H.E. NO. 94-17

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

In the Matter of

CITY OF ATLANTIC CITY,

Respondent,

-and-

Docket Nos. CO-H-89-75
CO-H-89-77

ATLANTIC CITY SUPERVISORS ASSOCIATION,
LOCAL 29, R.W.D.S.U., AFL-CIO,

Charging Party.

-and-

LOCAL 331, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the City of Atlantic City violated 5.4(a)(1) and (5) of the Act by failing to adopt criteria for special talent exceptions to its residency ordinances in accordance with the statute and an earlier settlement agreement. The City again violated the Act when it amended its residency ordinance after the charge was filed to eliminate the special talent exception altogether.

The Hearing Examiner further finds that, while the City unilaterally created an additional category of residency exemption for hardship and then unilaterally abandoned it, hardship exemptions are not permitted by statute. Therefore, there cannot be a duty of negotiate over hardship exemptions.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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LOCAL 331, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Charging Party.

Appearances:

For the Respondent,
Murray, Murray & Corrigan, attorneys
(Karen Murray, of counsel)

For the Charging Party - Local 29,
Reitman, Parsonnet, attorneys
(Jesse Strauss, of counsel)

For the Charging Party - Local 331,
Walter DeTreux, attorney

HEARING EXAMINER'S REPORT AND
RECOMMENDED DECISION

On September 13 and 22, 1988, International Brotherhood of Teamsters Local 331 ("Local 331") filed an unfair practice charge and an amendment with the Public Employment Relations Commission ("Commission") alleging that the City of Atlantic City ("City") violated subsections 5.4(a)(1) and (5) of the New Jersey

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., ("Act").[1/] On September 16 and October 11, 1988, the Atlantic City Supervisors Association, affiliated with Local 29 RWDSU, AFL-CIO ("Local 29") also filed an unfair practice charge and an amendment alleging that the City violated N.J.S.A. 34:13A-5.4(a)(1) and (5).

Locals 331 and 29 allege that the City violated a settlement agreement of an earlier unfair practice charge by failing to adopt criteria for exemptions to its residency requirements. Both Locals further allege that in June, 1988 the City unilaterally created a new category of exemption from its residency requirements based upon hardship, and thereafter refused to consider other employees for such exemptions. The Locals assert that, by unilaterally changing its residency requirements and failing to comply with the prior settlement agreement, the City's actions constitute a refusal to negotiate in good faith under the Act.

On December 18, 1989, the Director of Unfair Practices issued a Complaint, Notice of Hearing, and Consolidation Order scheduling the charges for hearing. The City agreed to a stay of

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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.

any enforcement of its residency requirements pending a final determination on these charges. The City filed an Answer on January 8, 1990, denying the charges' allegations. The City asserts that alleged violations of the parties' earlier settlement agreement should be deferred to the parties' contractual grievance/arbitration process.

On March 24 and April 6, 1992,[2/] Local 29 and Local 331 amended their respective charges to also allege that on November 22, 1991, the Locals learned that, on September 25, 1991, the City had further unilaterally amended its employee residency ordinances. The City filed a supplementary Answer to these amendments admitting that the City passed this ordinance but denying an unfair practice. I conformed the Complaint to include these amendments without prejudice to the parties' procedural or substantive arguments.

A hearing was conducted on April 21 and 22, November 23 and 24, 1992, at which the parties examined witnesses and presented documents.[3/] The parties filed briefs and reply briefs, the last of which was received on April 2, 1993. Based upon the entire record in this matter I make the following:

2/ From 1990 until 1992, the parties agreed to suspend the hearing process while they attempted to resolve the dispute with the assistance of another hearing examiner. When it became apparent in 1992 that the matter could not be resolved, the matter was reassigned to me to conduct a hearing.

3/ Transcripts of the successive days of hearing are referred to as "1T-", "2T-", and "3T-"; jointly submitted exhibits are identified as "J-"; the charging parties' exhibits are referred to as "CP-"; and the City's exhibits are referred as to "R-".

FINDINGS OF FACT

1. Local 331 represents a collective negotiations unit of blue collar and white-collar employees. Local 29 represents the City's supervisors.

