BOSTON SCHOOL COMMITTEE AND BOSTON TEACHERS UNION, LOCAL 66, AFT, MUP-2503. BOSTON SCHOOL COMMITTEE AND BOSTON ASSOCIATION OF SCHOOL ADMINISTRATORS AND SUPERVISORS, MUP-2528. BOSTON SCHOOL COMMITTEE AND BOSTON PUBLIC SCHOOL BUILDINGS CUSTODIANS ASSOCIATION, MUP-2541 (4/15/77).

(50 Duty To Bargain)
54.512 hiring
54.513 promotion
54.520 residency requirement
54.7 permissive subjects
54.8 mandatory subjects
(60 Prohibited Practices By Employer)
67.8 unilateral change by employer

Commissioners Participating: James S. Cooper, Chairman; Garry J. Wooters, Commissioner

Appearances:

Philip J. Dunn, Esq.	- Counsel for the Commission
John F. McMahon, Esq.	- Counsel for the Boston Teachers Union (Case No. MUP-2503)
Richard W. Coleman, Esq.) Karl E. Klare, Esq.)	- Counsel for Boston Association of School Administrators and Supervisors (Case No. MUP-2528)
James T. Grady, Esq.	- Counsel for the Boston Public School Buildings Custodians Association (Case No. MUP-2541)
Joseph W. Ambash, Esq.) Jonathan D. Canter, Esq.)	- Counsel for the Boston School Committee (Case Nos. MUP-2503, MUP-2528 and MUP-2541)

DECISION

Statement of the Case

On May 14, 1976, a Complaint of Prohibited Practice was filed with the Labor Relations Commission (Commission) by the Boston Teachers Union, Local 66, American Federation of Teachers, AFL-CIO (BUT) alleging that the Boston School Committee (School Committee) had engaged in certain practices prohibited by Chapter 150E of the General Laws (the Law). This Complaint was docketed as Case No. MUP-2503. An Amended Complaint was filed on May 17, 1976 by the BTU.

On June 18, 1976, a Complaint of Prohibited Practice was filed with the Commission by the Boston Association of School Administrators and Supervisors (BASAS) alleging that the School Committee had engaged in similar practices prohibited by the Law. This Complaint was docketed as Cast No. MUP-2528.

On June 30, 1976, a Complaint of Prohibited Practice was filed with the Commission by the Boston Public School Buildings Custodians Association (Custodians Association) alleging that the School Committee had engaged in similar practices prohibited by the Law. This Complaint was docketed as Case No. MUP-2541.

The Commission investigated the Complaints pursuant to its authority under Section 11 of the Law and issued Formal Complaints of Prohibited Practices against

the School Committee in MUP-2503 on July 13, 1976, in MUP-2528 on July 21, 1976, and in MUP-2541 on July 29, 1976.

On July 20, 1976, the Commission consolidated MUP-2503 and MUP-2528. The parties to these actions submitted and the Commission accepted a stipulation of facts, with each party reserving the right to argue in its brief as to the relevancy of any such facts. Briefs were timely filed by the School Committee, BTU and BASAS.

On July 20, 1976, the Commission consolidated MUP-2541 solely for the purpose of decision with MUP-2503 and MUP-2538. MUP-2541 was heard by the Commission on August 6, 1976. The parties to this action submitted and the Commission accepted a stipulation of facts, with each party reserving the right to argue in its brief as to the relevancy of any such facts. Briefs were timely filed by the Custodians Association and the School Committee.

Findings of Fact

Upon all of the evidence and the record as a whole, the Commission makes the following findings of fact:

1. The City of Boston is a municipal corporation situated in the County of Suffolk, and is a "public employer" within the meaning of Section 1 of the Law.

2. The School Committee is the representative of the City of Boston for purposes of collective bargaining with BTU, BASAS and the Custodians Association.

