

P.E.R.C. NO. 93-70

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-H-91-277

POLICEMEN'S BENEVOLENT ASSOCIATION
LOCAL NO. 3,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the City of Newark violated the New Jersey Employer-Employee Relations Act by unilaterally applying a residency ordinance to Records and Identification officers represented by Policemen's Benevolent Association Local No. 3. Although the terms of the residency ordinance can now be read to apply to I.D. officers, the Commission cannot find that, at the time the ordinance was enacted, the City intended that it apply to I.D. officers. Under these circumstances, the City had an obligation to negotiate with the PBA before applying a residency ordinance to I.D. officers.

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Appearances:

For the Respondent, Oliver Cato and James E. Walker,
Assistant Corporation Counsel

For the Charging Party, Zazzali, Zazzali, Fagella & Nowak,
attorneys (Tanya E. Pushnack, of counsel)

DECISION AND ORDER

On April 12, 1991, Policemen's Benevolent Association Local No. 3 filed an unfair practice charge against the City of Newark. The PBA also sought interim relief. The charge alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),^{1/} by unilaterally applying a residency ordinance to Records and Identification ("I.D.") officers. The PBA claims that the

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit...."

City's 24 year old ordinance had never been applied to I.D. officers and that by disciplining three officers for violating the ordinance, the City unilaterally changed terms and conditions of employment and repudiated the 24 year practice.

On May 15, 1991, an interim order was entered restraining the City from proceeding with departmental hearings or otherwise implementing the residency ordinance against the I.D. officers. I.R. No. 91-21, 17 NJPER 298 (¶22130 1991). On May 28, a Complaint and Notice of Hearing issued. The City filed its Answer denying it had violated the Act and claiming that until these three officers, it had not been aware of any I.D. officers who had violated the residency requirement.

On July 16, 1991, Hearing Examiner Edmund G. Gerber conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On February 5, 1992, the Hearing Examiner issued his report and recommendations. H.E. No. 92-20, 18 NJPER 118 (¶23055 1992). He found a practice of exempting I.D. officers from the residency ordinance that could not be altered without first negotiating with the PBA. He recommended an order rescinding the disciplinary action against two of the I.D. officers.

On March 16, 1992, after an extension of time, the City filed exceptions to certain findings of fact and conclusions of law. It claims there was no established practice of exempting I.D. officers from the residency ordinance. On April 6, the PBA filed a

reply and cross-exception. It urges adoption of the recommendation but extension of the remedy to the third officer. On April 21, the City filed a reply opposing extension of the remedy to the third officer.

We have reviewed the record. The Hearing Examiner's findings of fact are generally accurate. We incorporate them with these modifications.

The City does not claim that only police officers are exempt from its residency requirement. The City's personnel director testified that there are a number of statutes exempting particular titles from residency requirements including chief engineer, all attorneys, police and firefighters (T179).

The City's current residency ordinance was enacted in 1976. The City relies on a statement in its post-hearing brief indicating that the City first enacted a residency ordinance in 1932 and revised it in 1951 and 1976. It has not cited where in the record those facts were presented. N.J.A.C. 19:14-7.3(b).

Two I.D officers testified that they believed that I.D. officers, like police officers, could move out of the City and that they were never told otherwise. Although there is no evidence in the record that any City official informed I.D. officers that they were exempt, neither is there any evidence in the record that I.D. officers were told that they were covered.

Both the civilian and police manuals have a section on residency that states that civilian and police employees,

respectively, shall be bona fide residents of the City of Newark. Both require that employees report changes in residency.

The chief I.D. officer testified that the identification office has always been a gray area, treated sometimes as civilian and sometimes as "uniformed" (T98). When the residency ordinance was passed, he was told that he was exempt by operation of a "grandfather clause" (T101).

