P.E.R.C. NO. 2022-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (KEAN UNIVERSITY),

Respondent,

-and- Docket No. CO-2016-033

IFPTE LOCAL 195,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies IFPTE's exceptions and adopts a Hearing Examiner's recommended decision and order dismissing IFPTE's unfair practice charge. The charge alleges that Kean violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), when it subcontracted work performed by unit employees to a private company (GCA) while retaining control of the working conditions of GCA's employees, thereby making Kean and GCA joint employers, and by failing to negotiate the terms and conditions of employment of those GCA employees. The Commission finds that Kean has a non-negotiable managerial prerogative to subcontract services to GCA and that the record does not demonstrate that Kean exercises substantial control over employment matters such that it could be considered a "joint employer" along with GCA. The Commission finds that the indicia of employer status demonstrate that GCA is the sole employer of its employees working at Kean, and that IFPTE's allegations of Kean control over disciplinary decisions and overtime decisions were not proven by IFPTE's evidence or witnesses during the hearing. Accordingly, the Commission holds that Kean is not the employer of the GCA employees and cannot be found to have violated subsection 5.4a(5) of the Act for failing to negotiate over their terms and conditions of employment.

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 Respondent, Matthew J. Platkin, Acting Attorney General (Kevin K.O. Sangster, Deputy Attorney General)

For the Charging Party, Oxfeld Cohen, P.C., attorneys (Arnold S. Cohen, of counsel)

DECISION

On February 4, 2022, IFPTE Local 195 (IFPTE) filed exceptions to a Hearing Examiner's Report and Recommended Decision, H.E. No. 2022-6, 48 NJPER 325 (¶72 2022). In that decision, the Hearing Examiner found that Kean University (Kean) did not violate subsection 5.4a(5) of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., when it subcontracted work performed by IFPTE unit employees to a private company (GCA) and refused to negotiate with IFPTE over the terms and conditions of employment of the GCA employees.

Procedural History

On September 16, 2015, IFPTE filed an unfair practice charge against Kean alleging that it violated subsections 5.4a(3) and

(5)[1/] of the Act when it subcontracted work performed by unit employees in the titles of senior building maintenance worker and grounds worker to GCA while retaining control of working conditions of GCA's employees, thereby making Kean and GCA joint employers, and further, by not responding to IFPTE's request to negotiate terms and conditions of employment of the GCA employees who assumed the duties of the former IFPTE unit employees.

On August 2, 2016, the Director of Unfair Practices (Director) issued a Complaint and Notice of Hearing. On December 20, 2016, Kean filed a motion for summary judgment. On January 27, 2017, IFPTE filed a brief opposing summary judgment. On January 31, 2017, the motion for summary judgment was referred to the Commission. N.J.A.C. 19:14-4.8(a). On May 25, 2017, the Commission denied Kean's motion for summary judgment and dismissed the 5.4a(3) charge, leaving only the 5.4a(5) charge pending. See P.E.R.C. No. 2017-65, 43 NJPER 443 (¶124 2017). The Commission found that there were disputed issues of material fact concerning the relationship between Kean and GCA's employees

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; (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."

and the degree of control Kean exerts over their terms and conditions of employment.

On January 16, 2018, the Hearing Examiner held a hearing. Former IFPTE President Steven Pinto testified on behalf of IFPTE. Kean's Chief Labor Counsel, Ken Green, testified on behalf of Kean. The parties submitted post-hearing briefs by May 2018. On January 26, 2022, the Hearing Examiner issued her decision recommending that IFPTE's Complaint be dismissed.

