P.E.R.C. NO. 90-63

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

NEW JERSEY SPORTS
& EXPOSITION AUTHORITY,

Petitioner,

-and- Docket No. SN-89-89

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL 164,

Respondent.

SYNOPSIS

The Public Employment Relations Commission finds mandatorily negotiable a subcontracting contract proposal made by the International Brotherhood of Electrical Workers, Local 164 during successor contract negotiations with the New Jersey Sports and Exposition Authority.

P.E.R.C. NO. 90-63

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

NEW JERSEY SPORTS
& EXPOSITION AUTHORITY,

Petitioner,

-and- Docket No. SN-89-89

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL 164,

Respondent.

Appearances:

For the Petitioner, Grotta, Glassman & Hoffman, Esqs.
(M. Joan Foster, of counsel)

For the Respondent, Giblin & Giblin, Esqs.
(Paul J. Giblin, of counsel)

DECISION AND ORDER

On June 23 and September 26, 1989, the New Jersey Sports & Exposition Authority ("Authority") filed a scope of negotiations petition and an amended petition. These petitions were filed as a result of a dispute between the Authority and the International Brotherhood of Electrical Workers, Local 164 ("IBEW") over the negotiability of subcontracting contract proposals made during the course of successor contract negotiations.

The Authority operates the Meadowlands Racetrack, the Brendan Byrne Arena and Giants Stadium. The IBEW represents a unit of the Authority's maintenance electricians. The parties entered

into a collective negotiations agreement effective December 1, 1985 through November 30, 1988. The Authority now seeks a determination that a revised contract proposal is not mandatorily negotiable absent certain clarifying language. The parties have filed briefs, reply briefs, supplemental briefs, certifications and documents.

The disputed contract proposals concern subcontracting. Local 195, IFPTE v. State, 88 N.J. 393 (1982), determines the negotiability of contract proposals in general and subcontracting proposals in particular. Under Local 195, a public employer's decision to subcontract work is not subject to binding arbitration, even when it is economically motivated and would result in layoffs. But public employee organizations may negotiate proposals requiring employers to discuss subcontracting motivated by economic considerations. The Court noted, "This is altogether appropriate. We do not mean to stifle discussion. We encourage it." 88 N.J. at 409. Finally Local 195 states:

> We emphasize that our holding today does not grant the public employer limitless freedom to subcontract for any reason. The State could not subcontract in bad faith for the sole purpose of laying off public employees and substituting private workers for public employees. [88 N.J. at 411]

We now track the evolution of the parties' negotiations positions in light of Local 195, leading up to the narrow negotiability dispute that remains. On October 25, 1988, prior to negotiations for a successor contract, the Authority notified the

IBEW that it would not agree to continue Article 20 "Sub-Contracting" in any new agreement because it was not mandatorily negotiable. That provision reads:

> Subject to applicable law, the Employer shall not contract or agree to contract, or otherwise assign to any other firm, person or company, work which can be performed by employees covered by this Agreement during the term of this Agreement unless the subcontractor agrees to abide by the terms and conditions of this Agreement, and unless the Union approves said contracting or subcontracting. For purposes of this Agreement, maintenance work shall include the repair or modification of existing facilities, which does not substantially change or increase the size, type or extent of such facility.

In response to the Authority's position that Article 20 was not mandatorily negotiable, the IBEW, on April 12, 1989, proposed a new article:

> Subject to applicable law, the Employer shall not contract or agree to contract, or otherwise assign to any other firm, person or company, work which can be performed by employees covered by this Agreement during the term of this Agreement for the sole purpose of laying off employees or substituting private workers for workers covered under this Agreement. Should the Employer contemplate contracting or subcontracting unit work for purely economic reasons it shall discuss such action with the Union prior to taking such action. In the event the Employer decides to contract or subcontract unit work it shall negotiate with the Union the effects on the employees of its decision.

The Authority responded that the new proposal was also not mandatorily negotiable. The original petition was filed.

Thereafter, the IBEW again revised its proposal. It now reads:

> Prior to reaching any decision to subcontract any work which can be performed by employees covered by this Agreement and it becomes apparent that a layoff or job displacement will result, if the proposed subcontracting is based solely on fiscal considerations, the Employer agrees that it will discuss such decision to subcontract with the Union. The Employer agrees that it will not subcontract in bad faith for the sole purpose of laying off employees or substituting private workers for workers covered by the provisions of this Agreement.

The Authority then amended its petition. It accepts the first sentence of the revised proposal, but asserts that the second sentence is not mandatorily negotiable unless the following language is added:

> The Union agrees that any such alleged "bad faith" subcontracting decision shall be within the exclusive jurisdiction of the Public Employment Relations Commission, and that grievances related to such subcontracting decisions shall not be subject to the arbitration process referred to in Article 15.

