UNION JOB PROTECTION 101:

A Legal Guide to Detect Contracting Out

CSEA Legal Department

INTRODUCTION

Outsourcing can be dangerous and costly to our members and their communities' well-being. Many CSEA departments, including Field Operations, Communications, and Political Action, can assist you with campaigns to stop outsourcing efforts by non-legal means. The Legal Department can provide you with the legal analysis and tools with which we can formally challenge an employer's efforts to take away our work.

As this guide explains, there are certain legal tests under New York State Public Employment Relations Board and National Labor Relations Board case law which determine whether an employer can legally outsource union work. Both the decision to outsource and the impact of that decision are subjects which the employer must bargain with the union.

In addition to Taylor Law and/or National Labor Relations Act protections, certain collective bargaining agreements may address outsourcing, but this guide does not discuss contract issues.

We hope you find these materials helpful.

Daren J. Rylewicz, General Counsel

Background

Merriam-Webster Dictionary defines "outsourcing" as the procurement of goods or services from outside sources, especially from foreign or nonunion suppliers.[1] The legal limitation on the ability to outsource public sector work in New York State stems first from the New York State Constitution,[2] which provides that:

> Appointments and promotions in the Civil Service of the State and all of the Civil Divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive.[3]

Two court cases also provide the legal framework regarding the issue of outsourcing in New York. In *Corwin v. Farrell*,[4] the Court held that the State Constitution does not require that all services provided to a county be performed by persons directly employed by that county. The Court further held that a contract to provide services between the private sector and the government can be challenged as violating Article V, Section 6 of the Constitution only where the private party's employees are not independent of the government, but are controlled and supervised by government officials. Substitute the "State," the "Town," the "School District," or any other political subdivision for the "County" in *Corwin*[5] and you will have the same result: the governmental body may decide to have some of its services offered by non-governmental entities.

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1 "Outsource." <https://www.merriam-webster.com/dictionary/outsource>. Merriam-Webster Online. Accessed March 19, 2019.
2 New York State Const. Article V, Section 6.
3 *Id.*
4 303 NY 61, 100 NE2d 135 (1951).
5 *Id.*

A subsequent decision[6] refined *Corwin*.[7] In *Westchester County CSEA*,[8] the Court found that a contract between Westchester County and a private security firm did not mask an employer/employee relationship: Westchester County did not retain enough control of the contractor's employees to be considered as the employer. The Court found that the contract neither abolished civil service jobs in bad faith nor violated the New York State Constitution. Thus, the New York State Court of Appeals upheld the employer's right to outsource services and to abolish positions of public employees who had previously performed those services. Significantly, the Court did not address the employer's duty to bargain regarding outsourcing issues in this particular case.

Duty to bargain

Public employee unions do have some power to curb the contracting out of public services. Public employers are faced with a mandatory duty to bargain on the issue of outsourcing.[9] In a matter pursued by CSEA, the Court upheld a PERB decision which found outsourcing to be a mandatory subject of bargaining in New York when it affects the terms and conditions of employment of current employees and when the subcontractor is to perform the same work under similar performance standards.[10] This decision applies to situations where the

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[6] *Westchester County Civil Service Employees Association, Inc., et al. v. Cimino*, 44 NY2d 985, 380 NE2d 327, 408 NYS2d 501 (1978).

[7] 303 NY 61, 100 NE2d 135 (1951).

[8] 44 NY2d 985, 380 NE2d 327, 408 NYS2d 501 (1978).

