

P.E.R.C. NO. 2014-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF UNION,

Petitioner,

-and-

Docket No. SN-2013-017

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 102,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the County of Union for a restraint of binding arbitration of a grievance filed by the International Brotherhood of Teamsters, Local 102. The grievance asserts that the County violated the parties' collective negotiations agreement when it proposed layoffs of three teachers who were replaced by Union County Educational Services Commission (ESC) employees. The Commission finds that Local 102's demand to arbitrate the County's failure to discuss the layoffs/subcontracting impermissibly challenges the County's non-negotiable right to adjust and expand its pre-existing contractual arrangement with ESC for reasons of economy and efficiency.

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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Respondent.

Appearances:

For the Petitioner, Bauch Zucker Hatfield, LLC,
attorneys (Kathryn Van Deusen Hatfield, of counsel)

For the Respondent, Levy Ratner, P.C., attorneys (Susan
J. Cameron, of counsel)

DECISION

On November 2, 2012, the County of Union filed a scope of negotiations petition. The County seeks a restraint of binding arbitration of a grievance filed by the International Brotherhood of Teamsters, Local 102 (Local 102) asserting that the County violated the parties' collective negotiations agreement (CNA) when it proposed layoffs of three teachers, whose positions were subsequently filled by employees of the Union County Educational Services Commission (ESC).

The County has filed briefs, exhibits, and the certification of Gregory Lyons, Superintendent of the Juvenile Detention Center. Local 102 has filed a brief, exhibits, and the

certifications of Tom Duffy, Local 102 Business Agent, and one of the three laid-off teachers. These facts appear.

Local 102 represents a negotiations unit of Public Safety Professional Staff at the Union County Jail and Juvenile Detention Center. The County and Local 102 are parties to a CNA effective from January 1, 2009 through December 31, 2012. The grievance procedure ends in binding arbitration. Since 2000, the County has had a contractual relationship with the ESC, a public entity, to "provide educational services [and supervision] for residents of the Juvenile Detention Center." The contract is renewed annually.

On February 15, 2012, the County filed a layoff plan with the New Jersey Civil Service Commission (CSC) for the elimination of 43 positions, including the three teacher positions held by the grievants. On February 29, 2012, the CSC's Director of State and Local Operations approved the plan in a letter addressed to the County Manager and copied to 11 other persons, including the President of Local 102.^{1/}

On February 15, 2012, the teachers were notified that the County planned to lay them off effective May 1. As all three

1/ The letter reminded the County of procedural and notice mandates set by law. It advised the County that, after service of layoff notices, his office would determine "seniority, displacement and re-employment rights." It directed that the County advise "of any contemplated or actual changes in the scope or timing of the layoff. . ."

teachers had the requisite years of service, in order to preserve their rights to retiree health benefits, the teachers opted to retire on April 30 in lieu of being laid off.

On April 30, 2012, the County replaced the three teachers with three "regular education" teachers provided by the ESC.

On March 14, 2012, Local 102 filed a grievance asserting that the County's proposed layoff of the teachers violated the recognition and seniority clause of the CNA. The County denied the grievance and Local 102 demanded arbitration. An arbitration hearing was held on October 1. The parties agreed that the arbitrator would not issue his decision until a scope of negotiations determination was made by the Public Employment Relations Commission. On November 2, the County filed this petition which asserts that Local 102 seeks to have the arbitrator overturn its decision to subcontract.

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 merits of the grievance or any contractual defenses the employer may have.

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

[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].

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

Both the County and Local 102 concur that a public employer has a right to subcontract work to private employers or other public employers.

The County argues that arbitration over its decision to have the ESC provide teaching services at the Juvenile Detention Center would significantly interfere with its governmental policy

decision to determine whether it will provide such services itself or by utilizing third parties. The County cites Local 195, supra, for the proposition that the ultimate substantive decision to subcontract is a non-negotiable matter of managerial prerogative. It asserts that the Commission has applied the Local 195 balancing test to situations, as in the instant case, involving the contracting of public work to another public employer. The County cites two decisions involving Interlocal Services Agreements [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)] in which the Commission found that the decision to subcontract to another public employer is a non-negotiable policy decision about the manner and means of providing public services. The County contends that use of the ESC teachers is more efficient and cost-effective, and that Local 102's interest in avoiding layoffs must yield to the County's ability to make the governmental policy determination of who will provide educational instruction to Juvenile Detention Center residents.

