

STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF
TORRINGTON BOARD OF EDUCATION AND
EDUCATION CONNECTION

DECISION NO. 3726

-and-

SEPTEMBER 2, 1999

TORRINGTON EDUCATION ASSOCIATION

Case No. TPP-19,530

A P P E A R A N C E S:

Attorney Victor M. Muschell
For the School Board

Attorney Victor Schoen
For Education Connection

Attorney William J. Dolan
For the Association

DECISION AND DISMISSAL OF COMPLAINT

On November 7, 1997 the Torrington Education Association (the Association) filed a complaint with the Connecticut State Board of Labor Relations (the Labor Board) alleging that the Torrington Board of Education (the School Board) had engaged in practices prohibited by § 10-153e(b) of the Teacher Negotiation Act (TNA or the Act). Specifically, the Association alleges that the School Board unlawfully subcontracted bargaining unit work by ratifying an agreement with Education Connection to provide a program for middle and high school students with behavioral and other problems. On December 30, 1998, Education Connection filed a Motion to Intervene in the proceedings as an interested party.

After the requisite preliminary steps had been taken, the matter came before the Labor Board for a hearing on January 7, 1999. At the hearing, the Labor Board granted Education Connection's Motion to Intervene. All parties appeared, were represented and allowed full opportunity to present evidence, examine and cross examine witnesses and make argument. The

parties stipulated to certain facts. Based on the entire record before us, we make the following findings of fact and conclusions of law and we dismiss the complaint.

FINDINGS OF FACT

The following findings of fact are based on the stipulation of the parties as well as the record evidence.

1. The School Board is an employer within the meaning of the Act.
2. The Association is an employee organization within the meaning of the Act and at all material times has exclusively represented certified School Board employees who are within the teachers' unit.
3. Education Connection is a regional educational service center (RESC) established in accordance with § 10-66a of the Connecticut General Statutes, as amended.
4. As a statutory regional educational service center, Education Connection has all powers, authorities, responsibilities, and obligations contained in Connecticut General Statutes § 10-66a.
5. Education Connection is one of six regional educational service centers permitted by statute to be established in the State of Connecticut. The others are as follows: Capital Region Education Council - Hartford County Area, Area Cooperative Educational Services - New Haven and Middlesex County Areas, EastConn Educational Service Center - Windham and Tolland County Areas, LEARN - New London County Area, Cooperative Educational Services - Fairfield County Area.
6. In general, the above noted regional education service centers provide programs for member districts for outplacement of special education students, disabled students, gifted and talented students, and other exceptional students. Regional educational service centers also operate magnet schools for various purposes. For example, Area Cooperative Educational Services operates a multi-district school with a longer school day and school year and other non-traditional features for the districts of Hamden, New Haven, Woodbridge and Wallingford (Wintergreen Magnet School).
7. As a statutory regional educational service center, Education Connection operates a program at Forest Court in Torrington, Connecticut for its member districts. This program is known as Gateways Alternative Education School.
8. The program is an alternative school that services students of member districts. These students typically come from troubled homes, skip classes, have a high absentee rate, and often have become involved with the law, and are disruptive to other students and staff. At this point in the program's development, the Gateways Alternative School also often serves as the statutory "alternative educational opportunity" for students who are expelled from school.

9. Each member district pays Education Connection for “slots” to send students to this alternative school.

10. There are thirty-one school districts in the Litchfield County area that are members of Education Connection. They are as follows:

Barkhamsted	Bethel	Brookfield	Canaan
Colebrook	Cornwall	Danbury	Easton
Kent	Litchfield	New Fairfield	Newtown
New Milford	Norfolk	North Canaan	Plymouth
Redding	Region 1	Region 6	Region 7
Region 9	Region 12	Region 14	Region 15
Salisbury	Sharon Sherman		Thomaston
Torrington	Watertown	Winchester	

11. On June 4, 1997, the School Board passed a motion to contract with Education Connection to operate an alternative program in the 1997-98 school year for middle and high school students.

12. Subsequent to June 4, 1997, the Association orally requested through the Superintendent of Schools that the School Board negotiate over its decision to operate such program at Education Connection.

13. By letter to the chairperson of the School Board dated July 8, 1997 (Ex. 3), the Association restated its demand for negotiations over such decision and requested certain information relevant to such demand.

14. Subsequent to July 8, 1997 the Association representatives met with the Superintendent of Schools and the chair of the School Board’s negotiations committee to discuss the Association’s July 8th letter. The Superintendent later informed the Association in a telephone call that the School Board would not negotiate over such decision.

