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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4969-06T3

TOWNSHIP OF TOMS RIVER,

Petitioner-Appellant,

v.

TEAMSTERS LOCAL 97,

Respondent-Respondent.

Argued March 5, 2008 - Decided July 29, 2008

Before Judges Payne and Sapp-Peterson.

On appeal from New Jersey Public Employment Relations Commission, SN-2006-046.

John P. Reilly argued the cause for appellant (Citta, Holzapfel & Zabarsky, attorneys; Robert A. Greitz, on the brief).

Leonard C. Schiro argued the cause for respondent (Mets Schiro & McGovern, LLP, attorneys; Mr. Schiro, of counsel and on the brief with Jordan M. Kaplan).

Ira W. Mintz, Deputy General Counsel, argued the cause for Public Employment Relations Commission (Robert E. Anderson, General Counsel, attorney and on the brief).

PER CURIAM

The Township of Toms River appeals from a decision by the Public Employment Relations Commission (PERC), following a

grievance by Teamsters Local 97, that allocation of overtime potentially available under a subcontract for tree removal, granted by the Township to a private company as the result of public bidding, was arbitrable.

Local 97 is the exclusive collective bargaining representative of the blue collar workers employed by the Township of Toms River (formerly, Township of Dover). Some of those workers are assigned to the Department of Public Lands, and perform duties that include the removal of Township trees. In 2000, the parties entered into a collective bargaining agreement, effective from July 1, 2000 to June 30, 2003. In relevant part, the agreement provided:

> ARTICLE XIII
> DIVISION OF WORK
>
> A. Foremen or other employees outside the bargaining unit shall not perform any work customarily performed by workers covered by this Agreement, except as may be required to instruct employees or in an emergency as may be required to assist employees.
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> ARTICLE XIV
> HOURS OF WORK
>
> A. This Article is intended to define the normal hours of work and shall not be construed as a guarantee of hours of work per day or week or of days of work per week and shall not apply to part-time workers.
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> B. The basic work week shall consist of forty (40) hours from Monday to Friday

inclusive. The basic work day shall consist of eight (8) hours per day exclusive of a thirty (30) minute lunch period.

C. The normal starting time shall be 7:00 a.m. and quitting time 3:30 p.m., but may be varied for seasonal operations or in emergencies.

ARTICLE XVI
OVERTIME

A. All work performed in excess of eight (8) hours in any one (1) day and forty (40) hours in any one (1) work week shall be considered overtime and compensated for at the rate of time and a half.

B. All work performed on Saturday shall be compensated for at time and one half.

* * *

F. Overtime work shall be equally distributed among employees in their respective departments as is reasonably practical among those capable of performing the work to be done.

In 2002, the Township recognized that a large number of its trees required removal. Following public bidding, on July 2, 2002, the Township entered into a negotiated contract with a private tree service, Mark Fernandes t/a Re-Mark-Able Tree Service, for the removal of 124 street trees at a cost of $474 per tree, for a total of $58,776. The bidding specifications required that the job be completed within 120 working days from

the award and execution of the contract. The specifications further provided:

> The contractor may work Monday through Friday between the hours of 7:00 AM and 6:00 PM and Saturdays between the hours of 9:00 AM and 6:00 PM. No work shall be performed on Sunday.

The executed contract contained a work hour provision that stated:

> [N]o labor, workman or mechanic in the employ of the Contractor, subcontractor or other person doing or contracting to do the whole or a part of the work contemplated by this contract shall be permitted or required to work more than (eight hours) in any one calendar day, or more than (five days) in any one week, except in cases of extraordinary emergency including fire, flood or danger to life or property, or in case of national emergency when so proclaimed by the President of the United States of America, or in any other case provided by law.

A grievance was filed by Teamsters Local 97 claiming that the private contract violated Article XIII and various other provisions of its collective bargaining agreement with the Township. After the claim was grieved without resolution, the union requested submission of the dispute by PERC to an arbitrator, alleging: "Township using outside workers to perform union members jobs." Although the Township did not object to the appointment of an arbitrator, it contended in that forum that its decision to contract with a private party for

performance of work that would otherwise have been performed by Township employees was neither negotiable nor arbitrable, and it requested that the grievance be dismissed.

