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TOWN OF LEE AND LEE POLICE ASSOCIATION, MUP-5211 (11/21/84). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

53.2	conflicting ordinances and by-laws
54.520	residency requirement
67.8	unilateral change by employer
82.	Remedial Orders
92.51	appeals to full commission

Commissioners participating:

Paul T. Edgar, Chairman  
Gary D. Altman, Commissioner  
Maria C. Walsh, Commissioner

Appearances:

Gerard S. McAuliffe, Esq. - Representing the Lee Police Association  
Jerome T. Scully, Esq. - Representing the Town of Lee

DECISION ON APPEAL  
OF HEARING OFFICER'S DECISION

Statement of the Case

On September 30, 1983, Hearing Officer Judith Neumann issued a decision finding that the Town of Lee (Town) had violated Sections 10(a)(5) and (1) of the Law by unilaterally implementing a residency requirement as a condition of continued employment in its police department.<sup>1</sup> The Town filed a timely notice of appeal pursuant to Commission Rules, 402 CMR 13.13(2).

In its supplementary statement filed on January 6, 1984,<sup>2</sup> the Town argues that it has had a residency by-law since 1954, and that the by-law has been uniformly enforced and requires all permanently-appointed police officers to continue to reside in the Town. The Lee Police Association (Union) did not submit a supplementary statement. For the following reasons, we affirm the hearing officer's decision.

Findings of Fact

We have reviewed the hearing officer's findings of fact and conclude that the record supports the findings, with minor modifications reflected below.<sup>3</sup> We summarize those facts as follows.

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<sup>1</sup>The full text of the decision appears at 10 MLC 1262 (H.O. 1983).

<sup>2</sup>The Union did not object to the Town's delayed submission of a supplementary statement to the Commission. In addition, the Town provided information that it had mailed its supplementary statement to the Commission, with a copy to the Union, in mid-November 1983. We have therefore accepted and considered the statement.

<sup>3</sup>The Town has only objected to the hearing officer's finding that police officers  
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During the time material to this case, the Lee police force has been composed of between five and eight officers. The Union represents all full-time officers appointed pursuant to Civil Service. Since May 1978, the Town has requested a "residence preference" list from the Civil Service Commission, and both the Notice of Civil Service Examination and the resulting list of eligible applicants have indicated that Lee residency was preferred.

The Town's by-laws, adopted in 1954, include a provision that "[a] citizen of the Town qualified under the General Laws applicable to police departments in towns under civil service shall be eligible for membership in the police department." The Town provides all police officers with copies of the by-laws but has not specifically advised prospective candidates for employment that residency is a requirement for becoming or remaining an employee in the police department.<sup>4</sup> The collective bargaining agreement between the Union and the Town, effective July 1, 1982 through June 30, 1983 contains no residency requirement.

In January 1983, Officer Gamelli, a Lee resident and member of the bargaining unit represented by the Union, was not allowed to move outside of the Town. The Town had not notified the Union that it was imposing a requirement of continued residency upon members of its bargaining unit, nor did the Town offer to negotiate about the requirement. On April 20, 1983, the Union's attorney sent a letter to the Town's Board of Selectmen protesting the implementation of a residency requirement, notifying the Town that the Union was filing a charge with the Commission and informing the Town that the Union would withdraw the charge if the Town complied with its obligations under c.150E. The Town did not rescind its requirement.

Prior to the incident involving Officer Gamelli, three police officers lived outside the Town during their employment. Two of these officers, Winters and Smith, were non-residents when the Town hired them as provisional Civil Service appointments under G.L. c.31. Winters, who was hired in 1971, worked for three or four years as a full-time provisional employee. He kept the Town informed of his address at all times and received calls at his out-of-town residence on several occasions concerning assignments. In 1975, after moving into the Town, Winters received a permanent Civil Service appointment. There is no evidence that the Town ever challenged Winters about his non-residence or asked him to move to Lee.

