P.E.R.C. NO. 2015-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WINSLOW TOWNSHIP PARAPROFESSIONAL ORGANIZATION LOCAL 6171, AFT, AFL-CIO,

OAL DKT. NO. EDU 1077-110
AGENCY DKT NO. 159/6/11

OAL DKT NO. PRC 15022-13
PERC DKT NO. CO-2011-086

Petitioner/Charging Party,

-and-

WINSLOW TOWNSHIP BOARD OF EDUCATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission adopts the Initial Decision of an Administrative Law Judge designated to hear a contested case pursuant to a Joint Order of Consolidation and Predominant Interest (P.E.R.C. No. 2014-8, 40 NJPER 171 (¶65 2013)) that consolidated an unfair practice charge filed by the Winslow Township Paraprofessional Organization Local 6171, AFT, AFL-CIO (Local 6171) against the Winslow Township Board of Education (Board), and an appeal by Local 6171 to the Commissioner of Education. As to the PERC matter, the Initial Decision denied Local 6171's motion for summary decision, and granted the Board's motion for summary decision and dismissed the unfair practice complaint. The Commission holds that the ALJ was correct in finding that the Board had a managerial prerogative to subcontract, and that the record is devoid of bad faith on the part of the Board. The Commission also finds that the ALJ was correct in dismissing unfair practice allegations for refusal to permit union representatives on workers' compensation on school property where the record showed a Board policy prohibiting employees on workers' compensation from entering school property, and the Board offered another negotiations location.

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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WINSLOW TOWNSHIP BOARD OF EDUCATION,

Respondent.

Appearances:

For the Petitioner/Charging Party, Freedman & Lorry, P.C., attorneys (Lance Geren, of counsel)

For the Respondent/Respondent, Wade, Long, Wood & Kennedy, LLC, attorneys (Leonard J. Wood, of counsel)

DECISION

On July 20, 2011, the Winslow Township Paraprofessional Organization, Local 6172, AFT, AFL-CIO filed a petition with the Commissioner of Education appealing the determination by the Winslow Township Board of Education to hire a private company to provide educational aides, bus aides, day-care providers and before and after school care givers.

On August 23, 2011, the Local filed an unfair practice charge with the Public Employment Relations Commission (PERC) alleging that the Board violated the New Jersey Employer-Employee

Relations Act, N.J.S.A. 34:13A-5.4a(1), (3) and (5)[1/], (Act) when it unilaterally subcontracted unit work and interfered with the Local's selection of its representatives in retaliation for protected activity.

On July 5, 2013, the Local filed a motion to consolidate the cases and for a predominant interest determination. On August 8, 2013, Administrative Law Judge Susan M. Scarola issued an Order for Consolidation and Determination of Predominant Interest finding that the matters should be consolidated and that this Commission has the predominant interest. On August 29, the Chair of PERC pursuant to the authority delegated to her by this Commission and the Commissioner of Education issued a joint order consolidating the two cases for hearing before the Office of Administrative Law and determining that PERC has the predominant interest. Winslow Tp. Bd. of Ed., P.E.R.C. No. 2014-8, 40 NJPER 171 (¶65 2013).

1/ These provisions 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. ... [and](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."

On January 31, 2014, the parties agreed before the Administrative Law Judge (ALJ) to a Stipulation of Facts with exhibits. On May 6, Local 6171 filed a motion for summary decision. On May 28, the Board filed a cross-motion for summary decision. On August 12, Administrative Law Judge Susan M. Scarola issued an initial decision. As to the PERC matter, the ALJ granted the Board's motion and dismissed the unfair practice complaint.[2/] The ALJ held that the employer had a managerial prerogative to subcontract unit work and that the stipulated record did not establish that the Board acted in bad faith.

On August 25, 2014, Local 6171 filed exceptions to the ALJ's decision. The exceptions to the decision as related to the PERC case focus on whether the ALJ erred by failing to find that the Board engaged in bad faith negotiations in connection with its decision to subcontract unit work and whether the ALJ erred by failing to address the issues of whether the Board violated the Act by unilaterally replacing unit employees and unilaterally eliminating unit employees. To address these exceptions, we will first summarize the facts related to the unfair practice case that were stipulated to by the parties.

2/ In the Commissioner of Education matter, the ALJ granted the Association's motion, in part, and denied it in part. Pursuant to the Joint Order, this decision only considers the unfair practice complaint.

Local 6171 was certified on October 3, 2001 as the majority representative for all regularly employed paraprofessional employees of the Board including those in the job classification Lunchroom/Playground Aide (LPA), ESA classrooms, ESA bus, breakfast aide, copy clerk and clerk typist. The parties entered into a collective negotiations agreement (CNA) with a duration from July 1, 2002 through June 30, 2005.

In February 2004, Local 6171 was also certified as the majority representative of all regularly employed child care givers employed by the Board in its before and after school child program, including child care workers and head child care workers. The parties entered into a CNA with a duration from July 1, 2005 through June 30, 2007 wherein the parties agreed to amend the recognition clause and merge the two units to include the positions of Caregivers and Head Caregivers.

