

P.E.R.C. NO. 2016-9

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

VERNON TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-040

VERNON TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Vernon Township Board of Education's request for a restraint of binding arbitration of a grievance filed by the Vernon Township Education Association. The grievance contests the Board's unilateral subcontracting of bargaining unit work to non-bargaining unit individuals. The Commission holds that the Board exercised its non-negotiable right to subcontract services to the private sector and that the Association failed to effectively raise any related impact claim.

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, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (James L. Plosia, Jr., of counsel)

For the Respondent, Oxfeld Cohen, P.C., attorneys (William P. Hannan, of counsel)

DECISION

On December 18, 2014, the Vernon Township Board of Education (Board) filed a scope of negotiations petition. The Board seeks a restraint of binding arbitration of a grievance filed by the Vernon Township Education Association (Association). The grievance asserts that on September 11, 2014, the Board unilaterally subcontracted bargaining unit work of Association occupational therapists (OT) and physical therapists (PT) to non-bargaining unit individuals.

The parties have filed briefs and exhibits. However, neither party has recited facts "supported by certification(s) based upon personal knowledge."<sup>1/</sup> These facts appear.

The Association represents, among others, occupational and physical therapists employed by the Board. The Board and the Association are parties to a collective negotiations agreement (CNA) in effect from July 1, 2013 through June 30, 2016. The grievance procedure ends in binding arbitration, with certain exceptions listed in the CNA.

The Association filed a Level 3 grievance with the Board on September 12, 2014 alleging that bargaining unit work (evaluations and therapy caseload) was assigned to non-bargaining unit individuals (private agency therapists)<sup>2/</sup> on or around September 11, 2014. Subsequently, the Association filed a Level 5 grievance with the Board on September 17, 2014 alleging that a finalized directive to assign OT and PT caseload to non-bargaining unit individuals was presented to in-district OTs and PTs by two Special Education supervisors. Despite the Association's indication that in-district OTs and PTs had time within their schedule to adequately accommodate all of the students being removed from their caseload, the grievance asserts

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<sup>1/</sup> N.J.A.C. 19:13-3.6(f)1.

<sup>2/</sup> The Board's scope petition and brief specify that the private contractor is J&B Therapy, LLC.

that the Special Education supervisors repeatedly noted that the topic and decision were not up for discussion. The Board denied the grievance at all steps. On October 29, 2014, the Association demanded binding arbitration. This petition ensued.

The Board asserts that even if it did subcontract services to an outside entity in the form of work normally performed by Association members, such action is within the Board's non-negotiable managerial prerogatives. Citing East Brunswick Bd. of Ed., P.E.R.C. No. 2000-41, 26 NJPER 21 (¶31006 1999), South Amboy Bd. of Ed., P.E.R.C. No. 82-10, 7 NJPER 448 (¶12200 1981), N.J.S.A. 18A:46-5.1,<sup>3/</sup> N.J.A.C. 6A:14-5.1(a)(2),<sup>4/</sup> and N.J.A.C.

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3/ Pursuant to N.J.S.A. 18A:46-5.1:

Each board of education and State operated program shall separately or jointly with one or more boards of education or State agencies provide for basic child study team services. The basic child study team shall consist of a school psychologist, a learning disability teacher consultant and a school social worker, and for the purposes of evaluation and classification shall include pertinent information from certified school personnel making the referral.

4/ Pursuant to N.J.A.C. 6A:14-5.1(a)(2):

(a) Each district board of education, independently or through joint agreements, shall employ or contract with child study teams as set forth in N.J.A.C. 6A:14-3.1(b), speech correctionists or speech-language specialists and other school personnel in numbers sufficient to ensure provision of

(continued...)

6A:14-3.1(b),<sup>5/</sup> the Board argues that the Association's grievance is not arbitrable because boards of education in New Jersey may supplement child study team (CST) services with additional teams through contracts or joint agreements.

The Association responds that OTs and PTs are included in Article I of the CNA and maintains that the work performed by OTs and PTs - which includes student evaluations and therapy - has traditionally been performed by bargaining unit members. While conceding that boards of education in New Jersey generally have a managerial prerogative to subcontract services, the Association cites Byram Tp. Bd. of Ed. v. Byram Tp. Ed. Ass'n, 152 N.J.

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4/ (...continued)  
required programs and services pursuant to this chapter.

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2. A district board of education may supplement child study team services with additional teams through contracts or joint agreements.

5/ Pursuant to N.J.A.C. 6A:14-3.1(b):

Child study team members shall include a school psychologist, a learning disabilities teacher-consultant and a school social worker. All child study team members shall be employees of a district board of education, have an identifiable, apportioned time commitment to the local school district and shall be available to provide all needed services during the hours students are in attendance.