[9] Ronald Donovan & Marsha J. Orr, *Subcontracting in the Public Sector: the New York Experience* (1982). PERB has adopted the practice of the private sector in categorizing subjects as mandatory, non-mandatory, or prohibited subjects of negotiation. A mandatory term or condition of employment is one that, if raised by either party, must be negotiated in good faith, even to the point of deadlock. On the other hand, a non-mandatory or permissive subject may not be pressed to impasse except by mutual agreement. The employer is free to make unilateral changes in terms and conditions of employment that are non-mandatory subjects so long as the matter is not part of a current agreement. However, the employer is obliged to negotiate the impact of any such unilateral change on terms and conditions at the request of the bargaining agent. The duty to negotiate impact is so firmly established that, in *North Babylon Union Free Sch. Dist.*, 7 PERB ¶3027 (1974), the Board determined that, upon request, an employer must negotiate the impact of a decision even when the employer suspects there is no impact. *Id.*

[10] *Saratoga Springs Sch. Dist.*, 11 PERB ¶3037 (1978), aff'd *Saratoga Springs v. NY PERB*, 68 AD2d 202, 416 NYS2d 415 (3d Dep't 1979), appeal denied 47 NY2d 711, 394 NE2d 294, 420 NYS2d 1024 (1979).

employer merely seeks to replace public sector with private sector employees without changing its basic operation or reducing its services. The Appellate Division, Third Department, has also upheld PERB findings regarding the employer's duty to bargain over the issue of outsourcing in other cases.[11]

Bargaining may not be required if the decision to contract-out is related to an alteration in the level of services provided to the public. Under such circumstances PERB invokes a balancing test, as set out in *Niagara Frontier Transportation Authority,*[12] wherein the Board held that, absent a change in job qualifications, a public employer's unilateral reassignment of unit work to non-unit employees violates Section 209-a.1(d) of the Taylor Law if the transferred duties are substantially similar in form and have been exclusively performed in the past by unit employees.[13] As a result, and absent contract language establishing the contrary, the employer has an obligation to negotiate the actual decision to outsource, as well as an obligation to negotiate the impact of any decision to outsource. If the employer were to decide to eliminate the services provided, the union would be limited by law to negotiating only the impact of such a managerial decision. PERB has also long held that "the fiscal or operational wisdom of a decision to subcontract unit work is immaterial to the negotiability of the subject."[14] The criteria

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[11] *See Lawrence Teachers' Ass'n, NYSUT, AFT, NEA, AFL CIO v. New York State Pub. Employment Relations Bd., 152 A.D.3d 171, 173, 57 N.Y.S.3d 551, 552 (N.Y. App. Div.), leave to appeal denied sub nom. Lawrence Teachers' Ass'n v. New York State Pub. Employment Relations Bd., 30 N.Y.3d 904, 89 N.E.3d 1257 (2017); Matter of Manhasset Union Free School Dist. v. New York State Publ. Empl. Relations Bd.,* 61 A.D.3d 1231, 1232–1233, 877 N.Y.S.2d 497 (2009); *Matter of Romaine v. Cuevas,* 305 A.D.2d 968, 969, 762 N.Y.S.2d 122 (2003).

[12] 18 PERB ¶3083 (1985).

[13] *Id*. Although the Taylor Law §209-a.3 specifically states that private sector labor law shall not be regarded as binding or controlling precedent, it is obvious that private sector National Labor Relations Board and federal case law is not ignored. In *Fibreboard Paper Products v. NLRB,* 379 US 203 (1964), the Court held that an employer's decision to subcontract that resulted in "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" is a mandatory subject of bargaining.

[14] *Pine Valley CSD,* 51 PERB ¶3036 (2018); *City of Lockport,* 47 PERB ¶ 3030, 3092 (2014), quoting *City of Niagara Falls*, 31 PERB ¶ 3085, 3188 (1998); *see also Cayuga Community College*, 50 PERB ¶ 3003, at 3012; Manhasset Union Free Sch. Dist., 41 PERB ¶ 3005, at 3021.

set forth in *Niagara Frontier Transportation Authority*[15] have been applied in later cases to further clarify what is meant by "exclusive" and "substantially similar" work.

