IN THE COMMONWEALTH COURT OF PENNSYLVANIA

C. Alan Walker, in his capacity as Secretary for the Department of Community and Economic Development, Petitioner	:	
v.	:	No. 569 M.D. 2011
City of Harrisburg, Respondent	:	

MEMORANDUM AND ORDER

C. Alan Walker, in his capacity as Secretary of the Department of Community and Economic Development (Department), has filed a "Petition for Appointment of Receiver for the City of Harrisburg and Related Relief Pursuant to Subsection 702 of Act 47 [Act] as amended" [1] (Petition) in this Court's original jurisdiction. For the reasons that follow, this Court grants the Petition and appoints David Unkovic as Receiver for the City of Harrisburg (City).

On November 18, 2011, the Department filed the Petition alleging, among other things, that Governor Thomas Corbett, Jr., has declared a state of financial emergency existing in the City of Harrisburg pursuant to Section 602(b) of Act 47, 53 P.S. § 11701.602(b). In that declaration, the Governor directed the Department to file the Petition with this Court seeking the appointment of a Receiver.[2]

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[1] The Municipalities Financial Recovery Act (Act 47), Act of July 10, 1987, P.L. 246, as amended, 53 P.S. §§ 11701-101-11701.710.

[2] Certain members of the Harrisburg City Council, by Attorney Mark Schwartz, filed

(Continued....)

Section 702(c) of Act 47, 53 P.S. § 11701.702(c), requires this Court to hold a hearing on the Petition within 15 days of the filing of the Petition and Section 702(d) of Act 47, 53 P.S. § 11701.702(d), requires the Court to render a determination on the Petition within 60 after the filing of the Petition. Given the statutory time limits, this Court conducted a hearing on the Petition on December 1, 2011. The Department and the City, through Mayor Linda Thompson, appeared. The Department and the City placed the following stipulation on the record:

STIPULATION

> Petitioner, C. Alan Walker, in his capacity as the Secretary for the [Department], and Respondent, the City of Harrisburg, by and through Linda T. Thompson, in her capacity as the Mayor of the City of Harrisburg, hereby stipulate as follows:
>
> 1. The conditions set forth in Section 702(d)(1), (d)(2)(i), and (d)(3), exist as of the time of this

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preliminary objections to the Petition alleging that it filed Chapter 9 bankruptcy in the U.S. Bankruptcy Court for the Middle District of Pennsylvania and that, therefore, any proceedings in this Court are stayed as a result of the bankruptcy petition. On November 23, 2011, the Honorable Mary D. France of the U.S. Bankruptcy Court dismissed the bankruptcy petition. Notwithstanding the issue of whether preliminary objections are permissible in statutory procedures, we dismissed City Council's preliminary objections and the City's, by Mayor Linda Thompson, preliminary objections to City Council's preliminary objections.

Thereafter, Attorney Schwartz notified the Court in a November 25, 2011 letter that he would no longer participate in the proceedings on the preliminary objections and any *future proceedings* before this Court. As a result of the unclear nature of Attorney Schwartz' letter, this Court treated the letter as a notice of non-participation and directed the Chief Clerk to copy all parties and members of City Council with Attorney Schwartz' letter. As a result, this Court precluded Attorney Schwartz from participating in the proceedings on the Petition currently before this Court for disposition.

Of note, Attorney Schwartz alluded in his November 25, 2011 letter that Act 47, as amended, is unconstitutional. However, at the time of this Court's December 1, 2011 hearing on this Petition, no party had filed a challenge to the validity of Act 47.

Stipulation and the entry of this Honorable Court's Order granting the said Petitioner, specifically:

(a) Thirty days have elapsed from the date of the Governor's Declaration of Fiscal Emergency on October 24, 2011 in satisfaction of Section 702(d)(1);

(b) There has been a failure by the Harrisburg City Council, the governing body of the City of Harrisburg, to adopt an ordinance under Section 607 of Act 47 as amended in satisfaction of Section 702(d)(2)(i); and

(c) a fiscal emergency under Section 602(a) of Act 47 as amended continues to exist in the City of Harrisburg in satisfaction of Section 702(d)(3).

2. David Unkovic meets and satisfies the qualifications set forth by Section 705(b) of Act 47, as amended.

3. During the fiscal emergency, the Mayor shall continue to carry out her duties, including duties relating to the City's budget, subject to and consistent with the provisions of the Emergency Act Plan, and Recover Plan developed by the Receiver and approved by this Court, and Chapter 7 of Act 47, as amended.

Hearing Transcript (H.T.), 12/1/11, at __.

Pursuant to Section 702(d) of Act 47, this Court shall issue an order under Section 702(e), 53 P.S. §11701.702(e),[3] if it finds by a preponderance of the evidence that all of the following apply:

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[3] Section 702(e) of Act 47 provides as follows:

(e) Order.—An order issued under this subsection shall:

(1) set forth the findings under subsection (d);

(2) grant the petition and declare the distressed city to be in receivership;

(Continued....)

1) Thirty days have passed since the declaration of a fiscal emergency.

2) There has been a failure by:

(i) The governing body of the distressed city to adopt an ordinance under section 607;
(ii) The governing body of the distressed city to implement an ordinance under section 607; or
(iii) An elected or appointed official of the distressed city or authority to strictly comply with an order issued by the Governor under section 604.

3) A fiscal emergency under section 602(a) continues to exist.

Section 702(d) of Act 47, 53 P.S. § 11701.702(d).