2. N.J.S.A. 40A:9-1.1 et seq. regulates municipal residency ordinances. Section 40A:9-1.3 provides,

> 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....

The City has had a residency requirement for its employees for many years. On November 22, 1982 the City adopted Ordinance No. 21 (J-1), which required employees (with certain statutory exceptions) appointed thereafter to reside within the City. The ordinance permitted the appointment of non-residents if the City determined that "a sufficient number of qualified residents" could not be recruited for available positions, but further required such non-residents, once hired, to become City residents within one year (Sections 5 and 3). It further required the maintenance of residency and provided that failure to maintain residency status would result in discharge (Section 4). Finally, the ordinance provides an exemption for "special talent" positions:

> Whenever the governing body of the City shall determine that there are certain specific positions and employments requiring special talents, skills, experience or qualifications which are necessary for or will improve the operations of the City and which may not be found

> to the extent necessary among the residents of the City, such positions or employments so determined shall be filled without preference to residency and the Section 3 requirement [to become a City resident within one year] shall not apply.
>
> The governing body will provide the formal criteria pursuant to which such positions and employments will be so determined (J-1, Section 6).

In 1984, the City amended its residency policy by adopting Ordinance No. 77 (J-2). This residency ordinance restricts the hiring of non-residents to special talent positions and the non-availability of qualified residents. It established hiring preference for residents first, followed by preference by geographic proximity to the City.[4/] The 1984 amendment also specifically allowed for removal of non-exempt employees not in compliance with the residency requirements, and it made all residency provisions effective September 30, 1982. All other provisions concerning employees' residency remained in effect.

On June 21, 1985, the City again amended the residency requirements by Ordinance No. 38 (J-3). This ordinance required "grandfathered" employees (i.e., those hired before September 30,

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4/ The amendment established that after City residents, job candidates residing in Atlantic County would be considered next, followed by residents from contiguous counties, followed by New Jersey residents, then those from outside the State.

1982, and living outside the City as of June 30, 1984) who subsequently moved into the City, to remain as City residents.[5/]

On October 16, 1985, the City passed a resolution urging the complete enforcement of its residency ordinances: "if any employees are appointed or hired contrary to said ordinance they will be immediately terminated from employment or service."

In late December, 1985 and early January, 1986, Locals 331 and 29 filed unfair practice charges[6/] over the 1985 change in the residency ordinance, together with the apparent enforcement of residency. All parties in that matter entered into a settlement agreement (CP-1) which provided that the current residency ordinance would have prospective effect only and further provided for the "grandfathering" of certain specifically enumerated employees currently living outside the City, provided they continued to live outside the City.

5/ The new section 4 states,

> 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.

6/ Commission Docket Nos. CO-86-113, CO-86-147, CO-86-149, CO-86-161, and CO-86-201.

The settlement agreement specifically stated,

> The current ordinance and any amendments thereto, along with all resolutions pertaining to residency for municipal employees, shall continue in full force and effect with prospective effect only.
>
> The individuals who are the subject of the pending unfair practice actions will withdraw these charges and will be unaffected by the current residency ordinances and resolutions, so long as they do not reside within the City. Should any of these individuals move into the City, they will be fully subject to said ordinance and resolutions.
>
> It is further agreed that any suspensions and papers pertaining to same, e.g., notices, etc. presently in the files of those individuals listed below which arise out of or pertain to these proceedings shall be removed.
>
> Individuals affected:
> Vincent Ponzio
> Allyn Seel
> Jeanne Zahringer
> Donald Headlye
> Patricia Stewart
> Victoria Smith
> Patrick MacNamara
> Diana Santiago
> Patricia Seel

4. Local 29 President Evelyn Hayes spoke to City Councilman Mosee in late 1986 and to City Administrator Carl Briscoe in 1987 about when the City would adopt the special talents exemption criteria. She received no responses (2T5-7).

Neither Local 29 nor Local 331 included a provision on residency in their negotiations proposals for the 1986-88, 1988-90 contracts. Local 331 attempted to negotiate about residency in

negotiations for its successor contract.[7/] The City refused to negotiate about residency (3T19-20).

