P.E.R.C. NO. 80-103

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON,

Respondent,

-and- Docket No. CO-79-82-71

COUNCIL 52, LOCAL 2306,
AFSCME, AFL-CIO,

Charging Party.

SYNOPSIS

The Commission adopts the findings of facts and initial conclusions of law, but not the ultimate legal conclusion, contained in the Hearing Examiner's Recommended Report and Decision regarding the County's implementation of a residency requirement for its employees. The Commission finds that: 1) residency generally is a negotiable term and condition of employment; 2) under the decision in State v. State Supervisory Employees Assn., 78 N.J. 54 (1979), N.J.S.A. 11:22-7 is a specific statute which establishes a residency requirement as a requisite for County employment; and 3) Section 7 of Chapter 63, Laws of 1978 which states that ordinances adopted prior to its June 30, 1978 effective date validates the County's February 1978 residency ordinance. Therefore, under these circumstances, the County was not under an obligation regarding the implementation of its February 1978 residency ordinance. Thus, the complaint was dismissed in its entirety. This decision does not address or consider the effect of Chapter 63 on ordinances adopted after June 30, 1978.

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COUNTY OF HUDSON,

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-and- Docket No. CO-79-82-71

COUNCIL 52, LOCAL 2306,
AFSCME, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Murray, Granello & Kenney, Esqs.
(Mr. Robert E. Murray, of Counsel, Mr. Bruce J. Ackerman, of Counsel and Harold Kreiger, County Counsel)

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs.
(Mr. Sanford R. Oxfeld, of Counsel)

DECISION AND ORDER

On October 11, 1978, an Unfair Practice Charge was filed with the Public Employment Relations Commission by Council 52, Local 2306, AFSCME, AFL-CIO ("Council 52") alleging that the County of Hudson (the "County") engaged in an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, Council 52 alleges that, in violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5),[1/] the County through its Department of Welfare,

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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term and 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 (continued)

unilaterally imposed a residency requirement on its employees without prior negotiations, notwithstanding the conditions of initial appointment, Civil Service certification, and prior contractual provisions, and further that the County had warned non-residents that they must comply with the residence requirement by December 31, 1978, or have their employment terminated.

The Charge was processed pursuant to the Commission's Rules, and it appearing to the Director of Unfair Practices that the allegations of the Charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 30, 1979.[2/] In accordance with a Notice of Hearing, hearings were held on June 27 and August 21, 1979 before Alan R. Howe, Hearing Examiner of the Commission, at which both parties were represented and were given an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Subsequent to the close of the hearing, Council 52 and the County submitted briefs on September 27, 1979 and October 1, 1979 respectively. Reply briefs were filed on October 11, 1979. On October 18, 1979, the Hearing Examiner issued his Recommended Report and Decision,[3/] which included findings of

1/ (continued) 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/ On January 17, 1979 the Special Assistant to the Chairman of the Commission denied Council 52's request for interim relief, In re County of Hudson, P.E.R.C. No. 79-47, 5 NJPER 52 (¶10035 1979), and on February 23, 1979, a Motion for Reconsideration was also denied by the Special Assistant, In re County of Hudson, P.E.R.C. No. 79-52, 5 NJPER 93 (¶10051 1979). It should be noted that the Commission's decision in this matter draws its essence from those legal considerations and analysis which the Special Assistant relied on in denying both these motions.

3/ H.E. No. 80-14, 5 NJPER 479 (¶10243 1979).

of fact, conclusions of law, and a recommended order. The original of the Report was filed with the Commission and copies were served upon all parties. A copy is attached to this Decision and Order and made a part hereof. Exceptions and a brief in support thereof were filed by the County on November 19, 1979, along with a request for oral argument,[4/] and, pursuant to an extension of time granted by the Commission, Council 52 filed a lengthy brief in reply.

The Hearing Examiner found that : (1) a "residency requirement" for employees was a mandatorily negotiable term and condition of employment; (2) the County did not have in effect a valid and enforced residency requirement by ordinance or other enactment prior to its adoption of a Residency Ordinance on February 9, 1978; and (3) the County violated the Act when it failed to first negotiate with Council 52 before implementing the Ordinance.

The Commission, after a careful consideration of the record, briefs, and exceptions, adopts the Hearing Examiner's findings of fact and initial conclusions of law,[5/] but not the ultimate legal conclusion that, since the County did not have a

4/ Since the Commission has decided not to adopt the Hearing Examiner's ultimate legal conclusion, thereby ruling in favor of the County, any further argument by the County in support of its position is superfluous. Accordingly, its request for oral argument is denied. Additionally, the parties were afforded an opportunity to argue orally before the Hearing Examiner.