We now address the merits. N.J.S.A. 34:13A-5.3 requires an employer to negotiate with the majority representative before changing a mandatorily negotiable term and condition of employment. The City does not claim that, in general, a residency requirement is not mandatorily negotiable. See Hudson Cty., P.E.R.C. No. 80-103, 6 NJPER 101 (¶11052 1980). It instead argues that it validly adopted a residency ordinance at least as early as 1976 and that enforcing it against I.D. officers in 1991 was not a change in terms and conditions of employment. The PBA claims that, despite the plain language of the ordinance, there was a practice of exempting I.D. officers from coverage, and that this practice could not be changed without prior negotiations.

N.J.S.A. 40A:9-1 et seq. permits local governments to require, by resolution or ordinance, that all officers and employees be and remain bona fide residents unless otherwise provided by law. N.J.S.A. 40A:14-122.1 precludes municipalities from applying a residency requirement to members of a municipal police department or force, but N.J.S.A. 40A:14-123.1a permits municipalities, in hiring

police, to first hire residents of the municipality, then of the respective county, then of the State, and then all other qualified applicants.

There is no dispute that the ordinance was validly adopted. Nor is there any dispute that its terms could cover I.D. officers. The question we must answer is whether, by enforcing the ordinance against three I.D. officers, the City unilaterally changed a term and condition of employment.

Police cannot be required to maintain their residence within a municipality. N.J.S.A. 40A:14-122.1. In 1976, when the most recent residency ordinance was enacted, I.D. officers were part of the collective negotiations unit that included police officers. It was not until two years later that I.D. officers were separated from the police negotiations unit. There is no evidence to suggest that at the time the ordinance was enacted and applied to City employees, the City had any intention of treating the I.D. officers any differently than it treated police officers. And even after I.D. officers were separated from the police, in many ways, they continued to be treated like police. For example, they were given the right to go to interest arbitration, D.R. No. 81-18, 7 NJPER 3 (¶12002 1980); and they have received police, not civilian, rules and regulations.

Under the unique circumstances of this case, we cannot conclude that, at the time this residency requirement was enacted, the City intended that it apply to I.D. officers. Nor can we find

that the I.D. officers, who were members of the police unit at the time, had any reason to believe that they would be treated differently from police officers. After the ordinance was passed, I.D. officers filed change-of-address cards that notified the chief I.D. officer, the deputy chief in charge of the division, the police director's office, internal affairs and the City's personnel office that they lived outside the City. Yet no action was taken to enforce the residency requirement against them.

Although the terms of the ordinance can now be read to apply to I.D. officers, there is no evidence in the record that the ordinance was ever applied to any I.D. officers before the ones involved in this case. Under these circumstances, we find that the City had an obligation to negotiate with the PBA before applying a residency requirement to I.D. officers.^{2/} Accordingly, we order that the City rescind any disciplinary actions taken against any I.D. officers under the residency ordinance. Should the City seek to apply the ordinance to I.D. officers in the future, it must first negotiate with the majority representative of those officers.

ORDER

The City of Newark is ordered to:

A. Cease and desist from:

^{2/} This case does not hold that an employer who establishes a work rule but fails to enforce it must negotiate before doing so. Here we have found that at the time the work rule was established, it was not intended to apply to these employees.

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with PBA Local No.3 before imposing a residency requirement on unit employees.

2. Refusing to negotiate in good faith with the PBA concerning terms and conditions of employment of unit employees, particularly by failing to negotiate with PBA Local No.3 before imposing a residency requirement on unit employees.

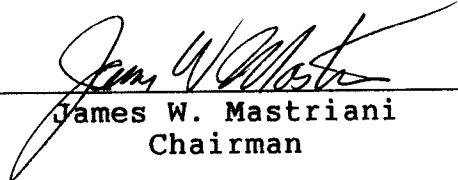
B. Take this action:

1. Rescind any disciplinary actions taken against any I.D. officers under the residency ordinance.

2. Negotiate with the PBA before applying the residency requirement to unit employees.

3. Notify the Chairman of the Commission within twenty days of what action the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan and Smith voted in favor of this decision. None opposed. Commissioner Wenzler was not present.