15. On September 8, 1997, the School Board voted to approve a contract (Ex. 4) for Education Connection to “operate a quality alternative school for 25 high school and 15 middle school students.” This alternative program became the Gateways Alternative School referred to in Findings of Fact #7 and #8.

16. In the 1997-98 school year, Education Connection employed four teachers in the Gateways Alternative School program it operated for the School Board. The students served by the program are not identified as special education students.

17. From 1985 through the 1988-89 school year, the School Board operated an alternative educational program within the school system designed to help approximately 15 academically

unsuccessful students. This program covered middle school grades and students were selected due to academic failure usually related to behavioral problems. The program was staffed with two or three bargaining unit teachers and was operated in a self-contained classroom where the students received instruction in all core academic subjects.

18. For at least the last twelve years, the school system has operated a special education self-contained alternative program at the Torrington Middle School. The program has between eleven and fifteen students and aims to mainstream the students to the classroom. The program is staffed with bargaining unit teachers. Special education students are identified as such by the school system. A process is then instituted to decide the most appropriate educational program for the special education student which includes input from parents and school personnel, including teachers. If the parties are unable to agree on the appropriate placement for the student, an independent hearing officer may make the decision.

19. In any given school year, the Torrington school system places a variety of students outside the system in various educational programs. Certain students attend the vocational agricultural programs at Wamogo and Region 7 schools. Approximately five students attend the Greater Hartford Academy for Performing Arts which is run by the regional educational service center CREC. Bargaining unit teachers also provide arts education. Some students attend the special education program Polaris which is also run by CREC. The Torrington school system pays part or all of the tuition for students in these programs. The school system also contracts for certain services such as psychological counseling, services for hearing impaired students, speech therapy and social work. Some of those same services are also provided by Torrington teachers and staff members within the school system.

20. The certified teachers in all regional educational service centers, except Education Connection, are represented by exclusive bargaining agents as follows:

- a) CREC - Capitol Regional Education Council Education Association
- b) EASTCONN - EASTCONN Federation of Teachers
- c) LEARN - Project Learn Education Association
- d) ACES - Area Cooperative Educational Services Education Association
- e) CES - Cooperative Educational Services Education Association

21. As of the date of the hearing in this matter, Education Connection was not aware of any attempt to organize the certified teaching staff of Education Connection.

22. Section 10-153a (commonly referred to as the Teachers Negotiation Act) currently applies to regional educational service centers.

CONCLUSION OF LAW

1. The Torrington Board of Education did not commit a prohibit practice in violation of the

Act when it unilaterally contracted with Education Connection to provide a program for certain students within the Torrington school system.

DISCUSSION

This case presents the question of whether the School Board unlawfully unilaterally subcontracted bargaining unit work when it contracted with Education Connection to provide an alternative school for troubled and/or expelled students.

The Association argues that pursuant to our decision in *City of New Britain*, Decision No. 3290 (1995), it has established a *prima facie* case of unlawful subcontracting which the School Board has failed to rebut. The Association also argues that the public policy favoring collective bargaining in the educational environment supports a decision in its favor.

The Respondents argue that the Association did not establish all the necessary elements under *New Britain* and has, therefore, failed to prove a *prima facie* case. In the alternative, the Respondents argue that the collective bargaining agreement between the parties allows the School Board's action and that public policy supports unilateral action in this circumstance. Here, we agree with the Respondents that the Association has failed to prove a *prima facie* case and we dismiss the complaint.

In *City of New Britain, supra*, this Board established the analysis to be used in cases alleging unlawful subcontracting of bargaining unit work. A party complaining of unlawful subcontracting must establish each of the following in order to present a *prima facie* case:

1. The work in question is bargaining unit work;
2. The subcontracting or transfer of work varies significantly in kind or degree from what has been customary under past established practice; and
3. The subcontracting or transfer of work has a demonstrable adverse impact on the bargaining unit.

If the Complainant makes a *prima facie* showing, the Respondent may provide certain defenses to its actions such as showing that a contractual provision allows the action or that the work assigned outside the unit is *de minimus*. In *New Britain* the Labor Board also recognized the importance of public policy implications that either support or weigh against either party in these cases.

In this matter, the Respondents concede that the work in question is bargaining unit work. Thus, the first prong of the *New Britain* analysis is satisfied.

