

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL ASSOCIATION OF :
FIRE FIGHTERS LOCAL 839 :
 :
v. : Case No. PF-C-99-82-W
 :
WILKINSBURG BOROUGH :

FINAL ORDER

On December 20, 1999, Wilkesburg Borough (Borough) filed exceptions and supporting brief with the Pennsylvania Labor Relations Board (Board) to a November 30, 1999, proposed decision and order (PDO), wherein the hearing examiner determined that the Borough committed an unfair labor practice within the meaning of Section 6(1)(e) of the Pennsylvania Labor Relations Act (PLRA) when it unilaterally imposed a residency requirement for applicants for fire fighter positions without negotiating with the International Association of Fire Fighters Local 839 (Union).

The hearing examiner relied on the Township of Moon v. Police Officers of the Township of Moon, 508 Pa. 495, 498 A.2d 1305 (1985), wherein the Supreme Court concluded that residency requirements are mandatory subjects of bargaining. The hearing examiner concluded that the Borough unilaterally changed a mandatory subject of bargaining, and therefore violated Section 6(1)(e) of the PLRA. Plumstead Township v. PLRB, 713 A.2d 730 (Pa. Cmwlth. Ct. 1998). Further, the hearing examiner concluded that the Union had standing to file the charge, and that the charge was ripe for adjudication.

The facts of the case are summarized as follows. On June 16, 1999, the Borough's council passed a resolution adopting civil service rules and regulations that cover applicants for fire fighting positions. Section 305 of the rules and regulations provide as follows,

[a]ll applicants must be a resident or declare the intent to become a resident within one year of hire. Failure to do so will cause said applicant to be ineligible for admission to the examinations required hereunder.

FF 3, PDO at 2. The current collective bargaining agreement (agreement) between the Borough and the Union contains no language addressing residency.

In its exceptions, the Borough asserts that (1) the Union did not have standing to challenge the Borough's adoption of the residency requirement because the Union only represents employees, not applicants for employment; (2) the residency requirement is not a mandatory subject of bargaining, rather it is a qualification for employment within the Borough's managerial prerogatives.

The Board will first address the standing issue. The Borough acknowledges that Act 111 requires employers to bargain with the representatives of its employees over wages, hours, terms and conditions of employment. As such, the Borough reasons that it has no duty to bargain

with the Union in this case because it only represents current fire fighters, not applicants for employment. As the hearing examiner explained, in Township of Moon, supra, our Supreme Court expressly held that the exclusive representative of a bargaining unit had the right to bargain over a residency requirement which covered applicants for positions in the bargaining unit. The Commonwealth Court in City of Chester v. FOP, Lodge 19, 615 A.2d 893 (Pa. Cmwlth. Ct. 1992), and earlier in Cheltenham Township v. Cheltenham Police, 301 A.2d 430 (Pa. Cmwlth. Ct. 1973), likewise determined that residency requirements are a mandatory subject of bargaining. More recently, in City of Harrisburg, 29 PPER ¶ 29221 (Proposed Decision and Order, 1998), the City's refusal to bargain a residency requirement for applicants was found to be a violation of Act 111. In that case, fire fighters were not required to reside within the city, but applicants for fire fighter positions were required to sign a statement of intent to continue to reside within the city after commencement of employment. The hearing examiner determined that "the City's action . . . effectively repudiated the bargained-for provision of the collective bargaining agreement." Id. The hearing examiner further rejected the City's argument that because the union did not represent applicants, the City did not have to bargain with it,

the City's insistence that applicants commit to post-hire terms of employment which contradict the collective bargaining agreement does constitute a unilateral change and as such, the Union has standing to challenge the action. To rule otherwise would allow employers to completely circumvent the entire collective bargaining agreement by requiring prospective employes to agree to work under a different set of terms and conditions of employment than those bargained.

Id. Similarly, permitting the Borough to establish residency requirements for applicants allows it to circumvent the agreement and institute a different set of terms and conditions of employment for applicants, than those for which it bargained with the employes' representative. The same conclusion is reached under the Public Employe Relations Act (PERA). In City of Erie School District, 9 PPER ¶ 9031 (Nisi Decision and Order, 1989), the Board determined that residency requirements are mandatory subjects of bargaining that may not be imposed unilaterally. Accordingly, the Union has the right to bargain over residency requirements for applicants, and thus has standing to charge the Borough with refusal to bargain. The Borough's standing contention finds no support under Board, Commonwealth Court or Supreme Court precedent.

The Borough argues that the Supreme Court's "view of the duty to bargain, to the extent that it has ever been truly applicable to applicants for employment, can no longer be considered to have any vitality with respect to applicants." The Borough further argues that the Supreme Court's opinion regarding applicants is mere dicta. The Board is bound by the Supreme Court's decision in Township of Moon, and will not dismiss it as mere dicta. Further, the language of the Commonwealth Court in Cheltenham Township, supra, expressly relied on by the Supreme Court in Township of Moon, wherein the Commonwealth Court upheld residency provisions of an interest arbitration award applicable to applicants and employes was not mere dicta. See also City of Chester, supra.