3. BTU, BASAS, and the Custodians Association are "employee organizations" within the meaning of Section 1 of the Law.

On May 12, 1976, the School Committee adopted an order with respect to the household residency of employees and incorporated this order in the Rules and Regulations of the School Committee and the School Department. On May 25, 1976, the School Committee substituted the following residency requirements for the order adopted on May 13, 1976:

> "ORDERED, That all persons hired or promoted by the School Department after July 1, 1976 shall within three months of such hiring or promotion become residents of the City of Boston and file with the Secretary of the School Committee an affidavit that they are residents. Failure to do so shall be deemed a voluntary termination of employment."

In adopting the residency requirement on May 12, 1976 and revising it on May 26, 1976, the School Committee acted unilaterally and without prior negotiation with any of the employee organizations that are parties hereto. Prior to

the adoption of this residency requirement, the employees represented by these three employee organizations were unrestricted by any residency requirement.[1]

On June 7, 1976, the School Committee by letter to the Commission clarified the meaning of the residency rule adopted on May 26, 1976 as it related to promotions. This letter of clarification stated in part:

> The proposed rule would require that employees become residents of the City within the time period set forth in the rule in order to remain in their new position. If they did not become residents they would be entitled to return to their former position.

On July 26, 1976, the School Committee voted to delay implementation of the residency rule until the conclusion of these proceedings. The School Committee ordered, however, that

> all persons hired or promoted after July 1, 1976, shall be hired or promoted subject to [the residency rule]....

Opinion

As a general rule, a public employer may not unilaterally change the wages, hours, standards of productivity and performance, or any other terms and conditions of employment of its organized workers without first negotiating with their union. City of Boston, 3 MLC ___, MUP-2646, 2647 (1977); Town of Marblehead, 1 MLC 1140 (1974); Town of Andover, 1 MLC 1103 (1974). The Complainants herein assert that the Committee made such a unilateral change in a condition of employment when the Committee introduced its residency requirement in May, 1976. The Unions contend that the Committee thereby violated Sections 10(a)(5) and (1) of the Law.

To support such a charge, the evidence must show some pre-existing condition of employment, unilaterally altered by the employer, affecting a term or condition of employment. Town of Andover, supra. It is undisputed in the instant proceeding that the School Committee initiated a unilateral change when it enacted the residency rule in May, 1976. The only disputed issue is whether this rule is a term and condition of employment.

In resolving this issue we must determine the precise effect of the residency rule. A residency rule establishes a condition of continued employment if an employee is required to reside in the municipality during the term of employment. In comparison, a residency rule establishes a condition of hire or

[1] All of the employee organizations offer, as exhibits numbered 1-7, former School Committee Rules and Regulations and a vote of the Committee on February 17, 1948 to repeal all residency requirements. The Committee stipulates to the authenticity of these exhibits, but objects to their relevance. These documents are relevant to establish whether practice of prior years constituted an established procedure with regard to residency, and are accepted into evidence for that purpose.

recruitment standard if a job applicant will be rejected because of non-resident status. A residency rule establishes a condition of promotion if resident status is considered in selecting the individual for promotion.

The residency rule here compels employees of the School Committee hired or promoted after July 1, 1976 to become residents of the City of Boston within three months of their hire or promotion, and remain residents thereafter. Employees subject to the rule who fail to maintain a Boston residence are subject to discharge or loss of their promotions. This rule, however, does not establish a prerequisite for hire or promotion, since an applicant for hire or promotion will be considered regardless of his or her residence. Where this residency rule sets a requirement that must be complied with only in order for employees to maintain their previously acquired employment or promotion, we conclude that the rule establishes a condition of continued employment. See Detroit Police Officers Association v. City of Detroit, 391 Mich. 44, 215 N.W. 2d 803, 85 LRRM 2536 (1974). The question raised here is quite narrow: is residency, as a requirement for retaining a job or promotion, a "condition of employment" within the meaning of the Law?

