P.E.R.C. NO. 2015-71

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HAMILTON TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2014-089

MERCER COUNTY & VICINITY BUILDING TRADES COUNCIL,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of several clauses in an expired collective negotiations agreement between the Hamilton Township Board of Education and the Mercer County & Vicinity Building Trades Council. The Commission holds that the disputed clauses, concerning subcontracting limitations and requiring the employer to hire from a union hiring hall, are not mandatorily negotiable.

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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Appearances:

For the Petitioner, Capehart Scatchard, attorneys (Joseph F. Betley, of counsel)

For the Respondent, Pellettieri Rabstein & Altman, attorneys (Andrew L. Watson, of counsel)

DECISION

On April 14, 2014, the Hamilton Township Board of Education petitioned for a scope of negotiations determination. The Board asserts that portions of the most recent collective negotiations agreement (CNA) between it and the Mercer County and Vicinity Building Trades Council (Council or Union) are not mandatorily negotiable and may not be included in a successor CNA.

The parties have filed briefs and exhibits. The Council represents blue collar workers employed by the Board in six

specific titles.[1/] The Board and the Council are parties to a CNA in effect from July 1, 2010 through June 30, 2012.

On November 19, 2014, while this case was pending, the Board approved a new CNA to be in effect from July 1, 2012 through June 30, 2017. However, the parties did not completely resolve their negotiability differences and have jointly requested that the Commission issue a decision on the disputed language.[2/]

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982), defines the test for determining mandatory negotiability:

> [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

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1/ The titles are: carpenters; painters; plumbers; electricians; masons; and laborers.

2/ The parties have confirmed that disputes over proposals or existing language on these issues have been resolved: creation of new "General Lead Person" position; Article 4.2 regarding sick leave verification; current language in Article 7:1.1 concerning five issues pertaining to a second shift. The new CNA specifically identifies the provisions raised in the scope of negotiations petition that remain in dispute. However, we will not make a ruling on Articles 10:2.7-1 and 10:2.7-4, addressing emergency situations, as the Board has not argued their negotiability and its Reply Brief omitted those provisions as matters still in dispute.

> managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

Initially we reject the Council's argument that the presence of specific contract language in CNAs between the Board and the Council and/or adherence to a specific past practice for a period of several decades establishes that the disputed provisions are mandatorily negotiable and may be included in a successor CNA. The Council cites no authority for that proposition. Its position is at odds with precedential rulings on negotiability.

For example, in Ridgefield Pk. Ed. Ass'n v. Ridgefield Pk. Bd. of Ed., 78 N.J. 144 (1978), the parties' CNA contained explicit language addressing both voluntary and involuntary transfers of teachers. 78 N.J. at 150. The Association had filed several grievances alleging that transfer decisions by the Board violated contract mandates governing substantive and procedural aspects of transfers. Despite the existence of that language, the Court held that grievances seeking to enforce the language and remedy the alleged contractual violations could not be submitted to arbitration because they were not mandatorily negotiable. Ridgefield Park, 78 N.J. at 162. See also In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977) where the negotiability dispute involved the terms of the parties most recent agreement as well as proposed new contract terms.

Council also contends that our negotiability ruling should be informed by the parties' agreement to use a private sector structure, including a "hiring hall" and a list of union-approved contractors eligible for priority consideration by the Board in subcontracting situations.

Some public employers operate facilities and perform functions that are identical to private businesses. See e.g. New Jersey Sports & Exposition Authority, P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987) (race track with pari mutual betting).

But, unless a statute provides that a special class of public employees are governed by a different scope of negotiations definition[3/], public employees are subject to public sector negotiability standards. The identity of the employer, not the nature of the employees' work, controls the scope of negotiations and related issues. See Monmouth Univ. and West Long Branch PBA Local No. 141, 31 NJPER 142 (¶62 App. Div. 2006)

We now review the contract language that remains in dispute.

Maintenance/Repair Work: subcontracting

Article 10:2.6 provides that in non-emergent circumstances:

- The Board will not subcontract "any routine preventive maintenance or repair work normally performed by members of the bargaining unit."

3/ See N.J.S.A. 27:25-14(d) governing New Jersey Transit employees and In the Matters of N.J. Transit Bus Operations Inc., New Jersey Transit Corporation and Amalgamated Transit Union, et al., 125 N.J. 41 (1991).

- The Board may subcontract for the replacement of "entire system components" where the subcontractor complies with the requirements of a September 24, 2003 Board resolution

Article 10:2-7.3 provides that the Board shall solicit bids from a list of subcontractors provided by the Council.

Local 195 holds that the decision to subcontract work currently performed by a public employer's own employees to a private employer is not mandatorily negotiable. The Court holds that in cases where the subcontracting would result in layoffs, a public employer may agree to engage in pre-subcontracting discussions with the majority representative. 88 N.J. at 409. However, Article 10:2-7.6 would limit the Board's subcontracting options beyond that which is permitted by Local 195.[4/]

A public employer has discretion to determine who to hire to perform the services it offers to the public. See North Bergen Tp. Bd. of Ed. v. North Bergen Fed. Teachers, 141 N.J. Super. 97 (App Div 1976). Limiting the Board to contractors on a union-approved list would violate that principle. See also George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8 (1994). Article 10:2-7.3 is not mandatorily negotiable.[5/]

Hiring Hall

4/ See New Jersey Sports & Exposition Authority, P.E.R.C. No. 90-63; 16 NJPER 48 (¶21023 1989); 1989 NJ PERC LEXIS 344, for examples of both non-negotiable and negotiable contract clauses regarding subcontracting

5/ Our decision does not consider how public bidding statutes may affect the Board's subcontracting flexibility.

Article 10:2-7.2 requires that for temporary employee positions, the Board shall use the union hiring hall. The Council also asserts that, by virtue of a long-standing past practice, the Board must use the hiring hall to employ regular workers.

We have not directly addressed whether a public employer can bind itself to hire as employees only those workers who are referred through a union hiring hall. However, as we have discussed in connection with Article 10:2-7.2, requiring a public employer to limit its choice of subcontractors to those who have been approved by the Union would significantly interfere with managerial prerogatives and is not mandatorily negotiable. That principle applies with equal or greater force in situations where the public employer is hiring workers that will be its own employees. See North Bergen.

ORDER

These provisions are not mandatorily negotiable and are deemed not to be included in the successor CNA between the Board and the Council in effect form July 1, 2012 through June 30, 2017: Article 10:2.6; Article 10:2.7-2; Article 10:2.7-3.

BY ORDER OF THE COMMISSION

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

ISSUED: May 21, 2015

Trenton, New Jersey