

WILLIAM L. RICHARD, P.A.
Arbitrator

November 17, 2011

Township of Palm Beach Florida
Employer

Florida State Lodge
Fraternal Order of Police
Union

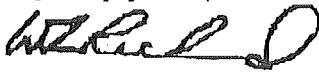
Re: PERC Case No. SM-2011-001
Report and recommendations of Special Magistrate

Gentlemen:

My report and recommendations in the above-captioned case follow. The document is not complete. There are three remaining Articles at impasse to be addressed. Given the 5:00 p.m. deadline on this date, which you imposed on November 7, the volume of pages in the incomplete report, and the amount of time required to fax them all to you, I have not had an opportunity to edit it as I would like to have done. I will address the three remaining Articles and editing the entire report, tomorrow morning, and should have the final pages and my invoice for services rendered faxed to you before the end of the day tomorrow.

I am sorry to have required so much time to complete this report, but deteriorating health issues precluded any more rapid results. Thank you for your patience, and professional courtesies throughout its processing.

Very truly yours,



W. L. Richard

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**TOWN OF PALM BEACH
PUBLIC EMPLOYEES RELATIONS COMMISSION**

TOWN OF PALM BEACH

Employer,

Case Nos. SM-2011-001

v.

FLORIDA STATE LODGE
FRATERNAL ORDER OF POLICE, INC.,

Union,
_____ /

REPORT AND RECOMMENDATIONS OF SPECIAL MAGISTRATE

APPEARANCES: Anthony Livoti, Esquire, Florida State Lodge Fraternal Order of Police.
Jeffrey Mandel, Attorney for Respondent Town of Palm Beach.

IN THE MATTER OF IMPASSE BETWEEN

TOWNSHIP OF PALM BEACH

PERC CASE NO.: SM-2005-033

And

FLORIDA STATE LODGE
FRATERNAL ORDER OF POLICE

1. INTRODUCTION AND BACKGROUND

The parties to the impasses which are at issue in this matter have no previous contracts, and no history of collective bargaining with each other.. The Township ("employer") is located in Palm Beach County, Florida, just north of Boca Raton and Fort Lauderdale. It is a small town with an approximate population of 10,000 residents, which is reputed to be the third wealthiest community in the United States. The Union is the exclusive bargaining agent for Seventy-One employees of its Police Department.

Sometime in late 2009 or early 2010 the parties presented each other with proposed articles for a collective bargaining agreement and began collective bargaining. In late 2010 they declared they were at impasse on some thirty-five articles, and notified The Florida Public Employees Commission accordingly.

2. ARTICLES AT IMPASSE

Article 2 – Non-Discrimination and Workplace Environment
Article 5 – Management Rights & Scope of Agreement
Article 7 – Bill of Rights and Related Matters
Article 9 – Vehicles and Equipment
Article 12 – Causes for Disciplinary Action
Article 13 – Grievance and Arbitration Procedure

Article 15 – Holidays
Article 16 – Sick Leave
Article 17 – Bereavement Leave
Article 19 – Vacations
Article 20 – Extra Duty Police Employment (Details)
Article 21 – Insurance and Miscellaneous Benefits
Article 23 – Hours of Work and Overtime
Article 24 – Compensation
Article 25 – Uniforms, Safety, and Equipment
Article 30 – Safety Standards
Article 31 – Prevailing Rights and Past Practice
Article 33 – Retirement Benefits
Article 34 – Drug and Alcohol Free Workplace/Testing
Article 35 – Duration of Agreement

The parties met for negotiation on various occasions, resulting in modifications in a number of proposals for Articles, resolutions of a few, and ultimately, impasse on those listed above. The parties sought recourse through The Florida Public Employees Commission, and the Special Magistrate was appointed to address the Articles at impasse, and to make recommendations to resolve them.

