P.E.R.C. NO. 2004-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MATAWAN-ABERDEEN REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2004-10

S.E.I.U. LOCAL 74,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Matawan-Aberdeen Regional Board of Education for a restraint of binding arbitration of a grievance filed by SEIU Local 74. The grievance contests the Board's decision to subcontract cafeteria services for the 2003-2004 school year. The Commission concludes that under Local 195, IFPTE v. State, 88 N.J. 393 (1982), a public employer need not negotiate over a decision to subcontract with a private sector company to have that company take over governmental services.

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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SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 74, AFL-CIO,

Respondent.

Appearances:

For the Petitioner, Kenney, Gross, Kovats, Campbell & Pruchnik, attorneys (Michael J. Gross, of counsel; Ari G. Burd, on the brief)

For the Respondent, O'Dwyer & Bernstein, LLP, attorneys (Raul Garcia, on the brief)

DECISION

On August 18, 2003, the Matawan-Aberdeen Regional Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by Service Employees International Union, Local 74, AFL-CIO. The grievance contests the Board's decision to subcontract cafeteria services for the 2003-2004 school year.

The parties have filed briefs and exhibits. These facts appear.

Local 74 represents cafeteria workers including Leaders, Cooks, General Workers, Food Truck/General Workers, Bakers and

Cafeteria Aides. The parties' collective negotiations agreement is effective from July 1, 2001 through June 30, 2004. The grievance procedure ends in binding arbitration.

In developing its budget for the 2002-2003 school year, the Board sought ways of saving money, including privatizing cafeteria, custodial and maintenance services. Privatization of the cafeteria had been considered not only because of potential cost saving, but because high school students were dissatisfied with the quality and variety of food.

In April 2003, the district budget was defeated. The municipality then cut $477,000 from the proposed budget. The Board then solicited proposals from vendors to determine if privatization of the cafeteria staff could help make up for the budget shortfall. A prerequisite for proposals was the rehiring of the current staff at their current wages.

On April 16, 2003, the Board gave the cafeteria staff notices of non-renewal for the 2003-2004 school year. It then reviewed bids from various vendors and gave the union and the Director of Food Services the opportunity to review the bids to see if they could cut costs while improving the quality and variety of food provided. The Board rejected the Director's proposal and a private contractor's bid was awarded.

On May 2, 2003, Local 74 filed a grievance. It states, in part that:

> [T]he grievance concerns the employer's delivery of the Notice of Dismissal. This action is a clear violation of Article 15, Section 2 of our collective bargaining agreement. We understand the reason for the dismissal arises from a proposal to subcontract the work normally performed by these employees.

Article 15 is entitled voluntary separation from employment. Section 2 provides that "No unit member employed on June 30, 1998, shall lose their position due to subcontracting during the term of this contract. A sunset provision shall apply to this provision."

On June 11, 2003, Board representatives met with Local 74 representatives. According to Local 74, the Board representatives stated that they were exploring the possibility of subcontracting, but they never asked Local 74 to modify the contract. According to the Board, it had several meetings with Local 74 to permit the union to propose modifications to try to avoid privatization.

On June 26, 2003, after reviewing the bids, the Board voted to subcontract food services for the 2003-2004 school year to Chartwells School Dining Services. According to Local 74, the Board assured it that the private company would honor all the terms of the collective negotiations agreement through June 30, 2004.

By letter dated July 24, 2003, Chartwells informed the union that it would recognize it as the bargaining representative of

Unit Leads, formerly Leaders; Cooks, Station Attendants, formerly General Workers; and Driver/Station Attendant, formerly Food Truck/General Workers. Chartwell also advised the union that it would only serve as a payroll service to the cafeteria aides and would not be employing those workers. Recognition has not been granted for workers in the job classification of cafeteria aides. The Board has told the union that Chartwells is the employer of the aides; Chartwell denies that it employs those employees.

On July 22, 2003, Local 74 demanded arbitration. This petition ensued. Arbitration hearings have been held in abeyance pending disposition of the scope petition.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual merits of this grievance or any contractual defenses the Board may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable and therefore legally arbitrable:

> [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]

The Board argues that an employer has a managerial prerogative to subcontract cafeteria workers and that it did so in good faith.

Local 74 argues that Section 2 of Article 15 is a mandatorily negotiable work preservation clause; the Board acted in bad faith and violated that clause; and an arbitrator should rule on what should be the remedy and whether any benefits are due employees as a result of the subcontracting.

The Board replies that its decision to subcontract was not made in bad faith; there is no provision in the agreement requiring the Board to consult with or notify Local 74 of its

decision to subcontract, but it did so anyway; and it did everything it could to limit the impact of privatization on unit employees.

Under the Supreme Court's actual 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. Burlington Cty. Bd. of Social Services, P.E.R.C. No. 98-62, 24 NJPER 2 (¶29001 1997). The Court recognized the employees' vital interest in not losing their jobs, but held that this interest was outweighed by the employer's interest in determining "whether governmental services are provided by government employees or by contractual arrangements with private organizations" and making "basic judgments about how work or services should be performed to best satisfy the concerns and responsibilities of government." Id. at 407. No negotiations duty attaches even if a subcontracting decision is based solely on a desire to save money and even if employees will lose their jobs as a result. In such instances, however, public employees can seek a contractual provision requiring the employer to discuss (rather than negotiate) economic issues, thus giving them a chance to show that they can do the work at a price competitive with that charged by a private sector subcontractor.

Following Local 195, we have prohibited negotiations or arbitration over decisions to subcontract work to private sector companies. See, e.g., 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. 137 N.J. 312 (1994); Borough of Pompton Lakes, P.E.R.C. No. 90-68, 16 NJPER 134 (¶21052 1990); Lacey Tp., P.E.R.C. No. 90-59, 16 NJPER 43 (¶21019 1989). Local 195's holding applies even if the subcontracting occurs during the life of a contract, Ridgewood Bd. of Ed., or if the parties have negotiated a unit work preservation clause, Cape May Cty. Bridge Comm'n, P.E.R.C. No. 92-8, 17 NJPER 382 (¶22180 1991). This case does not present any arguments or facts that warrant a departure from these precedents. Accordingly, we restrain arbitration over the decision to subcontract cafeteria services.

In addition, while Local 74 alleges that the Board's decision was made in bad faith, that allegation does not make the subcontracting decision arbitrable. The allegation must be presented in another forum. See Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 94-28, 19 NJPER 539 (¶24254 1993); N.J. Sports & Exposition Auth., P.E.R.C. No. 90-63, 16 NJPER 48 (¶21023 1989).

ORDER

The request of the Matawan-Aberdeen Regional Board of Education for a restraint of binding arbitration over the decision to subcontract cafeteria services is granted.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Katz, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Mastriani was not present.

DATED: December 18, 2003
Trenton, New Jersey
ISSUED: December 19, 2003