Exclusivity

It is well established that two essential questions must be addressed when determining whether a transfer of exclusive unit work to a non-bargaining unit worker violates § 209-a.1 (d) of the Act: (1) was the at-issue work exclusively performed by unit employees for a sufficient period of time to establish a binding past practice; and (2) was the work assigned to non-unit personnel substantially similar to that exclusive unit work.[16] PERB has found that as little as nine months of exclusive performance was sufficient to establish exclusivity over certain bargaining unit work.[17] If both these questions are answered in the affirmative, a violation of § 209-a.1 (d) of the Act will be found unless there has been a significant change in job qualifications.[18] When there has been a significant change in job qualifications, the respective interests of the employer and the unit employees must be balanced to determine whether the Act has been violated.[19]

In *Indian River Central School District*,[20] the Board clarified its concept of "exclusivity" when it dismissed an improper practice charge where the employer had previously utilized a private contractor for a significant percentage of its bus operations, indicating that once exclusivity is lost, it is lost as to the whole, and not merely to the shared portion of work. However, if there are precise boundaries in time, operation, and personnel, such as seasonal work, large or unusual tasks, or specialized expertise, the lack of exclusivity may not be

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15 *Niagara Frontier Transp. Auth.*, 18 PERB ¶3083 (1985).
16 *Pine Valley CSD, supra*.
17 *Buffalo CSD*, 43 PERB ¶4627 (2010).
18 *Pine Valley CSD, supra.*
19 *Id*.
20 20 PERB ¶3047 (1987).

determinative in destroying exclusivity to the whole.[21] In *Town of West Seneca*,[22] the Board recognized that work may be considered to be exclusive unit work even if, at times, it is performed by non-unit employees.[23] PERB further clarified this concept, known as "discernible boundary," in subsequent cases.[24]

This rationale by the Board has been followed in many cases. In *County of Allegany*,[25] the Board dismissed an improper practice charge where the County had outsourced tree removal, sand and salt hauling, and operation of County equipment on loan. The County showed that no exclusivity existed because outside contractors had been used in the past to remove trees that were near power lines and to pave County roads. In addition, private contractors had provided various materials and equipment used by the County in its road maintenance in order to complete the work during relatively short periods of warm weather. Once private employees are used to perform public employee unit work, it is difficult – though not impossible – to argue that exclusivity has not been lost.[26]

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[21] *See*, *Town of West Seneca*, 19 PERB ¶3028 (1986). The Board rejected the employer's contention of non-exclusivity based on its practice of employing non-unit student seasonal employees in the summer to facilitate vacations for unit employees. The Board found that this clearly circumscribed practice did not justify unilateral assignment of unit work to non-unit employees during the regular work year. Citing *Niagara Frontier Transp. Auth.*, 18 PERB ¶3083 (1985), the Board stated, "a public employer may not assign tasks of unit employees to non-unit employees unless the tasks or the qualifications for the job have been substantially changed;" *see also*, *Spencer-Van Etten Cent. Sch. Dist*, 21 PERB ¶3015 (1987); *see also, City of Rome*, 32 PERB ¶3058 (1999).

[22] 19 PERB ¶3028 (1986).

[23] *State of New York*, 33 PERB ¶4544 (2000).

[24] 33 PERB ¶4544 (2000).

[25] 27 PERB ¶3013 (1994).

[26] *See*, *State of New York (Division of Military and Naval Affairs)*, 27 PERB ¶3027 (1994). The union's charge that the State unilaterally transferred air base gate-security duties to non-unit federal personnel was dismissed where evidence failed to show that the duties in question were performed exclusively by unit members. CSEA lost, despite arguing that the federal guards' gate duties were rendered within a discernible boundary of peacetime training, wartime protection or emergency situations. *Id.*; *See also*, *Town of Brookhaven*, 27 PERB ¶3063 (1994), where, while the evidence indicated that both unit employees and private employees transported trash and garbage and loaded such items from containers at landfills for transport to the final destination points, the union failed to establish the requisite exclusivity of the transport work; neither ownership of the containers nor type of trash or garbage was sufficient to define discernible boundary of unit work; *see also, Town of Shawangunk*, where the ALJ found that non-unit performance of work incidental to a larger construction project did not destroy exclusivity. 32 PERB ¶4537 (1999).

