

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS LOCAL 840

v.

LARKSVILLE BOROUGH

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Case No. PF-C-16-46-E

FINAL ORDER

Larksville Borough (Borough) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on January 3, 2017, to a Proposed Decision and Order issued on December 14, 2016, in which the Hearing Examiner found that the Borough violated Section 6(1)(e) of the Pennsylvania Labor Relations Act (PLRA), as read in *pari materia* with Act 111 of 1968, by failing to implement the terms of a ratified collective bargaining agreement. The Borough filed a brief in support of the exceptions, and the International Association of Firefighters, Local 840 (Union) filed a brief in response to the exceptions. After a thorough review of the exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDING OF FACT

24. By email dated February 8, 2016, Mr. Kohn agreed to a revised counterproposal submitted by Mr. Barras on February 5, 2016, which covered the topics of changes to sick leave, wages, starting salary, employee contributions to health insurance, and accrual of leave time. (N.T. 25-27; Complainant's Exhibits 7 & 8).

DISCUSSION

A hearing was held on October 28, 2016, at which time the parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.¹ Based on review of the record and the evidence presented by the parties, the Hearing Examiner made Findings of Fact, as supplemented herein by an additional finding, which are summarized as follows.

The Union and the Borough were parties to a collective bargaining agreement that was effective from January 1, 2012 through December 31, 2015 (CBA). (FF 3). Article 21 of the expired CBA provides as follows: "**Section E. Safety Staffing.** The vehicle and equipment safety manning complements, which are currently maintained, shall continue to be maintained at those levels." (FF 4). Article 26 of the CBA provides for the wages of the Chief Engineer (i.e., firefighter) and two other engineers. (FF 5).

On May 28, 2015, President of Local 840 George Tomasak sent a letter to Borough Council President Joseph Romanoskey requesting the commencement of collective bargaining negotiations pursuant to Act 111 for the firefighters. (FF 6). On August 31, 2015, the Union sent to the Borough its Act 111 demand for arbitration identifying Thomas Kohn, Esquire as the Union's partial arbitrator. (FF 7). Thereafter, Joel Barras, Esquire, contacted Mr. Kohn and informed Mr. Kohn that he would be acting as the Borough's collective bargaining representative. In lieu of pursuing interest arbitration, Mr. Barras and Mr. Kohn engaged in negotiations for a successor collective bargaining agreement. (FF 10).

On November 5, 2015, Mr. Kohn memorialized his telephone offer to Mr. Barras.² The offer addressed only uniform allowance, sick leave and salaries. (FF 11). Mr. Kohn testified that the salary proposals included salary for the Chief and two firefighters, which was the staffing at the time, and consistent with provisions of the expired CBA.

¹ After the hearing, the Hearing Examiner left the record open for submission of an audio recording by the Borough, which was received by the Board on December 7, 2016.

² Negotiations were never face-to-face meetings, but were telephone conversations and emails. (FF 10).

(FF 9). Changing the minimum manning provisions in Articles 21 and 26 in the expired CBA was not included in any of the Union's proposals or any of the Borough's counterproposals at any time during negotiations. (FF 12). By email dated February 8, 2016, Mr. Kohn agreed to a revised counterproposal submitted by Mr. Barras on February 5, 2016, which covered the topics of changes to sick leave, wages, starting salary, employee contributions to health insurance, and accrual of leave time. (FF 24). During negotiations, Mr. Barras and Mr. Kohn both expressed their understanding that a tentative agreement would be ratified and approved by Borough Council as a package. (FF 13).

Mr. Barras authored and provided a tentative agreement on behalf of the Borough, which listed those matters negotiated and agreed to by the parties. The tentative agreement submitted to the Borough Council for ratification did not include or address changes to the manning provisions in the expired CBA. (FF 14).