5. Thereafter, the City granted exemptions from the residency ordinance on several occasions as follows:

a. On November 20, 1985, the City passed a resolution permitting the appointment of Lillian Myers, a non-resident of the City, to the position of Shelter/Volunteer Coordinator. That resolution specifically noted that "it appears there cannot be recruited qualified residents for this position at this time" and declaring the position to be a special talent position under section 6 of the 1982 residency ordinances. (R-2)

b. On December 4, 1985, the City passed a resolution appointing Acting Public Defender Caryl Amana to the position of Public Defender. The resolution states that the City has been unable to find a City resident with the necessary qualifications for the position, a "position requiring special talents, skills, experience and qualifications." (CP-2)

c. Jacqueline McBride, the City's then deputy coordinator of emergency management, was granted a Section 6 "special skills exemption" exemption on May 7, 1986, based upon her qualifications, experience and credentials for the position. (R-1).

d. By resolution on May 13, 1987, the City granted Anthony Barbara, the City Auditor, an exemption based upon the special

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7/ This fact is based upon the unrefuted testimony of Teamsters Representative Joe Yeoman (3T19-20).

talents exception (CP-3). N.J.S.A. 40A:9-11 also provides that a City Auditor is a statutorily exempt position.

e. By resolution of September 2, 1987, the City granted Suzanne Sampson, a secretary in the Mayor's office, an exemption based upon "special skills and hardship." (CP-4)

f. By resolution of October 21, 1987, the City granted Gerald McCleary, the Assistant Building Service Superintendent an exemption based upon "special skills and hardship." That resolution noted that McCleary had been employed by the City for more than eight years, and provided specifically,

> McCleary has recently married, and his wife has nine children and owned a home in Ocean City, New Jersey, large enough to house her family and it would be extremely difficult for him to locate affordable housing in Atlantic City to house his new family, and
>
> Whereas, City Council desires to waive the residence requirements for Gerald McCleary due to hardship which would be put upon him and his new family if he was forced to relocate them; and based upon his special talents, skills and experience as Assistance Building Services Superintendent...City Council, pursuant to Ordinance 77 of 1984, Section 6, it hereby waives the residency requirements as to Mr. McCleary for the reasons stated above. (CP-5).

g. By resolution of June 1, 1988, the City granted Katherine Neggers, a senior accountant, an exemption based upon special skills and the unavailability of qualified residents (CP-6).

h. By resolution of June 15, 1988, the City granted Barbara Dalton, a four-year employee in the position of clerk-typist and assistant to City Council, an exemption from the residency

requirements based on special skills and hardship. That resolution noted that Dalton's position "possesses a great degree of confidentiality" but further states,

> Whereas, due to the recent conversion to condominium at Chelsea Village where she resides with her father, it will be necessary for her to move and it would be extremely difficult for her to locate affordable housing in Atlantic City,
>
> Whereas Council desires to waive the residency requirement for Barbara Dalton due to hardship which would be put upon her if she was forced to find suitable housing, and based upon her special skills and talents related to her position...(CP-7).

On December 6, 1988, the New Jersey Superior Court, on a summary judgment motion from one of the City Council members, voided the resolution granting Dalton a residency exception, and ordered the City to enforce its residency requirement against Dalton (R-9).

6. In June, 1988, Local 29 President Hayes was asked by two unit employees, Umar Salahuddin and Linda Steele, to seek exemptions for them based upon hardship (1T37). Hayes asked Councilman Mosee to introduce resolutions to exempt them. Mosee did draft resolutions for Steele, as well as Michelle Salahuddin and Eugene Moffa, which proposed to grant them exemptions based upon "special talents." (CP-8). However, then City Administrator Carl Briscoe withdrew these proposed resolutions from the agenda and they were never introduced (1T39-1T41).