A hearing regarding the impasses was scheduled for January 6, 2011 but was aborted, before it began, by the parties' concerns regarding the Magistrate's shortness of breath, as observed upon his arrival at the hearing site. Despite repeated assurances from the Magistrate that this was merely a temporary exacerbation of a chronic condition, and that he was ready to proceed, EMTs, who were present as witnesses to be, transported the Magistrate to a nearby hospital where he was admitted for two

days through the emergency room. The hearing was rescheduled for May 4 at Palm Beach Fire Station No. 1.

A hearing was conducted by the Special Magistrate on May 4, 2011, as scheduled, and continued across the street at the Town Hall on May 5. Jeffery Mandell, Esq. appeared on behalf of the employer, and Anthony Livoti, Esq., appeared on behalf of the Union. No court reporter was provided by the parties, therefore the official record of the hearings is the Magistrate's notes and memory. No post-hearing briefs were filed.

3. SUMMARY OF ISSUES AT IMPASSE

(Article by Article, Discussion and Magistrate's Recommendations with each)

The parties' positions and proposals with respect to each article are summarized below: but several points are clear throughout this entire proceeding and all of the Impasses. The employer, based upon a forecast by an independent auditing firm, of a five million dollar shortfall this fiscal year, is primarily motivated in its negotiations by costs and expenses and fears of deficits, while the union is motivated by eliminating perceived potentials for unfair treatment of employees through unilateral decisions or unilateral policy changes by management

Article 2 - Non-Discrimination

Although this PERC procedure deals with an initial collective bargaining agreement between the parties, the employer has in place a unilaterally established, published, policy entitled "Workplace Environment" which addresses in great detail its "equal employment opportunity policy," its recognition of employees' entitlement to be treated fairly and with respect, its general "Anti-Harassment Policy," its prohibition of any sexual harassment, its "Fair Labor and Standards Act Policy," and a number of other policies and procedures. (Ex. B, C, & D) Early in the negotiations it proposed this policy of seven pages for Article 2. In January 2010 the union proposed a much shorter single paragraph covering these matters in more general terms. In June 2010 the employer adopted a more general approach with a single paragraph proposal of its own. Both single paragraph proposals are of similar content, except that each contains at least one aspect that the other does not.

The union proposal (Article 2 - Ex. A) prohibits "...discrimination, interference, restraint, or coercion" by either party against any employee of any classification protected by federal, state, or local law, and specifies that "(A)ll references to employees in this agreement designate both sexes whenever the male gender is used It shall be construed to include male and female employees." The employer's proposal (Article 2 - Ex. E) limits the prohibition to the causes of such conduct to an employee's "member-

ship of non-membership in the union” and specifies members of the bargaining unit are free to join, or not join, the union, or to withdraw from union membership as they deem appropriate.

There is no real substantive dispute between the parties proposals. The Magistrate therefore makes the following Recommendation regarding this Article:

The parties should again negotiate. They should select either Ex. A, or Ex. E, as the proposal to be modified, and make the following modifications: From the proposal not selected they should select the subjects not in the selected proposal, and add them to it. In other words, Article Two should include the mutually proposed prohibitions of discrimination, interference, restraint or coercion for employee behavior protected by federal, state, or local law, and for joining, not joining, or withdrawing from union membership, and they should specify that all provisions of their agreement apply to all male and female employees in the bargaining unit whenever such employees are referenced by either gender.

Article 5 – Management Rights and Scope of Agreement

Again the impasse is the result of different approaches in phrasing. The employer’s last revised proposal is a page and one-half of details

attempting to name every possible management decision right retained, while the union's is a single paragraph in much more general terms. While the employer attempts to itemize each type of managerial decision it reserves the right to make, the union identifies only the different categories of decisions reserved. "Article 5 - Ex. A":

"Unless otherwise expressly provided in this agreement, the Town reserves the exclusive right to manage and direct all of its operations and employees, to decide the scope of services to be performed, to terminate, suspend, or otherwise discipline for just cause, to determine matters bearing upon promotion, to determine hours of work and shift times, to establish Town and departmental policy, rules and regulations and procedures, and further to exercise all of the statutory public employer rights acknowledged in the Florida Public Employee Relations Act unless the exercise of such right is inconsistent with any express provision of this Agreement.