5/ Specifically, the Commission notes that it adopts the Hearing Examiner's analysis of the interrelationship between the various statutes and County Ordinances cited in the Recommended Report and Decision, i.e. most importantly, that Chapter 63 does not affect the viability of the County Residency Ordinance since, under Section 7 of Chapter 63, this Ordinance was in effect prior to the effective date of Chapter 63, and also that Chapter 422 does not void the Residency Ordinance.

residency requirement in effect prior to adoption of the February 9, 1978 Residency Ordinance, it violated sections (a)(1) and (5) by failing to negotiate this subject with Council 52 prior to the County Executive's July 1, 1978 memo which implemented this Ordinance[6/] and threatened noncomplying employees with termination.[7/]

The New Jersey Supreme Court in State v. State Supervisory Employees, 78 N.J. 54 (1978), stated that a specific term and condition of employment which is expressly set or established by statute and/or regulation cannot be contravened by an inconsistent provision of a negotiated agreement, and any negotiations over such a set term of employment are precluded, having been preempted by the specific statute or regulation. The decision also emphasizes that a public employer is required to comply with such statutes or regulations and to act consistent with their prescriptions.

The Commission finds that N.J.S.A. 11:22-7 is such a specific statute which expressly establishes or sets a residency

6/ The Commission, in disagreement with the Hearing Examiner, finds that an employer is not required to negotiate prior to its implementation of a term and condition of employment "set" by statute. The Legislature, by enactment of such a statute, has precluded any negotiations over the term of employment covered by the statute. State v. State Supervisory Employees Assn, 78 N.J. 54 (1978).

7/ The Commission specifically adopts the Hearing Examiner's finding that, in the abstract, i.e. absent a specific statute on the subject - a residency requirement is a term and condition of employment, mandatorily negotiable. However, the Commission specifically declines to decide at this time what effect Chapter 63 has on the negotiability of this issue in those counties and localities which proceed to adopt a residency requirement subsequent to the effective date of Chapter 63, and further declines to decide whether the procedures - i.e. the extent of prior notice - surrounding the enforcement of a residency requirement are mandatorily negotiable.

requirement[8/] as a requisite for eligibility for County employment.[9/] Accordingly, negotiations over the subject of a residency requirement are precluded, having been preempted by this statute, and the County, in adopting the Residency Ordinance, was fulfilling its mandatory obligation to enforce this legislatively established condition of employment.

The Commission further finds that the question of whether or not a local ordinance is necessary to implement this residence statute is immaterial to the ultimate determination of this dispute. Chapter 63, Section 7, states that it does not affect the viability of any local ordinance adopted prior to its June 30, 1978, effective date. The County residency ordinance, adopted on February 9, 1978, became effective in accordance with N.J.S.A. 40:41A-101(c), on March 1, 1978. Chapter 422, which became effective on February 25, 1978, did not nulify the County ordinance, but simply stayed

8/ The Commission finds that, under the decisions in Lavitz v. Civil Service Commission, 52 N.J. Super. 158 (App. Div. 1958), and Skolski v. Woodcock, 149 N.J. Super. 340 (App. Div. 1977), N.J.S.A. 11:22-7 specifically establishes or sets a mandatory residency requirement on County employees, not exempted by other statutes, as a necessary prerequisite to initial public employment and maintaining that employment. Accordingly, both issues, which are covered by the County Ordinance, are outside the scope of negotiations.

9/ We reject Council 52's argument that the employees in question are not subject to N.J.S.A. 11:22-7 and the county ordinance. N.J.S.A. 11:22-7 reads: "For all positions and employments in the classified service, where the service is to be rendered in a particular county, municipality or school district, or any judicial district of such county, and payment therefor is made from the funds of such county, municipality or school district, or judicial district of the county, the commission shall limit the eligibility of applicants to the qualified residents of the county, municipality or school district, or judicial district of such county, in which the service is to be rendered and from the funds of which the employee is to be paid." (emphasis added) There is no question

(Continued)

its operative effect until June 30, 1978. According, the County ordinance being in effect prior to the adoption of Chapter 63, remains in effect under the exemption in Section 7 of Chapter 63.

