P.E.R.C. NO. 2017-65

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

IFPTE LOCAL 195,

Petitioner,

-and- Docket No. CO-2016-033

STATE OF NEW JERSEY
KEAN UNIVERSITY,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies a motion for summary judgment filed by Kean University in an unfair practice case brought by IFPTE Local 195 alleging that Kean violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(3) and (5), by subcontracting unit work while retaining control of working conditions of the contractor's employees and not negotiating over the terms and conditions of employment of those employees. The Commission dismisses IFPTE's 5.4a(3) charge because none of its assertions establish a basis for it and such charge is already included in a related consolidated appeal pending at the Office of Administrative Law. The Commission denies summary judgment on the 5.4a(5) charge finding disputed issues of material fact over the relationship between Kean and the subcontractor's employees.

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.

P.E.R.C. NO. 2017-65

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

IFPTE LOCAL 195,

Petitioner,

-and- Docket No. CO-2016-033

STATE OF NEW JERSEY
KEAN UNIVERSITY,

Respondent.

Appearances:

For the Petitioner, Oxfeld Cohen, P.C. (Arnold Shep Cohen, of counsel)

For the Respondent, Christopher S. Porrino, Attorney General, Peter H. Jenkins, Deputy Attorney General of counsel

DECISION

This matter comes to us by way of a motion for summary judgment filed by the State of New Jersey, Kean University (University or Kean) in an unfair practice case initiated by IFPTE Local 195 (IFPTE). IFPTE alleges that the University violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically §5.4a(3) and (5),[1/] by

1/ These provisions prohibit public employers, their representatives or agents from: "(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 (continued...)

subcontracting work performed by unit members in the titles of senior building maintenance worker and grounds worker while retaining control of working conditions of the contractor's employees, thereby making Kean and the subcontractor joint employers, and further, by not responding to IFPTE's request to negotiate terms and conditions of employment of the contractor's workers who assumed the duties of the former unit members.

Procedural History

The charge was filed on September 16, 2015. The Director of Unfair Practices (Director) issued a Complaint and Notice of Hearing on August 2, 2016. The University filed an answer denying IFPTE's allegations on August 12.

On December 20, 2016, the University filed its motion for summary judgment with a supporting brief, exhibits, and the certification of its attorney. IFPTE filed a brief in opposition to the University's motion on January 27, 2017 along with an exhibit and the certification of the Chapter President of Local 195. The motion for summary judgment was referred to the Commission on January 31, 2017. N.J.A.C. 19:14-4.8(a).

1/ (...continued)
concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

Factual Background

After securing an outside evaluation of its facilities in 2013 that reported deficiencies in housekeeping and maintenance of the University campus and buildings, Kean issued in 2014 requests for proposals (RFPs) to outsource the provision of those services. GCA Education Services (GCA), a national provider of facilities services incorporated in Tennessee, submitted a response to both requests. In February 2015, at Kean's request, the same consultants that performed the facilities evaluation analyzed GCA's response to the RFPs and reported that the University's estimated labor costs savings if it outsourced both services to GCA would be approximately $3.45 million annually.

In March 2015, the University's Board of Trustees approved the subcontracting of campus-wide housekeeping and grounds maintenance services to GCA. On April 7, 2015, Kean and GCA entered into a housekeeping services contract and a separate grounds maintenance services contract, each of which incorporates the applicable RFP and GCA proposal.[2/] Each contract has a term of one-year with the option of two, one-year renewals, and recites, among other things, that GCA was an independent contractor and that neither it, nor its employees, are to be considered employees of the University.

2/ The contracts also identify the contractor as "GCA Services Group, Inc."

As a result of the subcontracting, on April 30, 2015, Kean eliminated 55 positions and laid off 4 supervisors in facilities, 14 grounds workers, and 37 senior building maintenance workers. The latter 2 titles had been in IFTPE's negotiations unit.

The Local President certifies that he is employed by Kean as an auto mechanic and that after May 2015, he personally witnessed GCA employees using the University's equipment, such as water tanks, lawnmowers, line trimmers, a tractor, John Deere Gator Number 1, Black Metal Two, behind trailers, and a Toro vac, and driving a University vehicle. He further asserts that GCA employees have the University's logo on their jackets and shirts and that the University's director of facilities, before leaving its employ in December 2016, worked with and gave directions to GCA supervisors and gave daily job duties to and approved overtime for GCA employees. Lastly, he states that he has seen the University's current acting director of facilities riding in a Kean vehicle accompanied by GCA employees.