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<sup>3</sup> (continued)

in Lee are not specifically advised during the hiring process that they must be, become or remain residents of the Town. That finding is addressed infra.

<sup>4</sup>We agree with the hearing officer that the evidence as to the Town's communication of any residency requirement warrants this finding. John D. DeVarennes, Chairman of the Board of Selectmen, testified that he never advised prospective candidates of a residency requirement. The Town's argument that DeVarennes is only one member of the Board of Selectmen is misplaced. If the Town had evidence that other members of that Board had informed prospective employees, current employees or the Union that residency was a requirement for hire or continued employment, the Town should have produced that evidence at the hearing. We note that the record also discloses that the Union's witness, Officer Winter, testified that he did not remember being informed of a residency requirement.



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Smith worked from 1972 to 1974 as a full-time provisional Civil Service police officer for the Town without becoming a resident. Smith left his employment without attaining permanent Civil Service status. There is no evidence that the Town imposed a residency requirement upon him.

The third officer who lived outside of the Town during his employment by the Town was Officer Litchfield. Litchfield was a permanent Civil Service employee who resided in Lee for many years and then moved outside the Town limits a month or two before he died, but while he was still employed as a police officer. There is no evidence that the Town imposed a residency requirement on him.

#### Opinion

The Commission has held that a requirement that current employees establish residency as a condition of continued employment is a mandatory subject of bargaining.<sup>5</sup> City of Worcester, 5 MLC 1414, 1415 (1978); Boston School Committee, 3 MLC 1603 (1977). An employer must provide a union representing its employees with prior notice and an opportunity to bargain if the employer proposes to institute a residency requirement for present employees. Failure to do so is a violation of Section 10(a)(5) and (1) of the Law. City of Worcester, *supra*. The Town argues that it has not instituted a new residency requirement by refusing to allow Officer Gamelli to move outside the Town limits. It asserts that its past practice has been to require Town residency as a condition of continuing employment and maintains that the police officers are aware of this requirement through the by-law and the notices of Civil Service Examinations. The evidence, however, does not support this argument.

The Union established that three officers lived outside of the Town while working on the Lee police force. In the early 1970's, Officers Winters and Smith each worked for two to four years in the Police Department while residing outside the Town. Because Winters and Smith held provisional Civil Service status, the Town contends that their out-of-town residence is inapplicable to a determination of the past practice. We agree with the hearing officer that the by-law provides no basis for differentiating between provisional and permanent Civil Service status and that the parties' collective bargaining agreement does not exclude provisional employees from the bargaining unit.<sup>6</sup> The Town can only point to the fact that Winters received a permanent appointment after he moved to Lee. There is no evidence, however, that Winters' permanent appointment was conditioned upon a residency requirement.

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<sup>5</sup> A residency requirement imposed only on new applicants, however, that has no effect on conditions of continuing employment is not a mandatory subject of bargaining. Boston School Committee, 3 MLC 1603, 1608 (1977).

<sup>6</sup> Article I of the July 1, 1982 through June 30, 1982 agreement between the Town and Union provides that the Union represents "all full-time Civil Service appointed police officers... ." Civil Service law specifically covers provisional appointments, G.L. c.31, Sections 12, 13 and 14.



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The facts concerning Officer Litchfield, a permanently appointed Civil Service employee, also support the Union's position that continuing Lee residency was not an established past practice. Litchfield moved outside of the Town and notified the Town of his new address. The Town argues that there is no evidence that it would have allowed Litchfield to continue to reside outside of the Town. The Town also contends that Litchfield's situation was unique because his move was prompted by certain personal exigencies. The record, however, reflects that the Town did permit Litchfield's out-of-town residence. Even if the Town considered Litchfield's personal difficulties to be extenuating circumstances, that factor leads to the conclusion that residency was not an absolute requirement.