In the private sector, and mployer need not bargain over managerial decisions which lie at the core of entrepreneurial control, and which are fundamental to the basic direction of the corporate enterprise. Such core entrepreneurial decisions are not viewed as conditions of employment. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 57 LRRM 2609 (1964).

> Those managerial decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from the area [of collective bargaining]. 57 LRRM at 2617.

By analogy, this Commission has concluded that certain decisions regarding core educational or governmental policy need not be submitted to the negotiation process. Town of Danvers, MLC , MUP-2292, MUP-2299 (1977). In Groton School Committee, 1 MLC 1221 (1974), we decided that matters pertaining to curriculum were not conditions of employment that needed to be bargained over.

This "core educational policy" concept, however, is limited. As the Commission said in Medford School Committee, 1 MLC 1250, 1253 (1975),

> School Committees [have] the right to determine matters affecting basic educational policy which lie at the core of a school district's governmental control...[But] obviously, when the Legislature enacted Chapter 149 [and later Chapter 150E], it contemplated that certain subjects - those relating to "wages, hours, and conditions of employment" - would be removed from the sphere of the municipal employer's exclusive unilateral control - without thereby intending in any manner to undermine the legislative policies reflected in Chapter 71, Section 37.

In Medford, we concluded that work weeks, working hours, work load,

seniority, and building evaluations for pay purposes were all conditions of employment over which the parties had to bargain.

The determination of what is a condition of employment, as opposed to a core educational policy matter, is not subject to hard rules. We must balance the competing interests. Is the predominant effect of a decision directly upon the employment relationship, with only limited or speculative impact on core educational policy? Or is the predominant effect upon the level or types of education in a school system, with only a side effect upon the employees? See Town of Danvers, supra, slip opinion p. 20, 21.

The residency rule adopted by the School Committee certainly has a direct and profound impact upon the employment relationship between the School Committee and the bargaining unit members. The rule must be adhered to in order for employees to retain their jobs, and therefore impinges directly on employment security.

Looking to the other side of the equation, the School Committee argues that the newly introduced residency rule involved an educational policy determination, and that the School Committee was therefore entitled to unilaterally impose this requirement without bargaining.[2] Of course, every decision of the School Committee is presumably made with the ultimate goal of providing quality education in the City of Boston. The Legislature in passing G.L. c.150E nevertheless commanded the School Committee to bargain collectively regarding conditions of employment. It must be concluded that a decision by the School Committee does not fall outside of the scope of bargaining merely because that decision is made with an eye toward the interest of the public in a sound educational system. Where a School Committee decision will impact directly on the employment relationship with bargaining unit members, that decision should be insulated from the bargaining process only if the decision goes directly to the issue of level or types of services to be provided in the school system.

Certain School Committee members expressed their view that implementation of this residency rule would have a beneficial effect upon the school system. The residency decision, however, did not involve the basic issue of how much education or what types of educational programs to provide. In view of the direct impact on employees, even assuming that the residency rule would be educationally beneficial, we conclude that the School Committee was obligated to bargain with these unions prior to the introduction of such a rule.

Finally, the Commission is cognizant of decisions from other jurisdictions where it has been decided that residency is a bargainable condition of employment

[2]The School Committee offers as its exhibit 1 an "Excerpt from School Committee meeting [minutes] of May 26, 1976 re: residency requirements." In this Excerpt, certain members of the Committee supported the residency rule and gave their reasons for supporting it. The unions object to the relevancy of this document. The employer answers that the minutes support its position that educational policy underlines the residency rule, and that these minutes are therefore relevant in determining whether the residency rule involves a condition of employment. The minutes are accepted into evidence for the limited purpose of their tendency to show that members of the School Committee considered that the introduction of a residency rule involved an educational policy decision.

within the meaning of those jurisdictions' public sector collective bargaining laws. Detroit Police Officers Association v. City of Detroit, 391 Mich. 44, 214 N.W. 2d 803, 85 LRRM 2536 (1974); City of Brookfield v. Wisconsin Employment Relations Commission, 87 LRRM 2099 (Wisc. Cir. Ct., Waukesha County, 1974); Madison Professional Police Officers Association et.al. v. City of Madison, GERR 696:8, WERC Case XLVI, No. 20976, MP-681, Decision No. 15095 (1976). See also, City of Auburn, 9 PERB ¶ 3085, p. 3151 (1976). While these cases are not controlling, they provide further support to the Commission's conclusion that residency is a condition of employment over which a public employer must bargain in good faith, pursuant to Chapter 150E.