DATED: February 22, 1993
Trenton, New Jersey
ISSUED: February 23, 1993

H.E. NO. 92-20

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
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-and-

Docket No. CO-H-91-277

PBA LOCAL NO. 3,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find the City of Newark committed an unfair practice when it sought to discipline certain Records and Identification (I.D.) Officers for failure to comply with the City's residency ordinance. The I.D. Officers did not believe the ordinance applied to them. They believed they were exempt from the ordinance, as are police officers. The residency ordinance has been in existence for 16 years and had never been enforced against the I.D. Officers nor have I.D. Officers ever been notified that the ordinance applied to them. Accordingly, the City's action established a practice exempting I.D. Officers from the residency ordinance. This practice could not be altered prior to negotiating with the I.D. Officers' majority representative, PBA Local 3.

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attorneys (Tanya E. Pushnack, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On April 12, 1991, the Policemen's Benevolent Association Local #3 (PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the City of Newark Police Department (City) committed an unfair practice when it unilaterally changed a term and condition of employment by imposing a residency requirement on Records and Identification Officers (I.D. Officers) without first negotiating with the PBA. It

was claimed that this action constituted a violation of N.J.S.A. 34:13A-1 et seq, specifically 5.4(a)(1) and (5).^{1/}

The unfair practice charge was accompanied by an Order to Show Cause seeking an interim restraint of the City's action. I conducted a hearing and issued an interim order restraining the City from enforcing the residency requirement upon I.D. Officers pending a final Commission decision. City of Newark, I.R. No. 91-21, 17 NJPER 298 (¶22130 1991). A complaint was issued on the charge and a hearing was held.^{2/}

The PBA represents I.D. Officers employed by the City. The contract between the parties is silent as to the question of residency. On February 25, 1991 the City served preliminary notices of disciplinary charges on two I.D. Officers^{3/} employed by the City for failure to comply with the City's residency ordinance. The City claims that only police officers are exempted from its residency ordinance; I.D. Officers are not police officers and are subject to the ordinance. The PBA argues that the City neither

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

^{2/} The record closed September 23, 1991.

^{3/} The charge alleges three I.D. Officers were served with notices.

implemented nor enforced its residency ordinance on I.D. Officers. Accordingly, an established practice within the meaning of subsections 5.3 and 5.4(a)(5) of the Act was created.

The City's current residency ordinance, R.O.2:14-1 was enacted in 1976. It provides that "All officers and employees of the City who shall hereafter become employees of the city (sic) are hereby required as a condition of their continued employment to have their place of abode in the city and to be bona fide residents therein, except as otherwise provided by the charter...".^{4/}

N.J.S.A. 40A:9-1.5 grants public bodies the discretion to pass an ordinance requiring all officers and employees be bona fide residents unless otherwise provided by law.

N.J.S.A. 40A:14-122.1 prohibits a municipality from requiring police officers to maintain their residence within the municipality as a condition of employment. Accordingly, after police officers are hired they are exempt from the City's residency ordinance.

N.J.S.A. 40A:14-122 states that no one shall be appointed as a member of a police department unless (s)he qualifies for membership in the Police and Firemen's Retirement System of New Jersey pursuant to N.J.S.A. 43:16A-1(2)(a). This statute defines a policeman as one

^{4/} As can be seen, those who were City employees on the date of the enactment were exempt from this ordinance.

"...whose primary duties include the investigation, apprehension or detention of persons suspected or convicted of violating the criminal laws of the State and who:

(i) is authorized to carry a firearm while engaged in the actual performance of his official duties;

(ii) has police powers..."

There is no dispute that I.D. Officers are not police officers within the contemplation of 43:16A-1(2)(a); they do not carry guns and they lack specific statutory authorization to exercise police powers. Compare: City of Gloucester v. PERC, 107 N.J. Super. 150 (App. Div. 1969), aff'd 55 N.J. 333 (1975).

In City of Newark, D.R. No. 81-18, 7 NJPER 3 (¶12002, 1980) the Director found I.D. Officers "perform services which are integral to criminal detection". They perform police services and are included in the coverage of the police and fire officer interest arbitration statute, N.J.S.A. 34:13A-15.