State Supervisory Employees Association, supra, also held that such statutorily established terms and conditions of employment are incorporated by reference in all collective negotiations agreements. The Commission has held that, where an established practice is contrary to, or different from a clear and unambiguous contractual provision on the same subject, the employer may unilaterally terminate the established practice and demand adherance to the contractual provision. In re New Brunswick Board of Education, P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), In re State of New Jersey, P.E.R.C. No. 79-33, 5 NJPER 27 (¶10018 1978). A closely related rule is that an employer's failure to protest past violations of a clear contract rule does not bar the employer, after notice to the violating employees,[10/] from

9/ (Continued) that the employees in question render their services within a particular county - Hudson - and so they are subject to this statute and local ordinances passed in furtherance of the statutory mandate. The Commission has consistently stated that the public entity which exercises substantial control over labor relations matters and has the power to hire, fire and fix salaries and other terms and conditions of employment is the public employer. In re County of Mercer, D.R. No. 78-37, 4 NJPER 147 (¶4069 1978), P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110 1978), appeal pending App. Div. Docket No. A-4587-77. The Commission considers the agreement between Hudson County Board of Chosen Freeholders and Local 2306, AFSCME, AFL-CIO, January 1, 1977 through December 31, 1977 (Exhibit R-1) as ample evidence that the County is the employer of the employees in question.

10/ The Commission notes that the County did notify its employees of its intent to enforce in the future the requirement of residency as a condition for continued employment. See Hearing Examiner's Recommended Report and Decision, findings of fact #13 and #14 at pages 6 and 7.

insisting upon compliance with the clear contract requirement in future cases.[11/] Since statutory terms and conditions of employment are as much a part of a collective negotiations agreement as those terms actually negotiated,[12/] the Commission sees no reason why the above rule should not be applied to both types of contractual provisions. Accordingly, the Commission finds that, while prior to the February 9, 1978 Residency Ordinance, the County did not have an ordinance or an established practice enforcing the statutory residency requirement, this does not affect the ability, if not the obligation, of the County to enforce this requirement as of December 31, 1978, the date set by the County Executive for employee compliance with the Ordinance. Contrary to the Hearing Examiner's recommendations, the County was thus under no obligation to negotiate with Council 52 prior to issuing a notice threatening noncomplying employees with termination.

Finally, the Commission specifically adopts the Hearing Examiner's recommendation that the County did not violated N.J.S.A. 34:13A-5.4(a)(2) and (3).

11/ How Arbitration Works, 3Ed (1973), Elkouri and Elkouri, B.N.A., Inc., at pages 408-410, Arbitration and Collective Bargaining Prasow and Peters, Inc., McGraw Hill Book Company (1970) at pages 48-50. See also the cases cited in both treatises, specifically Arkansas Chemicals Inc. v. Oil, Chemical and Atomic Workers International Union, Local 5-434, 73-1 ARB ¶175 (1973), and Zimmer v. Westinghouse Electric Corp., 26 N.J. 339, 350 (1958).

12/ State v. State Supervisory Employees Assn, 78 N.J. at 80.

ORDER

Accordingly, for the reasons set forth above, the Complaint in this matter, CO-79-82-71, is hereby dismissed in its entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Parcells and Newbaker voted for this decision. Commissioners Hipp and Graves voted against this decision. Commissioner Hartnett was not present.

DATED: Trenton, New Jersey
February 19, 1980
ISSUED: February 21, 1980

H. E. No. 80-14

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

In the Matter of

COUNTY OF HUDSON,

Respondent,

- and -

Docket No. CO-79-82-71

COUNCIL 52, LOCAL 2306,
AFSCME, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the County violated Subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when, without negotiations with the Council and/or Local, it sought on July 1, 1978 to implement the provisions of a Residency Ordinance, adopted February 9, 1978, the effect of which was to require incumbent employees to acquire bona fide residence within the County by December 31, 1978 or face termination of employment.

The Hearing Examiner, in a case of first impression, resorted to public sector decisions in other jurisdictions in concluding that a "residency requirement" for incumbent employees was a mandatorily negotiable term and condition of their employment. Further, the Hearing Examiner found that the County did not have in effect a valid and enforced residency requirement by ordinance or other enactment prior to the adoption by the County of a Residency Ordinance on February 9, 1978. Having so found, the Hearing Examiner concluded that the County violated the Act when it failed to first negotiate with the Council and/or Local before implementing the February 9, 1978 Ordinance with respect to incumbent employees represented by the Council and/or Local. The Hearing Examiner recommended that the Commission order the County to negotiate the question of residency before implementation.