7. On November 4, 1989, the City again amended its residency policy by Ordinance 54 of 1989 (R-3). This ordinance amended the Section 6 "Special Talents" exception to adopt the

following criteria to determine whether a position would be considered a "special talent" position:

> The formal criteria pursuant to which specific positions shall be determined to fall within the parameters of this section shall include one or more of the following:
>
> (a) The nature of the position and job duties set forth in the specific job description for the position; such as City engineer, landscape artist, physician, tax collector, tax assessor, nurse construction official and sub-code official.
>
> (b) the necessity for specific skills, talent, technique, experience, and/or educational or other qualifications to perform the duties of the position, as reflected in the job description or in New Jersey Department of Personnel requirements for the position.
>
> (c) The scarcity or lack of qualified applicants for the position for a period of thirty (30) calendar days from the position becoming available and advertised.
>
> (d) An indication that a Department of Personnel eligible list is not likely to provide full certification for existing or anticipated vacancies from among qualified residents of the City.

This 1989 Ordinance (R-3) also amended the special talent section of the residency requirements to mandate that non-residents who are appointed to special talent positions must move within the City within one year of their appointment, or face removal (R-3).

8. By ordinance of September 25, 1991 (CP-9), the City further amended its residency ordinance to: (a) define the specific proofs of legal residency; (b) require employees not statutorily exempt from the residency requirements to submit annual proof of their residency; (c) requiring specific, extensive advertisement for the position before determining that qualified residents cannot be

found; (d) requiring non-resident appointees to become City residents within one year; and (e) requiring the City administration to annually confirm the residency of all non-exempt City employees. The 1991 ordinance also repealed the entire provision for special talent exceptions. (CP-9) The employees exempted as a result of the 1986 settlement agreement are apparently unaffected by the 1991 ordinance.

ANALYSIS

Local 29 argues that by the City's continuing failure to adopt eligibility criteria under the section 6 "special talents" exception, coupled with its expansion of the exception for hardship, and finally, its elimination of the "special talent" exception altogether, violated the parties' 1986 settlement agreement of the earlier unfair practice charges, and thus amounts to a continuing refusal to negotiate in good faith. It argues that the settlement agreement should be set aside, and the City should negotiate in good faith anew over residency.

Further, Locals 29 and 331 contend that the City unilaterally changed the residency ordinance in 1988 by creating an additional exception for "hardship", and that by refusing to consider additional employees under the hardship exemption it had created, the City again changed employees' terms and conditions of employment. Further, the Locals contend that by the 1991 amendment, the City again unilaterally changed employees' terms and conditions of employment by eliminating all residency exemptions for employees.

N.J.S.A. 40A:9-1 et seq. permits local governments to adopt residency requirements for employees not otherwise exempt by statute. Residency requirements, in general, are mandatorily negotiable. See Hudson Cty., P.E.R.C. No. 80-103, 6 NJPER 101 (¶11052 1980). See also, City of Newark, P.E.R.C. No. 93-70, 19 NJPER 151 (¶24075 1993), appeal pending, App. Div. Dkt. No. A-3857-92T5.

City's Failure to Adopt Criteria for the Special Talent Exemption

Local 29 argues that the City's failure to adopt criteria for eligibility for the section 6 "special talents" exception violated the parties' 1988 settlement agreement of the earlier unfair practice charges, and thus amounts to a continuing refusal to negotiate in good faith.

The City argues that the claimed failure to comply with its statutory requirements to adopt such criteria is untimely, and also not within the Commission's jurisdiction to decide. Further, the City, citing State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), argues that an alleged breach of a settlement agreement raises, at best, a contract interpretation issue, not an unfair practice.

N.J.S.A. 34:13A-5.4(c) prohibits consideration of unfair practices occurring more than six months before the filing of the charge, unless the charging party can show that it was prevented from filing earlier. But that provision of the Act is not blindly applied. The facts of each particular case must be considered in

determining whether or how 5.4(c) applies. In this case, I find that the operative time from which the Locals might allege the City's failure to act is not a specific date; rather, the City had a continuing obligation to comply with the terms of its own residency ordinance, which was accepted by the Locals as part of the settlement agreement. The City's continuing failure to adopt the criteria created a continuing violation. Thus, I find that this allegation is not barred by the 5.4(c) statute of limitations.