The arbitrator rejected the Township's position, and further found that the Township had violated the collective bargaining agreement, determining that the Township could supplement the work of Township employees during regular working hours with contract employees, but that it must offer any overtime and Saturday opportunities first to Township union employees. The arbitrator additionally held:

> Article 13 requires bargaining unit work to be assigned to bargaining unit members unless an emergent situation arises. In the opinion of this Arbitrator, there was no emergent circumstance controlling the present subcontracting. The work could have (and should have) been assigned and performed by bargaining unit personnel.
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> * * *
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> The Township cannot avoid utilizing bargaining unit employees solely on the basis of overtime costs under the present language of the Agreement. Despite the Township's reasonable decision to use an outside contractor as a supplement for tree [removal], that assignment must be undertaken with the provisions of the Agreement and cannot be used as an excuse to substitute non-bargaining unit employees in work for which union employees are entitled.

The grievance was thus sustained, and the Township was directed to make bargaining unit employees whole for tree-cutting work

performed in 2002 during overtime hours and while union employees were off duty, inclusive of Saturdays. The parties were directed to meet in an attempt to negotiate the amount of the award and, if unable to reach agreement, to request that the arbitrator establish the remedy.

The Township filed a complaint in the Law Division seeking to vacate the arbitration award, and the union filed a counterclaim seeking its confirmation. Following submissions of cross-motions for summary judgment, the trial judge determined that the Township's decision to contract with a private company for tree removal that would otherwise have been performed by union members was a non-arbitrable managerial prerogative. Summary judgment in the Township's favor was granted, and the award was vacated.

On appeal, we remanded the matter to PERC for a determination of whether the matter in dispute was within the scope of collective negotiations. Township of Dover v. Teamsters Local 97, No. A-6267-03T3 (October 31, 2005) (slip op. at 5-11). Upon remand, PERC noted that the union "had not sought to preclude the Township from subcontracting with a private sector company to supplement the work of public employees in removing trees." See Local 195, IFPTE v. State, 88 N.J. 393 (1982). "Instead," PERS recognized, "the narrow issue

is whether the Township, having decided to use both public and private sector employees to remove trees, can legally agree that it will [not] offer work opportunities beyond the normal work day and on Saturdays to its own employees before using the subcontractor to perform that work."

PERS answered the question, thus framed, in the negative, citing its prior decisions in Old Bridge Tp. Bd. of Ed., 31 NJPER 146 (2005), Howell Tp. Bd. of Ed., 30 NJPER 333 (2004) and Paterson State-Operated School Dist., 27 NJPER 99 (2001), aff'd, 288 NJPER 290 (App. Div. 2002). PERS held:

> [T]his case involves work that is shared by unit employees and subcontractor workers. The disputed assignments are within the skills of all, but would involve the payment of overtime if given to the in-house employees. The employer has asserted a broad right to subcontract under Local 195 that does not apply to the facts presented and does not outweigh the employees' interests in seeking the extra work hours and overtime pay involved in removing trees on Saturdays or outside normal work hours. Accordingly, the grievance is legally arbitrable.

The Township has again appealed to us, asserting on appeal its position that its decision to contract with a private entity for performance of the work and its negotiation of the terms of the contract with that entity were matters of non-negotiable, non-grievable managerial prerogative. We agree.

It is conceded that the Supreme Court's decision in Local 195, as it relates to the negotiability and arbitrability of subcontracting, provides the starting point for an analysis of the issue raised in this matter. In discussing that issue, the Court recognized the constitutional right of public employees to organize and present "grievances and proposals" to their employers through a negotiating process, the paramaters of which have been established by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to -39, and case law. 88 N.J. at 401.

While recognizing that public employees, like private ones, have a legitimate interest in engaging in collective negotiations about issues that affect the terms and conditions of employment, the Court found that the scope of negotiations in the public sector was more limited, "because the employer in the public sector is government, which has special responsibilities to the public not shared by private employers." Ibid. "What distinguishes the State from private employers is the unique responsibility to make and implement public policy," which is "properly decided, not by negotiation and arbitration, but by the political process." Id. at 401-02. As a consequence, the Court stated that a legal distinction is drawn between "mandatorily negotiable terms and conditions of employment and

non-negotiable matters of governmental policy." Id. at 402 (quoting Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 163 (1978)).

> [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.
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> [Id. at 404-05.]