The proposal now under review has incorporated Local 195's principles, which have been accepted by each side. The remaining dispute is narrow. The parties do not agree on the proper forum to review a grievance which could arise over the clause's interpretation or application. Given the parties' respective positions, the dispute can be framed as follows: Can a public employer legally agree to submit to binding arbitration a grievance alleging that it has subcontracted in bad faith for the sole purpose of laying off public employees and substituting private employees? If not, must contract language precluding bad faith subcontracting specifically state that the issue cannot be submitted to binding arbitration and must be submitted to the Commission?

The Authority contends that absent its proposed clarifying language, the second sentence of IBEW's revised proposal would contravene Local 195 by allowing subcontracting decisions to be reviewed by an arbitrator. Citing S. Brunswick Bd. of Ed., P.E.R.C. No. 83-3, 8 NJPER 429 (¶13199 1982) and Jefferson Tp. Bd. of Ed. vs. Jefferson Tp. Ed. Ass'n, 188 N.J. Super. 411 (App. Div. 1982), it contends that when a grievance predominantly involves unfair practice allegations, our statutory jurisdiction precludes binding arbitration. Thus, it claims that we have exclusive jurisdiction over allegations that a public employer has subcontracted in bad faith or has engaged in other unfair practices.

The IBEW contends that its contract proposal simply incorporates the statements made in Local 195 and that an arbitrator has the authority to determine whether subcontracting was done in bad faith. It argues that acting in bad faith is not a managerial prerogative and that therefore such a claim is subject to binding arbitration.

In Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983), the New Jersey Supreme Court addressed a similar argument. We had held that the denial of a promotion based on race was not based on educational policy and therefore a grievance alleging such discrimination could be submitted to binding arbitration. P.E.R.C. No. 82-27, 7 NJPER 576 (¶12258 1981). The Court, however, reasoned that "adding a discrimination claim does not change the reality that the arbitrator would be reviewing the managerial decision and the

agency's exercise of its functional right - not to discriminate - but to choose among qualified candidates." 94 N.J. at 16-17. Claims of racial discrimination must instead be submitted to statutorily-available forums. See also Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 324 (1979). Likewise, although Local 195 holds that an employer cannot subcontract in bad faith for the sole purpose of laying off employees or substituting private workers for public workers, an arbitrator assessing an allegation of bad faith would be impermissibly reviewing the managerial decision to subcontract and displacing a statutorily-mandated forum to resolve claims of anti-union discrimination. Thus, we agree with the Authority that binding arbitration cannot be used to enforce an employer's pledge not to subcontract in bad faith.

This holding does not leave the employees without a procedure to enforce their rights. We have addressed claims that subcontracting decisions were motivated by anti-union discrimination and will do so upon proper application. See South Brunswick; Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985).

We now consider whether the IBEW's revised proposal is mandatorily negotiable even absent the Authority's proposed limiting language. We believe it is. The revised proposal incorporates the employees' right to be protected from bad faith subcontracting, a right articulated in Local 195. Cf. State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978). There is no dispute that the right can be reviewed through non-arbitral review procedures or any

available statutory forums. See Teaneck. And the proposal does not impermissibly state that the right is enforceable in binding arbitration. The Authority may demand negotiations over including an explicit clause prohibiting binding arbitration. But such a clause is not required to render the IBEW's revised proposal mandatorily negotiable since, upon proper application, we must restrain binding arbitration of a grievance which seeks to challenge a subcontracting decision. Compare Delran Bd. of Ed., P.E.R.C. No. 87-155, 13 NJPER 578 (18212 1987)(just cause clauses which do not misstate the legal arbitrability of disciplinary disputes are mandatorily negotiable); see also Old Bridge Bd. of Ed., P.E.R.C. No. 88-143, 14 NJPER 465 (¶19194 1988); cf. Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd App. Div. Dkt No. A-2053-86T8 (10/23/87).

The Authority's proposed phrase "shall be within the exclusive jurisdiction of the Public Employment Relations Commission" is also not required to render the revised proposal mandatorily negotiable because it could improperly displace the jurisdiction of other forums. Cf. Hackensack v. Winner, 82 N.J. 1 (1980). Where allegations of bad faith involve anti-union animus, the IBEW may contest the subcontracting decision through our unfair practice proceedings. Jefferson Tp. However, other forums, such as the Division on Civil Rights or the courts, may have jurisdiction over other types of "bad faith" subcontracting claims.

ORDER

The revised IBEW proposal is mandatorily negotiable consistent with the terms of this decision.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
December 14, 1989
ISSUED: December 15, 1989