In *City of Rochester*,[27] the Board concluded that the City violated its bargaining obligation when it unilaterally assigned civilians to police a "tele-serve" unit, which received non-emergency criminal complaints from citizens via telephone. The evidence showed that the work in question was exclusively that of unit police officers. The fact that interns had performed such work in the past did not destroy exclusivity because interns were essentially officer trainees who, shortly thereafter, became police officers. PERB declined to abandon the concept of "discernible boundary" to unit work in favor of the City's absolute concept of exclusivity, wherein performance of any unit work by non-unit personnel, at any time and under any circumstances, resulted in the loss of exclusivity.

In *Hudson City School District Unit*,[28] the Board affirmed an ALJ decision which held that, although aides and clerical workers had done attendance work in certain schools of the District, a discernible boundary existed for the attendance work at the Middle School since the aides there had exclusivity over that work.

In *Schenectady Police Benevolent Association*,[29] the Board found that the City had violated its bargaining obligation by unilaterally assigning non-unit auxiliary police to perform traffic control duties during a "half-marathon." In the past, the non-unit auxiliary police had been supervised by sworn police officers. The assignment of work entirely to the auxiliary police was therefore improper.

In *Cairo-Durham CSD Unit*,[30] the Board upheld the ALJ's determination that CSEA retained exclusivity over daytime cafeteria operations at the school. The ALJ found a discernible boundary between the daytime cafeteria program for students and evening banquets. The use of

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[27] 27 PERB ¶3031 (1994).
[28] 24 PERB ¶3039 (1991).
[29] 25 PERB ¶3073 (1992).
[30] 25 PERB ¶3059 (1992).

volunteers working food service in connection with after-school programs was held not to affect the past practice of the work being exclusively performed by unit employees during normal school days.

In *County of Onondaga,*[31] PERB continued to find that exclusivity is not lost where a discernible boundary exists. The Board concluded that the County violated its duty to bargain by unilaterally outsourcing laboratory testing for sexually transmitted diseases (STD). The County's use of a private laboratory to perform syphilis tests for an eight-month period preceding the illegal outsourcing of all STD testing did not extinguish the union's claim of exclusivity over such work. The evidence showed that the private laboratory performed an insignificant number of tests incidental to a battery of unrelated tests.[32]

In *City of Rome*,[33] the "discernible boundary" precedent was further refined into the concept of a "core components" test: Only the unilateral reassignment of the core components (not the peripheral or incidental tasks) of exclusive unit work to non-unit employees can constitute a violation of the Act.

In *Manhasset USFD,*[34] the Board stated that when determining the scope of unit work and whether that work has been performed exclusively by the bargaining unit, it will examine whether an enforceable past practice exists by applying the traditional past practice test; thus considering whether the "practice was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue." The Board would thus analyze the nature and

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[31] 27 PERB ¶3048 (1994); *See also, County of Monroe*, 27 PERB ¶4637 (1994), where the County violated its bargaining obligation by subcontracting the training of the County's staff in basic cleaning and health and safety issues to a private service provider.

[32] County employees performed 54,000 STD tests, while the private lab only performed 841 in 1992.

[33] 32 PERB ¶3058 (1999).

[34] 41 PERB ¶3005 (2008) *aff'd* 61AD3d 1231 (3rd Dept. 2009)

frequency of the work performed, the geographic location where the work is performed, the employer's explicit or implicit rationale for the practice, and other facts establishing that the at-issue work has been treated as distinct from work performed by non-unit personnel.