Local 102 argues that the dispute involves seniority and recognition issues which are mandatory subjects of negotiation. It asserts that it seeks to enforce Articles 1 and 6 of the CNA, the Recognition and Seniority clauses respectively. Local 102 cites Passaic County Prosecutor's Office, P.E.R.C. No. 2009-33,

34 NJPER 440 (¶138 2008) for the proposition that when laying off for economic reasons, as in the instant case, an employer can agree to use seniority as a deciding factor. Local 102 contends that the underlying grievance does not dispute the County's ability to subcontract to the ESC, but if it did, then it would still be arbitrable because Local 195 held that the issue of "discussing" a subcontracting decision based on fiscal reasons that results in layoffs is mandatorily negotiable.

The County replies, citing Lyons certification, that laying off the teachers and then replacing them with ESC personnel after they retired was not based exclusively on fiscal reasons.

Initially, we observe that, even though on the date the grievance was filed the County had apparently not yet requested ESC to provide personnel to replace the retired teachers, Local 102's pending claims amount to a de facto challenge to the County's contractual arrangement with ESC.

Local 102's recognition clause claims seek a determination that personnel performing the duties of the retired teachers are part of the collective negotiations unit it represents. And the Seniority clause contentions amount to an assertion that, as employees with lengthy tenure, the retired grievants had a superior claim on the positions now filled by ESC teachers. Under either theory, Local 102's grievance and arbitration demand

challenges the County's non-negotiable right to adjust and expand its pre-existing contractual relationship with ESC.

Local 195 holds that a decision to subcontract is a non-negotiable managerial prerogative where that determination is made for reasons of economy and efficiency, but a requirement that a public employer discuss subcontracting if undertaken only for economic reasons is mandatorily negotiable and enforceable where layoffs would occur.^{2/}

^{2/} The Court (88 N.J. at 393, 409-410) makes a distinction between discussions and collective negotiations:

[W]e hold that a public employment contract may include a provision reciting an agreement by the State to discuss decisions to contract or subcontract whenever it becomes apparent that a layoff or job displacement will result, if the proposed subcontracting is based on solely fiscal considerations. In such situations, the public would clearly benefit from suggestions by public employees directed toward improving economy or efficiency. While the public employees have no right to negotiate on the ultimate decision to subcontract, they may have a procedural right to present their position on the economic issue. Thus, for example, they could seek to show the employer that the employees are willing to perform the same job at a price competitive with the private replacements.

Discussion of subcontracting which is contemplated for purely fiscal reasons does not implicate governmental policy to the extent that it would if the decision were based on non-fiscal reasons. . . . However, discussion about such a replacement would not significantly interfere with the determination of public goals. In fact, as we have explained, such discussions would be in the public interest, since employees could demonstrate that they would do the same work more efficiently than a private contractor.

Based upon the unrefuted certification submitted by Lyons, the following circumstances appear: In 2000 the County made a decision to subcontract with the Educational Services Commission to provide supervision and instructional services needed to comply with the educational requirements set forth at N.J.A.C. 13:92-1 et. seq. As part of this arrangement the ESC provided three (3) regular education teachers, and the services of a Physical Education teacher, an English as a Second Language teacher, a Title One teacher, a Math teacher, a Science teacher, and a School Secretary. In addition to these staff, the ESC also provides a Head Teacher who supervises and coordinates the educational staff and program at the Juvenile Detention Center to insure compliance with the Administrative Code. The Head Teacher makes all operational and educational decisions concerning the composition of classes, the daily schedule and the assignment of staff to students. The Head Teacher reports to the Superintendent of the ESC, and functions as the Educational Administrator of the program, including the evaluation of both the ESC staff, and the three teachers employed by the County.

The County claims that the subcontracting of the remaining three teacher positions to the ESC was based upon reasons of both economy and efficiency. While the economic underpinnings of the decision are unchallenged, Local 102 disputes that there was an efficiency component to the decision, and urges that its request

to arbitrate the failure of the County to engage in "discussions" should be permitted to proceed.

Based upon what has been stated above, Local 102 has not met the standard set forth in the Local 195 decision to mandate a right to submit to arbitration a failure to discuss the subcontracting issue. On the record before us, we determine that the County's personnel action was more than a subcontracting based on economic reasons. As set forth above it would appear that the County had the managerial prerogative to decide that all of its teachers should be under the direction of its Head Teacher, that they should all work the school schedule required by the Administrative Code, rather than the County work schedules, and to have the availability of substitute teachers provided by the ESC. Simply put, it is more efficient for the entire Educational Program at the Juvenile Detention Center be under a single unified educational and administrative program providing for a single educational schedule, single administrative control, and a single staff schedule, rather than the duality which existed before the subcontract with ESC.

For all of these reasons the arbitration will be restrained.

ORDER

The request of the County of Union for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson, Voos and Wall voted in favor of this decision. None opposed. Commissioners Bonanni and Jones were not present.

ISSUED: November 21, 2013

Trenton, New Jersey