The union's shorter, concise, more generalized proposal includes all of the Town's proposed decisions. Indeed, it concedes management's right to make all managerial decisions except those in conflict with expressed provisions of the Agreement. The Magistrate therefore makes the following Recommendation: The parties should adopt the union's proposal of January 25, 2010 (Article 5 - "Ex. A") as Article 5.

Article 7 – Bill of Rights and Related Matters

In January 2010 the union proposed that this article incorporate by reference "Section 112.531 Florida Statutes," commonly known as "Police Officers Bill of Rights." as well as ten additional numbered paragraphs (Article 7 – Ex. A). At the Magistrate's hearing the employer provided Article 7, - Exs. B and C. Ex. B, entitled "Town Impasse Proposal," is an undated blank sheet of paper but for the heading (which is crossed out) and the single word, in brackets, ["None."] EX. C is a multiple page "print out" of "The 2010 Florida Statutes, Title X, Chapter 12." It is captioned "Date Printed: 2/7/2011." It contains Sections 112.532 *and* 112.534, Florida Statutes, **2010**. It appears that Section 112.531, referenced in Ex. A was amended sometime between January 2010 and February 2011, and is now exhibited in two sections.

No discussion, testimony, or argument was offered regarding this Article at the Magistrate's hearing in this matter. Nonetheless, the union's proposal of Incorporating the statutory "Police Officers' Bill of Rights," whatever its proper designation, and amendments there to, is reasonable, and should not have any negative effects or costs to the employer, as (a) the employer is already bound by the statute, and (b) should the union allege violation of the rights recognized by the statute, it is free to file a grievance and seek arbitration if necessary (faster and less expensive than litigation.) The magistrate therefore recommends adoption of the propos-

al, with great care taken to properly identify the statutes which contain the rights in question.

Article 9 – Vehicles and Equipment

The union's proposal of January 25, 2010 for this Article ("Ex B") contained 13 paragraphs addressing different points concerning types, maintenance, take home programs, etc., regarding vehicles, weapons, ammunition, officer qualifications, development of rules, off-duty injuries to officers driving assigned vehicles, etc. At Article 9.4 the union proposed that "all officers shall be eligible to participate in the Take-Home Vehicle Program subject to availability of vehicles and applicable Department Policies." This proposed Article had three sub-paragraphs, (A)(B)&(C), involving initiating the program and establishing a policy governing limitations and usage of take home vehicles, assignment of take home vehicles to detectives, and a meeting with the Chief of Police and the parties to various factors leading to continuance or elimination of the program. Proposed Article 9.4.1 requires that rules regarding this program be developed by the Chief with "input from the union."

The employer's proposal of June 23, 2010 for this Article (Ex A) was comprised of only 5 paragraphs, "9.1" through "9.5." Two of these were identical to two of the union's paragraphs, while two others contained only minor variations from the unions proposals. The employer's proposal, however, did not address in any manner the issue of take home vehicles.

An itemized breakdown of the cost of the union's proposal to provide all officers and sergeants with take home vehicles (Ex. C) was provided, showing a cost per vehicle of \$48,695, and a total cost to the employer to provide additional vehicles for 30 officers and 6 sergeants of \$1,753,020.

At the hearing, the union provided testimony that the employer was overlooking the fact that during negotiations it had modified its 9.4 proposal to limit take home vehicles to detectives only, and had withdrawn its proposed sub-paragraphs (A)(B) & (C). With these changes there is very little conflict left between the parties' proposals. The most notable conflict is the union's proposal that officers be allowed to carry weapons not issued by the employer upon meeting certain stated criteria. The magistrate therefore recommends that if, after further negotiation regarding that issue, no agreement is had regarding it, the employer's proposal of June 23, 2010 be adopted as Article 9.