Borough Council held a public meeting on March 15, 2016. During the meeting, after adjourning to an executive session to discuss the "fire union collective bargaining", the public meeting reconvened and the meeting minutes provide, under new business, in relevant part, as follows: "Motion to accept Fire Dept. Contract and settle grievance by Mr. Austra, second Mr. Gimble. Motion carried." (FF 15). The Borough Council members knew there was an expired CBA when they reviewed the tentative agreement. (FF 22). Council Member Austra testified that he understood that there were other terms and conditions of employment included in the expired CBA that were not expressly included in the tentative agreement that would remain the same. (FF 19). Neither the minutes, nor the audio recording of the meeting, indicate that Borough Council conditioned its approval of the tentative agreement on a subsequent review by the Borough Solicitor. (FF 16). Following the March 15, 2016 Borough Council public meeting, Mr. Barras informed Mr. Kohn that Council had approved the agreement. (FF 20).

Union President Tomasak had prepared a consolidated collective bargaining agreement that included the changes ratified by the Borough Council on March 15, 2016, and all unchanged provisions from the expired CBA, including the minimum manning provisions. (FF 20). On April 21, 2016, Mr. Barras informed Mr. Tomasak that Council would not sign the agreement because it contained the minimum manning provisions from the expired CBA. (FF 21).

Since the March 15, 2016 ratification of the tentative agreement, the Borough has maintained the *status quo* of the expired contract, minus the minimum manning provisions, and has not implemented any of the changes agreed to in the tentative agreement. (FF 23).

In the PDO issued on December 14, 2016, the Hearing Examiner found that the Borough refused to sign and implement a ratified tentative agreement constituting a successor collective bargaining agreement between the Borough and the Union. Thus, the Hearing Examiner concluded that the Borough committed unfair labor practices in violation of Section 6(1)(e) of the PLRA. On exceptions to the Board, the Borough argues that the Hearing Examiner erred in failing to credit its proffered testimony and evidence, and to find as fact, that the Borough's March 16, 2016 ratification vote was conditioned on the Borough Solicitor's review of the agreement. The Borough further argues that the appropriate forum to resolve this dispute is interest arbitration under Act 111.

The Borough offered the testimony of Council Member Austra that he made the motion to accept the Union contract with the condition that it be approved by the Borough Solicitor. The Borough offered a tape recording of the March 15, 2016 Borough Council Meeting to support its assertion that the conditional approval was not reflected in the Borough Meeting Minutes because the recording device did not record the full discussion and vote on Mr. Austra's motion. Other than Council Member Austra's self-serving statement that "I made the motion to accept the Firemen's Contract, with the understanding that it was to be reviewed and approved by our Solicitor" (N.T. 48), there is no other evidence that Borough Council's March 15, 2016 ratification of the firefighters' contract was based on any express pre-condition. With regard to the reasons

why the Official Meeting Minutes do not reflect an alleged conditional motion to accept the tentative agreement, Mr. Austras testified as follows:

A. Our President of Council started to make a statement about, you know, the review approved our Solicitor; the tape stops, and, the time our—I'm not sure how you'd classify her, but basically, our Borough Manager, by the time she flipped the tape back over to the next side to record the rest of the minutes, we were already through it, and nobody on Council actually realized that the tape had stopped; so, the minutes are not accurate on that part.

Id.

In rejecting the testimony and evidence presented by the Borough concerning Borough Council's alleged conditional acceptance of the Union contract, the Hearing Examiner stated as follows:

The following factors have caused me to reject the position that the record or Mr. Austras credibly establish that Council conditioned ratification on subsequent Solicitor approval: (1) The Council members were confused over which contract was being ratified; (2) the Solicitor had access to the expired CBA and reviewed the Fire contract during pre-ratification executive session on March 15, 2016;

(3) the lack of Council members' statements, their voting or the alleged post-ratification conditions on the audio recording; and (4) the probability that the audio recording was altered, thereby undermining all credibility in establishing the existence of a condition for which there is no substantial evidence to support. Accordingly, I will not credit Mr. Austras's testimony, and the Borough's assertion, that the Fire contract was ratified with the condition that it be subsequently approved by Solicitor Haley. Therefore, the existence of a pre-ratification condition that Solicitor Haley provides post-ratification approval of the contract is not supported by substantial, competent evidence and I reject the Borough's position that such a condition did in fact exist.

