

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 :

FINAL ORDER

Summit Township (Township) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) by United States first-class mail on February 18, 2009. The Township's exceptions challenge the January 30, 2009 Proposed Decision and Order (PDO) of a Board Hearing Examiner finding that the Township violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA). The American Federation of State County and Municipal Employees, District Council 83 (AFSCME) filed an answer to the exceptions, and pursuant to an extension of time granted by the Board Secretary, timely filed its brief in opposition to the exceptions on April 15, 2009.

AFSCME was certified by the Board on June 1, 2007, as the exclusive representative of a bargaining unit that includes laborers employed by the Township. In October 2007, during a negotiation session, at which all three members of the Township's Board of Supervisors (Robert T. Fritz, David P. Lohr and Earl R. Miller) were present, Thomas Gibbs, the AFSCME representative, presented a proposal for a collective bargaining agreement. AFSCME's proposal was for an eight-year contract, retroactive to January 1, 2007 and effective through December 31, 2015, and calls for no-layoffs during the life of the agreement. (Joint Exhibit 1). In addition, among other provisions, the AFSCME proposal provided a two-dollar increase in salary (N.T. 49), with annual cost of living wage increases starting in 2010 of at least two percent. (Joint Exhibit 1). At the bargaining session in October 2007, Mr. Fritz and Mr. Miller agreed to the proposal, but Mr. Lohr did not.

After the October 2007 bargaining session, at the regularly-scheduled November 19, 2007 monthly meeting of the Township Board of Supervisors, Mr. Fritz and Mr. Miller called an executive session during which time they signed the collective bargaining agreement with AFSCME. Following the November 19, 2007 meeting, the Township immediately implemented and abided by the collective bargaining agreement.

In January 2008, Walter Lenhart, who defeated Mr. Fritz in the November 6, 2007 general election, took his position as a newly-elected Township Supervisor. 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..." Mr. Lohr seconded the motion, and the motion passed. The Township thereupon stopped paying the wages and insurance premiums set forth in the agreement with AFSCME. The Board of Supervisors also laid off Christopher Rhodes, a bargaining unit member hired by the previous Board of Supervisors.

The Hearing Examiner found that a binding collective bargaining agreement was entered into by AFSCME and the Township during the negotiating session in October, 2007. Therefore, the Hearing Examiner determined that the Township's January 21, 2008 action was an unlawful repudiation of that agreement in violation of Section 1201(a)(1) and (5) of PERA.

In its exceptions, the Township asserts that no binding agreement with AFSCME was reached by the Board of Supervisors because Mr. Fritz and Mr. Miller's actions on behalf of the Township did not comport with the Sunshine Act, 65 Pa. C.S. §§ 701 - 716, or the Second-Class Township Code, 53 P.S. §65101 et seq. Contrary to the Township's argument, a public employer may not use the Sunshine Act or statutory public meeting requirements, as a guise to engage in bad faith bargaining, or to avoid finalizing an agreement reached by a majority of board members, or to negate its contractual obligations arrived

at through collective bargaining. Mullen v. DuBois Area School District, 436 Pa. 211, 259 A.2d 877 (1969); St. Clair Area School District v. PLRB, 552 A.2d 1133 (Pa. Cmwlth. 1988), *affirmed*, 525 Pa. 236, 579 A.2d 879 (1990); Rudolph v. Albert Gallatin School District, 431 A.2d 1171 (Pa. Cmwlth. 1981). In this regard, in Mullen the Pennsylvania Supreme Court held as follows:

[I]t is clear beyond doubt that the expression of the board members' approval required by the statute can be evidenced in ways other than by a formal vote recorded in the minutes. To allow this does no violence to the purpose of the statute. The overwhelming bulk of evidence in this case indicates that the Board members did in fact approve Mullen's employment. To hold that the lack of a formal vote recorded in the minutes, the presence or absence of which is entirely within the control of the Board, renders this contract null and void, would be to exalt form over substance. What possible value can there be in establishing rigid civil service requirements to protect public employees, if such legislation can be defeated by school board mistakes in the appointive process? We hold the requirement of a formal recorded vote to be directory only, although with the caveat that the proof from which Board approval can be inferred must be solid.