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.

H. E. No. 80-14

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

In the Matter of

COUNTY OF HUDSON,

Respondent,

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Docket No. CO-79-82-71

COUNCIL 52, LOCAL 2306,
AFSCME, AFL-CIO,

Charging Party.

Appearances:

For the County of Hudson
Murray, Granello and Kenney, Esqs.
(Robert E. Murray, Esq. and Bruce J. Ackerman, Esq.)

For Council 52, Local 2306, AFSCME, AFL-CIO
Rothbard, Harris and Oxfeld, Esq.
(Sanford R. Oxfeld, Esq.)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on October 11, 1978 by Council 52, Local 2306, AFSCME, AFL-CIO (hereinafter the "Charging Party", the "Council" or the "Local") alleging that the County of Hudson (hereinafter the "Respondent" or the "County") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the County, through its Department of Welfare, imposed a residency requirement on its employees, notwithstanding the conditions of initial appointment, Civil Service certifications, and prior contractual provisions, without attempting to negotiate the same with the Charging Party, and that the County has warned non-residents that they must comply with the residence requirement by December 31, 1978, or have their employment terminated, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) of

the Act. 1/

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 30, 1979. Pursuant to the Complaint and Notice of Hearing, hearings were held on June 27 and August 21, 1979 2/ in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The parties filed post-hearing briefs by October 1, 1979 with reply briefs by October 11, 1979.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The County of Hudson is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Council 52, LOCAL 2306, AFSCME, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The County and the Local have been parties to a series of collective

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1/ These Subsections prohibit 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.
"(2) Dominating or interfering with the formation, existence or administration of any employee organization.
"(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."

A request by the Charging Party for interim relief was denied by the Special Assistant to the Chairman of the Commission on January 17, 1979, P.E.R.C. No. 79-47, 5 NJPER 52 and on February 23, 1979, P.E.R.C. No. 79-52, 5 NJPER 93.

2/ The delay in scheduling the initial hearing and the second hearing was due to unusual conflicts, including vacations, in the schedules of counsel for the parties and the Hearing Examiner in both instances.

negotiations agreements covering a unit of Case Workers, etc., the most recent of which are the 1977 and 1978-80 agreements, received in evidence as R-1 and R-2, respectively. 2a/

4. The collective negotiations agreements, supra, contain no provision with respect to the residency of unit employees.

5. Effective February 9, 1978, the County adopted Ordinance No. 63-2-1978, with respect to residency, which provides, in pertinent part, as follows:

> "1. Except as otherwise provided by law...every person holding an office, position or employment, the authority and duties of which relate to the County of Hudson, shall be a bona fide resident of the County of Hudson during the term of his employment.
>
> "2. All officers and persons employed by the County of Hudson or hereafter to be employed by the County of Hudson are hereby required as a condition of their continued employment to have their place of abode in the County and to be bona fide residents therein.
>
> "3. A bona fide resident, for the purpose of this ordinance, is a person having a permanent domicile within the County of Hudson and one which has not been adopted with the intention of again taking up or claiming a previous residence acquired outside of the County limits..." (Emphasis supplied) (CP-1).

6. Effective February 25, 1978, the Legislature enacted Chapter 422, which provides that:

> "1. Notwithstanding the provisions of N.J.S.A. 40A:9-1 or any law to the contrary, any officer or employee of a county who was employed by a county on the effective date of this act shall be exempt from the requirement of residency within a respective county until June 30, 1978.
>
> "2. This act shall take effect immediately." (Emphasis supplied) (CP-2).

7. Effective June 30, 1978, the Legislature enacted Chapter 63, which provides, inter alia, that:

2a/ The unit certifications by the Commission issued on January 6, 1970 and November 12, 1972 (R-1, p. 3).

"1. 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 bona fide residents therein...

* * * *

"3. The governing body of a local unit which has adopted a resolution or ordinance, as the case may be, pursuant to section 1 of this act shall require therein that all nonresidents subsequently appointed to positions or employments shall become bona fide residents of the local unit within 1 year of their appointment..."

"It shall be the duty of the hiring authority to insure that all employees hired after the effective date of this act remain bona fide residents of the local unit in which they are employed. Failure of any such employee to maintain residency in a local unit shall be cause for removal or discharge from service. In the event such employee does not maintain bona fide residency, the hiring authority shall notify said employee that failure to again take up bona fide residency in the local unit within 6 months of such notification will result in removal or discharge from service...

