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In the matter of Compulsory Interest Arbitration
concerning the negotiations impasse between

Borough of Ho-Ho-Kus, New Jersey

and

Ho-Ho-Kus PBA Local #353

PERC Docket IA-2012-002

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APPEARANCES

FOR THE BOROUGH:	Raymond R. Wiss, Esq., Wiss & Bouregy, PC
	Donald Cirulli, Borough Administrator
	John Mongelli, Council President
FOR THE PBA	Richard D. Loccke, Esq. Loccke Correia Limsky & Bukosky
	Mike Lacroix, President
	Anthony Balestrieri, Vice President
	Eugene Schultz, Delegate
	Jaime Bodart, Dective & Spokesman

This case assignment was made by the Public Employment Relations Commission pursuant to the conditions imposed by the New Jersey State Legislature which are instructive to the parties and the arbitrator and which, in certain circumstances could impose restrictions concerning negotiable matters.

The parties first met with the arbitrator on September 6, 2011. There was an extended discussion as to the issues presented but no resolution was reached. We met again on September 15th, at which meeting after much discussion which focused on the authenticity of a Memorandum of Understanding (MOU) which had been agreed to by representatives of the PBA and of the Borough. This was a hotly debated issue but which did not bring about any accord as to the effect of that document. In addition to that topic the PBA presented its foundation arguments for a new Contract which differed from those set forth in the MOU and were offered as final proposals for a four year agreement.

The events which led up to this began when the PBA, after having reached the above noted memorandum of understanding with the Borough, on August 5th, filed a petition with the PERC seeking binding arbitration of a negotiations impasse concerning this matter. This intention was made known to the Borough Attorney who contacted the PERC seeking a determination that such was improper as there had been a resolution of the negotiations and a MOU signed by the parties. The decision of the PERC was to shift any determination of that conflict of opinion to be made by the arbitrator as this was seen to be a part of the Legislature's intent in the expedition of such negotiations disputes.

Under the circumstances I advised the parties that I would hear the matter and provide full opportunity for the arguments and underlying legal principles to be presented at hearing. Thus on the meeting of September 15 both parties presented their arguments and evidence as to the issues of whether or not the MOU was determinative of the conditions of employment to be established and also allowing the Union to provide a full record in support of the terms and conditions it was seeking as replacement to those set forth in the MOU. The parties also were afforded an opportunity to present post hearing briefs to be inclusive of all arguments and evidential materials deemed pertinent to my considerations.

In the ordinary course of Interest Arbitration proceedings it would be essential to acknowledge the guiding statutory principles that I would find to be fundamental to any determination and award. In the situation presented here there is a need for the resolution of the above noted dispute before any consideration of alternative terms of a new agreement or the impact of the statutory criteria.

THE POSITION OF THE PBA

There are basically two broad arguments advanced by the PBA in support of its contention that the MOU should not be seen as a binding commitment of the Union. An element of that contention is that there has been a lengthy history of negotiations between it and the Employer which have resulted in past agreements. In every case the attorney for the Union has participated in the negotiations of those agreements and all were conditioned on the affirmation of the union membership by ratification vote. This is how business has always been conducted and the Employer should not have seen the Union's negotiating team, which agreed to the MOU in this case, as having the ultimate authority to bind the Union without its attorney's participation and formal ratification. This is particularly the case when the attorney for the Union had left those negotiations after advising the Employer that the Union saw no resolution and that he was about to seek intervention from the PERC in the form of a filing for interest arbitration. That the Employer then reached out the Union representatives to come back to the table and to hammer out an accord without advice and participation of their attorney or the membership is seen as an attempt to avoid these past practices and a disruption of the long standing relationship of the Union and the Borough. The claim is made that the Employer should have, and must have, known there was a need for the entire membership to vote on and approve any such accord and that such had not happened in this instance.

Secondly there is the argument that the officers who made the Agreement were not entitled to do so without the general accord of their attorney and that any such accord must have the approval of the entire membership and that the Employer should have known this was the case. The Union therefore concludes that the MOU was cast by the Employer to deliberately include the phrase, "..and approved by Ho-Ho-Kus on such date and by ratification vote of the PBA on such date..." That this first appeared on the draft of the MOU of June 21st is further evidence of its lack of viability because it must have been known that such ratification could not have taken place and secondly because that MOU was a draft which was later modified; although the same language as to ratification was continued in the final draft.