Addressing the issue of subcontracting resulting in layoffs, raised by the appeal, the Supreme Court recognized that: "Nothing more directly and intimately affects a worker than the fact of whether or not he [or she] has a job." Id. at 405 (quoting State v. State Supervisory Employees Assn'n, 78 N.J. 54, 84 (1978). Concluding that no preemption existed, and then addressing the third factor of interference with governmental policy, the Court observed:

> The issue of subcontracting does not merely concern the proper technical means for

implementing social and political goals. The choice of how policies are implemented, and by whom, can be as important a feature of governmental choice as the selection of ultimate goals. . . . It is a matter of general public concern whether governmental services are provided by government employees or by contractual arrangements with private organizations. This type of policy determination does not necessarily concern solely fiscal considerations. It requires basic judgments about how the work or services should be provided to best satisfy the concerns and responsibilities of government. Deciding whether or not to contract out a given government service may implicate important tradeoffs.

Allowing such decisions to be subject to mandatory negotiation would significantly impair the ability of public employers to resort to subcontracting. We have previously held that decisions to reduce the work force for economy or efficiency are non-negotiable subjects. State v. State Supervisory Employees Ass'n, 78 N.J. at 88. . . . The decision to contract out work or to subcontract is similarly an area where managerial interests are dominant. This is highlighted by the fact that allowing subcontracting to be negotiable may open the road to grievance arbitration. Imposing a legal duty on the state to negotiate all proposed instances of subcontracting would transfer the locus of the decision from the political process to the negotiating table, to arbitrators, and ultimately to the courts. The result of such a course would significantly interfere with the determination of governmental policy and would be inimical to the democratic process.

[Id. at 407-08.]

Nonetheless, the Court held that its decision did not grant the public employer an unlimited right 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." Id. at 411.

In the present appeal, the union does not contest the Township's right to enter into a private contract to aid in cutting down the unusually large number of trees designated as requiring that procedure. Implicitly, then, it concedes that, in 2002, the Township had a legally cognizable managerial interest in entering into a contract that would lessen the burden that would otherwise have been placed on municipal workers assigned to tree-felling duties and would accomplish the goal of eliminating dead or diseased sidewalk trees within the specified summer and fall period after the private contract was signed in early July.[1] Nor can the union legitimately complain that it was denied overtime opportunities during the week, since the contract signed by Re-Mark-Able specified that workers could only be employed for an eight-hour day, and thus overtime was,

[1] We note that 120 work days would encompass a period from July 2 to mid-November, when time for outdoor work effectively ended.

in a practical sense, unavailable. The union's complaint therefore can be distilled to an objection to the fact that Re-Mark-Able was authorized to perform work on Saturdays that, if accomplished by union employees, would have constituted overtime.

However, we see no evidence in the record to suggest that the purpose of the contract was to channel Saturday work to private employees and thus to avoid overtime expense. In this regard, we distinguish the three decisions upon which PERC relied (Old Bridge, Howell, and Paterson) all of which involved circumstances in which only overtime hours were contractually transferred to private employees. Here, in contrast, the fact that Saturday was included as a work day pursuant to the private contract between Re-Mark-Able and the Township was merely an incidental feature of the contract, and cannot realistically be deemed its predominant purpose. We thus do not accept as factually supported PERC's implicit conclusion that the Township entered into the private contract in bad faith to avoid excess labor costs, and conclude instead that the contract was rationally related to the legitimate governmental purpose of ridding the Township of dead and dying trees before winter commenced.

In order to meet the union's objections with respect to overtime, the Township would have been required to enter into a private contract that, in essence, mirrored the collective bargaining agreement between the union and the Township. However, nothing in statute or case law places such restrictions on the Township's exercise of its power to contract. Indeed, such restrictions would significantly interfere with the exercise of inherent management prerogatives in a fashion contrary to the dictates of Local 195 and the cases that preceded it. See 88 N.J. at 404. As a result, we find the union's grievance to be non-arbitrable.

In light of this conclusion, we decline to address at length the Township's further argument that Article XIII of the collective bargaining agreement does not preclude the contract at issue.[2] However, we note that if "other employees" is construed as the union argues to include the employees of independent contractors, such as Re-Mark-Able, then the provision would be in violation of Local 195, because it would

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[2] The Article provides:

> Foremen or other employees outside the bargaining unit shall not perform any work customarily performed by workers covered by this Agreement, except as may be required to instruct employees or in an emergency as may be required to assist employees.

essentially preclude the Township from exercising its management prerogative to enter into private contracts for municipal work.

Reversed.