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Public Employer Bulletin

A review and analysis of emerging developments affecting public sector employees

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Residency Issue Looms Large in Bargaining and Arbitration

The issue of residency for police, fire and security employees is a hot topic at the bargaining table for Illinois public employers. Unions have seized upon recent legislative changes and are attempting to loosen or eliminate residency rules for their members. Recent arbitration decisions suggest a gradual erosion of the employer's heretofore absolute right to mandate in-town residency. Although arbitration results are fact-specific, they can be useful in formulating strategies to address the issue at the bargaining table and, of course, in preparing for arbitration if you find yourself in that posture. Always remember that an arbitrator retains the right to consider evidence of bargaining history on this and other issues raised at the table.

The Illinois Public Relations Act

Prior to 1997, the issue of residency requirements for firefighters, police officers, and other related public employees was not considered a mandatory subject of bargaining, and thus could not be submitted to interest arbitration if the parties were unwilling or unable to reach agreement during collective bargaining. However, in 1997 the Illinois Public Labor Relations Act ("IPLRA") was amended to mandate bargaining over residency

requirements in municipalities under 1,000,000, so long as the requirement did not allow residency outside the state. This change did not apply to persons who are employed by a combined department that performs both police and firefighting services.

There have been several noteworthy interest arbitrations concerning residency requirements for firefighters and police officers following impasse during negotiations. With some exceptions, the decisional trend has been to uphold an in-town or radius-from-town residency requirement if one already exists, but not to impose new requirements that do not contain generous boundaries well in excess of the village limits.

Pre-Amendment Decisions

Existing Residency Requirements Upheld

In 1993, the Village of Maywood went to interest arbitration over a residency requirement. *In re Interest Arbitration between Village of Maywood and Illinois Firefighters' Alliance, Maywood Council*, ISLRB No. S-MA-92-102 (1993) ("*Maywood I*"). At that time the IPLRA did not permit arbitration of residency requirements. However, the issue was "grandfathered" and hence arbitrable in this case because Maywood's contract specifically addressed residency requirements. Firefighers employed after a date certain were obligated to live in town.

Arbitrator Aaron Wolff found that the union had not met its burden of showing why the existing in-town residency requirement should be changed in favor of a union proposal to allow firefighters to live within the broader area served by the fire department, which included contiguous municipalities. The union claimed that the existence of a mutual aid pact involving all of these communities eliminated the need for in-town residency. The Arbitrator acknowledged that the Village's mutual aid pact, which permitted the Village to obtain prompt and sufficient manpower from other communities at a fire scene, reduced the likelihood of having to call off-duty firefighters. However, he rejected the union's contention that the pact made the residency requirement "superfluous." He noted that the union admitted that "response time to a fire is critical to safety of the public and that response may be affected by a delay in emergency

callback responses of employees." Although emergency callbacks are relatively infrequent, he found prompt response was critical when the need arose. Further, he was unpersuaded by comparisons to other communities' residency requirements because the evidence was mixed.

Two years later, the Village of Maywood found itself arbitrating the same issue again. *In the Matter of the Arbitration between Maywood Firefighters, Service Employees International Union, Local 1, and Village of Maywood,* ISLRB No. S-MA-95-167 (1995) ("*Maywood II*"). This time the union wanted to change the provision so that union members could reside anywhere within a 20-mile radius of Village Hall. Arbitrator Martin H. Malin agreed that the residency issue was arbitrable, but disagreed with the union's contention that a change in the status quo should be made.

The Village's main argument was that a residency requirement for firefighters was necessary to preserve the town's middle class. The fire department was also predominantly white so, the Village asserted, eliminating the residency requirement would appear to sanction continued "white flight" from the area. The union argued that firefighters had a legitimate interest in living outside of the town due to mediocre schools and the Village's high crime rate. Arbitrator Malin countered that, as compared to 1993 when *Maywood I* was decided, the Village might be a more desirable place to live due to its improved fiscal situation. He agreed with the Union's argument that residency had little to do with the Village's ability to fight fires, but noted that Maywood was not the only community to require residency of its employees, and it would come under extreme pressure from other employees subject to residency requirements if it eliminated the requirement for firefighters. At the end of the day, the Arbitrator imposed the Village's final offer not to change the residency requirement.

