P.E.R.C. NO. 2008-5

STATE OF NEW JERSEY
BEFORE 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

The Public Employment Relations Commission dismisses a Complaint against the Borough of Palmyra. The Complaint was based on an unfair practice charge filed by the Palmyra Police Association, affiliated with FOP Lodge 2. The charge alleged that the Borough violated the New Jersey Employer-Employee Relations Act when its Borough Council refused to ratify a successor contract after its negotiations committee reached an agreement with the Association. The Commission holds, after considering all the evidence, including the parties' past history, that the Borough's negotiators did not have the apparent authority to enter into a successor contract without Borough Council ratification.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Ruderman & Glickman, P.C., attorneys (Mark S. Ruderman, of counsel)

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

DECISION

This case involves the question of whether the Borough of Palmyra violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when its Borough Council refused to execute a successor contract after its negotiations committee reached an agreement with the Palmyra Police Association, Affiliated with FOP Lodge 2. We hold that it did not and therefore dismiss the Complaint.

Negotiations for a successor agreement began in August 2005. After five or six sessions, the Association's committee agreed to take the Borough's offer of four percent raises in each year of a three-year contract to its membership, which then authorized the

Association's committee to accept the proposal. At the conclusion of negotiations, the parties did not prepare a written memorandum of understanding. The Association prepared a draft contract, which the Mayor forwarded to the Borough Solicitor for review. The Solicitor suggested six changes, which were resolved. The Borough then raised proposed changes to the health benefits plan, which the Association accepted. The Borough Council then met and refused to approve the contract because it believed the cost was too high.

The Association's unfair practice charge was filed on June 1, 2006. A Complaint and Notice of Hearing was issued on September 7. We denied the Borough's motion for summary judgment, finding that there were material facts in dispute. P.E.R.C. No. 2007-45, 33 NJPER 7 (¶6 2007). Hearing Examiner Susan Wood Osborn conducted a hearing on February 27, 2007 at which the parties examined witnesses and introduced exhibits.

On March 30, 2007, the Hearing Examiner issued her report and recommendations. H.E. No. 2007-7, 33 NJPER 86 (¶31 2007). She concluded that, under Commission precedent, the Association was justified in relying on the apparent authority of the Borough's negotiations team to enter into a binding agreement and that the Borough violated the Act by refusing to execute a draft contract reflecting that agreement. The Borough has filed exceptions and the PBA has filed an answering brief.

The Hearing Examiner found that the parties generally concluded negotiations with a handshake and did not ordinarily reduce any agreement to a memorandum of understanding. The prior round of negotiations was the only time in recent memory that the parties had signed a memorandum and it contained language requiring both parties to recommend ratification to their respective bodies. Before this round of negotiations, the Borough Council had passed resolutions authorizing the execution of agreements with the Association, but it had never rejected one.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. at 3-12). We reject the Borough's challenges to the Hearing Examiner's credibility determinations. Two Borough witnesses testified that the Mayor told Association representatives that ratification by the Council would be more difficult because as Mayor, he could not vote on the contract unless there was a tie. In prior negotiations, when the Mayor was a Council Member and a member of the three-member negotiations team, he could vote and only one additional vote was needed for ratification. Two Association witnesses testified that the Borough negotiators never said that they did not have authority to enter into a final contract. Based on demeanor, straightforwardness and consistency, the Hearing Examiner credited the Association's witnesses. We will not disturb those

findings. Warren Hills Reg. Bd. of Ed., P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd 32 NJPER 8 (¶2 App. Div. 2005), certif. den. 186 N.J. 609 (2006) (absent compelling contrary evidence, Commission will not substitute its reading of the transcript for the Hearing Examiner's credibility determinations); N.J.S.A. 52:14B-10(c).

In our first final decision after obtaining unfair practice jurisdiction, we held that a school board was bound to an agreement reached by its representatives during reopener negotiations of salary guides and that the board was required to execute a formal writing representing the agreed-upon salary guide. Bergenfield Bd. of Ed., P.E.R.C. No. 90, 1 NJPER 44 (1975) (board's team included, at various times, three of its five board members and did not expressly reserve full board's right to ratify separately). We found that under the circumstances presented, the union was entitled to rely on the apparent authority of the board's negotiators in the absence of express qualifying conditions.