As the Commission has concluded that the School Committee unilaterally imposed its residency rule and thereby changed a pre-existing condition of employment, and altered terms and conditions of employment without prior negotiation or agreement with the parties herein, we find that the action by the School Committee constituted a refusal to bargain in good faith and was in violation of Section 10(a)(5) of the Law. We further conclude that the action of the Committee tended to interfere with, restrain and coerce employees in the exercise of their right to bargain collectively, and was a further violation of Section 10(a)(1) of the Law.

Our decision here requires that the Boston School Committee bargain in good faith if it considers introducing a residency rule as a condition of continued employment for its organized employees. This duty to bargain in good faith does not compel either party to agree to any proposal or make any concession. We express no opinion on the wisdom of a residency rule.

While not raised in these cases, we wish to express our views regarding the duty to bargain over residency as a condition of hire or promotion. Although we hold that residency as a condition of continued employment is a mandatory subject of bargaining, we conclude that residency purely as a condition of hire is not such a mandatory subject. In so concluding, we note first that Section 5 of the Law gives the exclusive representative

> the right to act for and negotiate agreements covering all employees in the unit....(emphasis added).

Mere applicants for hire, who have had no prior employment within the bargaining unit in question, are not "employees in the unit ...." The exclusive representative therefore does not have the right under Section 5 to bargain on behalf of such applicants.

The Michigan Court of Appeals has similarly concluded that residency as a condition of hire is not a mandatory subject of bargaining, under Michigan's Public Employment Relations Act (PERA): MCLA 423.201 et. seq., MSA 17.455(1) et. seq. Detroit Board of Education v. Detroit Federation of Teachers, 65 Mich. App. 182, 237 N.W. 2d 238, 92 LRRM 2121 (1975). See also Detroit Police Officers Association v. Detroit, 391 Mich. 44, 214 N.W. 2d 803, 85 LRRM 2536 (1974). The New York Public Employment Relations Board reached the same result in City of Buffalo, 9 PERB ¶ 3015, p. 3028 (1976).

The U.S. Supreme Court's decision in Allied Chemical and Alkali Workers of America, Local I v. Pittsburg Plate Glass Co., 404 U.S. 157, 78 LRRM 2974 (1971) gives added support to our conclusion here. The Court held that a union has no right under the National Labor Relations Act to insist on bargaining over the benefits being paid to current retirees of a company since retirees are not employees within the meaning of the Act. The obligation of the employer to bargain collectively

> extends only to the "terms and conditions of employment" of the employer's "employees" in the "unit appropriate for such purposes" which the unit represents. (emphasis added) Allied Chemical Workers, supra, at 87 LRRM 2976.

We believe that the Supreme Court's analysis regarding retirees pertains as well to applicants for employment.

In a line of cases beginning with Houston Chapter, Associated General Contractors, 143 NLRB 409, 53 LRRM 1299 (1963), enf'd 349 F.2d 449, 59 LRRM 3013 (5th Cir. 1965), cert. den. 382 U.S. 1026, 61 LRRM 2244 (1966), the Board determined that terms of hiring (hiring halls) in the construction industry at least to some extent are mandatory subjects of bargaining. The Board noted that the construction industry is tansitory in nature, with employees moving regularly from job to job and employer to employer. Because of this, there is no job security through seniority with one employer. In enforcing the Board's order, the Court of Appeals noted that employees in the construction industry aim to establish job security and seniority through the negotiation of non-discriminatory hiring halls.

