

CITY OF PITTSFIELD AND PITTSFIELD PERMANENT FIREMEN'S ASSOCIATION, MUPL-2118 (4/26/78)

- (50 Duty to Bargain)
 - 54.234 moonlighting
- (70 Union Administration and Prohibited Practices)
 - 76. refusal to bargain in good faith
- (90 Commission Practice and Procedures)
 - 91.11 statute of limitations

Commissioners Participating: James S. Cooper, Chairman; Garry J. Wooters, Commissioner; Joan G. Dolan, Commissioner.

Appearances:

- W. Stanley Cooke, Esq. - Counsel for the Pittsfield Permanent Firemen's Association
- Thomas M. Sherman, Jr., Esq. - Counsel for the City of Pittsfield

DECISION AND ORDERStatement of the Case

On December 12, 1977, the City of Pittsfield (City) filed with the Labor Relations Commission (Commission) a prohibited practice charge alleging that the Pittsfield Permanent Firemen's Association (Association) had committed certain practices prohibited by section 10(b) of General Laws c.150E (Law). The charge alleges that the Association failed to bargain in good faith by by-passing the Mayor, the City's collective bargaining representative, and going to the Pittsfield City Council to obtain the repeal of the City's anti-moonlighting ordinance.

After investigation pursuant to its authority under section 11 of the Law, the Commission issued its own complaint of prohibited practice on February 2, 1978 alleging that the Association filed a timely Answer denying that it had committed the alleged prohibited practice.

On March 3, 1978, a Formal Hearing was held before Commissioner Joan G. Dolan. Both parties were present, represented by counsel, and given full opportunity to be heard, to examine and cross-examine witnesses and to introduce testimony. On March 24, 1978, both parties filed briefs, which have been considered by the Commission.

Jurisdictional Findings

1. The City of Pittsfield is a municipal corporation in Berkshire County and is a public employer within the meaning of section 1 of the Law.
2. The Mayor is the Chief Executive Officer of the City within the meaning of section 1 of the Law, and is the representative of the City for the purpose of bargaining collectively with the City's firefighters.
3. The Association is an employee organization within the meaning of section 1 of the Law and is the exclusive representative of Pittsfield Firefighters for the purposes of collective bargaining.

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Findings of Fact

For many years the City of Pittsfield (City) had an anti-moonlighting ordinance (ordinance) which prohibited its firefighters from engaging in any business or employment other than their job with the City. Since at least the early 1970's, the firefighters' desire for repeal of the ordinance has been a frequent subject of discussion between the employees and the City's representatives. Although the subject arose informally during several rounds of contract negotiations, there were never oral or written proposals made by either side since the City's chief negotiator always took the position that repeal of the ordinance was not a subject for bargaining but rather a matter for consideration by the City Council, which was the only body which could repeal the ordinance. The July 1, 1976 - June 30, 1978 collective bargaining agreement between the City and the Association is silent on the subject of moonlighting. Since the agreement's effective date there has been no bargaining for a successor contract.

The current mayor of the City is Paul Brindle. Brindle was elected to the City Council in 1972. He subsequently became Council President and, in 1976, Mayor. While a member of the Council, he was approached several times by firefighters who asked if he would vote for repeal of the ordinance. In each case he replied that he would have no problem with casting such a vote. In addition to a change in its Mayor, the City during 1976 and 1977 experienced the departure of its former chief negotiator and changes in its City Solicitor's office, both of which resulted in new appointments to its negotiating team.

Among the firefighters particularly concerned about the ordinance was Lieutenant Geral Miller. The father of five children, Lt. Miller has been a firefighter for 15 years. During this period he has sometimes moonlighted in order to support his family. During the Spring and Summer 1974 negotiations for the 1974-1976 contract, Miller was a member of the Association's bargaining team and was told by the City's chief spokesman that repeal of the ordinance could not be bargained and that he would have to approach the City Council. In April of 1975, Miller was reported for moonlighting. He was again reported in April of 1976, at which time he had to hire counsel to save his job. At that time Miller approached then-Councillor Brindle and another City Councillor on the subject of repeal of the ordinance. Brindle stated that he viewed the ordinance as an "antiquated blue law." He told Miller to wait until the negotiations taking place in the Spring and Summer of 1976 for the 1976-1978 contract were completed and then approach the City Council and get the ordinance repealed.