Analysis

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); see also, Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). In determining whether summary judgment is appropriate, we must ascertain "whether the competent

evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523. "Although summary judgment serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial" and "should be denied unless the right thereto appears so clearly as to leave no room for controversy." Saldana v. DiMedio, 275 N.J. Super. 488, 495 (App. Div. 1995); see also, UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

In its motion, Kean argues that there are no material facts in dispute and that the contracts between it and GCA conclusively establish that the latter's employees are not University employees, but solely those of GCA. It also argues that the complaint should be dismissed for failure to state a claim because GCA is a private employer and, as such, the Commission cannot order Kean to recognize IFPTE as the majority representative of GCA's grounds maintenance and housekeeping employees or to negotiate with IFPTE over their terms and conditions of employment.

IFPTE does not dispute that the employees now providing the subcontracted services are employees of GCA, which it

acknowledges is a private employer. IFPTE claims, however, that its Local President's observations, as set forth in his certification and recited earlier in this decision, are evidence or, at least indicators, of Kean and GCA being joint employers and that there are genuine issues of material fact in dispute concerning their relationship.

It is settled that public employers have a non-negotiable managerial prerogative to contract out work or subcontract and to reduce the workforce for economy or efficiency. Local 195, IFPTE v. State, 88 N.J. 393, 407-08 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 88 (1978). That is true whether the work is contracted out to private employers, as here, or to other public employers as, for example, in Union County, P.E.R.C. No. 2014-32, 40 NJPER 256 (¶98 2013) (replacement of teachers assigned to detention center by employees of educational services commission) and Cape May Cty. Bridge Commission, P.E.R.C. No. 92-8, 17 NJPER 382 (¶22180 1991)(elimination of bridge commission's maintenance department as a result of its entry into a interlocal services agreement pursuant to which a county took over the performance of the maintenance work).

After a public employer subcontracts unit work, it has no continuing negotiations obligation to the contractor's employees who assume responsibility for the performance of the former unit work. Nevertheless, invoking the theory that the University is a

joint employer with GCA, IFPTE seeks an order compelling the University to negotiate with IFPTE over the terms and conditions of GCA's employees who provide housekeeping and grounds maintenance services at the campus and its facilities.

The Commission has recognized joint employment relationships for purposes of labor relations and collective negotiations under the Act only in cases involving public employers. Typically, the issue arises where a public official or entity is granted statutory authority to hire its employees but another governmental unit bears fiscal responsibility for the employees. See, e.g., Monmouth Cty. Bd. of Recreation Comm'rs, E.D. No. 76-36 (Commission Executive Director adopts Hearing Examiner's decision that found county and county recreation commission were joint employers of recreation commission employees); In re Bergen Cty. Pros'r and Mercer County Pros'r, P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110 1978), aff'd (as to Bergen County), 172 N.J. Super. 363 (App. Div. 1980) and (as to Mercer) 172 N.J. Super. 411 (App. Div. 1980)(county prosecutors, rather than the counties, were the public employers, for the purposes of negotiations, of public employees working in prosecutors' offices); Mercer County Sup't of Elections, P.E.R.C. No. 78-78, 4 NJPER 221 (¶4111 1978)(under N.J.S.A. 19:32-27, as it then read, superintendent of elections and county were not joint employers of election workers); Salem Cty., P.E.R.C. No. 2014-87, 41 NJPER 54 (¶14 2014) (declining to

review decision of Deputy Director of Representation holding that surrogate and county were joint employers of probate clerk and deputy surrogate). Cf. Bergen County Sheriff, P.E.R.C. No. 84-98, 10 NJPER 168 (¶15083 1984)(under then-controlling statutes, county and sheriff were joint employers of sheriff's officers and correctional officers) to Bergen County PBA Local 134 v. Donovan, 436 N.J. Super. 187 (App. Div. 2014)(sheriff, not county executive, is the exclusive employer and hiring authority for the sheriff's office and its employees, and can solely negotiate the collective negotiations agreement for those employees).

