

H.E. No. 2007-7

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF PALMYRA,

Respondent,

-and-

Docket No. CO-2006-301

PALMYRA POLICE ASSOCIATION,
AFFILIATED WITH FOP LODGE 2,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find the Borough of Palmyra violated 5.4a(5) and (6) when its negotiations committee bargained a successor agreement with the Police Association and then failed to sign and implement the agreement. Based upon the Borough negotiating committee's actions and lack of qualifying statements, the Hearing Examiner found that the Association was entitled to rely on the committee's apparent authority to finalize the successor agreement.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Charging Party.

Appearances:

For the Respondent,
Ruderman and Glickman, attorneys
(Mark S. Ruderman, of counsel)

For the Charging Party,
Markowitz and Richman, attorneys
(Stephen C. Richman, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On June 1, 2006, Palmyra Police Association, FOP Lodge 2 filed an unfair practice charge alleging that the Borough of Palmyra violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., and particularly 5.4(a)(5) and (6)^{1/}

^{1/} These provisions prohibit public employers, their representatives or agents from: "(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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

by bargaining in bad faith and failing to sign a negotiated agreement.

On September 7, 2006, the Director of Unfair Practices issued a Complaint and Notice of Hearing on the charge. On November 9, the Borough filed a Motion for Summary Judgment with the Commission, asking that the Complaint be dismissed as a matter of law. The Borough supported its request with an affidavit of its Mayor. The Association opposed the Motion, and submitted an affidavit of its President. On January 25, 2007, the Commission denied Summary Judgment, finding a factual dispute, and remanded the matter to me for hearing. Borough of Palmyra, P.E.R.C. No. 2007-45, 33 NJPER 7 (¶6 2007). The Borough filed an Answer to the Complaint on February 26, relying on its pre-complaint position statement and the brief in support of its earlier Motion for Summary Judgment. A hearing was conducted on February 27, 2007, wherein witnesses testified and documents were entered into the record.^{2/}

The Association filed a brief on March 16; the Borough filed its brief on March 26, 2007. Based upon the record, I find the following:

^{2/} "C" refers to Commission exhibits; "R" refers to exhibits submitted by the Respondent; "CP" refers to exhibits submitted by the Charging Party. Pages of the transcript of the February 27 hearing will be referred to as "T- ."

FINDINGS OF FACT

1. The Palmyra Police Association, FOP Lodge 2 represents the Borough's patrolmen, sergeants and detectives. At the time of the events in this matter, there were 15 officers in the Association unit (T71). The most recent signed contract between the parties expired December 31, 2005 (CP-1).

2. Negotiations for the successor contract began in August, 2005. The Association negotiations committee consisted of its President, Patrolman Scott Pearlman, Patrolman Donald Lippincott, and Patrolman McGonigal. The Borough's negotiations committee consisted of Mayor John Gural, Councilman David Dorworth, and Councilman Benson. The Mayor also sits on the Borough's finance committee and the public safety committee. Councilman Dorworth is the Director of Public Safety (T9-T10; T24).

3. The Association's initial written proposals (CP-1) contained 24 demands, including a provision that officers be compensated for four hours of overtime they work every pay period. When the department went to 12-hour shifts a few years ago, patrol officers went from an 80-hour pay period to an 84-hour pay period schedule with no additional compensation for the extra four hours. Detectives stayed at the 80 hours per pay period. The purpose of the language in item #1 of the Association's proposal was to equalize the hours and pay rate for the two groups - to pay patrol officers for the extra four hours

and to lengthen the work schedule for detectives to match patrol's schedule (T36-T37).

The salary demand in the Association's written proposal, item 21, said, "Percentage increases every year. Amount to be determined." (CP-1). CP-1 was presented to the Borough negotiations committee at the first negotiations session in August 2005 (T9). The Borough made no counter-proposals at the first session.

