COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES DISTRICT COUNCIL 83	:	
v.	:	Case No. PERA-C-08-83-W
SUMMIT TOWNSHIP	:	

PROPOSED DECISION AND ORDER

On March 11, 2008, AFSCME District Council 83 (AFSCME) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that Summit Township (Township) violated sections 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by "unlawfully repudiat[ing] the collective bargaining agreement duly entered into between AFSCME and the Township in the Fall of 2007[.]"[1] On March 27, 2008, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on May 1, 2008, if conciliation did not resolve the charge by then. On April 10, 2008, the Township filed an answer averring that it lawfully repudiated the collective bargaining agreement because its supervisors never accepted or ratified the collective bargaining agreement at a duly conducted open public meeting as required under the Sunshine Act. After a series of continuances because of scheduling conflicts and because the parties requested additional time to settle the charge, the hearing was held on October 23, 2008. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On January 16, 2009, each party filed a brief by deposit in the U.S. Mail.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. On June 1, 2007, the Board certified AFSCME as the exclusive representative of a bargaining unit that includes laborers employed by the Township. (Case No. PERA-R-07-204-W)

2. In October 2007, a representative of AFSCME (Thomas Gibbs) presented to the then members of the Township's board of supervisors (Robert T. Fritz, David P. Lohr and Earl R. Miller) a proposal for a collective bargaining agreement. The proposal covered three relatives of Mr. Miller who are members of the bargaining unit. Mr. Fritz and Mr. Miller agreed to the proposal. Mr. Lohr did not. (N.T. 7, 11-12, 23-25, 32, 42, 60, 66, 71-73, 77-78)

3. At the general election in November 2007, Mr. Fritz was defeated by Walter Lenhart, who never would have accepted the collective bargaining agreement because of its length and cost. (N.T. 19-20, 35, 50-51)

4. On November 19, 2007, at the regular monthly meeting of the board of supervisors, Mr. Fritz and Mr. Miller passed a motion to hire Christopher Rhodes as a laborer with a start date of November 27, 2008. During an executive session, they signed the collective bargaining agreement they reached with AFSCME. (N.T. 12-13; Joint Exhibit 1, Respondent Exhibit 1)

5. The term of the collective bargaining agreement is from January 1, 2007, to December 31, 2015. (Joint Exhibit 1)

[1] AFSCME also alleged that the Township committed unfair practices by unilaterally declaring a clerical position held by Patricia Johnson to be outside the bargaining unit. AFSCME did not prosecute the charge as to Ms. Johnson at the hearing, however. A charge not presented to a hearing examiner is waived. SSHE, 32 PPER ¶ 32118 (Final Order 2001). Thus, the charge as to Ms. Johnson is no longer before the Board and will not be addressed except to note that after the charge was filed the hearing examiner excluded Ms. Johnson's position from the bargaining unit pursuant to a petition for unit clarification filed by the Township. Summit Township, Case No. PERA-U-08-326-W (Proposed Order of Unit Clarification, November 21, 2008).

6. Article XIII of the collective bargaining agreement provides at section 20 as follows: "The Employer agrees that it will not lay off employees during the period of this agreement." (Joint Exhibit 1)

7. On January 21, 2008, at the regular monthly meeting of the board of supervisors, Mr. Lenhart moved "to declare the contract between the Supervisors and the employees of Summit null and void at this time, and also the hiring of the fifth employe be re[s]cinded[.]" Mr. Lohr seconded the motion. Mr. Lenhart and Mr. Lohr passed the motion. The Township thereupon stopped paying the wages and premiums for eye and dental insurance as set forth in the collective bargaining agreement and laid off Mr. Rhodes. (N.T. 18, 22, 47-48, 60; Respondent Exhibits 4-5)

DISCUSSION

The Union has charged that the Township committed unfair practices under sections 1201(a)(1) and (5) by "unlawfully repudiat[ing] the collective bargaining agreement duly entered into between AFSCME and the Township in the Fall of 2007[.]"