The parties entered into another CNA from July 1, 2009 through June 30, 2010. On February 9, 2009, the Board received notice from the County Superintendent that, among other issues, the Board needed to look at privatization of services. On May 14, 2009, the Clerk Typists, Copy Clerks and Breakfast Aides received notices that they would not receive offers of employment the following year. In January 2010, the Board advised Local 6171 that it was looking into privatization for the services

being provided by the unit employees which was followed up with a meeting in March 2010.

On April 15, 2010, Local 6171 requested to commence negotiations for a successor agreement. In a letter dated April 23 and at a meeting held on April 26, the Board presented changes it sought to the parties' agreement to effectuate the needed savings. On June 7, the Board issued notices to Education Student Aides Classrooms, Education Student Aides Bus, Lunch/Playground Aides, and Caregivers and Head Caregivers advising them that they would not receive offers of employment for the following school year. On June 15, an "RFP" was published for privatization of services being performed by the unit employees. Notices were issued to employees on June 24 regarding the termination of their employment.

The parties also held a negotiations session on June 24, 2010. At the outset of the negotiations session, the Board declined to allow two members of the negotiations committee admittance to the facility because they were receiving workers' compensation. The Board's decision was based on a long-standing policy that Board of Education employees who are out of work on workers' compensation leave are not permitted on school property. The Board offered to reschedule the session at a different location, but the Local's representatives wanted to proceed. During the session, the parties entered into a tentative

Memorandum of Understanding (MOU) that was subject to ratification by the membership and the Board.

The Board needed to move forward as of July 1, 2010 to provide services if the Local failed to ratify the MOU. The Board ratified the MOU at its June 25, 2010 meeting. The Board also approved a response to the RFP at the same meeting. On July 1, Local 6171 notified the Board that it had overwhelmingly voted to not ratify the MOU.

As of June 30, 2010, there were 96 employees in the unit. Subsequent to July 1, 2010, the Board contracted with an outside agency to provide the needed services. On August 4, 2010, the Board approved job descriptions for the positions of Child Development Counselor - Child Service Worker and Child Development Counselor - Supervisor AM/PM. On July 22 and August 11, the Board posted for applicants for AM Supervisors, PM Supervisors, and Child Service Workers. On September 1, the Board approved the creation of the position Child Service Worker. The Board employed 28 child service workers and six supervisory staff who were hired in August 2010.

In December 2010, the Board received a letter from the County Superintendent commending it on the privatization and the savings generated. For the 2012-2013 school year, the Board determined that it would attempt to provide some services on its own that it had previously subcontracted to an outside agency.

On August 22, 2012, the Board hired six employees for the Winslow Child Development Academy Program. After one year, the Board determined that it was not cost effective to hire the employees and the outside agency again provided those services.

Local 6171 takes exception to the Board's subcontracting of unit work and the ALJ's finding that the Board had a managerial prerogative to subcontract the work for economic reasons. It further takes exception to the ALJ's finding that the Board negotiated in good faith regarding the subcontracting.

We reject these exceptions. The ALJ was correct in finding that the Board had a managerial prerogative to subcontract. Under the Supreme Court's actual holding in Local 195, IFPTE v. State of New Jersey, 88 N.J. 393 (1982), 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. Here, the stipulated record reflects the Board did negotiate to the point of signing an MOU with the union in an attempt to save the jobs of the employees the Board sought to subcontract. The Board ratified the agreement and the union

rejected it with the knowledge that the result would be the loss of jobs.

We further agree with the ALJ that the record is void of any bad faith on the part of the Board. This includes the Board's subsequent action of hiring for positions that were not subcontracted. The Board reorganized the way it delivered these services after the union rejected the MOU and we can not glean from the stipulated record an inference of a plan to eviscerate the union, particularly when the Board negotiated where it did not have an obligation to do so and ratified the MOU. An employer is generally obligated to negotiate with the majority representative before shifting work historically performed by one group of employees within a negotiations unit to other employees outside the unit. See, e.g., North Arlington Bd. of Ed., P.E.R.C. No. 98-10, 23 NJPER 469 (¶28210 1997). However, where an employer has exercised its managerial right to reorganize the way it delivers government services it may, by necessity, be able to transfer job duties to non-unit employees without incurring a negotiations obligation. See, e.g., Maplewood Tp., P.E.R.C. No. 86-22, 11 NJPER 521 (¶16183 1985)(employer consolidating police and fire dispatching functions had managerial prerogative to employ civilian dispatchers); Freehold Reg. H.S. Bd. of Ed, P.E.R.C. No. 85-69, 11 NJPER 47 (¶16025 1984) (board had prerogative to reorganize supervisory structure for custodial

employees with consequence that some unit work was shifted outside negotiations unit).

Finally, Local 6171 excepts to the ALJ's dismissal of its allegations that the Board violated section 5.4a(1) of the Act when it refused to permit negotiation representatives on school property who were currently receiving workers' compensation benefits. This argument is not supported by the stipulated record. Local 6171 stipulated that there is a Board policy prohibiting employees on workers' compensation to be on school property. If further stipulated that the Board offered to adjourn the negotiations session to be held at another location and the Local decided to proceed. On this record, the ALJ was correct in dismissing these allegations.

We dismiss the unfair practice complaint. We transmit this case to the Commissioner of Education for consideration in accordance with the Joint Order.

ORDER

The Unfair Practice Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Voos and Wall voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Eskilson was not present.

ISSUED: September 18, 2014

Trenton, New Jersey