Mullen, 436 Pa. at 216, 259 A.2d at 880.

Here, there is solid proof of approval of the collective bargaining agreement by a majority of the Board of Supervisors. The Hearing Examiner found as fact that in October 2007, AFSCME presented to the then members of the Township's Board of Supervisors a proposal for a collective bargaining agreement, and Mr. Fritz and Mr. Miller (two of the three Township Supervisors) agreed to the proposal. On November 19, 2007, Mr. Fritz and Mr. Miller then signed the collective bargaining agreement they had reached with AFSCME. (FF 2 and 4). Upon review of the record, Mr. Gibbs credibly testified that an agreement on the collective bargaining agreement was reached with Mr. Fritz and Mr. Miller in October 2007,¹ and Mr. Fritz and Mr. Miller both executed the collective bargaining agreement that they had reached with AFSCME.

Notwithstanding the Hearing Examiner's findings of fact, the Township argues that the acceptance or ratification of that agreement only occurred in November 2007, at which time there was a "lame duck" Board of Supervisors that lacked the authority to approve an agreement binding on the successor Board of Supervisors. We disagree. The Hearing Examiner expressly found that the collective bargaining agreement was entered into in October 2007, before Mr. Fritz lost his bid for re-election. Thus, contrary to the assertions of the Township in its exceptions, this case does not involve an issue of "lame duck" status. See Teamsters Local Union No. 205 v. Borough of Plum, 33 PPER ¶33077 (Proposed Decision and Order, 2002) (hearing examiner found no unfair practice based on "lame duck" status of the board, where a majority of the governing board voted to approve a collective bargaining agreement only after they were defeated in the general election); see also, Chichester School District v. Chichester Education Association, 750 A.2d 400 (Pa. Cmwlth. 2000), *petition for allowance of appeal denied*, 568 Pa. 668, 795 A.2d 980 (2000) (pursuant to PERA's statutory bargaining obligations, a public employer may enter into a collective bargaining agreement with its employes for a duration which extends beyond the term of office of the members of the governing body).²

¹ With respect to the credibility of witnesses, and findings of fact based thereon, it is the function of the hearing examiner, who is able to view the witnesses' testimony first-hand, to determine the credibility of the witnesses and to weigh the probative value of the evidence presented. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004). The Board will not disturb the hearing examiner's credibility determinations absent the most compelling of circumstances. Hand v. Falls Township, 19 PPER ¶ 19012 (Final Order, 1987); AFSCME District Council 84 v. Department of Public Welfare, 18 PPER ¶ 18028 (Final Order, 1986). After a review of the record, there is no compelling reason to reverse any of the Hearing Examiner's findings.

² Similarly, we reject the Township's argument on exceptions that an employer may rescind a collective bargaining agreement because one of its negotiators has relatives in the bargaining unit. Even assuming this would constitute a conflict of interest, the Pennsylvania Supreme Court has expressly held that, in those situations, the only recourse is for the Township to remove that negotiator from bargaining before an agreement is reached. McAdoo Borough v. PLRB, 506 Pa. 422, 485 A.2d 761 (1984).

In the context of the statutory requirements of good faith bargaining, the Board recognizes the importance of the enforcement of agreements that are reached at the bargaining table. Thus, in St. Clair Area School District, supra, where a majority of the school board had reached an agreement with the union during contract negotiations, but thereafter some of the board members changed their minds and voted against the agreement, the Board and the courts recognized that enforcement of the collective bargaining agreement that was reached by a majority of the board members during negotiations was the appropriate remedy for the district's unfair practice of failing to bargain in good faith. See also, Athens Area School District v. PLRB, 760 A.2d 917, 920 (Pa. Cmwlth. 2000) ("there can be little question that ... the [employer's] revocation of its ratification ... amounts to bad faith").

On this record, the Township's January 21, 2008 action to "rescind" its agreement with AFSCME was an unlawful revocation of the collective bargaining agreement that was reached by Mr. Fritz and Mr. Miller in October 2007, in violation of the Township's bargaining obligation under Section 1201(a)(1) and (5) of PERA. Accordingly, after a thorough review of the exceptions and all matters of record, the Board shall dismiss the Township's exceptions and make the Proposed Decision and Order final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Summit Township are hereby dismissed, and the January 13, 2009 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this sixteenth day of March 2010. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.