The Township has answered that it lawfully repudiated the collective bargaining agreement because its supervisors never accepted or ratified the agreement at a duly conducted open public meeting as required under the Sunshine Act. The Township also contends that it lawfully repudiated the collective bargaining agreement because the agreement is a "sweetheart deal" entered into by a lame duck board of supervisors and because the agreement was negotiated by one of its supervisors (Mr. Miller) with a conflict of interest under the Public Official and Employee Ethics Act.

An employer commits unfair practices under sections 1201(a)(1) and (5) if it repudiates an agreement that members of its governing body reached in collective bargaining even though they did not reach or vote on the agreement at a duly advertised meeting pursuant to the Sunshine Act, St. Clair Area School District v. St. Clair Area Education Association, 552 A.2d 1133 (Pa. Cmwlth. 1988), aff'd per curiam, 525 Pa. 236, 579 A.2d 879 (1990), and even though a member of the employer's governing body may have had a conflict of interest in negotiating and ratifying the agreement. McAdoo Borough v. Commonwealth of Pennsylvania, PLRB, 506 Pa. 422, 485 A.2d 761 (1984). If the agreement was reached by a lame duck governing body, however, the agreement is not enforceable, and no such unfair practices may be found. Borough of Plum, 33 PPER ¶ 33077 (Proposed Decision and Order 2002).

The record shows that in October 2007 two of the three then members of the Township's board of supervisors (Mr. Fritz and Mr. Miller) reached a collective bargaining agreement with AFSCME that includes a no layoff clause (findings of fact 2, 6). The record also shows that in November 2007 Mr. Fritz was defeated by Mr. Lenhart at the general election (finding of fact 3) and that on January 21, 2008, two of the three current members of the board of supervisors (Mr. Lenhart and Mr. Lohr) passed a motion declaring the collective bargaining agreement null and void and rescinding the hiring of an employe (Mr. Rhodes) (findings of fact 3, 7). The record further shows that the Township thereupon stopped paying the wages and premiums for eye and dental insurance as set forth in the collective bargaining agreement and laid off Mr. Rhodes (finding of fact 7).

On that record, it is apparent that the Township committed the unfair practices charged. Under the analysis set forth in St. Clair Area School District, supra, the collective bargaining agreement is binding on the Township regardless of whether or not Mr. Fritz and Mr. Miller accepted and ratified the agreement at a duly advertised meeting pursuant to the Sunshine Act. Under the analysis set forth in Borough of Plum, supra, the collective bargaining agreement is binding on the Township because the board of supervisors was not in lame duck status when Mr. Fritz and Mr. Miller reached the agreement. Under the analysis set forth in McAdoo Borough, supra, the collective bargaining agreement is binding on the Township regardless of whether or not Mr. Miller had a conflict of interest under the Public Official and Employee Ethics Act. Thus, by repudiating the collective bargaining agreement, the Township violated sections 1201(a)(1) and (5).

In support of its contention that it lawfully repudiated the collective bargaining agreement because its supervisors never accepted or ratified the agreement at a duly

conducted open public meeting as required under the Sunshine Act, the Township points out that a close review of the minutes of the meetings of its board of supervisors (Respondent Exhibits 1-4) reveals that no vote on the agreement ever occurred in public.

In St. Clair Area School District, supra, however, our Supreme Court rejected a school district's similar contention that it lawfully repudiated a collective bargaining agreement because the agreement did not take place at a duly advertised meeting pursuant to the Sunshine Act. Noting that a majority of the members of the school district's board of directors had reached the agreement themselves, our Supreme Court held that the school district was bound by the agreement and had committed unfair practices by repudiating the agreement in violation of its statutory obligation to bargain in good faith. The Court explained as follows:

> "The issue here is whether the School District bargained in good faith. The duty to bargain in good faith under section 1201 of the Public Employe Relations Act, Act of July 23, 1970, P.L. 563, *as amended*, 43 P.S. § 1101.1201, and the Sunshine Act were designed to accomplish different results. It was never the purpose of the Sunshine Act to compel negotiations of labor contracts in the open. In fact, section 278(a)(2) of the Sunshine Act, 65 P.S. § 278(a)(2), specifically permits an agency to hold collective bargaining sessions outside of an open meeting."