Standard of Review

The matter is now before the Commission to adopt, reject or modify the Hearing Examiner's recommendations. See N.J.A.C. 19:14-8.1(a). We cannot review the Hearing Examiner's Findings of Fact de novo. Instead, our review is guided and constrained by the standards of review set forth in N.J.S.A. 52:14B-10(c). Under that statute, we may not reject or modify any findings of fact as to issues of lay witness credibility unless we first determine from our review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence. See New Jersey Div. of Youth and Family Services v. D.M.B., 375 N.J. Super. 141, 144 (App. Div. 2005) (deference due to fact-finder's credibility determinations and "feel of the case" based on seeing and hearing witnesses); Cavalieri v. PERS Bd. of Trustees, 368 N.J. Super. 527, 537 (App. Div. 2004). Our case law is in accord. It is for

the trier of fact to evaluate and weigh contradictory testimony. Absent compelling contrary evidence, we will not substitute our reading of the transcripts for a Hearing Examiner's first-hand observations and judgments. See Warren Hill Reg. Bd. of Ed., P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd, 32 NJPER 8 (¶2 App. Div. 2005), certif. den., 186 N.J. 609 (2006); City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980).

Summary of Facts

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact. (H.E. at 4-9). We summarize the pertinent facts as follows. IFPTE is the exclusive majority representative for all employees in the state-wide Operations, Maintenance and Services and Crafts unit regularly employed by Kean. Kean and IFPTE are parties to a CNA dated July 1, 2011 to June 30, 2015. In 2015, Kean subcontracted all housekeeping and grounds maintenance work to GCA, which affected approximately 50 Kean employees.[2/] Kean and GCA are parties to two contracts dated April 7, 2015: one for housekeeping services and one for grounds maintenance services. Both Kean-GCA contracts contain a provision entitled "4. Contractor Employees" that provides as follows:

2/ In 2021, the Act was amended to set out conditions for subcontracting for State colleges and Universities. N.J.S.A. 34:13A-50 - 55. As Kean and GCA entered into contracts for subcontracting in 2015, the amendments are not applicable to this dispute.

> It is understood and agreed that [GCA] is an independent contractor and not an employee of [Kean], nor are the employees of [GCA] to be considered employees of [Kean].

Ken Green's unrefuted testimony established that Kean is not involved in the hiring, firing, training, or discipline of GCA employees. (T90-91). Green also testified that Kean does not evaluate GCA employees' performance, GCA employees receive no Kean compensation or benefits, and GCA employees do not interact with Kean human resources. (T91-93). He testified that Kean has no information about or involvement in GCA employee compensation systems, salary structure, promotions, demotions, or travel and business expenses. (T93).

Steven Pinto was employed by Kean from 1980 until January 31, 2017. He worked as an auto mechanic and performed diagnosis, repair, and maintenance of all Kean equipment and vehicles. Pinto served as IFPTE President for the last 15 years of his employment with Kean. Pinto interacted with GCA employees when they brought Kean equipment to him for repair. Pinto testified that GCA employees would advise him that Davis told them to bring the equipment to Pinto and Pinto would confirm with Davis that he needed to fix the equipment. (T28-29). Pinto testified that GCA employees working at Kean used Kean grounds and housekeeping equipment and supplies to perform GCA services. (T18; T25-30; T44). GCA employees working at Kean wore blue shirts and jackets

that were a shade of blue referred to as "Kean blue" and they had both the Kean and GCA logos on them. (T43).

Dereck Davis was Kean's Director of Facilities who oversaw GCA's work for Kean. Davis was not a Kean employee, but was an employee of outside contractor McKeon Grano. Ken Kimble was a manager in Kean's facilities office who reported to Dereck Davis. Pinto testified that during the transition from IFPTE to GCA employees in April 2015, Davis communicated with GCA employees regarding the performance of grounds and housekeeping tasks. (T32-33). Pinto testified that Davis communicated with GCA employees to assign work and to discuss what overtime was needed on a particular day. (T34-37). Pinto testified that Davis verbally reprimanded GCA employees when they damaged Kean equipment. (T39-40). Pinto testified that Davis instructed GCA employees about grounds work such as leaf cleanup and planting flower beds and that Davis worked with GCA employees to shovel dirt and leaves and pick up wooden traffic horses. (T30-32). Pinto testified that Kimble occasionally directed GCA employees in grounds maintenance work. (T50). Pinto testified that once Davis retired, Kimble assumed his position and continued supervision of GCA employees' grounds maintenance work. (T52-53).