A "cooling-off period" then ensued. After Mayor Brindle's election, the moonlighting issue heated up again early in 1977. In January, Thomas Maloney became president of the Association. Right after his election, several firefighters asked him whether they could use the Association's name and its attorney in an effort to get the ordinance repealed. Maloney told these individuals that they would have to undertake such efforts on their own. At approximately the same time, Lt. Miller was approached by some other firefighters, who asked him to renew his earlier efforts to repeal the ordinance. During the early winter there was discussion among some of the firefighters about a petition to repeal the ordinance. Maloney maintained the position that the Association would not sponsor such an effort, at least with a formal, secret



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ballot vote of the membership prior to the filing of a repeal petition.

In March or early April of 1977, Miller and Clifford Soutier, a 22-year member of the Fire Department, approached Mayor Brindle, who stated that, while he had no problem with repealing the ordinance, the City Council would be a problem. The mayor told Miller and Soutier that he would definitely sign an ordinance repealing the moonlighting provision if they could get it through the Council. Miller and Soutier spoke to the mayor as individuals rather than as Association representatives. Also during April, a motion was made at an Association meeting that the members vote by secret ballot on the following question: "Shall the members of the Association support a petition on the repeal of the moonlighting ordinance?" The vote was to be by secret ballot at all six fire stations, with the ballots to be opened and counted at the Association's next meeting on May 6, 1977.

On April 27th or 28th, the ballots were distributed to the fire stations. On April 29th, nine Association members, including Miller and Soutier, signed a petition requesting the City Council to repeal the moonlighting ordinance. The petition was filed with the City Clerk on May 2nd in the names of the nine individuals. No petition was filed by or on behalf of the Association, which also did not authorize the individuals' petition. None of the signatories except Lt. Miller had been active in the Association or even attended many of its meetings. The filing of the petition was the first in Mr. Maloney's extensive experience that individuals had taken an action affecting the firefighters without going through the Association.

On May 2nd, Association President Maloney heard through the media that the petition had been filed. He went to the City Clerk's office to get the names of the signatories and to make sure that the unauthorized petition had not been filed in the Association's name. Ballots from the secret vote were opened at the Association's May 6th meeting. The count revealed a 73-72 vote in support of a petition to repeal the ordinance. After the vote, none of the firefighters who had signed the petition came to Maloney to request support from the Association. The only action taken by the Association was that the result of the vote was posted on the bulletin boards of the City's fire stations so that members who had not attended the May 6th meeting would know the results of the vote. Although President Maloney told a few people of the vote, no action was taken by the Association to publicize it.

City Council hearings on the petition were held in May and June of 1977. Although President Maloney attends Council meetings and attended those in question, he did not speak on the petition. Lobbying the Council for repeal of the ordinance were Lt. Miller and his attorney, Mr. Cooke. Miller spoke to all members of the Council as an individual, and at Council hearings both Miller and Cooke stated that the petition had been filed by individuals and that the Association had nothing to do with it. No Association officer or representative lobbied in support of the petition.

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At some point after his meeting with Miller and Soutier, Mayor Brindle became aware of his negotiating team's position that repeal of the moonlighting ordinance was a matter for collective bargaining, a position taken by the City Solicitor's office on June 13, 1977 in a letter to the City Council. Representatives of the Mayor opposed the repeal during the May and June City Council hearings. On June 14th the Council read and passed for the first time an ordinance amending the anti-moonlighting provision by repealing it. On June 28th the Council read and finally passed the repealing ordinance. The mayor vetoed the repeal ordinance on July 6th in the form of a letter returning it with the explanation that, under the Law, the matter was one for bargaining.