N.J.S.A. 40A-1.17 provides that a municipality having a residency ordinance,

> ...shall provide in the adopting ordinance or resolution, as the case may be, that whenever the governing body, or the hiring authority of the local unit shall determine that there are certain specific positions and employments, requiring special talents or skills which are necessary for the operations of the local unit and which are not likely to be found among the residents of the local unit, such positions or employments so determined shall be filled without reference to residency. Any such provision shall set forth the formal criteria pursuant to which such positions and employments shall be so determined. (emphasis added.)

This statutory language makes it clear that a municipality enacting a residency ordinance is required to include a special talent exception, and that an exception provision must include formal criteria to determine eligibility. The City argues that, because the adoption of such criteria is statutorily mandated, it is not negotiable. I do not disagree. Where an issue is set by statute, it is not negotiable. State of New Jersey, 78 N.J. 54 (1978).

The City, however, misses the point. The Locals do not seek to negotiate over the actual criteria for special skills exemptions, nor do they seek to negotiate even the existence of such criteria. In fact, the Locals argue that, by their acceptance of the then current residency ordinances in the 1986 settlement, they accepted all of the then terms of the ordinance, including the City's own requirement, as stated in the ordinance and as required by statute, to adopt special talent exceptions criteria. The locals merely argue that the City was obligated to establish the criteria. When the City did not do that, it failed to comply with the terms of the settlement. The Locals did not need to negotiate into the specific terms of the settlement what the statute already required: to "adopt special talent criteria."

Under State (Dept. of Human Services), an alleged breach of contract claim may not ordinarily be litigated as an unfair practice. That is because the parties to a collective agreement have reserved, through the contractual grievance procedure, their abilities to obtain review of disputed terms, usually through arbitration. This case is inapposite. This settlement agreement is not part of the parties' contract, subject to a grievance procedure. Nor are the parties engaged in a good faith dispute over the meaning of a disputed contractual term.

The repudiation of a settlement is a refusal to negotiate in good faith. See Red Bank Bd. of Ed., P.E.R.C. No. 87-39, 12 NJPER 802 (¶17305 1986), adopting H.E. No. 86-63, 12 NJPER 503 (¶17189 1986). There, the hearing examiner observed,

> ...settlement of litigation ranks high in New Jersey's public policy and courts will be very reluctant to set such agreements aside. e.g., Jannarone v. W.T. Co., 45 N.J. Super. 472 (App. Div. 1961) certif. denied sub nom. Jannarone v. Calamoneri, 35 N.J. 61 (1961). "Barring fraud or other compelling circumstances, our courts strongly favor the policy that settlement of litigation be attained and agreements thereby reached, be honored." Honeywell v. Bubb, 130 N.J. Super. at 136. Moreover, it is the statutory mission of this agency to encourage and facilitate the prompt resolution of labor relation's disputes. N.J.S.A. 34:13A-2 and 6. ...It is this policy favoring settlement agreements, endorsed by the Courts, the Legislature and the Commission... that forms the basis of my conclusion that the [settlement] agreement of January 6, 1986 did create an obligation on the Board to negotiate. To hold otherwise would dilute the value of such agreements and be counterproductive to the process of resolving labor relations disputes. Id. at 12 NJPER 505.

The City's failure to adopt criteria after the 1988 settlement amounted to a failure to honor the settlement. The settlement involved the Locals' acceptance of the City's existing residency ordinance as it was then presently structured, with the exception of its inapplicability to certain grandfathered employees. From that point, the Locals had a right to believe that the City would implement the terms of the existing ordinance, including adopting criteria for special talents consideration of existing employee positions. The City's failure to do so amounted to a violation of the settlement agreement and a failure to negotiate in good faith.[8/]

8/ I note that, had the City adopted the special talents criteria earlier, it might not have strayed into the hardship exemption.

City's Establishment and Subsequent Abolition of the Hardship Exemption

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. A change in employees' terms and conditions of employment without negotiations violates 5.4(a)(5) of the Act. But an employer can defeat such a claim if it shows that it had a managerial or contractual right to make the change, or that the matter is pre-empted by statute. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322 (1989); Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed Ass'n, 78 N.J. 25 (1978); Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985).