Arguments

IFPTE excepts to the Hearing Examiner's report, arguing that Kean and GCA are acting as joint employers regarding the grounds

and housekeeping workers because it allegedly controls their terms and conditions of employment. IFPTE asserts that, through Pinto's testimony concerning Davis' oversight of GCA employees, it established the joint employer guidelines enunciated in the Commission's summary judgment decision, P.E.R.C. No. 2017-65. Specifically, IFPTE excepts to the Hearing Examiner's conclusion that "Pinto admitted that he never actually saw Davis assigning overtime to any GCA employees." It contends that Pinto testified that he heard and saw Davis assign overtime 1-3 times per week. IFPTE also asserts that the Hearing Examiner erroneously concluded that Pinto did not witness other indicia of joint employer status. It contends that Pinto testified to seeing and hearing Davis disciplining GCA employees and adjusting work hours. IFPTE asserts that the Hearing Examiner should have noted Kean's failure to call Davis as a witness, not IFPTE's failure to call him, arguing that there was no need for Davis to testify for IFPTE to establish joint employer status because Pinto testified regarding his direct knowledge of the daily operations of GCA.

Kean asserts it has a non-negotiable managerial prerogative to subcontract work to GCA and that it has no negotiations obligation to GCA's employees who assumed responsibility for the performance of former IFPTE unit work. It argues that GCA's employees who it employs to provide services to Kean are not public employees under the Act, so the Complaint is outside of

the Commission's jurisdiction. Kean asserts that it does not control the terms and conditions of employment of GCA's employees, they are not on Kean's payroll, and they are not required to attend any Kean employee trainings or meet any other Kean employee requirements. It argues that Pinto conceded that it would have been within Davis' purview to ensure that the Kean campus was being appropriately maintained. Kean contends that Pinto admitted on cross-examination that he had no knowledge of Davis having any direct influence over the schedules of GCA employees and never observed Davis fill out a timesheet or overtime assignment for any GCA employee.

Analysis

The Act covers employees of New Jersey public employers, including the State of New Jersey and its agencies. N.J.S.A. 13A-3. Employees covered by the Act have a right to select a majority representative to negotiate with their public employer over their terms and conditions of employment. N.J.S.A. 34:13A-5.3. It is an unfair practice for a public employer to refuse to negotiate in good faith with a majority representative over the terms and conditions of employment of employees in that unit. N.J.S.A. 34:13A-5.4a(5).

Public employers have a non-negotiable managerial prerogative to subcontract governmental services to a private company even if the decision is based solely on a desire to save

money and even if employees will lose jobs as a result. Local 195, IFPTE v. State, 88 N.J. 393, 407-08 (1982). In Local 195, the Supreme Court recognized public 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." Local 195 at 407. Following Local 195, the Commission has prohibited negotiations or arbitration over decisions to subcontract work to private sector companies. 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. denied, 137 N.J. 312 (1994); Burlington Cty. Bd. of Social Services, P.E.R.C. No. 98-62, 24 NJPER 2 (¶29001 1997); Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 2004-35, 29 NJPER 541 (¶173 2003). "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, as these employees are no longer employed by the public employer." P.E.R.C. No. 2017-65, supra.

In determining employer status, the Commission considers generally which entity controls employment matters, namely which

entity exercises substantial control over employees' hiring, performance evaluations, promotions, discipline, firing, work schedules, vacation, hours of work, wages, benefits, funding and expenditures. See Mercer Cty. Superintendent of Elections, P.E.R.C. No. 78-78, 4 NJPER 221 (¶4111 1978), aff'd, 172 N.J. Super. 406 (App. Div. 1980); Morris Cty. Bd. of Social Services, P.E.R.C. No. 86-15, 11 NJPER 491 (¶16175 1985) (although County provided significant funding to Morris View Nursing Home and could diminish its appropriations, the Board of Social Services was the employer because it made all personnel decisions including hiring, firing, discipline, promotions, work schedules, and providing salary ranges for submission to the Civil Service Commission). In Mercer Cty. Sup. of Elections, the Commission agreed with the Director of Representation's decision finding that, for purposes of collective negotiations, the Superintendent of Elections, rather than the County, was the public employer of employees working for the Superintendent of Elections. The Director found that, although the County provided the funding and facilities for the Superintendent's Office, including payment of employee salaries and provision of County office space and supplies, the Superintendent actually fixed the salaries and controlled the hiring, firing, discipline, and work assignments of employees. Accordingly, the Director held "that it is the Superintendent who substantially controls the labor relations