Two Assistant Chief Identification Officers, Thomas Payne and Jesse Barr, are the subjects of the unfair practice charge. They both testified that they were residents of the City when first employed and knew they had to be residents to qualify for their jobs. However, neither was ever told they had to maintain their residency within the City. Both understood the residency requirements which applied to them was the same as for police officers and both moved out of the City. Prior to moving out of the City both submitted "recall" or change of address cards. Eight recall cards must be filled out whenever an employee of the Police Department moves. These cards go to the office of the Chief I.D.

Officer, to the Deputy Chief in charge of the division, to the Police Director's office, to Internal Affairs and to the City's personnel office. When they were hired they received the Newark Police Department Police Manual. They never received, nor were they ever informed that they would be subject to, the civilian manual. (The civilian manual includes the residency ordinance while the police manual does not.)

In February, 1991, both men received preliminary notices of discipline because they were not complying with the City's residency requirement.^{5/}

Thomas DeMaio is the Chief I.D. Officer. He has held that position for ten years. He is the supervisor of I.D. Officers. It is his responsibility to ensure I.D. Officers comply with Police Department Rules and Regulations. DeMaio applies the Newark Police Department Rules and Regulations for police to the I.D. Officers. DeMaio testified that other non-police employees in his Department must comply with the Civilian Employee Rules of the Police Department, including those employees who wear uniforms, e.g. Communications Officers. DeMaio believed that I.D. Officers had the

^{5/} The record from the interim relief proceeding indicates that Barr and Payne were notified sometime in 1990 that they were eligible to sit for an upcoming examination for Assistant Chief I.D. Officer. They both sat for the exam and in November of 1990 were advised that they ranked two and three for appointment, respectively. The Department of Personnel issued certifications for the acting chief positions. Apparently the residency of Barr and Payne first came to the attention of the City when these promotions were processed.

same residency requirement as police officers; that is, they could move out of the City.

DeMaio has never been notified that I.D. Officers are required to reside in the City and never brought an I.D. officer up on charges because of their residency. He testified that I.D. Officer duties and treatment, at times, are the same as police officers. (He relates that on one occasion I.D. Officers were directed to "bring a gun with them to work.")

Stephen Patella is Deputy Chief of Police. The Newark Police Department manual for Civilian Employees was prepared when he was the captain in command of the Central Communications Bureau. Patella gave it to communications clerks, call takers and telephone operators. Patella believed that Chief DeMaio was given a copy of the Civilian Handbook for use in his bureau. However, he is not aware if the civilian handbook was distributed to I.D. Officers. He is aware that I.D. Officers are routinely issued copies of the Police manual when they are hired. Patella stated that I.D. Officers are not exempt from the residency requirement and was not aware that they were not complying with the ordinance. Patella never reviews address recall cards and testified that no one in the police department higher than the level of lieutenant reviews recall cards.

John D'Auria is the Personnel Director of the City of Newark. D'Auria testified that the residency ordinance applied to I.D. Officers. In 1988 he issued a memorandum on residency (R-4) to

"All Department Directors and Division Managers in the City and specifically to the police director.

The memorandum reviews the City's residency requirement and applies to "all officers and employees of the City hired after November 2, 1976, who are not otherwise exempt by state statute:

are required as a condition of their employment to be bona fide residents of the City of Newark.

Exception may be granted to permit an employee to remain in the employ of the City without complying with the residency requirement, where:

- (a) The health of any officer or employee necessitates residency outside of the City limits.
- (b) The nature of the employment is such as to require residency outside of the city limits.
- (c) The officer or employee possesses a special talent or technique which is necessary for the operation of the city government and which cannot be found among Newark residents justifying residence outside of the city limits.

Failure of any officers or employee (not otherwise exempt from the provisions of the law) to comply with the provision shall be cause for his removal or discharge from the city services."

The memo also reviews the procedure for requesting an exemption from the residency requirement. The request is to be made to the appropriate division director. In the case of the police department, the request goes to the police director who makes the final decision. There is no evidence that the memo was distributed to anyone in the police department other than the director.