Post-Amendment Decisions

After the IPLRA was amended in 1997, the arbitrability of residency requirements was permissible, encouraging many unions to attempt to negotiate changes in existing residency requirements.

Arbitrator Modifies Unwritten Custom

In *In the Matter of Arbitration between City of Nashville, Illinois and Illinois Fraternal Order of Police Labor Council,* ISLRB No. S-MA-97-141 (1999), Arbitrator Raymond E. McAlpin determined that an in-town residency requirement was the status quo in Nashville based on the fact that all police officers lived within the City and it was the City's intent that all employees live within city boundaries. The Arbitrator ignored a City ordinance requiring residency because it was enacted during contract negotiations. The union proposed that all covered employees be allowed to reside within a six-mile radius of an intersection in the center of town, an area which did not include any other major towns or school districts.

The Arbitrator required the union to show why the status quo should be changed and decided it had met that burden. Mr. McAlpin found that the City's interest in prompt emergency response time and having children remain in the same school district were balanced by the interests of the officers to explore alternative housing opportunities in the area immediately beyond Nashville. He was unpersuaded by the City's argument that officers should live in the City because they were paid with taxpayer dollars, noting that many government employees do not live where they work. And since the prior status quo had not been decided by a voluntary written agreement, as in *Maywood I* and *II,* there was no other reason to continue the residency requirement. Accordingly, the Arbitrator adopted the union's proposal.

Village Loses Attempt To Impose Strict New Requirement

University Park's firefighter union convinced Arbitrator Matthew W. Finkin that an in-town residency requirement proposed by the Village should not be selected over the union's proposal of a 30-mile radius restriction. *In the Matter of the Interest Arbitration between Village of University Park and I.A.F.F. Local No. 3661,* ISLRB Case No. S-MA-99-123 (1999).

The Village's argument that public safety required a residency requirement was given little weight from Arbitrator Finkin because neither party considered safety an important issue when they were bargaining. He did acknowledge the issue of faster recall of off-duty personnel in emergency situations, but believed the issue

was "significantly mitigated" by the fact that, with the joint emergency response system in place, no emergency had ever materialized in which the Village was left unprotected. And although both parties provided data on the residency requirements of comparable municipalities, it was found to support neither position.

The Village argued that public welfare would be better served because an in-town requirement could foster a more racially diverse fire department in a predominantly African-American community. But Arbitrator Finkin questioned how one would follow from the other. "It is counter-intuitive that a narrowing of the applicant pool, by eliminating those who do not wish to move, including the elimination of potential African-American applicants, will increase the number of qualified African-American applicants." Other Village arguments – that firefighters would model good citizenship, increase public confidence, and contribute to the local economy – were discounted as "imponderables" by the Arbitrator. Mr. Finkin found no reason to alter the status quo of having no residency requirement. He ended up selecting the union's compromise offer of residency within a 30-mile radius of Village Hall.

Personal Freedom Becomes Legitimate Argument Against Residency

The Town of Cicero failed to retain its residency requirement of many years in a decision that appeared to turn largely on the Arbitrator's own social and political views on the issue of residency and the social and economic problems of the Town. In *Interest Arbitration between the Town of Cicero, Illinois and Illinois Association of Fire Fighters, Local 717*, ISLRB No. S-MA-98-230 (1999), Arbitrator Herbert M. Berman summarized the critical underlying issue of the case to be "the classic political choice between personal liberty and social welfare."

Arbitrator Berman considered at length the issue of appropriate comparable communities. The statistical testimony of Cicero's expert, a professor of sociology and public policy at the University of Illinois, was found to be flawed and biased in favor of communities with residency requirements. The union's analysis, although "not unflawed," was at least found to be objective because it was based strictly on population. According to Mr.