Super. 12, 18-20 (App. Div. 1977), Union Tp. Bd. of Ed., P.E.R.C. No. 89-50, 14 NJPER 692 (¶19295 1988), and Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-6, 10 NJPER 494 (¶15224 1984) for the proposition that the impact of even a non-negotiable subject is arbitrable and/or negotiable and that the Commission must deny the request for restraint of arbitration to the extent that the decision to subcontract impacts the terms and conditions of employment for in-district OTs and PTs. The Association asserts that the decision to subcontract student evaluations and therapy has a number of significant impacts on the bargaining unit members who traditionally perform that work, potentially including hours of work, compensation, caseload, and other mandatorily negotiable terms and conditions of employment.

In its reply brief, the Board argues that because there is no impact alleged by the Association in its grievance or as a matter of fact in this case, arbitration of the underlying grievance must be restrained in its entirety.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the employer may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

The Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982):

[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.

Given the consensus set forth in the parties' briefs that boards of education in New Jersey generally have a non-negotiable managerial prerogative to subcontract services to the private sector, the question that the Commission must consider here is whether the Board's decision to subcontract has any severable impact on the terms and conditions of employment for in-district OTs and PTs which is mandatorily negotiable. Under the circumstances, we find that it does not.

"The unit work rule provides that an employer must negotiate before using non-unit employees to do work traditionally performed by negotiations unit employees alone." Ocean Tp., P.E.R.C. No. 2011-90, 38 NJPER 72 (¶15 2011). Although

"[s]ubcontracting and the unit work doctrine may have similar consequences," however, "the former is not negotiable while the latter is, depending on the circumstances." Id.; see also Rutgers, The State University and AFSCME, P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd NJPER Supp.2d 132 (¶113 App. Div. 1983). As set forth in Matawan-Aberdeen Regional Bd. of Ed., P.E.R.C. No. 2004-35, 29 NJPER 541 (¶173 2003):

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).

\* \* \*

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); ...

Here, there is no dispute between the parties that the Board exercised its non-negotiable managerial prerogative to subcontract services to a private company, J&B Therapy, LLC. Specifically, although the Board is required to provide basic CST services<sup>6/</sup> by employing CST members,<sup>7/</sup> OTs and PTs are not members of the CST and the Board is permitted to supplement CST services

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<sup>6/</sup> N.J.S.A. 18A:46-5.1.

<sup>7/</sup> N.J.A.C. 6A:14-3.1(b).



through contracts.<sup>8/</sup> Under these circumstances, the Board had no duty to negotiate with the Association regarding its decision to subcontract in-district OT and PT work to the private sector. See Matawan-Aberdeen Regional Bd. of Ed., supra. Accordingly, the Board's request to restrain arbitration of its decision to subcontract is granted.

Based upon the Association's assertion in its opposition brief, the Commission is also presented with the issue of whether the Board's decision to subcontract has any severable impact on the terms and conditions of employment for in-district OTs and PTs that is mandatorily negotiable. With respect to impact negotiations, "where...activities relate 'to managerial and/or educational decisions and are not themselves terms or conditions of employment,' they are not negotiable except to the extent that these matters may have an effect or impact upon the employees' terms and conditions of employment, in which case the employer is required to negotiate 'regarding that impact as it relates to terms and conditions of employment.'" Byram Tp. Bd. of Ed. v. Byram Tp. Ed. Ass'n, 152 N.J. Super. 12, 20 (App. Div. 1977) (citing In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976)).

Here, the grievances submitted in response to the Board's decision to subcontract provide no indication of any specific

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<sup>8/</sup> N.J.A.C. 6A:14-5.1(a)(2).

impact upon bargaining unit OTs and/or PTs. There is also no indication that the Association sought, or was refused, the opportunity to engage in impact negotiations with the Board. While the Association's brief asserts that subcontracting has created current/potential impact(s), the Association has not submitted any factual certification(s) addressing that point or specifying what, if any, impact the Board's decision to subcontract has on bargaining unit OTs and/or PTs. See N.J.A.C. 19:13-3.6(f)1. Although "[w]e may look beyond the initial grievance documents to determine the essence of a union's claim," in this instance we find that the Association has failed to effectively raise an impact claim at any stage - including in its submissions related to this scope petition. *City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504* (¶19212 1988); see also *North Hunterdon Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 86-55, 11 NJPER 707* (¶16245 1985). Accordingly, to the extent that the Association seeks to arbitrate the alleged impact of the Board's decision to subcontract, the Board's request to restrain arbitration is granted.

ORDER

The request of the Vernon Township Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Voos and Wall voted in favor of this decision. Commissioner Jones voted against this decision.

ISSUED: August 13, 2015

Trenton, New Jersey