Further, the officers who were instrumental in the negotiation of the MOU testified that they had questions about it at the time and the Union President voiced concerns as well; although the team of negotiators signed the Agreement. They later, at this hearing, indicated that they had not realized this would be seen as a formal approval of a contract but had not raised this condition at the negotiations meeting. The proposal had been made when the need for an accord was predicated on having an agreement in place prior to the Legislature's enactment of law which would have dramatically increased the member's requirement to pay a substantially greater portion of their health benefits premiums. The commitee had been told the Borough Council would not meet again until it would be too late to consider and approve any alternative accord and so there was a need for compromise at the time of those negotiations. Under that circumstance they agreed to the terms of the MOU which would protect against higher health benefits costs and since, in its modified form, most of the objections to the original draft had been accommodated and because there was no likelihood of further gains such as the four year term of Agreement which had been their demand. So on balance they agreed to and signed the MOU as modified.

THE POSITION OF THE EMPLOYER

The Employer does not deny knowledge of the notice of intent registered by the PBA to cease negotiations and to proceed to interest arbitration. However, the Union negotiating team returned and freely re-entered negotiations when the invitation was made to do so. At the outset the question was asked as to proceeding without presence of the Union's attorney and the response was that the Union was prepared to proceed. This testimony was not challenged. In the process of those further negotiations several issues were resolved, among them a determination to delete the provision freezing top salaries for the term of the agreement and the accord as to a three year contract period. Plus an added percentage increase in the overall wage adjustment package. Thus it can be seen these were negotiations of substance and resolutions of importance to both parties. The testimony revealed there was a high level of desire by the Union to have an early agreement in place to avoid the introduction of the greatly increased health benefits contributions. This was a two way change as the Employer would have to continue those health benefits premiums payments, a substantial portion of which would otherwise have passed on to the officers. So, in a way, the early resolution of the new Agreement would

prove to be more costly to the Employer than a delay, presuming all other elements of the accord were continued as agreed. This was known to the Employer and the Union when the opportunity to complete the Agreement was proposed and agreed upon.

No formal assertion concerning the authority of its negotiations team was brought to the attention of the Employer for several weeks after the signing of the MOU. And this was after the Employer had raised a question as to when the New Agreement would be fully incorporated in the contract between the parties, a responsibility ordinarily undertaken by the Union. The Attorney for the Union responded that it should be ready within a week The Union President testified that he had some question as to the execution of the MOU but that he did nothing to prevent its adoption. The spokesman for the negotiations team indicated that he had been ill at ease but had pursued the agreement because of the concerns of the members as to the potential increase in health benefits premiums and that there was a desire to avoid that if at all possible. He later indicated that he had not intended to avoid a ratification vote and viewed his commitments as intent. He is also the individual who spoke with the Employer stating the Union was willing to proceed with the negotiations which led to several key modifications without the presence of its attorney as not being a requirement. In his role he was clearly aware of the opportunity to conclude an Agreement which incorporated improvements which the Union membership wanted. And he demonstrated the flexibility to reduce the demand for a four year contract. He must have read the proposed MOU which included the admission of ratification and proceeded in order to have an Agreement before the Legislature imposed the health benefits preminm changes.

So it can be concluded that the Union representatives were anxious to find a reasonable settlement of the new agreement and that the Employer was also anxious to complete the process. Both having entered this last round of discussions with objectives of considerable value. The Employer wanted to complete an agreement for a three year period in order to preserve its protective limitations under the statutory provisions where the next round of negotiations would take place during the 2013 calendar year. Likewise the Union wanted some things of significance, principally the escape from the legislated increases in health care premiums and certain other items which were granted in that final round of negotiations. The Employer was apparently willing to pay the price of continuing to absorb the portion of health care premiums which would have shifted to the union members if it could be satisfied with the other aspects of an accord as mentioned above. This circumstance is at the core of the negotiations process, a give and take moving toward a mutually satisfactory agreement.

As there was no published requisite to the contrary before the parties and there was a statement from the Union spokesman to the effect that the Union was prepared to move forward without the presence of its attorney I find that, even after consideration of the testimony at hearing of the Union spokesman having some misgivings as to making a commitment on behalf of the Union, that such was done in an effort to achieve a number of objectives which were of concern to represented officers. At least one testified that it was of great import that the Union avoid the increase in health benefit premiums if it

could. As it turned out this was only possible if the Agreement could be completed quickly. And quickly could only be accomplished before the Borough Council recessed, which would have occurred within a couple of days. So action as to an agreement became an important objective. It was achieved by the signing of the modified MOU. The Union representatives who negotiated the terms of that MOU knew it contained the phrase, "..and approved by ratification vote", although no formal ratification had been undertaken by the Union. This was admitted in testimony before me. Apparently the need for a finished agreement was a driving force and the negotiators for the Union were convinced that the membership would support the end product. So no condition as to the acceptability of the agreement was reserved at the negotiations table; satisfying in part the need to have the Agreement, before the cut off date concerning the health benefits premium sharing requirement, be in place. For agreements made later, and within a few days, would not have accomplished that objective .

