

I.R. NO. 91-21

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-91-277

PBA Local 3,

Charging Party.

SYNOPSIS

A Commission Designee issues an interim restraint against the City of Newark in an action brought by PBA Local 3. After certain employees applied to take a Civil Service examination for Assistant Chief of Identification Officers in the City Police Department, they received notices of disciplinary actions, alleging that they were not complying with the residency requirements of the City. The Designee found that the residency requirement was never applied to identification officers and a residency requirement is a negotiable term and condition of employment. Accordingly, such a residency requirement had to be negotiated before it could be implemented. It was found that it would be more disruptive for the employees to potentially lose their jobs or be forced to move into the City than it would be for the City to restrain from processing the disciplinary action against these officers, pending a final Commission decision.

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Appearances:

For the Respondent
Glenn A. Grant, Corporation Counsel
(James E. Walker, Assistant Corporation Counsel)

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

INTERLOCUTORY DECISION

On April 12, 1991, PBA Local 3 filed an unfair practice charge against the City of Newark ("City") alleging that the City violated N.J.S.A. 34:13A-5.3(a)(1) and (5). It was alleged that the City served a notice of disciplinary action against three police records and identification officers employed by the City claiming that they violated the Newark residency ordinance by failing to reside in the City and departmental charges were scheduled for April 24, 1991 before the Newark Police Director. It was alleged that the City had never negotiated the issue of a residency requirement for police records and identification officers.

The unfair practice charge was accompanied by an Order to Show Cause which was executed and made returnable for May 1, 1991.

A hearing was conducted on that date. Both parties argued orally, submitted briefs and affidavits.

It is undisputed that the City has an ordinance in effect since 1966 requiring that employees live in the City and be bona fide residents of the City. An amendment to the ordinance exempts employees possessing special talents or techniques necessary for the operation of government from the residency requirement. This residency requirement appears in the Police Department Civilian Employee Handbook. There is no residency requirement for police officers in the Department. N.J.S.A. 40A:9-1.3 prohibits any municipality from creating a residency requirement upon any member of a police department. The Statute defines police officers as officers being eligible for participation in the State Police Retirement System. The identification officers in question are not eligible to participation in that system.

The PBA argues that during the past 24 years, the City has never implemented or enforced the residency requirement on records and identification officers. On or about February 25, 1991, the City served a preliminary notice of disciplinary charges on the officers in question. The PBA argues that since the City never applied the discretionary residency requirement on the identification officers, an established practice within the meaning of 5.4(a)(5) was created and an established practice cannot be altered without negotiations.

The City argues that N.J.S.A. 40A:9-1.5 gave the authority to the City to enact a residency requirement and this statutory authority pre-empts negotiations. Since the officers in question were not police officers within the meaning of N.J.S.A. 40A:9-1.5, the City had a non-negotiable right to discipline these employees for failure to comply with the residency requirement.

The City argues that the residency requirement always applied to the identification officers. Until now, it is unaware that any officer did not reside in the City. The City did not submit affidavits or other evidence in support of this claim.

The PBA submitted the affidavits of three officers who all affirmed that when they were hired, they received the Newark Police Department police manual and were advised that they were subject to the rules of that manual. They never received nor were they ever informed that they would be subject to the civilian manual. Two of the affiants, Barr and Payne, stated that on or about 1990 they were notified by the New Jersey Department of Personnel that they were eligible to sit for the upcoming examination for Assistant Chief Identification Officer they both sat for the exam and in November were advised that they ranked two and three for appointment respectively. They both state that the Department of Personnel issued certifications for the acting chief position, but the City has not completed the certification and they have not received their appointments. In February 1991, they both received Preliminary Notices of Disciplinary Action. Disciplinary hearings were

scheduled for April 24, 1991. The City agreed to suspend the scheduled hearings pending the disposition of the Interim Relief Hearing.

On April 24, 1991, the Department of Personnel issued a notification to Barr that he will not be issued a certification for the position of Assistant until the disciplinary action is resolved.

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the Courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in a final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for relief, the relative hardship to the parties in granting or denying the relief must be considered.^{1/}


Residency requirements are mandatorily negotiable. County of Hudson, 5 NJPER 91 (¶10035 1979); City of Atlantic City, 12 NJPER 91 (¶17023 1988). Although N.J.S.A. 40A:9-1.5 gives discretion to municipalities to enact residency ordinances, to the degree the statute is discretionary, it cannot preempt negotiations. State v. State Supervisory Assn., 78 N.J. 54 (1978); Bethlehem Tp. Bd. of Ed.

^{1/} Crowe v. DeGioia, 90 N.J. 126 (1982); Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975).

v. Bethlehem Ed. Assn., 91 N.J. 38 (1982); University of Medicine & Dentistry, P.E.R.C. No. 85-106, 11 NJPER 290 (¶16105 1085). The City has never enforced this residency requirement upon the identification officers and the officers were led to believe their work rules were the same as police officers who are not subject to the residency requirement. Moreover, the amendment to the residency ordinance permits the City to exempt certain employees from the residency requirement. On the record before me, the City's past failure to apply the residency requirement on identification officers creates an established practice within the meaning of the Act which cannot be altered without negotiations.

On balancing the equities here, it would be far more disruptive to these employees to be required to move into the City in order to preserve their jobs than it would be for the City to be restrained from processing the disciplinary action against these officers pending a final Commission determination.

Accordingly, I HEREBY RESTRAIN the City of Newark from proceeding with department hearings or otherwise implementing the residency ordinance against records and identification officers. This is an interim order only pending a final Commission determination.


Edmund G. Gerber
Commission Designee

DATED: May 15, 1991
Trenton, New Jersey