Berman, the fact that most cities of comparable population in the metropolitan Chicago area do not have city-limit residency requirements was "relevant, if not critical, to [his] decision."

Focusing on its "unique status as a blue collar industrial base community," the Town argued that eliminating the in-town residency requirement would be prejudicial to the community, in part because the firefighters were some of its highest-paid residents. It argued that if firefighters were allowed to move, then other municipal workers would likely push for similar treatment, which would cause "extreme economic and social upheaval." But Mr. Berman chose to resolve the "overriding philosophical choice between the 'liberty' of the individual firefighter and the social and economic 'welfare' of the Town of Cicero" in the firefighters' favor. He found that "67 firefighters in a town of 67,000 cannot be expected to carry the burden of the economic viability and social cohesion of the town," and that it would be futile to ask them to do so when they have little, if any, control over such problems. The Arbitrator therefore adopted the union's final offer, allowing firefighters to live in the large area bounded by Illinois Route 59 on the West, Interstate 80 on the South, Illinois Route 22 on the North and Lake Michigan on the East.

A Strong Victory for Management: Internal Comparability Warrants Retaining Status Quo

South Holland fared better in its residency arbitration with its police officers. In *In the Matter of the Interest Arbitration between the Village of South Holland and the Illinois Fraternal Order of Police Labor Council*, ISLRB Case No. S-MA-97-150 (1999), Arbitrator Elliot Goldstein relied heavily on the issue of internal comparability in granting the Village's proposal to maintain a three-mile radius residency requirement for all employees during their first 20 years of employment, and a 20-mile radius after their 20th year (the so-called "3/20/20 requirement"). The union had proposed a 20-mile radius for everyone.

Although external comparables were a major focus in the Cicero arbitration, here they were neither contested between the parties nor did they favor one side over another. Other factors were scrutinized more closely, particularly the issue of internal comparability. In South Holland's police department, officers worked alongside

telecommunicators, the only other group of unionized employees. The latter employees had agreed to adopt the same 3/20/20 requirement when negotiating its collective bargaining agreement a few years earlier. Arbitrator Goldstein found persuasive the Village's concern for a uniform residency requirement absent a compelling reason to differentiate among employee groups, and rejected the union's attempts to distinguish the officers from the telecommunicators for this purpose.

Most of the current police officers were in favor of expanding the residency requirement, but Arbitrator Goldstein found that such officer dissatisfaction had not adversely affected applicant flow or caused current officers to leave the department. He agreed with the Village's arguments that adopting a 20-mile radius restriction would have "significant social, philosophical and political consequences" on its efforts to sell South Holland as an "outstanding place to live." He rejected the union's attempt to categorize the issues of the potential "white flight" of its officers or the impact on the residents of officers moving out of the community in which they serve as "imponderables," as Arbitrator Finkin opined in *Village of University Park*. Mr. Goldstein found these issues worthy of consideration because they affected the interest and welfare of the community.

Conclusion

These decisions reveal the factors most likely to be considered by arbitrators when deciding residency requirements. The period of time the status quo requirement has been in place and whether or not it was bargained for are influential because, typically, the party seeking a change in the bargained-for status quo bears the burden of justifying the change. Although safety, particularly in certain urban areas, may no longer be considered as important as it was in *Maywood I* and *II,* due to the prevalence of joint response pacts with surrounding communities, evidence that off-duty personnel may be called back often, or response times would be substantially delayed, could be persuasive.

External and internal comparability are convincing if supported by competent statistical evidence. The impact on a town's social and economic viability by a residency requirement may also appeal to an arbitrator, as in *Village of South Holland.* But, as *Town of Cicero* shows, if the

town's problems are so severe that a residency requirement would have little effect, the infringement on an employee's personal freedom may outweigh the town's interests. And, as *City of Nashville* teaches, if the parties want substantially different requirements, it might be best for one to offer a compromise requirement that could address the concerns of both parties.