4. The first item the respective committees agreed upon was to compensate police for 104 hours of overtime a year and to put the detectives on an 84-hour pay period work schedule consistent with patrolmen (T11-T12).

5. After the first session, the parties met four or five more times between September and November. At one of those sessions, the Borough's negotiations committee offered the Association four percent salary increases in each year of the three-year contract. The Association committee agreed to take the Borough's offer back to its membership. The membership gave the Association the authority to accept the contract package, and at the final negotiations session on November 28 or 29, the Association committee informed the Borough that it would accept the four percent annual wage increase and other agreed upon terms (T11).

6. At the conclusion of the November 28 negotiations session, the parties did not prepare a written memorandum of

understanding concerning the terms (T59). It was agreed that the Association would prepare a draft of the new contract (CP-3; T12). It did so, and gave the draft to Councilman Dorworth in late December 2005 (T14-T15). It was Pearlman's understanding that the draft contract would be reviewed to confirm that it accurately reflected what the negotiations committees agreed upon, and then the agreement would be signed and implemented (T15).

7. After the final negotiations session, Gural forwarded the draft contract to Borough Solicitor Ted Rosenberg for review. During the first week in January 2006, the Borough implemented the revision to the detectives' work schedule to put them on the same 84-hour pay period as patrolmen as provided for in the new agreement (T18). The record is silent on whether detectives or the patrolmen started receiving the agreed upon four hours per pay period of overtime pay.

8. At a lunch meeting on February 8, Councilman Dorworth told Pearlman that there were a few "minor" language items in the draft contract that needed revision. He gave Pearlman a memorandum (CP-4) of the same date detailing six changes the Borough Solicitor proposed to the draft (T16). Nothing in that memorandum suggested that the agreement was subject to council approval. Dorworth and Pearlman discussed the proposed language changes and all were resolved. That same day, Pearlman made the

changes the Borough requested to the draft contract and returned the revised pages (CP-5) to Dorworth (T16-T17).

9. On February 14, the Borough negotiations committees met with the Association negotiations committee to discuss proposed changes to the health benefits plan. The Association agreed to the Borough's proposed changes (T20-T21).

10. Sometime after Dorworth's February 8 meeting with Pearlman to review the Borough's contract language concerns, the Mayor and six Borough Council members met in a closed session meeting to discuss the contract (T68). In advance of the meeting, the draft of the contract was distributed to the council members via their mailboxes (T68). Council President Ken Grail asked Borough Administrator Maryanne Hume, who is also the Chief Financial Officer, to do a financial impact analysis of the contract (T68). Hume prepared a spreadsheet (R-4) showing the cost of the contract. At the Council meeting, Gural and Dorworth recommended the 2006-2008 contract to the Council. However, the other council members exploded and refused to approve the contract because the cost to fund it was too high (T52, T56, T66-T67).

11. Sometime in late February, Hume brought it to the council's attention that the Borough was in a financial crisis. To manage the budget deficit, the Council ultimately decided to close the welfare office, and lay off a tax clerk and a part-time

maintenance employee. The Borough raised municipal taxes about 14 percent in 2006 (T53-T54).

12. On or about February 28, the Chief conducted a departmental meeting with police, and advised them that he had been told there was a financial crisis which would result in layoffs in every department (T20). The Chief suggested that the police "might be able to do something about that" and that the Mayor and Councilmen would meet with "them" (presumably, the Association) (T20-T22). The police asked if the Borough intended to sign the contract, and were told that the Borough could not finance it at that time (T22).

Past Practice:

13. With the exception of the 2003-2005 police contract, the Borough's negotiations committee typically consisted of the mayor and one or two councilmen. The parties generally concluded negotiations with a handshake and did not ordinarily reduce any agreement to a memorandum of understanding (T59-T60). The negotiations for the 2002-2005 contract was the only time in recent memory that the Borough had used an attorney for negotiations and the parties signed a Memorandum of Understanding (R-2; T59-T60). The Borough has passed resolutions (R3a through R3e) authorizing the signing of police contracts since at least 1994. Prior to 2006, the Council had never rejected a negotiated agreement with the Police Association (T58).