Substantially similar

In determining if the contracted work is "substantially similar" to the unit work, PERB compares the tasks and the nature of the services provided by unit employees. The Board's implementation of this requirement was seen in *Tonawanda City School District*,[35] where the District abolished a school nurse/teacher position and created a non-unit registered nurse position. The Board declined to follow its previous determination in *North Shore Union Free School District*,[36] in which it had found a non-unit nurse position to be substantially different due to the elimination of teaching duties. Rather, the Board focused upon the tasks of the two positions and found an impermissible unilateral change because the unit nursing task was substantially continued in the non-unit position.[37]

In *City of Rochester*,[38] PERB determined that the City had violated its duty to bargain by unilaterally replacing police officers who had been assigned to direct traffic at a construction site with security guards employed by a private contractor. Similarly, in *Lawrence Union Free School District*,[39] the PERB Board ruled that where union-represented Security Aides had exclusively performed District "property protection" that the assignment of said duties to a

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35 17 PERB ¶3091 (1984).
36 11 PERB ¶3011 (1978).
37 Irving Perlman, *Privatization, Consolidation and Sharing of Public Services – Status and Rights of Public Employees in the Current "Doing More, or 'Staying Even' With Less," Climate,* in *Public Sector Labor Law: Counseling Clients, Negotiating Contracts and Making Law in the Nineties*. P. 176 (1993).
38 21 PERB ¶3040 (1988), aff'd *City of Rochester v. PERB*, 105 AD2d 1056, 482 NYS2d 167 (4th Dep't 1989), *appeal denied* 66 NY2d 606, 513 NE2d 241, 519 NYS2d 1025 (1989); *see also, Village of Ocean Beach*, 35 PERB ¶4525 (2000), where the Board held that continual granting of holidays for a five-year period was enough to be considered past practice.
39 50 PERB ¶3034 (2017).

private security company violated the Act and required the work be restored to the affected bargaining unit members.

In *Town of Smithtown,*[40] PERB held that the Town had violated its bargaining obligation by unilaterally outsourcing the collection of white metal refuse to a private carter. PERB declined to accept the Town's contention that it was not required to bargain this outsourcing because the private carter made collections more often and faster than unit employees. PERB found that the transferred tasks were unchanged. In addition, PERB held that:

> Although improved service is often a reason given by employers in justification of their unilateral subcontracting, it has not been considered a defense to a refusal to bargain allegation.[41]

When a public employer may unilaterally outsource

An employer may act unilaterally to outsource work if the employer shows a "compelling need." A compelling need will be found only if the employer has exhausted all other possibilities and is faced with an emergency. A compelling need is found when: (1) the parties are at an impasse in negotiations; (2) the employer is faced with an emergency; and (3) the employer is willing to continue with the negotiations after the transfer of the work.[42] Where the employer invokes the compelling need standard, PERB looks to the bargaining history of the parties, and to the timing and the nature of the emergency situation. For example, PERB applied the *NFTA*[43] balancing test to determine that the City of Newburgh did not violate bargaining obligations when it abolished the civilian animal control position and unilaterally transferred the work to uniformed non-unit employees. PERB weighed the mere loss of work against the City's

[40] 25 PERB ¶3081 (1992).
[41] *Id.*
[42] *Wappingers Falls Cent. Sch. Dist.*, 19 PERB ¶3037 (1986).
[43] 18 PERB ¶3038 (1985).

legitimate managerial concerns and concluded that the City did not need to negotiate the transfer.[44]

An employer may unilaterally outsource when a union has waived its right to bargain in the collective bargaining agreement with the employer.[45] However, the contract language must be clear and unambiguous in order to constitute a waiver by a union.[46]

In *County of Livingston*,[47] PERB found that CSEA had waived its right to negotiate with respect to outsourcing by reason of its agreement to language in the management rights clause which gave management the right "to determine whether and to what extent the work required in operating its business and supplying its services shall be performed by employees covered by this agreement...."[48] In reaching this decision, the Board gave more weight to the general language of a management rights clause than it had previously.

In *Garden City UFSD*,[49] the Board reversed the ALJ's decision and held that the outsourcing of a cafeteria operation did not violate §209-a.1(d) because the collective bargaining agreement's management rights clause contained a waiver by CSEA. That agreement provided that management could "contract for performance of any of its services." The Board found that

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[44] *City of Newburgh*, 33 PERB ¶7009 (2000).