> It seems clear that this aim bears directly on regulating relations between the employers and employees in the industry involved, and it would settle a term or condition of employment. This is a multi-employer situation where the essence of employee security would rest on job priority standards being established through a common source - the hiring hall. In these circumstances we hold that the demand for a non-discriminatory hiring hall clause...presented a mandatory subject of bargaining. NLRB v. Associated General Contractors, 349 F.2d 449, 59 LRRM 3013, 3015 (5th Cir. 1965).

To the extent that a similar fact situation exists in the public sector in Massachusetts, certain terms of hire might be mandatory subjects of bargaining under the Law.

A single residency rule could constitute both a condition of hire and continued employment. See Detroit Police Officers Assn. v. City of Detroit, 391 Mich. 44, 214 N.W. 2d 803, 85 LRRM 2536 (1974). A rule requiring that only residents be hired, and that non-residents be terminated, would be such a rule. An employer could unilaterally institute that portion of the rule establishing a condition of hire. But the employer would be bound to negotiate with its employees' exclusive representative before introducing the portion of the rule establishing a condition of continued employment.

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Turning to residency as a condition of promotion from one job to another within the same bargaining unit, we conclude that this is a mandatory subject of bargaining. See Town of Danvers, supra, slip opinion p. 27, and cases cited therein. Certainly standards of promotion are a "condition of employment" within the common meaning of that phrase. The promotional opportunities available to workers are of utmost importance in that the possibilities of increased pay, benefits and job satisfaction are at issue.

In Detroit Police Officers Assn. v. City of Detroit, 61 Mich. App. 487, 233 N.W. 2d 49, 90 LRRM 2912 (1975), the Michigan Court of Appeals concluded that the setting of standards of promotion is not a managerial prerogative under the test established in Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 57 LRRM 2609 (1964).

> The decision concerning the factors to consider in granting promotions and the weight to be given each factor is not fundamental to the basic direction of a police department. Management prerogative is not threatened by allowing the DPOA some input on the subject of promotions. Fundamental police department policy is not undermined by a decision granting unit members the right to bargain about the conditions under which they will be allowed to rise in the ranks of the profession of their choice. By the same token, a subject of such importance to unit members impinges very directly on their employment security, and therefore falls within the limits set by section 8(d) of the NLRA and section 15 of PERA. 90 LRRM at 2914,5.

The Michigan Court of Appeals held that standards of promotion within the bargaining unit are a mandatory subject of bargaining. Accord, City of Albany, 7 PERB ¶ 3078, p. 3132, 3135 (1974).

The Second Circuit Court of Appeals reached a similar result in NLRB v. Century Cement Co., 208 F.2d 84, 33 LRRM 2061 (2nd Cir. 1953). The Court noted that promotion based on seniority is a "proper" subject of bargaining, and held that the employer's failure to bargain in good faith on this subject constituted a violation of Section 8(a)(5) of the Act. See also American Gilsonite Co., 121 NLRB 1514, 43 LRRM 1011 (1958), supplemented by 122 NLRB 1006, 43 LRRM 1242 (1959), where the Board held that unilateral institution of aptitude tests as a condition of transfer to certain bargaining unit assignments constituted a violation of Section 8(a)(5) of the Act.

We further conclude that residency as a pre-condition of promotion to a job in a different bargaining unit is a mandatory subject of bargaining, where the promotional position constitutes a step in an established career ladder or is a position which is typically filled from within the bargaining unit. We have already expressed our view that residency as a condition of promotion within the bargaining unit is a mandatory subject of bargaining. In so ruling, we noted the importance of promotions to bargaining-unit members because of the relationship between promotions and increased pay, benefits and prestige. Promotional opportunities are not less important merely because the promotional

position is within a different bargaining unit. The possibility of promotion is still a most important condition of employment for those employees who aspire to the promotional position. We believe that the bargaining unit which represents the potential promotees has the right under the Law to bargain over these promotional standards. Detroit Police Officers Assn. v. City of Detroit, 61 Mich. App. 487, 233 N.W.2d 49, 90 LRRM 2912 (1975).[3]