552 A.2d 1134-1135.

As noted above, the record shows that a majority of the then members of the board of supervisors (Mr. Fritz and Mr. Miller) reached the collective bargaining agreement with AFSCME. Under the analysis set forth in St. Clair Area School District, supra, then, the agreement is binding on the Township regardless of whether or not Mr. Fritz and Mr. Miller may have violated the Sunshine Act by not accepting and ratifying the agreement at a duly conducted open public meeting. Thus, there is no basis for finding that the Township lawfully repudiated the collective bargaining agreement because they violated the Sunshine Act by not accepting and ratifying the agreement at a duly conducted open public meeting.

In support of its contention that it lawfully repudiated the collective bargaining agreement because the agreement is a "sweetheart deal" entered into by a lame duck board of supervisors, the Township points out that Mr. Lenhart defeated Mr. Fritz at the general election in November 2007 (N.T. 19-20, 35, 50), leaving the board of supervisors with a future new majority comprised of Mr. Lohr, who opposed the agreement from the outset (N.T. 71-73, 77-78), and Mr. Lenhart, who never would have accepted the agreement because of its length and cost (N.T. 50-51).

In Borough of Plum, supra, a borough similarly contended that it was not bound by a collective bargaining agreement because the agreement was approved by a lame duck council. Noting that the members of council who approved the agreement had been defeated in an election before they approved the agreement, the hearing examiner found that council was in lame duck status when they approved the agreement and that the agreement was not binding on the borough under the circumstances. The hearing examiner explained as follows:

> "Support for the Borough's position that it was under no obligation to abide by the terms of the agreement because a lame duck council had approved the agreement may be found in Lobolito, Inc. v. North Pocono School District, 562 Pa. 380, 755 A.2d 1287 (2000). In that case, our Supreme Court held that a school district was not bound by the terms of an agreement the members of a board of directors entered into after a new majority was elected to the board. As the Court explained:
>
> > This Court has long viewed agreements involving governmental bodies in a different light than agreements made exclusively between private parties. Since the mid-nineteenth century, we have distinguished between agreements encompassing governmental functions of governing bodies from agreements encompassing proprietary or business functions. See *Western Saving Fund Soc'y of Philadelphia v. City of* Philadelphia, 31 Pa. 175, 183 (1858) (distinguishing governmental contracts, or contracts encompassing 'things public,' from proprietary contracts, or contracts encompassing 'things of commerce').

> With respect to those agreements involving municipal or legislative bodies that encompass governmental functions, we have repeatedly held that governing bodies cannot bind their successors. *See, e.g., Mitchell v. Chester Housing Auth.,* 389 Pa. 314, 328, 132 A.2d 873, 880 (1957); *Commonwealth ex rel. Fortney for Use of Volunteer Fire Dep't v.* Bartol, 342 Pa. 172, 174-75, 20 A.2d 313, 314 (1941); *Born v. City of* Pittsburgh, 266 Pa. 128, 132-33, 109 A. 614, 615 (1920); *Moore v. Luzerne* County, 262 Pa. 216, 220-22, 105 A.2d 94, 94-96 (1918). In *Fortney*, we explained:
>
> > In the performance of sovereign or governmental, as distinguished from business or proprietary, functions, no legislative body, or municipal board having legislative authority, can take action which will bind its successors. It cannot enter into a contract which will extend beyond the term for which the members of the body were elected.
>
> *Commonwealth ex rel. Fortney*, 342 Pa. at 175, 20 A.2d at 314 (citations omitted).
>
> In *Mitchell*, we described the public policy behind this rule of law in the following terms:
>
> > The obvious purpose of the rule is to permit a newly appointed governmental body to function freely on behalf of the public and in response to the governmental power or body politic by which it was appointed or elected, unhampered by the policies of the predecessors who have since been replaced by the appointing or electing power. To permit the outgoing body to 'hamstring' its successors by imposing upon them a policyimplementing [sic] and to some extent, policymaking [sic] machinery, which is not attuned to the new body or its policies, would be to most effectively circumvent the rule. *Mitchell*, 389 Pa. at 324, 132 A.2d at 878.
>
> 755 A.2d at 1289-1290 (footnotes omitted)."