[45] *City of Syracuse*, 28 PERB ¶4501 (1995). Article 17 of the collective bargaining agreement, entitled *"Management Rights,"* provided, in pertinent part:

> ... the Fire Chief shall have the sole and exclusive right to direct and manage the Fire Department, including, but not limited to, the following rights: ... to determine what Fire Department related, or emergency work is to be performed by the Department, its place of performance, and who is to perform it; ... Departmental operations are to be conducted; and to change any such determination.

[46] *In Odessa-Montour Cent. Sch. Dist.*, 27 PERB ¶4621 (1994), the totality of bargaining between the school district and the union failed to demonstrate a clear and unmistakable waiver by the union of its right to bargain the school district's decision to contract out its busing and maintenance services. The fact that the school district never received a demand to negotiate the contracting-out decision, and that the contract remained silent on the contracting-out issue while presenting four-year proposals, was too ambiguous to support a finding of waiver. *Id.*

[47] 26 PERB ¶3074 (1993).

[48] *Id.*

[49] 27 PERB ¶3029 (1994).

this language was sufficiently specific to constitute a knowing waiver of CSEA's right to object to outsourcing.

Outsourcing may be unilaterally instituted in other situations as well. PERB has held in certain circumstances that there may be no need for bargaining where the transfer of work does not adversely affect the unit employees,[50] though loss of unit work is sufficient to render outsourcing a mandatory subject, as noted above. If the work in question has been performed by employees both in and out of the unit, then a decision to assign more work to employees outside the unit does not require bargaining.[51] Finally, there may be no obligation to negotiate if there has been a significant change in the qualifications for the job.[52] Under this circumstance, the interests of the public employer and the unit employees are weighed against each other.[53]

The Court of Appeals has also held that pursuant to Education Law §1950, school districts are exempt from the requirement of collective bargaining when outsourcing with a BOCES.[54]

Use of volunteers

A more refined question involving outsourcing is whether an improper practice charge can be filed regarding plans to use volunteers for bargaining unit work. The leading PERB cases on this matter are *City of Saratoga Springs*[55] and *Triborough Bridge Authority.*[56] In *Saratoga Springs,* PERB held that it is a management prerogative to use volunteers to replace employees who are on a leave of absence. PERB's rationale was that an employer cannot be prevented from

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[50] *See, e.g., City of Albany*, 13 PERB ¶3011 (1980), where the city was allowed to transfer police work (i.e., communications, issuance of parking tickets) to non-unit civilians.
[51] *Deer Park Union Free Sch. Dist.*, 15 PERB ¶3104 (1982).
[52] *See, e.g., Niagara Frontier Transp. Auth.*, 18 PERB ¶3083 (1985).
[53] *Id.*
[54] *See, Vestal Employees Ass'n, NEA/NY, NEA v. PERB*, 94 N.Y.2d 409, 413, 727 N.E.2d 122 (2000); *Webster Cent. Sch. Dist.*, 23 PERB ¶7013 (1990).
[55] 16 PERB ¶3058 (1983).
[56] 18 PERB ¶4622 (1985).

using volunteers in "emergency situations," as this would impose a restriction on the services the employer may choose to render. In the same case, the Board expressly did not determine whether it also would be a management prerogative to use a volunteer to replace a unit employee who had left the employer's service. In the *Triborough* case, which cites *Saratoga Springs*, the ALJ stated "a temporary reassignment of unit work to ensure continued delivery of services in an emergency is non-mandatory (for bargaining purposes)."

A claim that volunteers are needed to assist in activities for which there is no funding for staff would probably rely on an argument that the absence of funding constitutes the "emergency situation" and that, in accordance with its management prerogative, the employer must be allowed to use volunteers in order to ensure continued delivery of services in this emergency situation. If an alleged fiscal emergency were presented as a "temporary" situation, then perhaps management would prevail. However, the way in which management represents the alleged fiscal crisis may indicate that it does not consider the situation to be of a temporary, defined duration. Should this be the case, the union would be in a better position to argue that while management prerogative permits management either to offer or not to offer certain services, management cannot elect to offer the services by outsourcing work. As stated in *County of Montgomery*,[57] the decision to outsource services which adversely affect unit employees and continue substantially unchanged is a mandatory subject of bargaining.