14. Association President Pearlman has been on the Association's negotiations committee for several contracts, including negotiations for the 2003-2005 contract. The Borough's negotiations committee then consisted of Mayor Gural and former Councilman Joseph Threston. Labor Attorney Mark Ruderman served as the Borough's professional negotiator. Negotiations for the 2003-2005 contract resulted in a Memorandum of Understanding (R-2), prepared by Ruderman, and signed by members of the Association's and the Borough's negotiations committees on August 12, 2003. That Memorandum ended with the following language: "Both parties agree to recommend ratification to their respective bodies." (R-2; T44-T45).

Pearlman erroneously testified that past agreements reached with the Borough's negotiations committee had always been final and not conditioned upon ratification by the Council (T28-T29). He also submitted an affidavit in support of the Association's opposition to the Motion for Summary Judgment that stated that ratification by the Borough Council had never been a condition precedent to finalizing a collective agreement with the Association. On cross-examination, Pearlman explained that, with regard to the inconsistency in his testimony, he had only focused on the first page of the Memo of Understanding which contained the substantive terms (T33-T34). I do not believe that Pearlman provided false testimony about the 2003-2005 contract needing

Council approval; rather, I believe he truly did not focus on or remember the language in the Memo of Understanding.

The Authority Question:

15. There is a sharp contrast between the testimony of the Association's witnesses and the Borough's witnesses with regard to the Borough negotiators' alleged apparent authority in the 2005 negotiations. Based upon the following, I find that the Borough negotiations committee never told the Association's committee in the 2005 negotiations that the deal was tentative or that Council approval would be required.

Association President Pearlman testified that the Borough negotiators never said that the Borough's representatives did not have the authority to enter into a final contract (T23). He testified that at the final negotiations session, the Mayor did not make any comment about the need for Council approval of the contract or characterize the contract as "tentative." (T75). Pearlman testified, "we shook hands; we said things went pretty smoothly considering the grievance that occurred out of our prior contract, and that was about it." (T76). He testified that the issue of ratification did not come up (T75).

Patrolman John Lippincott was also a member of the Association negotiations committee in 2005 and attended all of the negotiations sessions (T73, T77-T78). He also denied that the Mayor or Councilmen ever said that the agreement would be

tentative and stated that there was no discussion about needing Council approval of the deal (T78-T79).

Gural has been on the Borough's negotiations committee for the past four contract negotiations (T43). On direct examination, Gural was asked if he ever told the Association negotiations committee that the Borough's committee had the authority to conclude an agreement without ratification from the governing body. He responded,

I never said that and I never hinted at it and quite the contrary, on numerous occasions, and I believe Mr. Pearlman is well aware as is everybody else, our contracts are subject to ratification by the members of the governing body. I even indicated at one meeting that this year, this particular negotiations ratification by the governing body would be slightly more difficult because as Mayor I don't have the authority to vote, I only vote in case of a tie . . . (T43)

Gural further testified that he emphasized on "numerous occasions" that the governing body has to ratify the contract (T51). He testified,

. . . I believe it was at the last negotiations meeting, that as Mayor I could not vote because the members of the Borough Council vote on ratification of resolutions, I only vote in the event of a tie, so therefore it would require the two members . . . I participated in the negotiations and could recommend ratification but had no final say in the matter (T51).

However, I do not credit Gural's testimony or his explanation that he advised the Association committee that ratification would be "slightly more difficult" because, as mayor

he would not have a vote (T43, T51, T61). There is no record evidence to support that the ratification would be more difficult now than the 2003 process, since he served on the negotiations committee and served as mayor in 2003.