affecting employees of the Superintendent's office." Mercer Cty., D.R. No. 78-37, 4 NJPER 147, 149 (¶4069 1978).

The Commission has also recognized the possibility of joint employer relationships for purposes of labor relations under the Act "where the indicia of employer attributes also indicate an extensive integration of labor relations programs and where the record demonstrates that effective negotiations on behalf of the employees could not take place without the presence of both governmental entities." Monmouth Cty. Bd. of Recreation Commissioners, E.D. No. 76-36, 2 NJPER 127 (1976). Joint employer status may be warranted when the record establishes that control over both economic and non-economic employment conditions is divided between two employers. Bergen County Sheriff, P.E.R.C. No. 84-98, 10 NJPER 168 (¶15083 1984). However, such joint employment relationships typically arise when both employers are public employers and, as discussed in P.E.R.C. No. 2017-65, the Commission has so far not found joint employer status involving a public and private employer.

In Hudson Cty. (ARC), P.E.R.C. No. 94-57, 19 NJPER 593 (¶24287 1993), the Commission analyzed the possibility of a joint public-private employer relationship between the State and the Association of Retarded Citizens, Hudson County Unit, a non-profit corporation. State agencies and ARC had contractually agreed that ARC is an independent contractor "responsible for the

organization's overall functions which include the overseeing and monitoring of its operation, establishing the salary and benefit levels of its employees, and handling all personnel matters as the employer of its workers." Id. at 603. The Commission found that ARC was dependent on State funding and that the State had some control over salaries (through contractual cost allocations, budget reallocation procedures, and COLA determinations), as well as some input on personnel such as setting minimum qualifications for hiring and urging that abusive employees be terminated. Ibid. The record also established that the State requires a program run by ARC to run for a specified number of hours, that State programs require ARC to establish certain personnel policies including performance appraisals, and that the State requires certain ARC employees to attend certain trainings and be certified in certain areas. Id. at 597.

However, the Commission ultimately determined that the State was not a joint employer but that ARC was the sole employer for purposes of labor relations. We noted that ARC has discretion to grant salary increases above annual COLA within its budget parameters, that ARC is responsible for social security taxes and unemployment and disability insurance, that ARC grants fringe benefits such as medical insurance and leave, and that "ARC determines such personnel matters as hiring, work hours, evaluations, promotions, transfers, discipline, and grievance

responses." Id. at 603. Thus, ARC could meaningfully negotiate over non-economic conditions of employment as well economic conditions, "although its ability to grant raises and a union's ability to obtain them may be limited by economic realities." Ibid. Accordingly, we held that, as ARC is a private employer, and the record did not establish that the State was a joint employer, ARC employees had no rights under our Act.[3/]

In this case, the record overwhelmingly demonstrates that the private subcontractor, GCA, is the sole employer of GCA employees and that Kean does not exercise control over GCA employees' economic and non-economic employment conditions. The indicia of employer status all indicate that GCA is the entity that exercises substantial control over employees' hiring, firing, performance evaluations, promotions, discipline, work schedules/hours, compensation, and benefits. GCA employees receive compensation and benefits through GCA and Kean has no involvement in GCA salaries, compensation systems, benefits, or promotions. Kean is not involved in the hiring, firing, training, discipline, or performance evaluations of GCA employees. Kean's level of control over employment matters is significantly less than that of the State in Hudson Cty. (ARC),