MEMBER ANNE E. COVEY DISSENTS.

I must respectfully dissent from the majority's opinion. AFSCME is the exclusive representative of a bargaining unit that includes laborers employed by the Township; three of those four bargaining unit employes are related to Earl R. Miller, a Township Supervisor. During a negotiation session in October 2007, at which all three members of the Township's Board of Supervisors (Robert T. Fritz, David P. Lohr and Mr. Miller) were present, AFSCME presented its proposal for a collective bargaining agreement.

AFSCME's proposal included as follows:

- an effective date of January 1, 2007 (six months prior to AFSCME's certification as the bargaining representative);
- a term of eight years, effective to December 31, 2015;
- no layoffs during the life of the agreement;
- a two-dollar increase in the employes' hourly rate of pay retroactive to January 1, 2007;
- annual cost of living wage increases starting in 2010 of at least two percent per year;
- added four paid holidays;

- increased each employe's annual allowance for supplies by \$125;
- provided employer paid eye and dental care, not previously offered Township employes; and
- a paid thirty-minute lunch period.

At the bargaining session in October 2007, the Township made no counter-proposal. Mr. Fritz and Mr. Miller simply verbally agreed to AFSCME's proposal.

Prior to the next regularly-scheduled meeting of the Township Supervisors in November 2007, Mr. Fritz, who had supported the AFSCME proposal in October, was defeated in the November 6, 2007 general election by Walter Lenhart. Nevertheless, at the November 19, 2007 meeting, despite Mr. Lohr's absence and Mr. Fritz's defeat in the general election, Mr. Fritz and Mr. Miller conducted a private executive session, at which time they signed the collective bargaining agreement with AFSCME. At the first regular monthly meeting of the Board of Supervisors that occurred after Mr. Lenhart took his position as a newly-elected Township Supervisor, on January 21, 2008, Mr. Lenhart moved "to declare the contract between the Supervisors and the employes of Summit null and void at this time..." Mr. Lohr seconded the motion, and the motion passed.

The majority and the Hearing Examiner find that this case does not involve an issue of Mr. Fritz's "lame duck" status as a Township Supervisor in November 2007. Having so found, the majority relies on Mullen v. DuBois Area School District, 436 Pa. 211, 259 A.2d 877 (1969), St. Clair Area School District v. PLRB, 552 A.2d 1133 (Pa. Cmwlth. 1988), *affirmed*, 525 Pa. 236, 579 A.2d 879 (1990), Chichester School District v. Chichester Education Association, 750 A.2d 400 (Pa. Cmwlth. 2000), *petition for allowance of appeal denied*, 568 Pa. 668, 795 A.2d 980 (2000), and Athens Area School District v. PLRB, 760 A.2d 917, 920 (Pa. Cmwlth. 2000), to bind the successor Board of Supervisors to the eight-year collective bargaining agreement. However, the majority's reliance on these cases is misplaced. Not only do these cases stress the need for a public employer's ratification of an agreement, but none involve the issue of a "lame duck" governing board. In binding the Township to the collective bargaining agreement, the majority and Hearing Examiner brush aside Board and court authority which recognizes the need for substantial compliance with statutory open meeting laws for the formation of a collective bargaining agreement and cases addressing the legal ramification of a "lame duck" board at the time of ratification.