Gural testified that he "absolutely" advised the Association committee that any agreement would have to go to the Council for a vote (T62) and that it came up,

numerous times during discussions. I have known these two gentlemen (Pearlman and Lippincott) for many years, and throughout all of those years in negotiations it was clearly understood and discussed privately through our negotiations that Council had to ratify it. . . . I recall exactly a conversation, I think it was at the last negotiations meeting, where you know, I simply stated, that, you know, it had to go before Council for ratification, it had to be approved (T62-T63).

It is this testimony that appears to be at the heart of the matter: I believe that Gural **assumed** that the Association always understood from past negotiations that any deal would be subject to approval by the Borough council, and that there was no need to announce it in this negotiations. That Gural made this assumption is corroborated by his statement in his affidavit submitted in support of the Borough's motion for summary judgment, wherein the mayor never said that he informed the Association committee that the deal was subject to ratification. Rather, his affidavit states that the practice had always been for the Council to vote on the agreement (C-3; T64).

Councilman Dorworth was on the Borough's negotiations committee and attended every session (T80). Dorworth recalled that Gural told the Association negotiations committee that it would have to go before the governing body and until it was in written form, they had nothing to review (T81). But he could not recall who was present when the Mayor made that comment (T81). I also do not credit Dorworth's testimony, since his recollection of Gural's claimed conversation with the Association committee appeared to be fuzzy on the details. Based upon demeanor, straightforwardness and consistency, I credit the testimony of Pearlman and Lippincott and specifically find that the Borough's negotiations committee did not articulate to the Association's committee that the negotiated contract settlement needed to be ratified by a Council vote. In addition, the actions of the Borough committee following the final negotiations session on November 29 tend to support the Association's version of the parties' expectations concerning the negotiated agreement. After the respective negotiations committees shook hands on the agreement, the Borough committee (a) took it to the Borough attorney for legal review; (b) implemented the contractual new work schedule for detectives; and (c) failed to take it to council for a vote for almost three months after the deal was struck. It appears that even the Borough negotiators believed that council approval would be no more than a rubber stamping of the committee's negotiated agreement.

ANALYSIS

N.J.S.A. 34:13A-5.3 provides, in part:

. . . [T]he majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment

When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

This portion of the Act contemplates that a governing body may be bound at the negotiations table through the actions of its representatives. A public employer also may, and commonly does, reserve the right to ratify a memorandum of agreement. See Borough of Tenafly, P.E.R.C. No. 98-129, 24 NJPER 230 (¶29109 1998).

N.J.S.A. 34:13A-5.4a(5) makes it an unfair practice for an employer, its representatives, or agents not to negotiate in good faith with a majority representative. N.J.S.A. 34:13A-5.4a(6) makes it an unfair practice for an employer, its representatives, or agents not to sign a negotiated agreement.

In Bergenfield Bd. of Ed., P.E.R.C. No. 90, 1 NJPER 44 (1975), the Commission held that the employer violated its duty to negotiate in good faith and to sign a negotiated agreement. The agreement was reached by the employer's authorized negotiations representatives, including two of the five board of education members, and the employer had not expressly stipulated that the

agreement was subject to ratification. The Commission concluded that a party is entitled to rely upon the apparent authority of the other parties' negotiators, in the absence of express qualifying conditions. In light of section 5.3's express recognition that an employer's authorized representatives may commit an employer to sign a negotiated agreement, the Commission has also rejected arguments that a public employer cannot be deemed to have bound itself to a memorandum of agreement absent a formal vote. See Long Beach Tp., P.E.R.C. No. 88-102, 14 NJPER 329, 330 (¶19122 1988); East Brunswick Bd. of Ed., P.E.R.C. No. 77-6, 2 NJPER 279, 281 (1976).