The Locals argue that, under the guise of considering employees for special talent exceptions, the City unilaterally created an additional category of exemption: hardship. The Locals bear the burden of proving: (1) a change; (2) in a term and condition of employment; (3) without negotiations.

The Locals have met their burden. The creation of this hardship exemption was clearly a change in employees' terms and conditions of employment. It was not negotiated with either of the Locals.

Before 1988, City employees were only considered for exception from the residency requirements if their positions fell under the special talents exception. In 1988, the City's series of resolutions effectively created a second category under which City

employees might be exempted from the residency requirement -- hardship. The City did not negotiate before it established this hardship exemption. By refusing to consider Steele, Salahuddin, and Moffa's request for consideration of an exception based upon hardship, the City, in essence, denied the existence of the hardship exemption it had created. Accordingly, by unilaterally creating the hardship exemption and then by denying its existence, the City unilaterally changed employees' terms and conditions of employment. See Hunterdon Cty.

However, to determine whether the City's failure to negotiate over the creation and/or subsequent abolition of the hardship exemption violated 5.4(a)(5) of the Act, I must first consider whether a hardship exemption is mandatorily negotiable. If it is not, then that unilateral change would not be an unfair practice. City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990); Jackson Tp., P.E.R.C. No. 82-79, 8 NJPER 129 (¶13057 1982).

The City contends that negotiations over the exemptions are pre-empted by the statutory language permitting municipalities to enact exemptions. A statute or regulation will preempt negotiations only when it sets terms and conditions of employment expressly, specifically and comprehensively. The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." IFPTE Local 195 v. State, 88 N.J. 393, 403-404 (1982), quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978) N.J. College Locals v. State Board of Higher Education, 91 N.J. 18, 30 (1982).

Here, 40A-9-1.5 provides that a municipality which has enacted a residency ordinance,

> ...shall require therein that all non-residents subsequently appointed to positions or employments shall become bona fide residents of the local unit within one year of their appointment, except as otherwise provided in such ordinance or resolution pursuant to sections [1.6 and 1.7] of this Act.

Section 1.6 provides that a municipality which has adopted a residency ordinance shall

> provide therein that whenever the [City] shall determine that there cannot be recruited a sufficient number of qualified residents for available specific positions or employments, the local unit shall advertise for other qualified applicants ...[classified by geographic proximity to the City].
>
> A local unit which has recruited and hired officers and employees under the provisions of this section may require such officers and employees, as a condition of their continued employment, to become bona fide residents thereof.

Section 1.7 provides an exception for filling special talent positions. It states that municipalities adopting a residency ordinance shall provide in the ordinance that,

> ...Whenever the [City] shall determine that there are certain specific positions and employments, requiring special talents or skills which are necessary for the operations of the local unit and which are not likely to be found among the residents of the local unit, such positions or employments so determined shall be filled without reference to residency. Any such provision shall set forth the formal criteria pursuant to which such positions and employments shall be so determined.

This statutory language of Section 9-1.5, I believe requires that municipalities enacting a residency ordinance must enforce it with only the statutorily mandated exceptions found in 1.6 and 1.7--unavailability of qualified residents (1.6) and special talents exceptions (1.7). The language is in the imperative; the municipality does not have discretion to create, or negotiate over, any other exceptions. Statutes and regulations setting forth terms and conditions of employment cannot be contravened by collective negotiations. Tp. of W. Windsor v. Public Employment Relations Commission, 78 N.J. 98 (1978). In view of the statutory language permitting only the two exceptions as noted above, I find that a hardship exemption is contrary to statute, and the City may not legally negotiate with the majority representatives over such an additional exemption.[9/] Accordingly, no violation can be found.[10/]

The 1991 Ordinance

The City's most recent change in residency was enacted by its 1991 ordinance. This ordinance fixes a number of procedural elements of residency, including the nature and timing of employee proofs of residency, and also abolishes the special talent exception

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9/ Should the City attempt to recreate a separate hardship exemption, the Locals may seek a remedy through the courts.

