

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL 205 :
 :
 v. : Case No. PERA-C-07-369-W
 :
 ELIZABETH TOWNSHIP :

PROPOSED DECISION AND ORDER

On August 23, 2007, Teamsters Local Union No. 205 (Union) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that Elizabeth Township (Township) violated sections 1201(a)(1) and 1201(a)(5) of the Public Employe Relations Act (Act) by unilaterally imposing a residency requirement on employes. On September 26, 2007, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on November 30, 2007, if conciliation did not resolve the charge by then. The hearing was held as scheduled. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. Each party made a closing argument. Neither party filed a brief. On December 26, 2007, the reporting service filed the notes of testimony with the Board.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. On March 2, 1973, the Board certified the Union as the exclusive representative of a bargaining unit that includes road workers employed by the Township. (Case No. PERA-R-2633-W)

2. On April 8, 1974, the Board certified the Union as the exclusive representative of a bargaining unit comprised of the Township's clerical employes. (Case No. PERA-R-4262-W)

3. In 1998, Malisa Migliori began working for the Township as a clerical employe. During her interview for the position, the chairperson of the Township's board of commissioners told her that she would be subject to a residency requirement if hired. She was the last clerical employe hired by the Township. (N.T. 28, 38-39, 45-50, 66-68)

4. In 1998, Benjamin Muir began working for the Township as a road worker. Before the Township hired him, he told a then member of the board of commissioners (Judith A. Marshall) that he was applying for a job with the Township. Ms. Marshall told him that he would be subject to a residency requirement if hired. He was among the last group of road workers hired by the Township. (N.T. 37-38, 40, 50, 69, 83)

5. In 2003 or 2004, a road worker (Karl "Jake" Weigard) spoke to a member of the board of commissioners (Donald Similo) about moving from the Township. Mr. Similo said that the Township's policy was for employes to be residents of the Township. Mr. Similo also said that he did not want to make a decision himself. Mr. Similo asked the board of commissioners if Mr. Weigard could move from the Township. The board of commissioners' response was no. (N.T. 57, 60, 76-77, 80-81)

6. In January 2007, Mr. Muir asked a member of the board of commissioners (Helen Kogan) for permission to move from the Township. Ms. Kogan asked the board of commissioners if Mr. Muir could move from the Township. The board of commissioners' response was no. (N.T. 16-18, 52, 77-78, 84-85)

7. By memorandum dated July 6, 2007, the board of commissioners wrote to all of the Township's employes as follows:

"It has recently come to the attention of the Board of Township Commissioners that certain rules, regulations, policies and conditions of employment of the Township are not being followed. Specifically, the Board of Township Commissioners ha[s] been advised that the condition of employment and past practice of residency in the Township may be being disregarded. The Board of Township Commissioners would like to remind all employees of the Township that when they were hired, a specific condition of employment was residency in the Township. This condition of employment and past practice is very important to the Board of Township Commissioners' philosophy of running an economical and efficient government. Any employee who violates this practice and condition of employment may be subject to disciplinary action. If any employee has a question concerning this condition and past practice, please contact your immediate Supervisor for further information on this important matter."

(N.T. 13-15, 21-22, 53)

DISCUSSION

The Union has charged that the Township committed unfair practices under sections 1201(a)(1) and 1201(a)(5) by unilaterally imposing a residency requirement on employees. The Union contends that the Township did so when it issued a memorandum dated July 6, 2007. In the memorandum, the Township "remind[ed]" its employees "that when they were hired, a specific condition of employment was residency in the Township" (finding of fact 7). According to the Union, because a residency requirement for employees is a mandatory subject of bargaining and because no such requirement existed before the Township issued the memorandum, the Township was obligated to bargain before it issued the memorandum.

The Township contends that the charge should be dismissed because employees were subject to a residency requirement before it issued the memorandum. According to the Township, the memorandum codified but did not change past practice in that regard.

An employer commits unfair practices under sections 1201(a)(1) and 1201(a)(5) if it unilaterally changes a mandatory subject of bargaining. Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978). A residency requirement is a mandatory subject of bargaining. City of Erie School District, 9 PPER ¶ 9031 (Final Order 1978), aff'd, 10 PPER ¶ 10112 (Court of Common Pleas of Erie County 1979). An employer does not commit unfair practices under sections 1201(a)(1) and 1201(a)(5), however, if it unilaterally codifies a past practice regarding a mandatory subject of bargaining unless the codification changes the past practice. Commonwealth of Pennsylvania, Pennsylvania State Police, 36 PPER 3 (Final Order 2005)(construing analogous provisions of the Pennsylvania Labor Relations Act).

In County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 (1977), the court defined a past practice as follows:

"A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type of situation. It must be shown to be the *accepted* course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be *accepted* in the sense of both parties having agreed to it, but rather that it must be *accepted* in the sense of being regarded by the men involved as the *normal* and *proper* response to the underlying circumstances presented."