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3/ We further held that, as the NLRB had also declined jurisdiction, the ARC employees should seek an election by the State Board of Mediation to effectuate their rights under the State Constitution to organize and collectively bargain with their private employer, ARC. Id. at 602, 605.

where we determined the State was not a joint employer despite having some level of input or control concerning qualifications for hiring, salaries, terminations, trainings and certifications, and performance appraisals. The relationship between Kean and GCA is more analogous to the relationship between the County and the Superintendent of Elections in Mercer Cty., where the County, like Kean, provided the funding, facilities, and supplies, but the Superintendent's office actually controlled the hiring, firing, discipline, compensation, and work assignments of the employees.

The record shows that Kean does not impose discipline on GCA employees and does not evaluate their performance. Pinto's hearing testimony regarding Davis verbally reprimanding some GCA employees about damaging equipment when they brought it in for repair does not establish that Kean actually disciplined or evaluated those GCA employees for those incidents or for anything else. There is no evidence that Davis had control over GCA's disciplinary decisions or employee evaluations.

Pinto's testimony that he overheard Davis asking GCA employees if they wanted to work overtime does not establish that Kean had control over GCA employee schedules or distribution of overtime to GCA employees. Pinto never actually saw Davis assign overtime to particular employees after asking about overtime and never saw Davis fill out a schedule for GCA employees. The

record does not explicate the overtime assignment process or indicate who was ultimately responsible for approving overtime requests. Pinto's testimony demonstrates, at most, some input from Kean (through Davis) regarding when it had a need for overtime work to be performed, but does not establish that Kean, rather than GCA, had control over authorizing an overtime request. Regardless of how those decisions may have been processed between Kean and GCA, IFPTE failed to establish Kean's control over that employment condition. As noted by the Hearing Examiner, IFPTE did not provide any additional witnesses, such as Davis or any current or former GCA employees, who might have provided any additional evidence or insight into Kean's control over any conditions of employment of the GCA employees.

We also do not find that GCA employees' use of Kean equipment and supplies and wearing of uniforms with both Kean and GCA insignia are indicia of Kean's control over employment conditions sufficient to establish it as a joint employer. Similar to Mercer Cty., where the Superintendent's employees were housed in County buildings and used County supplies and accommodations, the use of Kean equipment and supplies by GCA employees performing work on Kean's campus does not demonstrate control by Kean over key employment matters.

Furthermore, the testimony regarding Davis' and Kimble's instructions to and supervision of GCA employees while they

worked at Kean indicates only Kean's oversight of its subcontracted work to ensure that GCA properly performs the grounds maintenance and housekeeping services per the Kean-GCA contracts. Such direction from Kean is not indicative of control over the critical employment matters under the Commission's employer status test, e.g., hiring, performance evaluations, promotions, discipline, firing, work schedules, vacation, hours of work, wages, benefits, funding and expenditures. As discussed above, the record demonstrates that GCA has substantial control over GCA employees' hiring, firing, performance evaluations, promotions, discipline, work schedules/hours, compensation, and benefits. Accordingly, we find that some monitoring or supervisory control by Kean to ensure that the subcontracted services are being carried out properly by GCA employees does not suffice to transform the subcontracting relationship between Kean and GCA into a joint employer relationship.

Based on all of the above, we concur with the Hearing Examiner's legal conclusion that there is no joint employer relationship between Kean and GCA and, therefore, Kean is not the employer of the private GCA employees performing former IFPTE unit work and cannot be found to have violated N.J.S.A. 5.4a(5)

for failing to negotiate with IFPTE over GCA employees' terms and conditions of employment.[4/]

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni and Papero voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Voos abstained from consideration. Commissioner Ford recused himself.

ISSUED: April 28, 2022

Trenton, New Jersey

4/ As discussed in P.E.R.C. No. 2017-65, unlike the employees in Hudson Cty. (ARC), the GCA employees may pursue their representation and negotiations rights through the NLRB, as GCA has been deemed subject to the NLRB's jurisdiction and has entered into private sector collective bargaining agreements with various unions.