10/ Having found that the City had no bargaining obligation over a hardship exemption, it is unnecessary to consider the City's additional arguments.

entirely. While the Locals argue that this ordinance unilaterally changes employees' terms and conditions of employment, neither local argues what provisions it specifically wishes to negotiate. The City raises no defense concerning the 1991 residency amendment.

The procedural aspects of residency proofs appear to be negotiable. They are not specifically set forth in Title 40A. N.J.S.A. 40A-1.6 provides that a municipality with a residency ordinance may require newly appointed non-resident employees to move into the City within one year. This discretionary language does not prohibit negotiations over this subject. It is undisputed that the City did not negotiate with the majority representatives before it enacted the 1991 residency amendments. Accordingly, I find that, by adopting new procedures to confirm employee residency without first negotiating with the majority representatives, the City violated 5.4(a)(5) and derivately, (a)(1) of the Act.

Moreover, the abolishment of the special talent exceptions provision of the ordinance is ultra vires. Section 9-1.7 speaks in the imperative--it requires a municipality with a residency ordinance to also have a special talents exception, and to have formal criteria to determine employee eligibility.

While I agree with the City that ordinarily, the Locals' remedy for the City's non-compliance with the statute would not be before this Commission, I note that the 1986 settlement agreement provided that the parties agreed to the terms of the then existing residency requirements with prospective application. The Locals, by

entering into this settlement, had a right to expect that the City's residency regulations would be in compliance with the statute. As the New Jersey Supreme Court recently reaffirmed in State of New Jersey v. State Troopers Fraternal Association, 134 N.J. 393 (1993).

> Observing that statutes and regulations setting forth terms and conditions of public employment cannot be contravened by collective negotiations, we concluded that such statutes and regulations are 'effectively incorporated by reference as terms of any collective agreement covering employees to [whom] they apply.' Citing W. Windsor, at 116.

Thus, the City's 1991 residency amendment abolishing the special skills exception is not only contrary to the mandatory requirements of Title 40A, it also repudiates the terms of the parties' 1986 settlement agreement. Accordingly, I find that the City's abolishment of the special skills exception in its 1991 residency ordinance violates 5.4(a)(5) and derivately (a)(1) of the Act.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the Respondent City cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by unilaterally changing the residency requirements of unit employees, and specifically by abolishing the special talents exemption to residency contrary to the provisions of N.J.S.A. 40A:9-1.1 et seq.

2. Refusing to negotiate in good faith concerning the procedural aspects of employee residency proofs and any requirement that newly hired non-resident employees must move into the City within one year.

B. That the Respondent Board take the following affirmative action:

1. Negotiate in good faith with Locals 29 and 331 concerning the procedural aspects of timing and sufficiency of proof of residency concerning unit employees.

2. Reinstate the special talents exception to residency as mandated by the 1986 settlement agreement among the parties, and by N.J.S.A. 40A:9-1.5 and as particularly defined in 40A:9-1.7, together with criteria for special skills exception as described therein.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

C. Dismiss the Complaint with regard to the allegations concerning the creation and the abolishment of the hardship exceptions.

Susan W. Osborn
Susan Wood Osborn
Hearing Examiner

Dated: March 4, 1994
Trenton, New Jersey

Recommended Posting
Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfering with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by unilaterally changing the residency requirements of unit employees, and specifically by abolishing the special talents exemption to residency contrary to the provisions of N.J.S.A. 40A:9-1.1 et seq.

WE WILL negotiate in good faith with Locals 29 and 331 concerning the procedural aspects of timing and sufficiency of proof of residency concerning unit employees and any requirements that newly hired non-resident employees must move into the City within one year.

WE WILL reinstate the special talents exception to residency as mandated by the 1986 settlement agreement among the parties, and by N.J.S.A. 40A:9-1.5 and as particularly defined in N.J.S.A. 40A:9-1.7, together with criteria for special skills exception as described therein.

Docket No. CO-H-89-75
CO-H-89-77

City of Atlantic City
(Public Employer)

Dated _____

By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.