476 Pa. at 34 n. 12, 381 A.2d at 852 n. 12 (emphasis in original).

The record shows that in 1998 the Township told two prospective employees who were among its most recent hires (Ms. Magliori and Mr. Muir) that they would be subject to a

residency requirement if hired (findings of fact 3-4),¹ that in 2003 or 2004 the Township's response was no when it was asked if an employe (Mr. Weigand) could move from the Township (finding of fact 5) and that in January 2007 the Township's response was no when an employe (Mr. Muir) asked for permission to move from the Township (finding of fact 6).

On a substantially similar record in Lincoln University, 37 PPER 173 (Final Order 2006), the Board found a past practice that employes could not be disciplined for failing to file a form. In that case, the record showed that two employes had not been disciplined for not filing the form in the past. Likewise, in City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order 1987), the Board found a past practice that employes could donate sick leave where the record showed that employes twice had donated sick leave over a fifteen-year period.

On the instant record, then, it is apparent that employes were subject to a residency requirement by past practice before the Township issued the memorandum. Thus, the Township did not change a mandatory subject of bargaining when it issued the memorandum. Accordingly, under the analysis set forth in Commonwealth of Pennsylvania, Pennsylvania State Police, *supra*, the charge must be dismissed.

The Union contends that there is no basis for finding that employes were subject to a residency requirement by past practice before the Township issued the memorandum because it was not aware of any such requirement until the Township issued the memorandum. As the Union established at the hearing, it was not present at any employment interviews at which the Township might have informed prospective employes of a residency requirement (N.T. 55, 64, 73). As the Union also established at the hearing, its business agent (John Winters) was not aware of a residency requirement until the Township issued the memorandum (N.T. 29-30, 34). Under County of Allegheny, *supra*, the focus in a case of this nature is on the conduct of the employer and its employes. Thus, a past practice may be found even though the exclusive representative of the employes involved was unaware of it. Municipal Authority of the Borough of West View, 32 PPER ¶ 32187 (Final Order 2001). The Union's contention is, therefore, without merit.

The Union also contends that there is no basis for finding that employes were subject to a residency requirement by past practice before the Township issued the memorandum because testimony by the Township's witnesses that there was such a past practice (N.T. 45-46, 53-54, 58, 60-61, 67-68, 72, 76, 78) was not credible. The Union's own witness (Judy Thomas) testified, however, that "it's assumed that you have to live in the Township" (N.T. 26-27) and that "people would just say yes, I live in the Township to work there" (N.T. 27). Thus, her testimony likewise supports a finding that employes were subject to a residency requirement by past practice before the Township issued the memorandum. The Union's contention is, therefore, without merit.

The Union further contends that there is no basis for finding that employes were subject to a residency requirement by past practice because testimony that no employe has moved from the Township for years (N.T. 15, 18, 24, 41, 59-60, 68, 71, 74, 81, 86) was irrelevant. As noted above, however, the record shows that on two occasions prior to its issuance of the memorandum the Township informed prospective employes that they would be subject to a residency requirement if hired and that on two other occasions prior to its

¹ There was conflicting testimony as to whether or not the Township ever told Mr. Muir that he had to be resident of the Township if hired. Mr. Muir testified that he could not recall that the Township ever told him that (N.T. 84), while a former member of the board of commissioners (Ms. Marshall) testified that she told him that (N.T. 40). It has been found as fact that the Township told Mr. Muir that he had to be a resident of the Township if hired, for three reasons. First, Ms. Marshall's testimony was more definitive than Mr. Muir's in that she testified with certainty while he only testified to the best of his recollection. Second, Ms. Marshall appeared with less of an interest in then outcome of the hearing than Mr. Muir did in that she no longer is a member of the board of commissioners while he intends to move from the Township (N.T. 84). Third, the record shows that Mr. Muir subsequently asked for permission to move from the Township (N.T. 85). Common sense dictates that he would not have made the request unless he knew that the Township had a residency requirement. Thus, although Mr. Muir testified that he made the request just to be polite (N.T. 86), it seems apparent that he made the request because Ms. Marshall told him that he had to be a resident of the Township if hired. Ms. Marshall's testimony has been credited over Mr. Muir's accordingly.

issuance of the memorandum the Township's response was no when asked if employes could move from the Township. Thus, regardless of the fact that no employe has moved from the Township for years, the record nevertheless shows that employes were subject to a residency requirement by past practice before the Township issued the memorandum. The Union's contention is, therefore, without merit.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The Township is a public employer under section 301(1) of the Act.
2. The Union is an employe organization under section 301(3) of the Act.
3. The Board has jurisdiction over the parties.
4. The Township has not committed unfair practices under sections 1201(a)(1) and 1201(a)(5) of the Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the complaint is rescinded and the charge dismissed.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this eighth day of January 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner

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January 8, 2008

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ELIZABETH TOWNSHIP
Case No. PERA-C-07-369-W

Enclosed is a copy of my proposed decision and order.

Sincerely,

DONALD A. WALLACE
Hearing Examiner

Enclosure

cc: Elizabeth Township
Teamsters Local 205