In only three prior cases has a joint employer argument been advanced where both employers were not public employers, but instead a public and a private employer.[3/] In Association of Retarded Citizens, Hudson Cty. Unit (ARC), P.E.R.C. No. 94-57, 19 NJPER 593 (¶24287 1993), we considered an argument that the State

3/ In a fourth matter, Union Twp., P.E.R.C. No. 96-38, 22 NJPER 22 (¶27009 1995), a joint employer claim was asserted before the Director of Representation in D.R. No. 95-9, 21 NJPER 14 (¶26008 1994). There, an association sought to represent special police officers who performed unpaid services for a township in order to be eligible for paid side jobs, called "jobs in blue," for other public and private subscribers. The township objected to an election, asserting that it was not the employer for purposes of the side jobs since the subscribers paid the officers and, alternatively, it was a joint employer with the subscribers. The Director dismissed the petition finding that the township and the subscribers were joint employers and that the Act limited jurisdiction of the Commission to matters of public employment. On appeal, and based upon subsequent developments, the Commission sustained the Director's dismissal without considering the joint employer argument.

and ARC, a private, non-profit organization, were joint employers for purposes of collective negotiations. Before the case came to us, a Regional Director of the National Labor Relations Board (NLRB) declined jurisdiction over an unfair practice charge filed by the union alleging that ARC discriminated against one of its employees for engaging in protected activity. He found that ARC was not an "employer" within the meaning of the Labor Management Relations Act and, therefore, the person against whom ARC had allegedly discriminated was not an "employee" under the federal statute. He also noted that ARC's dependence on the State for the majority of its funding together with State regulation of and control over ARC employees' wages and fringe benefits precluded ARC from engaging in meaningful bargaining with the union. The union then filed an action in New Jersey Superior Court, demanding an election to represent ARC's employees. The Court referred the matter to us. We found that the State was not a joint employer and noted that we had never found joint employer status when one entity was a private sector employer, over which we lack jurisdiction, and the other entity was a public employer, but not a party in the case before us. We concluded that ARC's employees had no rights under the Act, noting that our conclusion was consistent with the ARC-State contracts, which specified that ARC was the employer, and labor relations practices involving

ARCs in other counties, where ARC and its employees negotiated without the State's participation.[4/]

Unlike ARC, the public employer claimed to be a joint employer in this case is a party. However, unlike ARC, it is doubtful that the NLRB would decline jurisdiction over GCA. We note that GCA or its affiliate named in the parties' contracts[5/] has been deemed subject to the Labor Management Relations Act, see Bldg. Serv. 32BJ Health Fund v. GCA Servs. Grp., Inc., 15 Civ. 6114, 2017 U.S. Dist. LEXIS 15950, (Feb. 3, 2017), recon. denied, 2017 U.S. Dist. LEXIS 52627 (S.D.N.Y., Apr. 5, 2017), and it has entered into private sector collective bargaining agreements with various unions. See, e.g., Jimenez v. GCA Servs. Grp., Civil Action No. 16-1871, 2016 U.S. Dist. LEXIS 160861 (D.N.J. 2016). Therefore, this case, in contrast to ARC, implicates no concern that employees may be left without a mechanism to exercise their organizing and negotiating rights

4/ We ultimately recommended to the Court that an election be held by the State Board of Mediation to effectuate ARC employees' rights under the State Constitution to organize and collectively bargain with their private employer. We found that ARC controlled their non-economic employment conditions, including personnel matters such as hiring, work hours, evaluations, promotions, transfers, discipline, and grievance responses; that the State's involvement in non-economic matters was sporadic, limited to setting minimum qualifications for hiring and urging the termination of abusive employees; and that ARC could also negotiate over economic conditions even though its ability to grant raises might be limited by economic realities.

5/ See note 2.

under our State Constitution or the federal private sector labor relations law. Moreover, while the record has not been fully developed, there is no suggestion here that GCA is so dependent upon University funding that the two are joint employers.

In the second case, Black Horse Pike Reg'l School Dist., P.E.R.C. No. 2010-23, 35 NJPER 371 (¶125 2009), the Director of Representation declined to issue a complaint on unfair practice charges filed against the district by a substitute teacher who alleged that he was terminated in retaliation for trying to form a union for substitutes. The Director found that the school district subcontracted its substitute teacher staffing to a private company and that the charging party was employed by it, thereby making him a private sector employee over which the Commission lacks jurisdiction. On review, we remanded the case to the Director to issue a complaint, concluding that if the substitute could prove that the contractor and the district were joint employers, then his allegation that the district terminated him in retaliation for protected activity might constitute an unfair practice. We acknowledged that our remedial authority would not extend to the private employer.[6/]

6/ The case was later administratively dismissed due to lack of responsiveness on the part of the charging party. N.J.A.C. 19:14-1.5(d).