Article 12 – Discipline and Discharge

With two exceptions, the differences between the parties' proposals for this article, as was the case for article 2 (above), are more nearly just differences in phrasing, not in substance. Both exceptions involve the union's proposal which requires just cause for disciplinary action, provides for appeals (grievances and arbitrations) for disciplinary penalties more severe than written reprimands, and, in a second paragraph, limits disciplined employees from any right to review or appeal for a period of

one year from the date of their appointment as probationary employees. The employer's proposal cites (and includes as exhibits [A] through [C], Section 6.6 of the Town's Employee Personnel Manual, and its published Department Rules, Regulations, and General Orders [some 17 pages in all]), and limits appeals of disciplinary actions to the grievance procedures of the Collective Bargaining Agreement.

It is not clear whether Ex.s (A)(B) & (C) were included just to show what offenses the employer viewed as disciplinable at the time of negotiations, or whether the employer proposes that all 17 pages be included in Article 12 of the CBA, but that is certainly not necessary. If the parties choose to follow the Magistrate's Recommendations regarding Article 5 (above), it is clear that management has retained among its rights the right to promulgate, edit, amend, adopt, publish, and enforce, reasonable departmental policy, rules, regulations, and general orders, and to appropriately discipline bargaining unit employees for violations thereof. Itemization of such in the CBA is not necessary so long as they are posted, published, or otherwise made known to the employees. Violation of such published guidelines is clearly just cause for disciplinary action. The Magistrate therefore recommends that the union's proposal of January 25, 2010 (Article 12, Ex. F) be adopted by the parties, with or without the second paragraph, as the parties see fit.

Article 13 – Grievance and Arbitration Procedure

Similarly to the impasse at Article 12 (above), there are only two or three minor disparities between the union's proposal of January 25, 2010, and the town's undated "Impasse Proposal." The first of these is in Article 13, Section 13.1, which deals with the "matters" to be covered by this Article. The union's proposal contains the following statement: "...shall cover matters bearing upon discipline or discharge (except as otherwise provided in Article 12) and any other matter bearing upon grievances arising out of the application or interpretation of this Agreement." The employer's proposal eliminates the parenthetical phrase and inserts, following the words "interpretation of", the following phrase "the specific terms of this Agreement." Otherwise, the two proposals for Section 13.1 of Article 13 are identical, as are those for sections 13.2 through 13.4 and its "Steps 1 through 4.

The employer's proposal to strike the parenthetical phrase at Section 13.1 is a bit surprising, in that the phrase recognizes Article 12's expedited grievance procedure for written reprimands limits such grievances to final determination by the Town Manager, without involving any neutral third party (in other words, "not arbitrable.") The employer's proposed limitation of an Arbitrator's interpretive authority to "specific terms" of the Agreement merely prevents arbitral speculation regarding unspecified intentions of the parties when finalizing their agreement, and

is perfectly reasonable, and of benefit to both parties. The Magistrate therefore recommends adoption of the union's January 25, 2010 proposal, with the modification of inserting the employer's "specific terms" as set forth in its "impasse proposal."

Article 15 – Holidays

The parties proposals for Article 15, Section 15.1, are in total agreement as to all twelve of the proposed named "Legal Holidays" to be observed, and differ only as to the number of "Floating Holidays" to be afforded members of the bargaining unit. The Magistrate recommends that they settle for two floating annual holidays. He also recommends adoption of the employer's proposed Sections 15.2 (as amended below) and 15.3, as to what options shall be available to officers required to work on the named holidays, or holidays which fall on employees' scheduled days off.

Recommended amended Section 15.2: "

Recognizing that the employees covered hereunder have an adjusted vacation policy in lieu of legal holidays, all matters concerning holidays shall be governed by the applicable provisions of the Town of Palm Beach Employee Personnel Manual as the same shall exist as of June 23, 2010. Any unilateral changes in said provisions made during the duration of this agreement shall not take effect as to employees

in this collective bargaining unit without prior written agreement from the union.