As previously noted, PERB has consistently held that economic motivations are not a defense to a demand to bargain the decision to outsource.[58] In *Chautauqua County*,[59] PERB held that the duty to bargain applied even though the County claimed that the outsourcing at issue was

[57] 19 PERB ¶4600 (1986).
[58] *See*, *Pine Valley CSD, supra; Somers Faculty Association*, 9 PERB ¶3014 (1976).
[59] 22 PERB ¶3016 (1989).

economically necessary as that on its own does not constitute a "compelling need" relieving the employer from its Taylor Law obligations.

Many arguments regarding the use of volunteers will also apply to the assignment of exclusive bargaining unit work to prisoners and welfare recipients. In *County of Niagara,*[60] the Board dismissed an improper practice charge filed by AFSCME Council 66 over the decision to allow non-unit volunteers to participate in a "Cleaning Day" at a beach it had closed because of a cut in parks personnel on the basis that the union did not establish its exclusivity over picking up trash at the beach as welfare recipients and weekend prisoners, along with seasonal employees and lifeguards, had performed similar work for a number of years. In *City of Amsterdam,*[61] the ALJ found that the City had violated its bargaining obligation by utilizing non-unit participants of the Alternatives to Incarceration (ATI) program to perform custodial and clerical duties historically performed exclusively by unit employees. The assertion that the benefits of the ATI program to the community outweighed the detriment to the unit was rejected as a defense to the charge.

In any circumstance involving welfare recipients and prisoners, advocates should be mindful of the statutes authorizing their use in public work assignments.

PRIVATE SECTOR OVERVIEW

Until the early 1960s, the National Labor Relations Board (NLRB) maintained the position that an employer's decision to outsource was not a mandatory subject of bargaining. In 1961, the Board decided *Fibreboard Paper Products Corp.*,[62] in which the Board stated that the Act does not require an employer to bargain over its decision to outsource where the decision is economically motivated. In 1962, the Board changed its position. In *Town & Country*

[60] 26 PERB ¶4582 (1993).
[61] 28 PERB ¶4516 (1995).
[62] 130 NLRB 1558 (1961).

Manufacturing Co.,[63] the Board found outsourcing to be a mandatory subject of bargaining where unit employees lost their jobs as a result of the outsourcing. The Board thereafter reconsidered and reversed its decision in the *Fibreboard* case. The second *Fibreboard* case was eventually affirmed by the United States Supreme Court, which held that the decision to outsource when unit employees are laid off as a result is a mandatory subject of bargaining.[64]

In 1965, the NLRB decided *Westinghouse Electric Corp*,[65] which enunciated several factors that it would use to determine whether an outsourcing decision required bargaining. It held that bargaining in the private sector is not required if the following factors were applied: (1) the outsourcing is motivated only by economic reasons; (2) it is customary for the employer to outsource various types of work; (3) the degree and nature of the outsourcing is not at variance with the custom or past practice of outsourcing; (4) there is no significant detriment to unit employees; and (5) the union has had an opportunity to bargain about changes in existing outsourcing practices at general bargaining sessions.

In applying this test, the NLRB has found that an employer is not required to bargain over outsourcing where the outsourced work is different than the type of work normally performed by unit employees.[66] The NLRB has also found that where the outsourced work comprises only a minimal amount of the bargaining unit work, bargaining is not required.[67] But, where employees lose jobs or a significant amount of overtime, bargaining is typically required.[68]

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[63] 136 NLRB 1022 (1962).
[64] 379 U.S. 203 (1964).
[65] 150 NLRB 1574 (1965).
[66] *See, e.g., Central Soya Co.,*151 NLRB 1691 (1965).
[67] *General Electric Co.,* 264 NLRB 306 (1982).
[68] *Weston & Booker Co.,* 154 NLRB 747 (1965).