In September, the City Solicitor's office learned of the Association's May 6th vote. On November 27th, the City Council overrode Mayor Brindle's veto of the ordinance repealing the no-moonlighting provision. Early in December, the City learned that the Association's attorney, Mr. Cooke, had, on or about December 1st, sent the Association a bill for services he had rendered in connection with the repeal of the ordinance. On December 8, 1977, the City mailed the charge in the instant case to the Commission, where it was received and docketed on December 12th.

At the hearing, it was established that the Association had held a meeting on December 2, 1977 at which Attorney Cooke's bill was presented for consideration. Because the bill was for services rendered to the petitioning firemen as individuals and not for Association work, the Association refused to pay the bill. President Maloney so notified Mr. Cooke on December 3rd. A week later, Attorney Cooke wrote to Mr. Maloney to state that the bill had inadvertently been sent to the Association, which should disregard it. Lieutenant Miller paid Mr. Cooke's bill.

Opinion

The City contends that the Association violated section 10(b) of the Law by by-passing the Mayor and going directly to the City Council to obtain the repeal of the no-moonlighting ordinance. The Association urges that the City's prohibited practice charge is barred by the Commission's 6-month Statute of Limitations, a position disputed by the City. Additionally, the Association argues that it has not violated the Law. We hold that the City's charge was timely filed but that it must be dismissed on the merits.

Statute of Limitations

Article III, Section 2 of the Commission's current Rules and Regulations requires that prohibited practice charges must be filed within six months of the event complained of. In accordance with National Labor Relations Board and federal Court precedent, the Commission's rule has been clarified to state that the six-month period will not begin to run until the complainant knew or should have know of the alleged violation. Town of Wayland and International Brotherhood of Police Officers, 3 MLC 1724, 1728 (H.O., 1977). The six-month statute is an affirmative defense which must be proved by the party propounding it. Town of Wayland, supra at 1729.

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The City's charge was filed with the Commission on December 12, 1977. In support of its Statute of Limitations defense, the Association contends that the City should be charged with knowledge of the alleged violation as of May 2, 1977, the date of filing of the petition with the City Clerk. In the alternative, the Association advances various dates prior to June 12th when hearings were held by the City Council. The City argues that it had no notice of any Association involvement in the petition until after the repeal process was well underway. It was not until September that the City Solicitor's office learned of the Association's May vote and not until December that the City had knowledge of the submission of Mr. Cooke's bill to the Association. Given the absence of an Association signature on the petition and the statements at Council hearings in May and June that the Association was not involved, the City argues that it cannot be held to knowledge of the alleged violation until some time subsequent to June 12th.

We agree with the City. As noted above, the Association has the burden of proving that the charge is time-barred. In order to meet its burden, the Association must establish that the City knew or should have known of the alleged violation prior to June 12, 1977, six months prior to the filing of the charge on December 12th. What the Association has proved is exactly the reverse. Its defense on the merits is that the Association was at no time involved in the repeal of the ordinance and that the individuals responsible cannot be held to be Association agents. Its evidence is that at all times when it seeks to charge the City with knowledge of the Association's responsibility for repeal of the ordinance, the individuals in question were stating publicly that the Association was not involved. Additionally, the Association neither presented evidence nor elicited testimony tending to prove that the City had any real knowledge of possible Association involvement prior to June 12th. On this record, the Association has failed to prove its allegation that the City's charge is barred by the six-month Statute of Limitations. We hold that the charge was timely filed.

The Merits

Section 6 of the Law requires that employers and unions bargain in good faith on wages, hours, standards of productivity and performance, and any other terms and conditions of employment. A union violates section 10(b) of the Law if it refuses to bargain in good faith with the public employer as required in section 6. The City alleges in the case sub judice that the Association was obligated to bargain with the Mayor on the subject of repeal of the anti-moonlighting provision and that it failed to do so by by-passing the Mayor and obtaining repeal of the ordinance from the City Council.