The Borough relies on Local No. 736 International Association of Firefighters v. Firemen's Civil Service Commission, 442 Pa. 398, 276 A.2d 507 (1971) and Star Tribune, a Division of Cowles Media Co., 295 N.L.R.B. 543 (1989) for the proposition that the Union has no standing to challenge the residency requirement for applicants. The Board finds no support for the Union's argument in either of these cases. First, Local No. 736 was not decided under Act 111, nor was it a scope of bargaining case. In that case, the union was trying to enforce a statutory residency requirement, rather than bargain over its implementation. In that case, the action was by employes seeking to enjoin a municipality from violating a statute which allegedly prohibited the municipality from hiring non-resident persons. The employes were attempting to limit the employer's ability to accept applicants from outside the municipality. In Local No. 736, the Supreme Court determined that the union did not have standing to enforce the statutory residency requirement because the statute did not confer any protected rights upon the union. However, this case arises under Act 111, and the courts have made clear that Act 111 vests unions with standing to negotiate over residency requirements for both applicants and existing employes. The Borough cites Star Tribune, a case in which the National Labor Relations Board (NLRB) determined that preemployment drug and alcohol testing was not a mandatory subject of bargaining. Because there are Pennsylvania decisions directly on point, the NLRB's alleged position on applicant drug and alcohol testing is irrelevant. There is no need to pursue federal authority when Pennsylvania caselaw is clear and dispositive under Act 111. See American Federation of State, County and Municipal Employees v. PLRB, 529 A.2d 1188 (Pa. Cmwlth. Ct. 1987)(the Board, in deciding questions of state law is not bound to follow decisions of the NLRB which involve questions purely of federal law).

The Borough next argues that residency is a qualification for employment, and therefore a matter of managerial prerogative. As support for this argument, the Borough cites FOP v. Rose of Sharon Lodge No. 3 v. PLRB, 729 A.2d 1278 (Pa. Cmwlth. Ct. 1999) alloc. denied, __ Pa. __, (1999). While it is true that "an employer need not bargain over the establishment of job qualifications because such action relates more directly to the employer's managerial interest in selection and direction of personnel than to the employees' interests in wages, hours, and working conditions," Id. at 1279, the Borough neither explains how residency is equivalent to a qualification, nor how residency relates more directly to the employer's managerial interest than the employees' interests. In Rose of Sharon, the qualification at issue was a minimum service requirement for promotion of police officers. The Commonwealth Court opined that the minimum service requirement was a qualification for employment that aided the township in measuring and evaluating police officers' performance. Unlike the promotional criteria in Rose of Sharon, residency is not a measurement or evaluation of a fire fighter's ability to perform on the job.

Although the Borough does not articulate how residency is a qualification of employment, arguments to this effect have been made and rejected by the Board in the past. In Ambridge Area School District, 9 PPER ¶ 9034, the Board rejected the Employer's four purposes for establishing a residency requirement (to reduce unemployment rates within the district; to enhance the quality of work performance by a greater knowledge of and personal stake in the progress of the district; diminution of absenteeism and tardiness; greater economic benefits from local expenditure of salaries including payment of local taxes). The same

arguments were again rejected in City of Erie School District, supra, wherein the Board noted the employer's failure introduce evidence to indicate the relationship between the residency requirement and the employer's basic policy system. The Board determined that residency requirements have a profound and total impact upon employes, and are therefore mandatory subjects of bargaining. Arguments regarding geography have also been rejected. For instance, in City of Harrisburg, supra, the employer's "strong interest" in having its firefighters remain residents of the City in order to ensure prompt response times was rejected. The geography argument fails because one fire fighter may live within the municipality and be further from the firehouse than a fire fighter who lives outside the municipality's boundary, but near the firehouse. Residency is not a qualification necessary for an individual to be able to perform fire fighting work, but rather a directive to employes and applicants regarding where to reside.

The Supreme Court expressly rejected the argument that residency is a matter of managerial prerogative and precluded the determination that residency is a qualification for employment within management's exclusive control when it opined that the "Commonwealth Court's decision holding that residence as a requisite for application to or membership in a police department clearly is a condition of employment within the meaning of Section 1 of Act 111 . . . cannot seriously be questioned." Township of Moon, 498 A.2d at 1313 (citing Cheltenham Township v. Cheltenham Police, 301 A.2d 430 (Pa. Cmwlth. Ct. 1973)). The Supreme Court determined that residency requirements have traditionally been considered as a term or condition of employment, and therefore an appropriate subject for collective bargaining. Township of Moon, supra (citing City of Lebanon, 14 PPER ¶ 14020 (Proposed Decision and Order, 1982); PLRB v. School District of the City of Erie, 9 PPER ¶ 9031 (Nisi Decision and Order, 1978), aff'd, 10 PPER ¶ 10112 (C.C.P. Erie County, 1979)). The Board is without inclination or authority to alter or abandon the precedent of the Supreme Court.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Borough in the above-captioned matter be and the same are hereby dismissed and the Proposed Decision and Order is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, and Members L. Dennis Martire and Edward G. Feehan, this fifteenth day of February, 2000. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

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AFFIDAVIT OF COMPLIANCE

The Borough hereby certifies that it has ceased and desisted from its violation of section 6(1)(e) of the Pennsylvania Labor Relations Act, that it has rescinded section 305 of its civil service rules and regulations, that it has posted the proposed decision and order and final order and that it has served a copy of this affidavit on the Union.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public