In summary, private sector outsourcing issues are mandatory subjects of bargaining if all that is involved is the replacement or substitution of one group of employees for another in order to perform the same work under similar conditions of employment. The union must be able to show some adverse impact on employees in the unit. The employer is not required to bargain if a minimal amount of bargaining unit work is repeatedly outsourced; but, the employer is required to bargain if there is a variation from past practice regarding outsourcing, or if the outsourcing has a significant effect on unit jobs, or present or future job security.

But what if an employer decides to shut down one aspect of its business? In *First National Maintenance*,[69] the Supreme Court held that an employer's decision to shut down part of its business for non-labor costs reasons, which involves a change in the scope and direction of the enterprise, is outside the scope of bargaining.

In the private sector, the distinction between a partial closure, as in *First National Maintenance*, and outsourcing, as in *Fibreboard*, often becomes blurred. Where the decision rests upon a change in the nature and direction of a significant facet of the business, that action is a management prerogative and is not subject to bargaining. Bargaining is not be required where the employer can clearly show that cost savings in relocating exceeds any possible wage concessions that could be negotiated with the union.[70] However, some courts have even held that relocation is not a mandatory subject of bargaining under any circumstance.[71]

In *O.G.S. Technologies, Inc.*,[72] the Board set forth a broad requirement that employers bargain over outsourcing decisions, even where new technologies and decisions about major capital investments are involved. Concerning the decision to outsource die-cutting work, the

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[69] 452 US 666 (1981).
[70] *Dubuque Packing Co*., 303 NLRB No. 66 (1991).
[71] *See, e.g. Dorsey Trailers, Inc. v. N.L.R.B., 233 F.3d 831, 844 (4th Cir. 2000)*
[72] 356 NLRB 642 (2011).

Board rejected the company's claim that the change represented a fundamental change in the scope of the enterprise and was therefore not a mandatory subject of bargaining under *First National Maintenance*. In reaching this conclusion, a two-member majority emphasized that the company had not abandoned a line of business or made some other fundamental change in its business, but had simply changed a manufacturing method. Thus, it was held, outsourcing in order to take advantage of more advanced technologies does not rise to the level of a change in the scope of the enterprise or its direction. The continuity in the company's overall operations made the decision to outsource the die-cutting work a mandatory subject of bargaining under *Fibreboard*. This standard was again cited in a 2018 Board decision finding that *Rigid Pak Co.* was required to bargain over the decision to subcontract injection-molding work.[73]

The issue of outsourcing in the private sector is more complicated, and more difficult for unions to traverse than in the public sector. Private businesses are not subject to State Constitutional limitations on outsourcing, and are not limited in such decisions by the United States Constitution either. Private enterprises are free to undertake different forms, consolidate, enter into business ventures with other companies, change the scope of its business, close down in whole or part, or relocate. All of these actions can affect unions and the employees they represent, and all can be disguises for outsourcing due to labor costs.

Even where a private sector employer's decision to outsource is not a mandatory subject of bargaining, the employer is required to bargain over the effects of its decision to outsource. Thus, an employer in the private sector is required both to notify the union of impending action and, upon demand, to bargain as to the impact of that impending action. The union has the right to bargain such issues as the right to relocate where the work will be performed, moving

[73] *Rigid Pak Co.*, 366 NLRB No. 137 (2018). In this case, the company continued to exercise substantial oversight over the substantial authority to inspect these processes and handle the shipping.

expenses, severance pay, continued health benefits for a period of time, payment for unused sick, personal, and vacation pay, job placement, etc.

In view of the above, where a private employer undertakes operational changes that will have an adverse impact on bargaining unit employees, it is good practice for the union to demand to negotiate the decision and the effects of that decision so that no issue of waiver can be raised in the future.

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