(PDO at 5).

Absent the most compelling of circumstances, the Board defers to the credibility determinations of its hearing examiners who are able to observe the manner and demeanor of the witnesses during their testimony. **Mt. Lebanon Education Association v. Mt. Lebanon School District**, 35 PPER ¶98 (Final Order, 2004); **SEIU, District 1199P v. Department of Public Welfare (Norristown State Hospital)**, 32 PPER ¶32117 (Proposed Decision and Order, 2001). The hearing examiner may accept or reject the testimony of any witness in whole or in part. **AFSCME, District Council 84, AFL-CIO v. Commonwealth of Pennsylvania**, 18 PPER ¶18028 (Final Order, 1986); **AFSCME, Local No. 1971 v. Philadelphia Office of Housing and Community Development**, 31 PPER ¶31055 (Final Order, 2000). Based on the credited evidence and testimony, the Hearing Examiner is permitted to make relevant findings of fact, which need only be supported by such relevant record evidence that a reasonable person would accept as adequate to support the conclusion or finding reached. **PLRB v. Kaufman Department Stores**, 345 Pa. 398, 29 A.2d 90 (1942); **St. Joseph's Hospital v. PLRB**, 473 Pa. 101, 373 A.2d 1069 (1977).

Contrary to the Borough's arguments on exceptions, we find no compelling circumstances warranting reversal of the Hearing Examiner's credibility determinations. Indeed, in addition to the reasons stated by the Hearing Examiner, there are other reasons which also justify the rejection of Mr. Austras's testimony that ratification of the firefighters' contract by Borough Council was conditioned upon subsequent approval by the Borough Solicitor. For example, Mr. Austras was the only Borough Council Member to testify. Neither the President of Council, who allegedly brought up the condition, nor the Borough Manager, who was recording the meeting, testified at the hearing in this case. Thus, the only evidence supporting the Borough's claimed conditional approval that was presented before the Hearing Examiner was Mr. Austras's testimony about unrecorded

statements made at the March 15, 2016 meeting. See Pa. R. Evid. 801; **Teamsters Local 110 v. Adams Township**, 36 PPER 162 (Final Order, 2005). Moreover, there is no evidence that following the ratification vote, the Borough ever indicated that its ratification was conditional. Indeed, the minutes of the March 15, 2016 meeting were subsequently approved by Borough Council without language reflecting a conditional approval. Also, after the March 15, 2016 meeting, the Borough did not convey to the Union that ratification of the firefighters' contract was conditioned on the Borough Solicitor's review. Indeed, to the contrary, as admitted by the Borough, following the March 15, 2016 meeting, the Union was advised by the Borough representative simply that Council had approved the tentative agreement. See Borough's Brief in Support of Exceptions at 3. It simply strains credulity for the Borough to argue that it pre-conditioned its ratification of the tentative agreement on subsequent review by its Solicitor, but did not mention this condition to the Union when it apprised the Union that the contract had been ratified, and only raised the condition when it came time to sign the agreement. Accordingly, there are no compelling reasons warranting reversal of the Hearing Examiner's credibility determinations and his rejection of the testimony by Mr. Austras that approval of the firefighters' contract was conditioned upon the Borough Solicitor's review.

The Board examines all relevant circumstances in determining whether the parties reached an agreement. It is the external objective conduct of the parties, and not subjective beliefs, that establish the presence or absence of a meeting of the minds. Where the parties have a meeting of the minds concerning the subject matter of the agreement, a binding agreement exists. **Bethel Park School District**, 27 PPER ¶27033 (Proposed Decision and Order, 1995); **AFSCME, District Council 88 v. Northampton County**, 38 PPER 19 (Proposed Decision and Order, 2007).