If the promotional position is "managerial" or "confidential" within the meaning of the Law, however, the employer is not bound to bargain regarding the standards of promotion. An employer need not consider the views of a union in determining what criteria to consider in selecting individuals to fill such positions. Any other rule would unduly hinder the employer in the conduct of its labor relations affairs. The employer must be able to select individuals who the employer views as loyal to it, unfettered by the views of the employees' collective bargaining agents.

Finally, it is our view that residency as a condition of promotion to a position currently unrepresented, but subject to the collective bargaining process under the Law, is a mandatory subject of bargaining. We again limit our views here to cases where the promotional position constitutes a step in a typical career ladder. The fact that employees in the promotional position are currently unrepresented should not preclude the bargaining representative of potential promotees from bargaining over the standards of promotion. The possibility of promotion is equally important to the aspiring promotees, whether or not the employees in the promotional position are organized. Unlike the case of promotion to a managerial or confidential position, here there is no undue infringement upon the employer's choice of persons to assist it in its policy-making and labor relations function.

ORDER

WHEREFORE, based upon the foregoing, it is hereby ORDERED that the Boston School Committee shall:

1. Cease and desist from:

   a. Unilaterally implementing a rule requiring residency as a condition of continued employment with the Boston Teachers Union, Local 66, American Federation of Teachers, AFL-CIO; the Boston Association of School Administrators and Supervisors; and Boston Public School Buildings Custodians Association.

   b. In any like or related manner, refusing to bargain in good faith with the exclusive representatives of its employees.

   c. In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed by the Law.

[3] It is possible that the "promotional standards" clause negotiated by one bargaining unit could unduly interfere with the promotional opportunities available to employees of a second bargaining unit, where employees in each bargaining unit aspire to common promotional positions. We do not reach that issue her.

2. Take the following affirmative action which will effectuate the policies of the Law:

   a. Rescind the residency rule adopted by the Boston School Committee on May 12, 1976 and revised on May 26, 1976.

   b. Upon request, bargain in good faith with the representatives of BTU, BASAS and the Custodians Association before introducing a residency condition of employment for employees of the Boston School Committee represented by these bargaining agents.

   c. Post in conspicuous places where employees represented by BTU, BASAS and the Custodians Association usually congregate, or where notices are usually posted, and for a period of thirty (30) days thereafter, copies of the attached Notice to Employees.

   d. Notify the Commission, in writing, within ten (10) days of the service of this Decision and Order of the steps taken to comply therewith.

SO ORDERED

NOTICE TO EMPLOYEES OF THE BOSTON SCHOOL COMMITTEE
POSTED BY ORDER OF THE MASSACHUSETTS LABOR RELATIONS COMMISSION

The Massachusetts Labor Relations Commission, in a Decision dated April 15, 1977, found that the Boston School Committee committed a prohibited practice in violation of Section 10(a)(5) and (1) of the General Laws, Chapter 150E.

Chapter 150E of the General Laws gives public employees the following rights:

To engage in self-organization

To form, join or assist any union.

To bargain collectively through representatives of their own choosing.

To act together for the purpose of collective bargaining or other mutual aid or protection.

To refrain from all of the above.

WE WILL NOT do anything that interferes, restrains or coerces employees in their exercise of these rights. More specifically,

WE WILL rescind the residency rule adopted by the Boston School Committee on May 12, 1976 and revised on May 26, 1976.

WE WILL upon request bargain in good faith with the representatives of the Boston Teachers Union, the Boston Association of School Administrators and Supervisors, and the Boston Public School Buildings Custodians Association before introducing a residency condition of employment for employees of the Boston School Committee represented by these bargaining agents.