"4. Any local unit which has adopted an ordinance or resolution, as the case may be, pursuant to section 1 of this act, shall provide therein that whenever the governing body, or appointing authority, 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. The local unit, or the hiring authority thereof, shall thereupon classify all qualified applicants for such positions or employments so determined in the following manner: ...

"b. In the case of counties:

"(1) Other residents of contiguous counties.

"(2) Other residents of the State.

"(3) All other qualified applicants...

* * * *

"7. The provisions of this act shall apply to all residency requirements adopted on and after the effective date of this act. Nothing herein shall be construed as to alter, abrogate, repeal or otherwise affect any residency requirement in effect in any local unit by ordinance or resolution, or rule or regulation of a local unit, on the effective date of this act; provided, however, that any amendment, modification or other change in any such residency requirement shall be subject to all the relevant provisions of this act..." (Emphasis supplied) (CP-3).

8. Effective June 14, 1979, the County adopted Ordinance No. 248-6-1979, amending the February 9, 1978 Ordinance, supra, which provides, inter alia, that:

"Where the appointing authority shall determine that there cannot be recruited a sufficient number of qualified residents for available specific positions or employments, the appointing authority shall advertise for other qualified applicants. The hiring authority shall thereupon classify all qualified applicants for such positions or employments in the following manner:

"(a) Other residents of contiguous counties.

"(b) Other residents of the State.

"(c) All other qualified applicants..." (CP-4).

9. N.J.S.A. 40:41A-101(c) provides that:

"No ordinance shall take effect less than 20 days after its final passage by the board and approved by the county executive, or supervisory or board chairman or president, where such approval is required, unless the board shall adopt a resolution declaring an emergency and at least two-thirds of all the members of the board vote in favor of such resolution." (Emphasis supplied)

10. N.J.S.A. 11:22-7, last amended in 1930, provides that:

"For all positions and employments in the classified service, where the service is to be rendered in a particular county, municipality or school district,

> or any judicial district of such county, and payment therefor is made from the funds of such county, municipality or school district, or judicial district of the county, the commission shall limit the eligibility of applicants to the qualified residents of the county, municipality or school district, or judicial district of such county, in which the service is to be rendered and from the funds of which the employee is to be paid." (Emphasis supplied)

11. Of the approximately 300 employees in the Charging Party's collective negotiations unit, about 35 of these employees were, at the time of the hearing, non-residents of Hudson County (1 Tr. 79). Of these 35 non-resident employees, at least four were hired since 1970 (1 Tr. 78). 3/

12. Agnes Bligh, the Principal Clerk-Typist at the Hudson County Welfare Division since 1970, who had access to the files of the Personnel Director and was familiar with hiring practices since that date, testified on cross-examination that she knew of no resolution or written memorandum of the Welfare Board, in which a policy of hiring residents over non-residents is embodied (1 Tr. 85, 86). 4/

13. On August 5, 1977 James F. Young, the Director of the County Division of Welfare since May 1976, sent a memo to all employees "who are not residents of Hudson County," advising such employees that if they wished to claim an exemption from the "residence requirement" they must act no later than August 12, 1977 (R-9).

14. Under date of July 1, 1978 non-resident employees of the County were sent a memo by the County Executive, which referred to the February 9, 1978 Residency Ordinance, 5/ which memo set a deadline of December 31, 1978 for establishing a bona fide residence within the County, unless an extension of time

3/ The County claims that in several years prior to 1970 there was a dearth of Case Workers in the County and, as a result of this emergent condition, the County hired non-resident employees (see R-4). It is noted that of the six witnesses produced by the Charging Party, five were hired prior to or in the year 1970 and were non-residents at the time of hire and remained so thereafter.

4/ Note is made of the reference of the Director of the County Welfare Board in 1971 that it was reverting to its "...established policy...concerning residence of employees...under Revised Statutes (N.J.S.A.) 11:22-7..." with regard to the hiring of County employees (R-4). Note is also made of a letter from Civil Service to the Director of the County Welfare Board, dated July 29, 1971, in which it is stated, inter alia, that: "...the Hudson County Welfare Board must first appoint from all existing eligible lists containing residents..." (R-6; see also, R-7).

5/ See Finding of Fact No. 5, supra.

is granted by the County Executive, and that failure to acquire such residence would result in termination (R-10, p. 2).