The Respondent argues that the parties' past practice and the inclusion of the ratification language in the 2003 Memorandum of Understanding is sufficient to put the Association on notice that the Borough committee did not have binding authority in this negotiations. In Black Horse Pike Reg. Sch. Dist. Bd. of Ed., P.E.R.C. No. 78-83, 4 NJPER 249 (¶4126 1978), the Commission synthesized its earlier Bergenfield and East Brunswick^{3/} decisions. It wrote:

In order for collective negotiations to be effective and productive, it is essential that each participant know with certainty the extent of the opposing team's authority. A party must be able to rely on

3/ See Bergenfield Bd. of Ed., P.E.R.C. No. 90, 1 NJPER 44 (1975); E. Brunswick Bd. Of Ed., P.E.R.C. No. 77-6, 2 NJPER 279 (1976), motion for recon den., P.E.R.C. No. 77-26, 3 NJPER 16 (1977), dismissed as moot 12/2/77, App. Div. Docket No. A-250-76 (Unpublished Opinion).

the statements and general conduct of the other side's representatives during the negotiations process. Accordingly, [we], in applying the criteria established in the Bergenfield and East Brunswick decisions, will consider only whether, during the course of the particular negotiations in dispute, there was an absence of oral or written qualifying statements or general conduct by negotiating representatives from which binding authority on the part of the negotiating teams to conclude an agreement could reasonably be inferred. To consider the additional factor of past history of ratification would only cause confusion and disruption to the negotiations process. A party would be uncertain whether to rely on the practice of ratification in previous negotiations or the current representations of binding authority by the negotiating representatives.

[4 NJPER 250]

In Black Horse Pike, the Commission specifically rejected the hearing examiner's finding that the parties' past practice of requiring ratification was controlling, but relied instead on evidence of oral qualifying statements made during negotiations which "either did or should have made the [opposing team] aware of the requirement that any proposed agreement required ratification of the [principal, whose negotiations team made the oral qualifying statements]". Id. at 250. Such oral qualifying statements or conduct is not present here (see finding of fact #15). Thus, the Borough's argument that the Association should have known, based upon the practice of previous Borough council approvals, that approval of the full council would be required this time must be rejected. Rather, I find that the Association was justified in relying on the apparent authority of the Borough's negotiations

team in this round of negotiations. The Borough accepted the 4-hour per pay period overtime payment scheme early in the negotiations; it was the Borough's four percent per year that ultimately formed the basis of contract settlement; the parties' shook hands, and I have found that the Borough committee made no representations that council approval was a requirement.

Finally, the Borough's actions after the deal was concluded support the concept that even the Borough negotiators believed that negotiations were finalized: the contract was prepared, the Borough attorney reviewed it for legal language; the Borough asked and received the Association's consent to language changes; and, most importantly, the Borough implemented the newly-negotiated work schedule for detectives. The Association had every reason to believe that obtaining signatures on the contract was a mere ministerial act.

CONCLUSIONS

Accordingly, I recommend that the Commission find the Borough of Palmyra violated 5.4a(5) and a(6) of the Act by refusing to sign the 2006-2008 collectively negotiated agreement.

RECOMMENDED ORDER

I recommend that the Borough of Palmyra:

A. Cease and desist from:

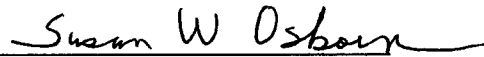
1. Refusing to sign and implement the 2006-2008 collective agreement negotiated with the Palmyra Police Association.

B. Take the following affirmative action:

1. Sign and implement the 2006-2008 collective agreement with the Palmyra Police Association.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.



Susan Wood Osborn
Hearing Examiner

DATED: March 30, 2007
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by April 10, 2007.



RECOMMENDED



NOTICE TO EMPLOYEES

**PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,**

We hereby notify our employees that:

WE WILL NOT refuse to sign and implement a collectively negotiated agreement with the Palmyra Police Association for the period January 1, 2006 through December 31, 2008.

WE WILL sign and implement the collectively negotiated agreement with the Palmyra Police Association.

Docket No. CO-2006-301

Borough of Palmyra
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372