Black Horse Pike is also distinguishable from this case. The concern there was being able to address the substitute's allegation that he was terminated on account of his organizing efforts. In contrast, IFPTE seeks an order compelling the University to negotiate over the terms of employment of GCA employees. In remanding the unfair practice case in Black Horse Pike to give the substitute a chance to prove his case, we specifically noted we were not addressing whether we would certify a majority representative in a case involving public and private employers. We need not decide that point now, but we do note that compelling a public employer to negotiate terms of employment of a private sector employer's employees raises a host of issues, some legal, including jurisdictional questions, others practical. And our concern in ARC over the absence of a necessary party is just as manifest here, where the private employer is not a party before us.

The third case, Burlington County Board of Social Services, P.E.R.C. No. 98-62, 24 NJPER 2 (¶29001 1997), was a consolidated scope of negotiations proceeding and unfair practice case. The board of social services requested a restraint of binding arbitration of a grievance challenging, as a contract violation, the board's subcontracting of its home energy assistance program to a private company, Kelly Temporary Services. The board asserted that it had a managerial prerogative to subcontract the

program work. The CWA's unfair practice charge alleged that the board violated the Act by shifting unit work from represented income maintenance workers to Kelly personnel. It contended that the board so controlled Kelly personnel that they should be viewed as joint employees of the board and Kelly. We did not address the joint employment argument. Rather, we followed and applied Local 195, supra, restrained arbitration, and dismissed the unfair practice charge, noting that the case was primarily about contracting to hire extra temporary personnel for seasonal work rather than eroding a negotiations unit.

While we have reservations about the viability of IFPTE's claim, particularly from a jurisdictional standpoint, we need not decide it now.[7/] A determination of the degree of control Kean exerts over GCA's employees depends upon the facts. Therefore, we will deny summary judgment so that a full record can be developed.

7/ However, we do reject IFPTE's suggestion that an appropriate test would be the one set forth in Estate of Kotsovska v. Liebman, 221 N.J. 568 (2015), a wrongful death action where the issue was not joint employment, but rather whether the decedent-caretaker was an employee of the alleged tortfeasor or an independent contractor. If an employee, her estate could recover in tort; if the latter, a workers compensation claim was the exclusive remedy. There is no issue here whether the persons performing the subcontracted work are employees versus independent contractors. While IFPTE maintains that there has been a "significant integration between GCA and Kean," actual control over employment conditions is the threshold for a finding of joint employment.

For the parties' guidance, we add that the observations of the Local President, assuming they are accurate, fall far short of establishing that the University controls the economic or non-economic conditions of GCA employment. The use of private sector employees to provide services does not relieve a public employer of its responsibility to ensure that the outsourced activities are carried out properly and in compliance with applicable laws. We would not consider it an indicator of joint employment, but rather an effort to address the risks associated with subcontracting, for a contract between the public employer and contractor to include provisions setting standards for contract performance and to provide for ongoing monitoring of service providers, even if this means the private employer retains some degree of supervisory control over the vendor and its employees. We also think that effective programs for managing subcontracting risks would include, as an element of oversight and monitoring of service providers, contracts that clearly define the scope of work of the vendor and its responsibilities with regard to its employees who will perform the outsourced functions. After all, public services are funded by public dollars regardless of who provides them. Therefore, the use of Kean equipment to provide grounds maintenance services, the supervision of GCA supervisors or its workers, the wearing of Kean insignia, and so forth, none

of these, singularly or in combination, show that the University controls the working conditions of GCA's employees.

Finally, we dismiss IFPTE's N.J.S.A. 34:13A-5.4a(3) charge as none of its assertions establish a basis for such a charge. However, a related consolidated appeal is pending at the Office of Administrative Law (OAL), consisting of a "good faith layoff" appeal filed by IFPTE with the Civil Service Commission and an amended unfair practice charge filed by IFPTE alleging that the University targeted IFPTE officials for layoff in violation of §5.4a(3) and (5) of the Act. Neither party requested consolidation of this matter with the matters pending in the OAL. Therefore, the N.J.S.A. 34:13A-5.4a(5) charge is the only charge pending in this case.

ORDER

Kean University's motion for summary judgment is denied and the §5.4a(3) charge is dismissed.

BY ORDER OF THE COMMISSION

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

ISSUED: May 25, 2017

Trenton, New Jersey