15. The Charging Party witnesses were unanimous in their testimony that they knew nothing about a residency requirement at the time of their hire and were not advised of such requirement until the facts giving rise to the instant charge of unfair practices arose.

THE ISSUES

1. Is the requirement of residency a mandatorily negotiable term and condition of employment for incumbent public employees? If so,

2. Did the County have a valid and enforced residency requirement in effect for incumbent employees prior to the adoption of the Residency Ordinance on February 9, 1978? If not,

3. Did the County violate the Act when on July 1, 1978 it threatened termination of employment for non-resident incumbent employees who did not acquire residence by December 31, 1978 without first negotiating with the Charging Party?

DISCUSSION AND ANALYSIS

The Requirement of Residency As a Condition of Continued Employment For Incumbent Employees Is a Term and Condition of Employment and Is Mandatorily Negotiable

In agreement with the Charging Party, which cites numerous public sector decisions from other jurisdictions, the Hearing Examiner finds and concludes, in a case of first impression, that the requirement of residency as a condition for continued employment of incumbent employees is a term and condition of their employment and is, therefore, mandatorily negotiable. 6/ The jurisdictions which have concluded that a residency requirement is a mandatorily negotiable term and condi-

6/ In so concluding, the Hearing Examiner refers to State v. State Supervisory Employees Ass'n., 78 N.J. 54 (1978) where the Supreme Court said at page 67: "Thus, negotiable terms and conditions of employment are those matters which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives..." (Emphasis supplied). A residency requirement clearly satisfies this test. The Hearing Examiner notes that this finding and conclusion is consistent with the non-binding conclusion of the Special Assistant to the Chairman of the Commission in P.E.R.C. No. 79-47, 5 NJPER 52, 54 (1979), this being the interim relief proceeding involving the instant parties (see footnote 1, supra).

tion of employment include Michigan, [7] Wisconsin, [8] Massachusetts, [9] New York, [10] Pennsylvania [11] and Connecticut. [12] These decisions from other jurisdictions have, as a group, found a mandatory obligation to negotiate a residency requirement for incumbent employees and have excluded from this obligation the initial hiring decision and, also, promotions.

The Hearing Examiner is of the opinion that these decisions constitute a sound statement of the law in the public sector and it is adopted herein.

Prior to February 9, 1978 The County Did Not Have in Effect a Valid and Enforced Residency Requirement For Incumbent Employees

As has been previously found, N.J.S.A. 11:22-7 was last amended in 1930. [13] Although this statute does not, by its terms, mandate that a statute or ordinance must be adopted by the "particular county, municipality or school district, or any judicial district of such county..." in order for it to become effective, the Hearing Examiner finds it most significant that the pertinent court decisions on residency subsequent to 1930 have involved instances where there was in effect an ordinance or other enactment by the political subdivision with respect to requiring residency as a condition for continued employment. Thus, for example, the Supreme Court has twice considered the residency ordinance of the City of Newark, originally adopted in 1932, and in each instance found it valid: Kennedy v. City of Newark, 29 N.J. 178 (1959) and Abrahams v. Civil Service Commission, 65 N.J. 61 (1974). Likewise, in Skolski v. Woodcock, 149 N.J. Super 340 (1977), the Appellate Division

7/ Detroit Police Officers Association v. City of Detroit, 391 Mich. 44, 190 N.W. 2d 97, 1 PBC para. 10,353 (Mich. Supr. Ct. 1974).

8/ City of Brookfield v. WERC, 1 PBC para. 10,279 (Wisc. Cir. Ct. 1974) and City of Madison, WERC Decis. No. 15,095 (1976).

9/ Boston School Committee, Mass. LRC Case No. MUP-2503 (1977) and Bd. of Trustees of Lowell University, Mass. LRC, 1977-78 PBC para. 40,517 (1978).

10/ City of Auburn, 9 PERB para. 3085 (1976) and City of Buffalo, 9 PERB para. 3015 (1976).

11/ City of Erie Sch. Dist., 9 Pa.PER para. 9132 (1978) and Ambridge Area Sch. Dist., 9 Pa.PER para. 9034 (1978).

12/ City of Bridgeport, Conn. SBLR Case No. MPP-3437 (1977) and New Haven Bd. of Ed., Conn. SBLR, 1979 PBC para. 41,174 (1979).