Here, the objective evidence of record concerning the parties' external conduct supports the Hearing Examiner's conclusion that on March 15, 2016, Borough Council ratified a successor collective bargaining agreement with the Union that included the unmodified terms of the expired CBA. As reflected in the evidence, with the exception of Mr. Kohn's initial telephone proposal to Mr. Barras, the bargaining proposals between the parties were in writing. The proposals made by the Union, and the counterproposals by the Borough, reflected the changes they wished to make to the language in the expired contract. For example, a Borough counterproposal referenced a "me too" clause of the expired collective bargaining agreement (not raised by the Union), which the Borough proposed be removed in the successor agreement. (Complainant's Exhibit 4).³ During negotiations, Mr. Barras and Mr. Kohn both expressed their understanding, in writing, that their negotiated changes to the expired collective bargaining agreement would be submitted to the Borough and Union membership as a package deal for ratification. (FF 13). In accordance with that understanding, Mr. Barras, the Borough's representative, prepared a document for ratification by Borough Council that included the negotiated tentative agreement on changes to the existing contract, and did not include the matters contained in the expired collective bargaining agreement where there were no proposed changes. Borough Council Member Austras testified that he understood that there were wages, hours and working conditions for the firefighters that were in the expired collective bargaining agreement that would continue. Mr. Barras' draft agreement was presented to Borough Council in anticipation of the March 15, 2016 Borough Council meeting. During that March 15, 2016 meeting, Borough Council broke into an executive session to discuss the firefighters' contract.⁴ Immediately thereafter, the ratification vote occurred during the public meeting on March 15, 2016. There is no substantial evidence of record that Borough Council's ratification was based on the express condition that the agreement would be reviewed and approved by the Borough Solicitor. Indeed, following ratification, Mr. Barras advised Mr. Kohn that the agreement had been ratified. There was no indication from Mr. Barras, or anyone, that the ratification was pre-conditioned on subsequent review or approval by the Solicitor. Accordingly, the objective

³ Mr. Kohn rejected this proposal on the part of the Union. Accordingly, the "me too" clause was not addressed in the Borough's tentative agreement, and was included in the successor collective bargaining agreement prepared for the parties' signatures by the Union.

⁴ In this regard, we are not concerned with what was discussed with the Borough Solicitor at that meeting, but only note that an executive session occurred to discuss the tentative agreement just prior to ratification of that agreement upon reconvening the open public meeting.

evidence regarding the parties' external conduct supports the finding that on March 15, 2016, Borough Council ratified a successor collective bargaining agreement with the Union, which included the unmodified terms of the expired CBA.

To the extent that the Borough may be arguing that there were irregularities in the manner in which the agreement was brought up for a ratification vote, or that there was, or was not, any confusion on the part of the Borough Council with respect to the vote or voting process, such arguments do not obviate the objective fact that Borough Council ratified a package successor collective bargaining agreement, and so notified the Union of that fact. **Blair County v. PSSU, Local 668, SEIU**, 35 PPER 102 (Proposed Decision and Order, 2004) (union committed unfair practice by refusing to execute agreement ratified by its members due to alleged irregularities in its internal voting process). Indeed, the facts of this case are similar in many respects to **Lancaster Uniformed Firefighters Association, Local 319 v. City of Lancaster**, 16 PPER 16164 (Proposed Decision and Order, 1985). In that case, it was not a minimum manning provision, but a parity clause that was at issue. In **City of Lancaster**, there was an existing agreement that included a clause to increase health insurance benefits for the firefighters if other city employees received better benefits (the parity clause). The city advised the union at the first negotiating session that it would not negotiate over the parity clause, but would leave it on the table in the event of interest arbitration because the city took the position that the clause was illegal. Thereafter, the parties continued to negotiate a tentative agreement and a package deal. During the negotiations, the city stated that it was opposed to the parity clause, "but it would not jeopardize the entire package without it." The union ratified the contract with the parity clause included. The City prepared a final contract that did not include the parity clause. The contract prepared by the city was not signed by the union. The hearing examiner found that the credible evidence of record led to the conclusion that the city, by agreeing at the bargaining table to a package, had agreed on an entire contract that would have included the parity clause. Thus, the Hearing Examiner concluded that because the written contract prepared by the city did not include the parity clause as was agreed to in negotiations, the city violated Section 6(1)(a) and (e) of the PLRA, and the Hearing Examiner directed the City to formally execute a contract including the parity clause.

