusion of the Charging Party's case on October 28, 1992, is granted and the Complaint is dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: November 25, 1992
Trenton, New Jersey