13/ Finding of Fact No. 10, supra.

there noted that, "Bergen County has adopted the Civil Service Act...," thereafter quoting the provisions of N.J.S.A. 11:22-7, supra. (149 N.J. Super at 344). Also, in Skolski the Court said that, "Residency requirements for governmental employment, whether at the state, county or municipal level, and whether imposed by statute or ordinance, are valid and enforceable...(citing Abrahams and Kennedy, supra)" (149 N.J. Super at 344).

Thus, the Hearing Examiner is of the view that the courts of New Jersey have placed a gloss upon the "residency requirement" of the Civil Service Act, namely, by recognizing that there must be an implementing ordinance, statute or other enactment by the political subdivision before a residency requirement may be enforced.[13a/] There is nothing in the instant record which substantiates that there was an ordinance or any like enactment of the County, such as a resolution of the Board of Chosen Freeholders, with respect to a "residence requirement" for incumbent employees until February 9, 1978 when the County adopted a Residency Ordinance which, by its terms and under law, became effective March 1, 1978. [14/]

In finding and concluding that the County did not have a valid and enforced residency requirement for incumbent employees until the Residency Ordinance of February 9, 1978 became effective, the Hearing Examiner has given due consideration to the County's proofs regarding an "established policy...concerning residence of employees," dating back to 1971. [15/] The Hearing Examiner is of the opinion that the 1971 correspondence between the County and Civil Service does not, standing alone, establish that there was a valid and enforced residence requirement for incumbent employees prior to the adoption of the 1978 Residency Ordinance. Of great concern to the Hearing Examiner is why there was a need for a Residency Ordinance in 1978 if there was a valid and enforced residency requirement for incumbent employees prior thereto.

14/ See Findings of Fact Nos. 5 and 9, supra. It is noted here that of the 35 non-resident employees in the Charging Party's negotiations unit as of the time of the hearing, at least four of these non-residents were hired since 1970 (see Finding of Fact No. 11, supra). Further, on August 5, 1977 the Director of the County Division of Welfare sent a memo to all non-resident employees of the County, advising that if they wished to make a claim for an exemption they must act no later than August 12, 1977 (see Finding of Fact No. 13, supra). There is no evidence on the record indicating that the memo of August 5, 1977 was ever implemented and the Hearing Examiner concludes that it was not implemented.

15/ See footnote 4, supra.

13a/ This view is reinforced by the language of Chapter 63, namely, Sections 1, 3 and 4, which refers to the adoption of "resolution or ordinance" by governing bodies for implementation of the provisions of Chapter 63. See Finding of Fact No. 7, supra.

Next for consideration is the significance or relevance of the adoption by the Legislature of Chapter 422, effective February 25, 1978, a date prior to the effective date of the February 9, 1978 Residency Ordinance. In agreement with the contention of the County, the Hearing Examiner is of the view that Chapter 422 merely provided a personal exemption from the residency requirement "within a respective county until June 30, 1978." 16/ Chapter 422 did not operate to void the February 9, 1978 Residency Ordinance, but merely postponed its implementation to June 30, 1978, the date on which Chapter 63 became effective. 17/

Having concluded that the Residence Ordinance of February 9, 1978 was in "effect" on June 30, 1978, and having previously found that the County sought to implement the ordinance on July 1, 1978, 18/ the final question to be resolved is whether or not the County was obligated to negotiate with the Charging Party prior to implementation. 19/

The County Violated Subsection (a)(5), and Derivatively Subsection (a)(1), of The Act When on July 1, 1978 it Threatened to Terminate Non-Resident Incumbent Employees Without First Negotiating With the Charging Party

16/ Finding of Fact No. 6, supra.

17/ Finding of Fact No. 7, supra. It is noted further that Section 7 of Chapter 63 provides that it shall not "alter, abrogate, repeal or otherwise affect any residency requirement in effect...on the effective date of this act..."

18/ Finding of Fact No. 14, supra.

19/ It should be noted here that the Hearing Examiner rejects the contention of the County that the instant charge of unfair practices, filed on October 11, 1978, is time barred under the six-month rule contained in Section 5.4(c) of the Act. Inasmuch as the effective date of the Residency Ordinance of February 9, 1978 was postponed by Chapter 422 until June 30, 1978, the Hearing Examiner finds that the triggering event for a charge of unfair practices occurred on July 1, 1978 when the County Executive issued his memo, supra. See Warren Hills Regional Bd. of Education, P.E.R.C. No. 78-69, 4 NJPER 188, 189 (1978). Thus, the charge of unfair practices was timely filed. Further, there having been no valid and enforced residency requirement prior to the adoption of the February 9, 1978 Residency Ordinance, there was no waiver or acquiescence by the Charging Party regarding the timely filing of an unfair practice charge, nor is the Charging Party estopped from so filing by any conduct herein. (Cf. Respondent County's main brief at pp. 15-19).