As both the City Solicitor and Mayor Brindle pointed out to the Pittsfield City Council, the Mayor is the City's representative under section 1 of the Law for the purpose of bargaining collectively with its firefighters. Under section 7 of the Law, a contract provision on a matter within the scope of negotiations under section 6 of the Law supersedes any conflicting municipal personnel

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ordinance, by-law, rule or regulation.¹ A moonlighting prohibition is a matter within the scope of negotiations. As Lt. Miller's experience indicates, the willingness to forego outside employment was a condition of working as a Pittsfield firefighter. The no-moonlighting provision impacted primarily and directly on employees' job security since violation of the ordinance was cause for dismissal from the City's service. Thus, an anti-moonlighting provision is analogous to the residency requirements which have been held to be mandatorily bargainable subjects of negotiations. Boston School Committee, 3 MLC 1603,1607 (1977); City of Worcester, 4 MLC 1285,1287(1977). Had the Association sought to abolish the moonlighting prohibition, it would have been legally obligated to seek such a change from the mayor at the bargaining table and not from the City Council. We do not find, however, that the Association can be held responsible for the repeal of the ordinance.

As Lt. Miller and President Maloney testified, the petition effort was made by nine individuals. There was a specific disavowal of assistance or permission from the Association. Both Mayor Brindle and City Council President Smith stated that, at all relevant points in the repeal process, the petitioners specifically stated that they were acting on their own and had no authority to represent the Association. President Maloney heard of the petition through the media and immediately took steps to assure that the petitioning firemen had not indicated Association sanction of the repeal effort. No Association officer or representative lobbied for the repeal or even spoke on the subject at City Council hearings.

The City relied principally on the Association's May vote to support a repeal petition and the submission of Mr. Cooke's bill as proof that it was really the Association which was responsible for the City Council's action. As was established at hearing, the Association rejected Mr. Cooke's bill, which was subsequently sent to, and paid by, Lt. Miller. There was no proof that the secret vote, counted after the petition was filed, led to any action whatsoever by the Association or had any effect on the City Council. President Maloney testified that the vote was an internal, unpublicized solicitation of the firefighters' opinion. Mayor Brindle, City Council President Smith, and Director of Administrative Services Jackman, the individuals most intimately involved with the repeal effort on the City's side, all testified. None of them even mentioned the vote to any degree, let alone any effect it had as an indication that the Association was the real moving force behind, or even supported, the repeal effort. Equally telling is the fact that, as the City stated, no City official apparently knew of the May vote until September, four months after the vote was taken and three months after the first favorable action for repeal by the City Council. Under these circumstances the vote cannot be found to be an authorizing or ratifying action of the Association which had any effect on the repeal process.

¹The record in this case amply documents the fact that the root of this case could well be confusion resulting both from changes in the City's negotiating personnel and also section 7's mandate that collective bargaining agreements take precedence over municipal personnel ordinances. G.L. c.150E became effective on July 1, 1974. The prior law, G.L. c.149, specifically stated that municipal ordinances took precedence over collective bargaining agreements. It is abundantly clear in this case that both sides at certain critical points were laboring under the impression that only the City Council could change the no-moonlighting ordinance.

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Thus we find that the City has failed to meet its burden of proving that the Association authorized, sponsored, or in any way supported the individuals' petition which resulted in the repeal of the City's anti-moonlighting ordinance. We also note that, even if Association responsibility had been established, the facts indicate that Mayor Brindle told Lt. Miller to follow the course he subsequently took. Even if the events which followed could be traced to the Association, it would clearly have been acting in accordance with the Mayor's advice. Having condoned the repeal effort, the City's exclusive bargaining representative would be held to have waived any prohibited practice charges flowing from a course of action in keeping with his instructions. See Leicester Police Assn., 4 MLC 1261(1977); Town of Leicester and SEIU, Local 495, 4 MLC 1264 (H. O.,1977), aff'd 4 MLC 1666(1978).

Accordingly, the Complaint alleging that the Association has violated sections 10(b)(1) and (2) of the Law must be, and hereby is, dismissed. So ordered.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

James S. Cooper, Chairman
Garry J. Wooters, Commissioner
Joan G. Dolan, Commissioner