Turning to the second prong, we find that the Association has failed to prove that the subcontracting in question varies significantly in kind or degree from what was customary under past established practice. In this regard, the School Board has historically subcontracted for programs and services, many of which are capable of being provided by the Torrington school

system or are currently being provided within the school system to one degree or another. Specifically, students are out-placed in the Greater Hartford Arts Academy in spite of the fact that art programs are offered within the system. While it is true that the full range of arts courses is not provided by the system, we fail to see how this impacts the analysis. The situation is analogous. The system clearly has the capability to teach the arts and does, in fact, offer arts education, but has a practice of utilizing another source to provide a more comprehensive program. Likewise, the school system utilizes subcontracted providers for such services as counseling and speech therapy in spite of the fact that such services are also provided by the bargaining unit. The reason for using the subcontracted services is sometimes as simple as lack of availability of staff personnel to handle the student load. In such cases, the school system looks elsewhere for services. Special education students are also regularly placed outside the system depending on their needs. It is quite clear from the record that special education services are also provided by the bargaining unit. We also note that the school system has a practice of using Polaris, another RESC program, for emotionally disturbed children.

We do not agree with the Association that the Gateway program is significantly different than any of the programs described above. Each constitutes a program or service provided by non-bargaining unit personnel which fulfills an educational need for special students. This is the same function that Gateway performs. Although we realize that the Gateway program has allowed an entire group of students to be taught by non-bargaining unit personnel, we do not believe this is any different than the other groups of students who are serviced by outside sources.

We are also not convinced that special education programs are irrelevant to this analysis. We realize that some special education placements are the result of a process in which a third party hearing officer may require the school system to place a child in a particular program. However, many special education placements are the result of agreement between the parents and the school system to place the student in a different program offering some services that could also be provided by the bargaining unit.

Finally, we are not convinced that, because the School Board once provided a program for at-risk middle schoolers, it is now bound to bargain about its decision to contract with Education Connection about the Gateway program. The prior program has not functioned for ten years. During the four years that it functioned in the late 1980's, it serviced only middle school students. Also, it did not serve as the alternative educational opportunity for expelled students as Gateway does. Due to the differences in the programs and the intervening practices of the School Board to contract out significant programs for special students, we find that the prior existence of a similar program for troubled students is not enough to establish that the current action of the School Board is a deviation from what is customary under past established practice.

Having found that the Association failed to establish the second prong of the *New Britain* analysis, it is not necessary to decide whether there was a demonstrable adverse impact on the bargaining unit of the School Board's actions or to consider the Respondents' contractual

defense. We do, however, feel it is appropriate to comment on the well articulated public policy arguments raised by both parties in this matter.

This case presents a classic example of the tension between the clear public policy supporting collective bargaining in the area of education and the strong arguments that can be made that public policy supports unilateral action to allow School Boards to deal with particularly difficult students. The Association ably articulated the collective bargaining public policy argument in its brief by stating:

Because collective bargaining itself is favored by public policy, exceptions to the duty to bargain over a mandatory subject on other public policy grounds should not be lightly recognized. ... Likewise a public policy excuse for not bargaining collectively should be rejected unless such policy is well defined, dominant, based on laws and legal precedents, and not dependent on "general considerations of supposed public interests." ...Simply because a decision to subcontract is educationally sound does not excuse a board of education from negotiating over the decision. [footnote omitted] Association brief at page 13.

Indeed, this Board has made the same statement in *Groton Board of Education*, Decision No. 3466 (1997) in which we stated:

We will not excuse bargaining merely because the School Board is able to demonstrate that its actions are based on sound educational policy. Indeed, the legislature has made it clear that public policy favors collective bargaining as part of the process of building and maintaining quality educational environments. *Groton, supra* at 5.

We continue to adhere to that statement. We believe that the legislature has determined that collective bargaining is an integral part of the process of providing quality education in this State.

In this case, however, the Respondents raise an argument that public policy supports a school board's unilateral decision to use the statutorily created RESCs to service troubled students. The Respondents argue that, particularly in a situation involving these kinds of students, the discretion to participate in a RESC program should rest solely in the hands of a school board because the TNA and the RESC statutes contain potentially conflicting provisions which may make it nearly impossible for a school board to honor collective bargaining obligations and take advantage of the RESC opportunities. In essence, they claim that there is as strong a public policy in favor of utilizing RESC opportunities as there is in favor of collective bargaining.

While we do not decide the instant case on a public policy basis, we believe these are the types of arguments to be considered by the Labor Board if it were to decide a case on public policy grounds as contemplated in *New Britain, supra*.

ORDER

By virtue of and pursuant to the power vested in the Connecticut State Board of Labor Relations by the Teacher Negotiation Act, it is hereby

ORDERED that the complaint filed herein be, and the same hereby is **DISMISSED**.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

John H. Sauter

John H. Sauter
Chairman

Wendella A. Battey

Wendella A. Battey
Board Member

John W. Moore, Jr.

John W. Moore, Jr.
Alternate Board Member

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed postage prepaid this 2nd day of September, 1999 to the following:

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