In view of the finding and conclusion of the Hearing Examiner that a residency requirement for incumbent employees is a mandatorily negotiable term and condition of employment, followed by the finding and conclusion that the County did not have a valid and enforced residency requirement for incumbent employees in effect prior to the adoption of the Residence Ordinance on February 9, 1978, little time need be spent in discussing the Hearing Examiner's final finding and conclusion, namely, that the County violated the Act when it failed first to negotiate with the Charging Party before threatening incumbent employees with termination in the memo from the County Executive dated July 1, 1978. Clearly, if mandatory negotiations were required before implementation of the February 9, 1978 Residency Ordinance then the failure to so to do is per se a violation of Subsection (a)(5), [20] and derivatively a violation of Subsection (a)(1), [21] of the Act. Having so found a violation of the Act, the Hearing Examiner will recommend an appropriate remedy. [22]

The Charging Party having adduced no evidence that would support a violation of Subsections (a)(2) and (3) of the Act, the Hearing Examiner will recommend dismissal of these allegations in the Unfair Practice Charge.

* * * *

Upon the foregoing,and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The Respondent County violated N.J.S.A. 34:13A-5.4(a)(5), and derivatively 5.4(a)(1), when, without first negotiating with the Council and/or the Local, its County Executive issued a memo on July 1, 1978 threatening incumbent non-resident

20/ See, for example, Galloway Twp. Bd. of Ed. v. Galloway Twp. Ass'n of Educ. Secretaries, P.E.R.C. No. 76-31, 2 NJPER 182, 184 (1976), aff'd. 78 N.J. 1, 6-8 (1978); Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Ass'n., P.E.R.C. No. 76-32, 2 NJPER 186, 187 (1976), aff'd. 78 N.J. 25 (1978); and Piscataway Twp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49,50 (1975), appeal dismissed as moot (App. Div., Docket No. A-8-75), pet. for certif. den., 70 N.J. 150 (1976).

21/ See Galloway Township Board of Education, P.E.R.C. No. 77-3, 2 NJPER 254, 255 (1976).

22/ In view of the foregoing findings and conclusions of the Hearing Examiner, he does not pass upon nor decide the contention of the Charging Party that the employees in the collective negotiations unit are in fact State and not County employees, and therefore not covered by N.J.S.A. 11:22-7 and the Residency Ordinances adopted by the County. (See Charging Party's main brief, pp. 24-26 and reply, p. 7).

employees with termination if they did not acquire bona fide residence within the County by December 31, 1978.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent County cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, in particular, by threatening non-resident incumbent employees with termination of employment unless they acquired bona fide residence within the County by a specific date.

2. Refusing to negotiate in good faith with the Council and/or the Local concerning terms and conditions of employment of employees represented by the Council and/or the Local, in particular, with respect to the threat of termination of non-resident incumbent employees unless they acquired bona fide residence within the County by a specific date.

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

1. Enter into negotiations in good faith with the Council and/or the Local regarding implementation of the Residency Ordinance of February 9, 1978 as to incumbent employees prior to implementation.

2. Post at all places where notices to employees are customarily posted, copies of the attached notice marked Appendix "A". Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, after being signed by the Respondent's authorized representative and shall be maintained by it for a period of sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent County to assure that such notices are not altered, defaced or covered by other material.

3. Notify the Director of Unfair Practices within twenty (20) days of receipt what steps the Respondent County has taken to comply herewith.

C. That the charges of violations by the Respondent County of N.J.S.A. 34:13A-5.4(a)(2) and (3) be dismissed in their entirety.

Alan R. Howe
Hearing Examiner

DATED: October 18, 1979
Trenton, New Jersey

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 interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, in particular, by threatening non-resident incumbent employees with termination of employment unless they acquired bona fide residence within the County by a specific date.

WE WILL enter into negotiations in good faith with the Council and/or the Local concerning the terms and conditions of employment of employees represented by the Council and/or the Local, in particular, regarding implementation of the Residency Ordinance of February 9, 1978 as to incumbent employees prior to implementation.

COUNTY OF HUDSON

(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 Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780