

I.R. NO. 86-8

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
CITY OF ATLANTIC CITY,

Respondent,

-and-

Docket No. CO-86-113

TEAMSTERS UNION LOCAL 331,

Charging Party.

SYNOPSIS

In an action brought by Teamster Union Local 331, a designee of the Public Employment Relations Commission temporarily restrains the City of Atlantic City from terminating an employee on the basis of an alleged violation of the City's newly promulgated residency requirement.

It was found that the requirement is a term and condition of employment and when the City modified its existing residency requirement, it failed to negotiate with the Union prior to the implementation of said modification. It was therefore found that the Union has substantial likelihood of success in prevailing at a full plenary hearing and, further, that the employee in question would be irreparably harmed if the City's actions were not restrained.

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Appearances:

For the Respondent
Aron, Salsberg & Rosen
(Louis C. Rosen of counsel)

For the Charging Party
Howard J. Casper & Associates
(Jay S. Koplove of counsel)

INTERLOCUTORY DECISION AND ORDER

On November 8, 1985, Teamster Union Local 331 ("Union") filed an Unfair Practice charge with the Public Employment Relations Commission ("Commission") alleging that the City of Atlantic City, through the City Administrator, unilaterally altered the terms and conditions of employment of certain employees represented by the Union when it altered its residency requirements. Said alteration was made without any discussions or negotiations with the Union. These actions allegedly were a violation of subsections 5.4(a)(1),

(3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act")^{1/}

The Unfair Practice charge was accompanied by an application for Interim Relief. An Order to Show Cause was executed and the return date was ultimately set for November 22, 1985. On that day, I conducted a hearing pursuant to N.J.A.C. 19:14-9.4. The parties presented oral argument and were given an opportunity to present evidence.

The grounds for the issuance of a restraint pursuant to the Commission's rules, are set forth in N.J.A.C. 19:14-9.2(c), the Charging Party must demonstrate a substantial likelihood of success on the merits of the entire charge and immediate and irreparable harm will ensue if relief is not ordered. Both conditions must be met before interim relief will be granted.

On November of 1982, Atlantic City, through its City Counsel, adopted an ordinance which required all employees appointed to positions or hired for employment, subsequent to December 5, 1982

^{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; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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."

to be bonafide residents of the City of Atlantic City (with certain exceptions not relevant here). This action was taken pursuant to N.J.S.A. 40A:9-1.1 et seq. which provides in pertinent part:

Unless otherwise provided by law, the governing body of any local unit may by resolution or ordinance, as appropriate, require, subject to the provisions of this act, all officers and employees employed by the local unit after the effective date of this act to be bonafide residents therein...

Further, 40A:9-1.5 requires that all non-residents subsequently appointed to positions by the governing body become bonafide residents of the local unit if a residency requirement is enacted.

The Union does not challenge the established or implementation of this ordinance.

Section 4 of the 1982 City ordinance provides that:

...any person not otherwise exempted who was hereafter appointed to a position or employed by the City shall remain a bonafide resident of the City while employed and failure to maintain said residency shall be cause for removal or discharge from service. In the event such employee does not maintain bonafide residency, the hiring authority shall notify said employee and failure to again take a bonafide residency in the City within six months of the notification will result in the removal or discharge from service...
[Emphasis supplied]

On June 21, 1985, the City amended Section 4 of this same ordinance to include the following language:^{2/}

^{2/} Section 4 of the ordinance of 1982 was amended in October of 1984, however, this amendment makes no provision for those employees who originally exempted and then moved back into the City of Atlantic City.

Those officers and employees appointed to positions of employment or hired for employment by the City prior to September 30, 1982 and have continued to be employed subsequent to September 30, 1982 and who did not have a permanent domicile within the City of Atlantic City at the time they obtained their position or who changed their permanent domicile outside of the City prior to June 30, 1984 shall be exempt from the requirements of Section 2, 4 and 8 of this ordinance, provided that they have not re-established a permanent domicile within the City of Atlantic City....[Emphasis supplied]

Pursuant to the ordinance, the City issued a resolution on October 16, 1985 which urges the complete enforcement of the ordinance, as amended, "if any employees are appointed or hired contrary to said ordinance they be immediately terminated from employment or service." The union brought the instant action after the City issued this resolution.

On the return date, the Union established that only one employee was affected by the City's revision of the residency requirement. Patrick MacNamara was hired by the City in July of 1980 as a traffic controller, accordingly, he was not subject to the 1982 ordinance. He was a resident of the City until on or about October 5, 1984 when his wife and three children moved outside the City. On November 12, 1985, MacNamara was suspended pending termination from employment for his alleged violation of the City's residency ordinance. He states he was never advised nor aware that the City regarded him as being in violation of the ordinance until on or about October 25, 1985, over one year after he moved his family to Ventnor.

The Commission has found that residency requirements in the abstract are mandatorily negotiable. See In the Matter of County of Hudson and Council 52, Local 2306, AFL-CIO, P.E.R.C. No. 80-103, 6 NJPER 101 (¶ 11052 1980). It is noted that the New Jersey Supreme Court in The State Supervisory Employees, 78 N.J. 54 (1978) held that a term and condition of employment which is expressly set or established by a statute and/or regulation cannot be contravened by an inconsistent provision of a negotiated agreement. The Court limited such pre-emption to statutes and regulations which speak in the imperative and leave nothing to discretion.

Here, 40A:9-1 et seq does not speak in the imperative. Rather it merely creates the authority in a governing body to adopt a residency requirement, "a local unit may by ordinance require...", accordingly the statute in question does not pre-empt negotiations.

Moreover, although 40A:9-1 et seq does contain nondiscretionary language, at Subsection 1.5 when it requires that "all non-residents subsequently appointed to positions become bonafide residents of the local unit." Neither this language nor any other language of 40A:9-1 et seq. addresses the question of what happens to an exempt employee who moves back into the City.

The June 1985 amendment to the residency ordinance is a newly created requirement unanticipated by the prior ordinance. Moreover, this provision is not the subject of statutory or regulatory language and therefore cannot be pre-empted from negotiations.


The 1985 revision of the residency requirement is negotiable; it directly creates a new term and condition of employment unanticipated by the existing ordinance and/or by the statute. The City had an obligation to negotiate this new term and condition of employment before it was implemented but it failed to do so.

Accordingly, I find that the Union has a substantial likelihood of success in prevailing at a full plenary hearing.

Moreover, the City is forcing Patrick MacNamara to move himself and his family back into Atlantic City in order to preserve his position with the City. He has been suspended from his job and will be dismissed if he does not move. It must be emphasized that this suspension and threat of dismissal is not based upon Mr. MacNamara's performance of his job but rather upon his residence. When the harm being done to MacNamara is balanced against the harm to the City it becomes clear that MacNamara must be allowed to return to his position and active status pending a final disposition of this matter. The City would suffer no significant harm if MacNamara were returned to his position. There is no question that MacNamara is performing a needed function for the City in a satisfactory manner and would not be the only City employee who resides out of the City.^{3/}

^{3/} The City admits there are others who were employees prior to 1982 and at that time lived outside the City and still are exempted from the residency requirement.

Therefore, given the rather extreme situation for Mr. MacNamara who must move his family to preserve his job as opposed to the relatively minor inconvenience to the City to simply maintain a satisfactory employee on its payroll, I HEREBY ORDER that the City of Atlantic City reinstate Patrick MacNamara to his position as traffic controller pending the final disposition of this matter. Said reinstatement is to take place immediately.



Edmund G. Gerber
Commission Designee

DATED: November 27, 1985
Trenton, New Jersey