Articles:

16 - Sick Leave

17 - Bereavement Leave

`` These Articles get an "either/or" recommendation from the Magistrate. He recommends that *either* the union's proposals of January 25, 2010 (Art. 16, "Ex. D; Art. 17, "Ex. C") be adopted, *or* the employer's proposals of June 23, 2010 (Art. 16, "Ex. C", Art. 17, Ex. B) be modified in the same manner as the Magistrate's recommended Article 15 (above) by specifying a date for the governing provisions of the Town of Palm Beach Personnel Manual, and excluding members of this bargaining unit from the effects of any unilateral changes to those provisions without the prior written consent of the union during the duration of this CBA.

Article 19 - Vacation Time

The Magistrate recommends adoption of the union's proposal of January 25, 2010 (Art. 19; Ex. D), which only moderately modifies the existing Vacation Leave provisions of the existing Town of Palm Beach Personnel Manual (Art. 19; EX. A, page 34), and then only for police department employees of long seniority.

Article 20 – Extra Duty (Detail) Police Employment

The Magistrate recommends adoption of the employer's proposal of June 23, 2010 (Art. 20, EX. A).

Article 21 – Insurance and Miscellaneous Benefits

The Magistrate recommends adoption of the employer's proposal of July 7, 2010 (Art. 21, Ex. A) with the following two modifications:

Modification 1: The third sentence of Section 21.1 shall be amended to read, "Should the Town propose to change the negotiable terms and conditions of any benefits governed by this Article during the duration of this agreement, the Town shall give notice of the proposed changes to the Union."
(The balance of Section 21.1 should remain as proposed in Ex. A)

Modification 2: (Substitution for employer's proposed Section 21.2)
"The Town shall provide Workers' Compensation benefits in accordance with Section 5.5 of the Town's Employee Personnel Manual as said Section was worded as of July 7, 2010."
(see Art. 21, Ex. B).

Article 23 – Hours of Work and Overtime

The Magistrate recommends adoption of the employer's proposal of September 29, 2010 (Art. 23, Ex. A), with the following modifications:

Modification 1: Section 23.4 should include the proposals of both parties. Example:

"Hours of work can be changed only for training purposes or when the Chief of Police or the Town Manager declares a state of emergency. No hours of work shall be changed to avoid the payment of overtime. Whenever possible, employees will be given five (5) days of advanced notice of any change in their regular hours of work."

Modification 2: The final sentence of Section 23.9 should list the specific types of leaves which will not be considered time worked and shall be excluded from the calculation of overtime. The Union's proposal to exempt bereavement

leave from this list (Art. 23, Ex. B) is not unreasonable, and the Magistrate recommends that it be adopted.

Article 24 – Compensation

The Magistrate recommends that the parties adopt the union's proposal of Nov. 8, 2010 and resume salary and increase negotiations for each year of this agreement.

Article 25 – Uniforms, Safety and Equipment

The Magistrate recommends that the parties adopt the employer's proposal of June 23, 2010 (Art. 25, Ex. A) with the modification of Section 25.2 to incorporate a clothing allowance for detectives of \$75.00 per month, or in accordance with Departmental policy (Art. 25, Ex. B, Section 2A), whichever is greater.

Article 30 – Safety Standards

At the hearing in this matter, the union stated that it had voluntarily withdrawn its proposed paragraph 32.2 from its proposal of Jan. 25, 2010 (Art. 30, Ex. C). The Magistrate therefore recommends that the parties adopt the union's 32.1:

"The Town shall take all reasonable steps to maintain all work areas in a clean and sanitary condition and will provide that equipment and working conditions will not jeopardize the health and safety of employees."

as Article 30.

Article 31 – Prevailing Rights (Past Practice)

The Magistrate recommends adoption of the union's proposal of
January 25, 2010 (Art. 31, Ex. A)