Here, as in **Lancaster**, because the Union and Borough reached a package deal that was submitted for ratification and was ratified without condition by Borough Council, the parties reached a successor collective bargaining agreement that included provisions of the expired agreement, including the minimum manning provisions in Articles 21 and 26. Likewise, whether or not minimum manning is a mandatory subject of bargaining under Act 111 is irrelevant because the Borough's staffing levels are not precluded by a state statute, and the Borough would nevertheless be bound by its negotiated agreement on a permissive subject. **Scranton School Board v. Scranton Federation of Teachers, Local 1147, A.F.T.**, 365 A.2d 1339 (Pa. Cmwlth. 1976). Having ratified a successor collective bargaining agreement on March 15, 2016, which included the unchanged provisions of the expired agreement, the obligation of the parties under the PLRA and Act 111 is to sign and implement their collective bargaining agreement. There is no additional statutory duty or obligation to proceed further with interest arbitration. **McAdoo Police Association v. McAdoo Borough**, 39 PPER 24 (Proposed Decision and Order, 2008); **Norristown Borough**, 15 PPER ¶15183 (Proposed Decision and Order, 1984).

After a thorough review of the exceptions and all matters of record, there are no compelling reasons to reverse the Hearing Examiner's credibility determinations. Also, substantial evidence of record supports the Hearing Examiner's findings that the Borough ratified a successor collective bargaining agreement that carried over and included the minimum manning provisions of the expired CBA, and that the Borough refused to sign and implement the ratified collective bargaining agreement. Accordingly, the Hearing Examiner did not err in concluding that the Borough violated Section 6(1)(e) of the PLRA as read in *pari materia* with Act 111, and in directing the Borough to execute and implement the collective bargaining agreement with the minimum manning provisions. As such, the exceptions filed by the Borough shall be dismissed, and the PDO shall be made absolute and final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Larksville Borough are hereby dismissed, and the December 14, 2016 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, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this eighteenth day of April, 2017. 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.

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Case No. PF-C-16-46-E

AFFIDAVIT OF COMPLIANCE

The Borough hereby certifies that it has ceased and desisted from its violations of Section 6(1)(e) of the Pennsylvania Labor Relations Act as read in **pari materia** with Act 111; that it has immediately signed and implemented a consolidated collective bargaining agreement that includes the terms of the tentative agreement ratified by Borough Council on March 15, 2016 and all terms from the expired CBA that were not changed by the tentative agreement, including but not limited to the minimum manning provisions of Article 21 and 26 of the CBA; that it has immediately made the bargaining unit fire fighters and Chief whole for any and all losses, including but not limited to, wages, wage increases, overtime pay, pension payments/benefits, vacation or sick leave, out of pocket expenses, as a result of not implementing the terms contained in the agreement ratified on March 15, 2016, retroactive to January 1, 2016; immediately paid interest at the simple rate of six percent per annum on any and all losses, including but not limited to, wages, wage increases, overtime pay, pension payments/benefits, vacation or sick leave, out of pocket expenses, as a result of not implementing the terms contained in the agreement ratified on March 15, 2016; that it has posted a copy of the proposed decision and order and final order in the manner prescribed therein; and that it has served a copy of this affidavit on the Union at its principal place of business.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public