ANALYSIS

The intent of the City was to apply the residency requirement to I.D. Officers. However none of the I.D. Officers, including their supervisor, Chief DeMaio, was aware that the residency requirement applied to them.

The City argues its residency ordinance is not negotiable because it is preempted by statute. It cites County of Hudson, P.E.R.C. No. 80-103, 6 NJPER 101 (@11052, 1980). In Hudson, the Commission recognized that a residency requirement is mandatorily negotiable. However, it found that N.J.S.A. 11:22-7 expressly established a residency requirement for all permanent Civil Service employees and preempts negotiations.

This analysis, although seemingly compelling, must fall. Title 11 has been repealed. See N.J.S.A. 11A:12-3. The successor statute, N.J.S.A. 11A:4-3, does not expressly establish a residency requirement and does not preempt negotiations.

N.J.S.A. 40A:9-1.3 et seq grants discretion to municipalities to adopt a residency requirement and subsection 1.7 grants discretion to a municipality to employ non-residents with special talent or skill. The City's ordinance tracks 1.7.^{6/}

To the degree a statute is discretionary, it cannot preempt negotiations. State v. State Supervisory Assn., 78 N.J. 54 (1978); Bethlehem Tp. Bd. of Ed. v. Bethlehem Ed. Assn., 11 N.J. 38 (1982),

^{6/} A city ordinance cannot unilaterally preempt negotiations; only a specific state statute or regulation could do so. Tp. of Denville, P.E.R.C. No. 81-146, 7 NJPER 359 (¶12162, 1981).

University of Medicine & Dentistry, P.E.R.C. No. 85-106, 11 NJPER 290 (¶16105, 1985).

The contract between the PBA and the City is silent as to residency. The I.D. Officers believed the residency ordinance did not apply to them. They never received notice to the contrary. The City allowed this practice to continue for 15 years. Both Payne and Barr filled out recall cards notifying the City of their new addresses, yet no action was taken by the City. The ordinance allows for a general exception based upon the City's own evaluation of its needs. These employees could fall within this exception. I believe the City's failure to inform the I.D. officers of its intent, or otherwise monitor the ordinance, established a practice concerning a term and condition of employment. This practice cannot be altered by the City prior to good faith negotiations. Barneget Tp. Bd. of Ed., P.E.R.C. No. 91-18, 16 NJPER 484 (¶21209 1990). City of Burlington, P.E.R.C. No. 89-132, 15 NJPER 417 (¶20170 1989), aff'd App. Div. Dkt. No. A-6485-88T2 (6/4/90); Denville Tp. See, State of New Jersey (Dept. of Corrections), P.E.R.C. No. 89-11, 15 NJPER 275 (¶29129 1989), aff'd 240 N.J. Super. 26 (App. Div. 1990) where the State claimed its regulations precluded a particular payment as overtime - held: the payment was made as vacation pay, was discretionary with State, and, therefore, created a binding established practice. Here the established practice of exempting I.D. Officers from the City's residency requirement cannot be altered without first negotiating such a change with the PBA.

Based upon the entire record, I make the following:

CONCLUSION OF LAW

The City of Newark violated N.J.S.A. 34:13A-5.4(a)(5) and derivatively (a)(1) by attempting to discipline Robert Payne and Jesse Barr.

RECOMMENDED ORDER

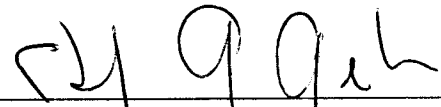
I recommend the Commission ORDER:

A. The City of Newark cease and desist from:

Interfering with, restraining or coercing its employees in the exercising of the rights guaranteed to them by the Act, particularly by failing to negotiate with the PBA over the imposition of a residency requirement upon Records and Identification Officers.

B. The City take the following action:

Rescind all disciplinary action against Assistant Chief Robert Payne and Assistant Chief Jesse Barr which arose out of their failure to comply with the City's residency ordinance.



Edmund G. Gerber
Hearing Examiner

Dated: February 5, 1992
Trenton, New Jersey