A year later, we ordered another school board to execute an agreement reached by its negotiators. East Brunswick Bd. of Ed., P.E.R.C. No. 77-6, 2 NJPER 279 (1976), recon. den. P.E.R.C. No. 77-26, 3 NJPER 16 (1977). We found that no qualifications were ever placed on the authority of the board's negotiations team to reach an agreement. Also, no writing limited the authority of

either negotiations team or called for ratification by the parties themselves. In addition, the conduct and demeanor of the board's team gave the impression that it had the authority to conclude a binding agreement. In the past, the parties' teams had negotiated the parties' agreements.

Two years later, we applied these cases and found that a school board violated its obligation to negotiate in good faith when if refused to resume negotiations after the association's membership rejected a tentative memorandum of agreement. Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 78-83, 4 NJPER 249 (¶4126 1978). The Hearing Examiner had found that there was an established practice in the district of contract ratification by the association's membership. We agreed that the association had reserved a right to ratify, but rejected the Hearing Examiner's reliance on the previous practice of ratification and instead based our conclusion on an express oral agreement at the first negotiations session that both parties had the right to ratify any proposed agreement. We stated that:

> 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 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 the instant case, the Hearing Examiner found that there were no written or oral qualifying statements made. She concluded that under Black Horse Pike, she had to reject the Borough's argument that the Association should have known, based on the practice of previous Council approval, that approval by the full Council would be required.

We believe that our early precedent needs revisiting. Black Horse Pike is important precedent, but its reasoning should not be applied to the facts presented in this case. In Black Horse Pike, the parties had a practice of association ratification and there was also an oral qualifying statement. We thought it important to emphasize that the statements of the parties in current negotiations will prevail over any past practice. Although the practice and qualifying statements in that case were consistent, we thought it important in that early decision to give precedence to the ground rules established in a current round of negotiations. Parties seeking to require or omit

ratification are not bound by their conduct in prior negotiations. Cf. Long Branch Tp., P.E.R.C. No. 88-102, 14 NJPER 329 (¶19122 1988) (Hearing Examiner found that assuming township had reserved right to ratify, negotiator's actions and statement that "Gentlemen, we have an agreement," constituted waiver of right to ratify).

Almost 30 years have passed since Black Horse Pike. Since then, ratification by the governing body has become the norm based on oral or written reservation, or based on the mutual understanding of the parties. Our cases reflect that many parties have a long history of negotiations, agreement and ratification. Accordingly, we believe it no longer appropriate to disregard the parties' history of ratification in determining whether a negotiations team has final negotiations authority. Thus, we will not apply Black Horse Pike so broadly as to amount to a bright line rule that present silence on ratification means ratification is never required despite a past history of ratification. Where the issue of ratification is addressed during negotiations, past history is irrelevant. Where the issue is not addressed, past history may be relevant to discerning the parties' expectations and the negotiators' apparent authority. Compare Borough of Little Ferry, P.E.R.C. No. 86-151, 12 NJPER 543 (¶17203 1986), adopting H.E. No. 86-53, 12 NJPER 463 (¶17175 1986) (although borough administrator did not expressly reserve

council's right to ratify, parties knew from experience that mayor and council had to approve and ratify contracts).

These parties have a history of reaching oral agreements. The Borough Council has passed resolutions authorizing the execution of contracts based on those agreements since at least 1994. The prior round of negotiations was conducted by attorneys and a written memorandum of understanding was signed by the same Mayor and the same Association President, among others. That memorandum specified that the negotiators would recommend ratification to their respective parties. Considering the additional factor of past history, we conclude that the Borough's negotiations team did not have authority to approve a contract without ratification by the Borough Council. That the Borough Council had never before rejected a contract does not mean that it did not have a right to do so.

Having reached this conclusion, we wish to add a note of caution and emphasize a point we made earlier. Ratification by a governing body is the norm and reserving a right of ratification as part of the ground rules for negotiations or as part of a memorandum of understanding remains the best practice. Reliance on past history alone to protect a right to ratify leaves that right subject to challenge.

After considering all the evidence, including the parties' past history, we conclude that the Borough's negotiators did not

have the apparent authority to enter into a successor contract without Borough Council ratification. Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed.

ISSUED: August 9, 2007

Trenton, New Jersey