33 PPER at 167-168.

As noted above, however, the record shows that Mr. Fritz and Mr. Miller reached the collective bargaining agreement with AFSCME in October 2007, while Mr. Lenhart did not defeat Mr. Fritz until the general election in November 2007. Unlike in Borough of Plum, supra, then, where the council was in lame duck status when its members approved an agreement, the board of supervisors was not in lame duck status when its members reached the agreement. Thus, "sweetheart deal" or not, the agreement is binding on the Township, and there is no basis for finding that the Township lawfully repudiated the collective bargaining agreement because the agreement was negotiated by a lame duck board of supervisors.

In support of its contention that it lawfully repudiated the collective bargaining agreement because the agreement was negotiated by one of its supervisors (Mr. Miller) with a conflict of interest under the Public Official and Employee Ethics Act, the Township points out that Mr. Miller is related to three members of the bargaining unit (N.T. 32, 42, 60, 66).

In McAdoo Borough, supra, however, our Supreme Court rejected a borough's similar contention that it was not bound by a collective bargaining agreement with the exclusive representative of its employes because the agreement was negotiated and ratified by a member of its council (Hubert Hartz) with a conflict of interest stemming from his membership in the exclusive representative. Our Supreme Court first observed that section 1801 of the PERA provides as follows:

> "(a) No person who is a member of the same local, State, national or international organization as the employe organization with which the public employer is bargaining or who has an interest in the outcome of such bargaining which interest is in conflict with the interest of the public employer, shall participate on behalf of the public employer in the collective bargaining processes with the proviso that such person may, where entitled, vote on the ratification of an agreement.

(b) Any person who violates subsection (a) of this section shall be immediately removed by the public employer from his role, if any, in the collective bargaining negotiations or in any matter in connection with such negotiations."

The Court then held that in light of section 1801 Mr. Hartz's negotiation of the agreement provided no basis for finding the agreement not to be binding on the borough. As the Court explained:

> "Removal by the public employer pursuant to section 1801(b) of any negotiator disqualified under section 1801(a), has been characterized as the employer's sole 'remedy.' *See Commonwealth v. Pennsylvania Labor Relations Board, 40 Pa.Commw. 468, 397 A.2d 858 (1979)*; *Pennsylvania Labor Relations Board v. Eastern Lancaster School District*, 11 Pa.Commw. 482, 315 A.2d 382 (1974); *Ellwood City Area School District v. Secretary of Education*, 9 Pa.Commw. 477, 308 A.2d 635, 637 (1973). We agree with that interpretation. A public employer's failure to avail itself of the remedy of removal should not work to the detriment of the collective bargaining process. If the public employer chooses a negotiator barred from participation under section 1801(a) and fails to ascertain the existence of a legislatively proscribed conflict during the course of the bargaining proceedings, it should not be heard to complain that its former negotiator should not be permitted to vote as a public official on the ratification of the ultimate agreement. Thus we conclude that the legislature did not intend to make the proviso in section 1801(a) contingent upon compliance by the negotiator with its conflict of interest provisions."

506 Pa. at 429-430, 485 A.2d at 765. The Court also held that Mr. Hartz's ratification of the agreement provided no better basis for finding the agreement not to be binding on the borough. As the Court explained:

> "The Commonwealth Court interpreted entitlement to vote for purposes of that section as turning on ethical considerations. Purporting to apply the principle that a councilman may not vote on any matter in which he or she has a personal or pecuniary interest, *Meixell v. Hellertown Borough Council,* 370, Pa. 420, 88 A.2d 594 (1952), that court summarily concluded that Mr. Hartz's membership in Local 401 created a personal interest in the outcome of the bargaining and he was thus not 'entitled' to vote.
>
> The effect of such an interpretation is to read section 1801(a)'s proviso out of existence; no public official having a conflict of interest as defined in section 1801(a) would be permitted to vote on the ratification of a collective bargaining agreement even if he or she refrained from participation in the bargaining process. Such a reading is not only directly contrary to the express language of the section's proviso but also ignores the legislature's requirement that '[e]very statute shall be construed, if possible, to give effect to all its provisions.' 1 Pa.C.S. § 1921(a).
>
> The only reasonable interpretation of the term 'entitled' in the context of the statute is 'entitled' *by virtue of public office*. Section 1801(a) simply recognizes that some negotiators disqualified from participating in the bargaining process may also be public officials charged with the responsibility of approving or disapproving the final agreement. It places no additional conditions upon the right of such officials to vote. The thrust of the proviso is that section 1801(a) concerns the integrity of the *bargaining* process. Mr. Hartz as a member of the Borough council was entitled to vote on the non-professional employees' contract. Act of February 1, 1966, P.L. (1965) 1656, No. 581, § 1006(3), *as amended*, 53 P.S. § 46006(3) (Supp. 1984-85). Since section 1801 provides no basis for the invalidation of Mr. Hartz's vote, the collective bargaining agreement between the Borough and its non-professional employees, ratified by a majority of the members of the Borough Council, was valid and enforceable. Thus there was no basis for the Borough's non-compliance with the terms of the agreement and the Board correctly concluded that the Borough's refusal to implement the agreement was an unfair labor practice."

506 Pa. at 430-431, 485 A.2d at 765-766 (emphasis in original).

As noted above, Mr. Miller was a member of the board of supervisors when he and Mr. Fritz reached the collective bargaining agreement with AFSCME. Under the analysis set forth in McAdoo Borough, supra, then, he was entitled to ratify the collective bargaining agreement regardless of whether or not he had a conflict of interest under the Public Official and Employee Ethics Act.[2] Thus, there is no basis for finding that the Township lawfully repudiated the agreement because he had a conflict of interest under the Public Official and Employee Ethics Act.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The Township is a public employer under section 301(1) of the PERA.

2. AFSCME is an employe organization under section 301(3) of the PERA.

3. The Board has jurisdiction over the parties.

4. The Township has committed unfair practices under sections 1201(a)(1) and (5) of the PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PERA, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the Township shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in article IV of the PERA.

2. Cease and desist from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

3. Take the following affirmative action which the hearing examiner finds necessary to effectuate the policies of the PERA:

(a) Implement the collective bargaining agreement;

(b) Make its employes whole for any losses sustained by them as the result of its refusal to implement the terms of the collective bargaining agreement;

(c) Pay interest at the simple rate of six per cent per annum on any back pay due them;

(d) Offer to Mr. Rhodes in writing unconditional reinstatement to his former position without prejudice to any rights or privileges enjoyed by him and make him whole for any losses sustained by him as the result of its refusal to implement the collective bargaining agreement from the time he was laid off up to the time he is offered unconditional reinstatement;

---

[2] AFSCME contends that Mr. Miller's relationship with the three members of the bargaining may not have presented a conflict of interest under the Public Official and Employee Ethics Act because his relatives are in a group covered by the collective bargaining agreement. AFSCME cites Salem Township Municipal Authority v. Township of Salem, 820 A.2d 888 (Pa. Cmwlth. 2006), in support of its contention. Under the analysis set forth in McAdoo Borough, supra, however, whether or not Mr. Miller's relationship with the three members of the bargaining presents a conflict of interest under the Public Official and Employee Ethics Act is irrelevant. Thus, AFSCME's contention will not be addressed.

(e) The back pay for him shall be computed on the basis of each separate calendar quarter or portion thereof during the period stated above. The quarterly period shall begin with the first day of January, April, July and October. The pay shall be determined by deducting from a sum equal to that which he normally would have earned for each quarter or portion thereof earnings that he actually earned or with the exercise of due diligence would have earned in other employment, earnings that he would have lost through sickness and any unemployment compensation received by him. If the Township claims lack of due diligence by him, it shall be obligated to establish that there was substantially equivalent employment reasonably available to him after he was laid off and that he did not exercise due diligence to find interim employment. Earnings in one particular quarter shall have no effect on the liability for any other quarter;

(f) Pay interest at the simple rate of six per cent per annum on any back pay due him;

(g) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

(h) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this order by completing and filing the attached affidavit of compliance.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this thirtieth day of January 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

_____

Donald A. Wallace, Hearing Examiner