Finally, it seems evident from the cases to date that one of the "maxims" of interest arbitration that a party may not typically or easily achieve victory through interest arbitration on a so-called "breakthrough" issue – has not yet been tested. Management negotiators should consider the implications of this maxim when planning their bargaining strategy, whether or not residency has been previously bargained in your jurisdiction.

If you have any questions about this article, please contact James Spizzo at (312) 609-7705, Charis Runnels at (312) 609-7711, or any other Vedder Price attorney with whom you have worked.

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Supremes Rule on Immunity From ADEA Suits

The Constitution prohibits states from being sued by individuals in federal court. At the same time, the Constitution allows Congress to limit this right, known as sovereign immunity, so long as Congress acts within its power. If Congress appropriately abrogates, or invalidates, state sovereign immunity, individual citizens may sue a state or a state employer in federal court. The Supreme Court recently considered whether sovereign immunity protects states from being sued under the federal age discrimination law.

On January 11 the U.S. Supreme Court, in *Kimel v. Florida Board of Regents*, held that states are immune from suit by individuals under the Age Discrimination in Employment Act ("ADEA"). The Court held that the ADEA was an improper exercise of Congress' power under the Constitution. The net effect of this ruling is that, unlike private employers, states and state employers

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cannot be sued in federal court under the ADEA.

The Supreme Court used a two-step analysis in reaching its determination, focusing first on Congressional intent and the language of the statute, and then on whether Congress exceeded its power. The first inquiry was whether Congress made its intention to invalidate states' sovereign immunity "unmistakably clear" in the statute. The Court found that the ADEA reflects this intent by stating that it shall be enforced in accordance with a provision of the Fair Labor Standards Act which, in turn, authorizes employees to maintain actions against "any employer (including a public agency) in any federal or state court of competent jurisdiction."

Then the Court decided whether Congress had exceeded its authority. The Court's test is whether there is a "congruent and proportional" relationship between the injury to be prevented and the remedy adopted to rectify it. In other words, Congress must be addressing a wrong with the appropriate measures to override sovereign immunity.

Applying this standard, the Supreme Court held that Congress had exceeded its authority because the ADEA was not enacted to remedy rampant age discrimination by public employers. The legislative history did not show real concern about age discrimination in the public sector. Further, older persons, unlike those who suffer discrimination because of race or gender, have not been subject to a history of purposeful unequal treatment, and old age is not a categorical minority because everyone ultimately will face it. The Court stated that the extension of the ADEA to the states was "an unwarranted response to a perhaps inconsequential problem." Therefore, Congress did not have the power to overcome the states' constitutional right to sovereign immunity.

Under this decision, state employers are no longer subject to suit under the ADEA. Not surprisingly, the American Federation of State, County and Municipal Employees (AFSCME) issued a statement denouncing the Supreme Court's decision, declaring that "public employees are not second-class citizens." *New York Times*, January 12, 2000. However, most states have state age discrimination statutes that cover state employment.

The rule may be no different for other public employers. The ADEA defines "public agency" as "the Government

of a State or political subdivision thereof," and "any agency of…a State, or a political subdivision of a State." Thus cities, counties, municipalities, and other governmental subdivisions could ultimately be found to enjoy the same immunity as the states. Although *Kimel* does not specifically address this question, and no case has yet answered this specific question, other Supreme Court decisions infer this result.

A similar issue presented in *Kimel*, as it relates to the Americans With Disabilities Act, was accepted for review by the Supreme Court but settled last week, prior to decision. The circuit courts of appeal accordingly remain divided on the issue of whether states can be sued under the ADA.

If you have any questions about *Kimel* or a public employer's immunity from suit under the ADEA or ADA, please contact James Spizzo at (312) 609-7705, or any other Vedder Price attorney with whom you have worked.

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