Indeed, the Board stressed in Teamsters Local 107 v. Upper Moreland-Hatboro Joint Sewer Authority, 30 PPER ¶130220 (Final Order 1999), that "persons who contract with municipalities ... do so at their peril and must inquire into the powers of the municipal officers or agents with whom they are negotiating to reach a binding agreement." Id. at 474. The Township is a township of the second class and as such may not transact business or ratify contracts, including collective bargaining agreements, outside of a public meeting. 53 P.S. §65603. Where a public employer is required by statute to conduct business at public meetings, the Board has found that acceptance or ratification of a collective bargaining agreement by the employer does not arise until the agreement is voted on by a majority of the governing body at a public meeting. Upper Moreland-Hatboro Joint Sewer Authority, *supra*; City of McKeesport Wage and Policy Committee v. City of McKeesport, 31 PPER ¶131130 (Final Order, 2000); *See also*, Hazelton Area School District v. Krashoff, 672 A.2d 858 (Pa. Cmwlth. 1996), *petition for allowance of appeal denied*, 546 Pa. 670, 685 A.2d 548 (1996) (formal affirmative vote of majority of school board is prerequisite to formation of contract). In this regard, and contrary to the representations of the majority, the unfair practice found by the Board in St. Clair Area Education Association v. St. Clair Area School District, 18 PPER ¶18116 (Final Order, 1987), *affirmed sub nom*, St. Clair Area School District v. PLRB, 552 A.2d 1133 (Pa. Cmwlth. 1988), *affirmed*, 525 Pa. 236, 579 A.2d 879 (1990), was not a refusal to abide by the agreement reached during bargaining sessions at the courthouse, but a finding of bad faith bargaining in the district's failure to ratify that agreement at a public meeting. See Old Forge Education Association, PSEA v. Old Forge School District, 38 PPER 43 (Proposed Decision and Order, 2007).

Under the law, a subsequent publicly-advertised meeting to ratify the tentative agreement was required for formation of a collective bargaining agreement. However, prior to the next regularly-scheduled public meeting of the Township Supervisors on November 19, 2007, Mr. Fritz was defeated in the November 6, 2007 general election. Nevertheless, at the November 19, 2007 meeting, and in Mr. Lohr's absence, Mr. Fritz and Mr. Miller, in private, signed a collective bargaining agreement with AFSCME. Mr. Fritz's execution of the collective bargaining agreement on November 19, 2007 was the deciding "vote" on acceptance of the October 2007 tentative agreement. However, Mr. Fritz had been defeated in the general election by the time of the November 19, 2007 meeting, and thus was in "lame duck" status when the agreement was ratified. As the Pennsylvania Supreme Court, the Commonwealth Court, and the Board have long recognized, a contract entered into by a "lame duck" administration which attempts to handcuff its successor may not be binding on the successor board. Fraternal Order of Police, E.B. Jermyn Lodge #2 v. Hickey, 499 Pa. 194, 452 A.2d 1005 (1982); Lobolito, Inc. v. North Pocono School District, 562 Pa. 380, 755 A.2d 1287 (2000); Falls Township v. McManamon, 537 A.2d 946 (Pa. Cmwlth. 1988); Borough of Pitcairn v. Westwood, 848 A.2d 158 (Pa. Cmwlth. 2004); Teamsters Local Union No. 205 v. Borough of Plum, 33 PPER ¶33077 (Proposed Decision and Order, 2002).

As a matter of law, Mr. Fritz's actions to ratify the agreement on November 19, 2007 could not bind the newly-elected successor Board of Township Supervisors once Mr. Lenhart took office. Thus, on this record, I would reverse the Hearing Examiner, and hold that the Township has not violated its collective bargaining obligation under Section 1201(a)(1) and (5) of PERA, by disavowing the actions of a "lame duck" Supervisor and rescinding the collective bargaining agreement as of January 21, 2008.

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AFFIDAVIT OF COMPLIANCE

The Township hereby certifies that it has ceased and desisted from its violations of Sections 1201(a)(1) and (5) of PERA; that it has implemented the collective bargaining agreement; that it has made its employes whole for any losses sustained by them as a result of its refusal to implement the collective bargaining agreement; that it has paid them any back pay due with interest at the simple rate of six percent per annum; that it has offered to Mr. Rhodes in writing unconditional reinstatement to his former position without prejudice to any rights or privileges enjoyed by him; that it has made Mr. Rhodes 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 was offered unconditional reinstatement; that it has paid Mr. Rhodes any back pay as directed with interest at the simple rate of six percent per annum; that it has posted the Final Order and Proposed Decision and Order as directed; and that it has served an executed copy of this affidavit on AFSCME.

Signature / Date

Title

SWORN AND SUBSCRIBED TO before me
The day and year aforesaid

Signature of Notary Public