Because the Union presented evidence that Litchfield, Winters and Smith were not subject to a residency requirement, the burden shifts to the Town to rebut the evidence of non-enforcement by presenting proof that the by-law has been consistently enforced. It has not done so. Moreover, the Town has also not produced sufficient evidence from which we can conclude that police officers who have continued to reside in Lee have done so because they were on notice that such residency is a condition of employment.<sup>7</sup> The language of the by-law is ambiguous. It implies a preference for hiring Lee residents but does not render non-residents ineligible. The preference for Lee residents in the notices of Civil Service examination suffers from the same ambiguity. The Town produced no witnesses who testified that police officers were aware of a requirement of continued Lee residency.

We find, therefore, that the Union has established that there was no requirement of continuing Lee residency as a condition of employment,<sup>8</sup> and that the Town has unilaterally altered this practice by refusing to allow Officer Gamelli to move outside of the Town. Therefore, unless the Town's by-law relieves it of its duty to bargain, the Town has violated Section 10(a)(5) of the Law.

The existence of a by-law pre-dating a collective bargaining agreement does not remove the bargaining obligation. If there is a conflict between a by-law and a subsequent collective bargaining agreement, the by-law must give way to the collective bargaining agreement. G.L. c.150E, Section 7. City of Worcester, 5 MLC at 1415 (1978); City of Springfield, 4 MLC 1517 (1977). Similarly, when a subject is within the scope of negotiations pursuant to Section 6 of the Law, but not contained in the collective bargaining agreement, the employer is still required to bargain over the subject despite the existence of a town by-law. Section 7 of the Law demonstrates the General Court's intent that the collective bargaining process is not to be frustrated by the presence of conflicting by-laws. See City of Springfield, *supra*.

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<sup>7</sup>The Town contends that Officer Gamelli "asked for" permission to move from the Town, and thus argues that he must have known of the residency requirement. The record does not support this assertion. No evidence was presented to indicate by what means the Town was informed that Officer Gamelli was considering moving outside of Lee.

<sup>8</sup>The infrequency of the employment of non-Lee residents does not negate the Union's claim that the past practice was to allow non-residency. The Commission has previously found the existence of a past practice where the frequency of the practice was "sporadic." City of Everett, 8 MLC 1393 (1981).



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In sum, the Union established that the Town did not maintain a practice of requiring residency as a condition of employment. The Town unilaterally changed its past practice without affording the Union notice or an opportunity to bargain over the change. The Town has not rebutted the Union's prima facie case. Therefore, we affirm the hearing officer's conclusion that the Town violated Sections 10(a)(5) and (1) of the Law by unilaterally implementing a new condition of employment when it denied a bargaining unit employee permission to move outside the Town limits in January 1983.

ORDER

WHEREFORE, based upon the foregoing, WE HEREBY ORDER that the Town of Lee shall:

1. Cease and desist from:
  - a. Failing and refusing to bargain collectively in good faith with the Lee Police Association (Union) over establishing a residency requirement as a condition of continued employment in the Town of Lee Police Department;
  - b. Implementing a residency requirement as a condition for continued employment in the Town of Lee Police Department prior to the earliest of the following conditions:
    - (1) an agreement with the Union on the establishment of a residency requirement for continued employment in the Town of Lee Police Department;
    - (2) a bona fide impasse in bargaining on the subject;
    - (3) the failure of the Union to commence bargaining within seven (7) days of notice of the Town's willingness to bargain and unconditional rescission of any residency requirement for continued employment.
  - c. In any like or similar manner, interfering with, restraining, or coercing any employees in the exercise of their rights guaranteed under G.L. c.150E.
2. Take the following affirmative action which will effectuate the policies of the Law:
  - a. Post in conspicuous places where employees represented by the Union usually congregate, or where notice is usually posted, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees;
  - b. Upon request of the Union, bargain collectively in good faith prior to establishing a residency requirement as a condition of continued employment in the Town of Lee;



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- c. Notify the Commission, in writing, within ten (10) days of the service of this decision and order of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, Chairman  
GARY D. ALTMAN, Commissioner  
MARIA C. WALSH, Commissioner

[NOTE: Notice to Employees Omitted.]