As the parties' stipulation is sufficient evidence that the statutory requirements for the appointment of a receiver are satisfied, the Court must then consider whether the person named in the Petition as the putative receiver likewise meets the statutory qualifications. See Kershner v. Prudential Ins. Co., 554 A.2d 864 (Pa. Super. 1989) (parties may bind themselves by stipulation on matters relating to the individual rights and obligations, as long as their stipulations

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(3) appoint the individual named in the petition to be the receiver for a period not to exceed two years, subject to extension under section 710(b);

(4) direct the receiver to develop a recovery plan within 30 days under section 703 and submit it to the court, the secretary, the governing body and the chief executive officer of the distressed city; and

(5) require and empower the receiver to implement the emergency action plan developed by the secretary under section 602 until a recovery plan developed by the receiver is approved by the court under section 703.

do not affect the court's jurisdiction or order of business; stipulations are binding on the court as well as the parties agreeing to them); Park v. Greater Delaware Savings & Loan Ass'n, 523 A.2d 771 (Pa. Super. 1987) (stipulated facts are binding upon the court as well as the parties). Section 705 of Act 47, 53 P.S. §11701.705, requires a putative receiver to "[h]ave a minimum of five years' experience and demonstrable expertise in business, financial or local or state budgetary matters" and to "[b]e a resident of the Commonwealth for at least one year prior to the appointment as receiver."

Upon consideration of the putative Receiver's credible testimony,[4] the Court is convinced Mr. Unkovic meets the statutory qualifications and that there are no demonstrable conflicts which would prevent Mr. Unkovic from performing his fiduciary duties in the best interests of the City and the Commonwealth. First, Mr. Unkovic testified as to his legal education and experience in public finance law. Mr. Unkovic assuaged the Court's concerns in relation to possible conflicts regarding payment as Receiver and his position as a state employee, possible involvement with all of the City's authorities or stakeholders, financial interest in entities involved either directly or tangentially in these proceedings, as well as financial interests and conflicts remaining from past employment. Mr. Unkovic testified that he has stepped down from his position as Chief Counsel for the Department and that he will continue to receive the same wages that he received as a state employee for his services as Receiver should the Court appoint him to the

[4] "It is well settled that the trial court, sitting as fact finder, is free to believe all, part or none of the evidence presented, to make all the credibility determinations and to resolve any conflicts in the evidence. Thus, when acting as a fact finder, the trial court is free to reject even uncontroverted evidence that if finds lacking in credibility." Roethlein v. Portnoff Law Assocs. Ltd., 25 A.3d 1274, 1279 n.4 (Pa. Cmwlth. 2011).

position. Further, Mr. Unkovic impressed upon the Court that should a conflict arise, he will so advise the Court.

Accordingly, it is hereby ordered as follows:

ORDER

AND NOW, this 2nd day of December, 2011, upon consideration of the stipulation of the parties to this proceeding and the credible testimony of David Unkovic, it is hereby ORDERED and DIRECTED as follows:

1. The parties having agreed and stipulated to the existence of the conditions set forth in Section 702(d)(1), (d)(2)(3), and (d)(3) of Act 47, this Court finds, by a preponderance of the evidence, that the following conditions apply and are established:

a. Thirty days have elapsed from the date of the Governor's Declaration of Fiscal Emergency on October 24, 2011, in satisfaction of Section 702(d)(1) of Act 47, 53 P.S. § 11701.702(d)(1);

b. There has been a failure by the Harrisburg City Council, the governing body of the City of Harrisburg, to adopt an ordinance under Section 607 of Act 47 in satisfaction of Section 702(d)(2)(i) of Act 47, 53 P.S. § 11701.702(d)(2)(i); and

c. A fiscal emergency under Section 602(a) of Act 47, 53 P.S. § 11701.602(a), continues to exist in the City of Harrisburg in satisfaction of Section 702(d)(3) of Act 47, 53 P.S. § 11701.702(d)(3).

2. The Commonwealth's Petition for Appointment of Receiver for the City of Harrisburg is hereby granted. The City of Harrisburg is hereby declared to be in receivership as provided for in Section 702(e)(2) of Act 47, 53 P.S. § 11701.702(e)(2).

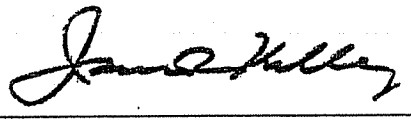
3. David Unkovic is found qualified, has no disqualifying conflicts of interest, and is hereby appointed to be the Receiver for the City of Harrisburg for a period not to exceed two years, subject to extension under 710(b) of Act 47, 53 P.S. § 11701.710(b).

4. The Receiver is ordered to develop a recovery plan within 30 days of the date of this Order under 703 of Act 47, 53 P.S. § 11701.703, and submit it to this Court, the Secretary for the Department of Community and Economic Development, the Harrisburg City Council, and the Mayor of Harrisburg.

5. The Receiver is required and empowered to implement the emergency action plan developed by the Secretary of the Department of Community and Economic Development under Section 602 of Act 47, 53 P.S. § 11701.602, until a recovery plan developed by the Receiver is approved by the Court pursuant to Section 703 of Act 47, 53 P.S. § 11701.703.

6. During the fiscal emergency, the Mayor shall continue to carry out her duties, including duties relating to the City of Harrisburg's budget, subject to and consistent with the provisions of the Emergency Action Plan, any Recovery Plan developed by the Receiver and approved by this Court, and Chapter 7 of Act 47 as amended.

Jurisdiction retained.



JAMES R. KELLEY, Senior Judge