The Employer has presented a great deal of information as to the concept of agency as it applies to this matter. Clearly the PBA had conveyed to the Employer that its spokesman had the authority to represent the interests of the Union. Nothing was ever stated as to limitations of that authority and even after the Agreement was made the Union did not claim the spokesman had not the authority to speak for all. The basic issues raised by the Union in opposition to an understanding that an an Agreement was reached and enforceable had to do with the absence of the Union's attorney who had traditionally been involved in such settlements and the question of the need for ratification. Neither of these issues were substantiated in any form of agreement or contract language. They were recognized as practices followed in past negotiations but never included in any set of agreed upon conditions for negotiation of all such matters or of the consumation of an agreement in absence of same.

What is clear is that the spokesmen for the Union had participated in all negotiations sessions including the last one which was attended by the Union's Attorney. When the Attorney left the spokesmen who had been involved were asked if they would consider further talks, without the presence of the Attorney who had to leave to attend other business. The response was yes. When asked if the team could negotiate without the Attorney the response was that they could proceed without an attorney present as they represented the membership. This conversation was attested to at hearing.

The hearing was several weeks after the time of the Union's commitment to the accord. At this time the testimony suggested that the spokesman did not know he was actually making a full commitment and that he anticipated a submission for ratification which he anticipated would be a matter of course. But that ratification could not have been effected before the deadline which had to be met to avoid the health benefits premium issue. The spokesman's testimony was not always clear and it appeared he had embraced the authority imposed upon him and was now somewhat uncertain as to whether he had clearly understood its effects. He did not recant the agreements made, he simply inferred an uncertainy as to the effects of signed commitments. This could have been clarified had he sought advice, but he did not do so. It appeared that he had placed the need to make

an Agreement in timely fashion above the need for procedural niceties. The Employer, however, had questioned him as to his being willing to go forward. He had responded as above noted and was supported by others on the negotiations committee. The Employer had every reason to believe that he understood his role. And it appeared he had so understood when the negotiations turned to contract duration, entitlement to a further pay increase, the elimination of the freeze on maximum salaries for officers at top of their pay ranges and the satisfaction of the date of agreement clause in order to protect against the increases in health benefits premiums. To accomplish these ends the Employer made the concession as to absorbing the health premiums which would otherwise have been visited upon the membership. All in all this was an exchange which benefitted both parties. The Union's representatives appeared to be fully competent.

Given the succession of events as set forth above it would seem the Employer had every right to conclude the Union's negotiations team was acting for the Union and I conclude the relationship was that of an agent and principal with the authority of the agent to act for and make binding agreements in the name of the principal. There was no written prohibition as to the agent making an agreement without the formal ratification of the full membership in any of this record. Faced with the need to timely execute the Agreement the spokesman elected to do so without that formality. There is no evidence indicating a limit as to his discretion in such a matter. And, while it would have been a good thing to have done so, the failure of completion of the Agreement because of a delay as to ratification might very well have been seen as very unfortunate as well as costly to all.

OPINION AND AWARD

My conclusion is that there was a formal Memorandum of Understanding reached as a result of the negotiations by the authorized representatives of the parties. This Memorandum of Understanding existed on the date when executed, June 23, 2011, and is the equivalent of an Agreement to which it was to become the singular supplement for the period from January 1, 2011 through December 31, 2013.

Because of the above conclusion and the existence of an Agreement between the parties for the period from January 1, 2011 through December 31, 2013 it would be inappropriate for me to bring into consideration other proposals of either party which were or could have been advanced as issues in dispute within the framework of an interest arbitration proceeding and governed by its strictures.

Frank A. Mason, Arbitrator

On this 28th day of September, 2011, before me personally came and appeared Frank A. Mason, to me known and known to be the individual described in and who, in my presence, executed the foregoing opinion and award.

This notary is for FRANK A MASON!
Signature only
Expires - July 3rd 2012