CITY EMPLOYMENT RESIDENCY REQUIREMENTS

In *Ector v. City of Torrance*[1] a city ordinance which required all city employees to be or become residents of the city within six months of appointment was held unconstitutional because it inhibited an employee's freedom to travel.[2] Plaintiff had worked as a city librarian for three years, but had never become a Torrance resident. The court described the freedom to travel beyond the boundaries of the city for residential purposes as a fundamental constitutional right which required a compelling governmental interest for a classification that restricted that right.[3] The court concluded that no reason had been advanced to justify the classifications involved in the Torrance ordinance.[4]

The result in the *Ector* case is not very surprising. A similar ordinance was struck down by the New Hampshire Supreme Court in *Donnelly v. City of Manchester*,[5] and a durational residency requirement was held unconstitutional in *Sokol v. Civil Service Commission*.[6] Yet the *Ector* case is illustrative of the divergent judicial attitudes toward city residency requirements for employment resulting from *Shapiro v. Thompson*.[7] In that case, the United States Supreme Court struck down durational residency requirements for welfare benefits. The Court held that the requirements violated fourteenth amendment equal protection by infringing on the constitutional right to travel without a compelling governmental interest to justify the infringements.[8] This decision applied the test of strict equal protection to situations involving the right to travel.[9]

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1. —Cal. App. 3d—, 104 Cal. Rptr. 594 (Dist. Ct. App. 1972) (on appeal to Supreme Court of California).

2. *Id.* at—, 104 Cal. Rptr. at 598.

3. *Id.* at—, 104 Cal. Rptr. at 596, 598.

4. *Id.* at—, 104 Cal. Rptr. at 598.

5. 111 N.H. 50, 274 A.2d 789 (1971).

6. No. 72 C 252 (1) (E.D. Mo., Dec. 29, 1972).

7. 394 U.S. 618 (1969).

8. *Id.* at 634-38

9. *See generally* Note, *Shapiro v. Thompson: Travel, Welfare and the Constitution*, 44 N.Y.U.L. Rev. 989 (1969).

I. The Applicable Test

Traditionally, equal protection was used to prevent arbitrary classifications by considering only whether the purpose of the classification was properly within the state's power, and whether the classification was reasonable in light of that purpose.[10] As quoted in *Krzewinski v. Kugler*:[11]

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective . . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[12]

Under this "reasonable" standard, courts generally refused to look deeply into the purpose of the residency requirements for city employment.[13]

Shapiro affected residency requirements by recognizing their inhibiting impact on the right to travel, which the Court held to be a fundamental constitutional right.[14] Secondly, the Court dictated that an inhibiting effect on the right to travel must be evaluated according to "strict" equal protection, which requires any classification that

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10. Note, *Shapiro v. Thompson: A New Approach Under the Equal Protection Clause?*, 6 Calif. Western L. Rev. 179, 180-81 (1969).

11. 338 F. Supp. 492 (D.N.J. 1972).

12. *Id.* at 497 (citations omitted). *See generally* Comment, *Constitutional Law-Equal Protection-Residency Requirements*, 21 Case W. Res. L. Rev. 571 (1970).

13. *See, e.g.*, Marabuto v. Town of Emeryville, 183 Cal. App. 2d 40, 6 Cal. Rptr. 690 (Dist. Ct. App. 1960); Williams v. Civil Serv. Comm'n, 383 Mich. 507, 176 N.W.2d 593 (1970); Berg v. City of Minneapolis, 274 Minn. 277, 143 N.W.2d 200 (1966); Kennedy v. City of Newark, 29 N.J. 178, 148 A.2d 473 (1959); Salt Lake City Fire Fighters Local 1645 v. Salt Lake City, 22 Utah 2d 115, 449 P.2d 239, *cert. denied*, 395 U.S. 906 (1969).

14. 394 U.S. at 630. *See* United States v. Guest, 383 U.S. 745 (1966).

The distinction between the right to interstate travel in *Shapiro* and the right to intrastate travel (as is usually involved in the city residency requirement cases) was considered in two subsequent federal court cases. In King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971), the court decided that the use of the term "interstate" in *Shapiro* reflected only the state-wide enactments involved there. "It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state." *Id.* at 648. *See also* Cole v. Housing Authority, 435 F.2d 807 (1st Cir. 1970). For a discussion of the conflicting views of Justices Harlan and Warren on the origin of the right to travel and their importance in the interstate-intrastate distinction see Note, *Residence Requirements After Shapiro v. Thompson*, 70 Colum. L. Rev. 134, 138-39 (1970).

penalizes the exercise of a fundamental constitutional right to be shown to promote a compelling governmental interest or be struck down as unconstitutional.[15]

The *Shapiro* test for residency requirements was not as readily applied in the area of city employment as it was in cases involving voting rights,[16] bar membership,[17] and other eligibility requirement situations.[18] In several subsequent city employment cases, state courts refused or neglected to insist upon *compelling* governmental interests.[19] The Supreme Court of New Hampshire[20] finally applied the test of *Shapiro* and held that an ordinance requiring residency for all classified city employees was invalid as to school teachers because it required a surrender of the fundamental right to travel and live where one wishes without any compelling public interest shown to justify the restriction.[21]

Any fears that strict equal protection would be the end of all city residency requirements for employment were soon allayed by the Federal District Court of New Jersey in *Krzewinski v. Kugler*[22] when the application of the same strict equal protection test employed in *Donnelly* resulted in upholding an ordinance as justified by a compelling governmental interest in promoting police-community relations.[23]

Consistent with the split of the two preceding cases, the application of the strict equal protection test in *Ector* made the decision fairly easy. No justification was shown for a residency requirement that inhibited a librarian's right to travel.[24] Could any justification have been shown? To answer this question it is necessary to examine the

15. 394 U.S. at 634. *See also* Krzewinski v. Kugler, 338 F. Supp. 492, 497-98 (D.N.J. 1972).

16. Dunn v. Blumstein, 405 U.S. 330 (1972).

17. Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970).

18. *See generally Symposium—Durational Residency Requirements,* 6 SUFFOLK U.L. REV. 565 (1972).

19. *See* Detroit Police Officers Ass'n v. City of Detroit, 385 Mich. 519, 190 N.W.2d 97 (1971); Williams v. Civil Serv. Comm'n, 383 Mich. 507, 176 N.W.2d 593 (1970); Hattiesburg Firefighters Local 184 v. City of Hattiesburg, 263 So. 2d 767 (Miss. 1972); Jackson v. Firemen's and Policemen's Civil Serv. Comm'n, 466 S.W.2d 412 (Tex. Civ. App. 1971).

20. Donnelly v. City of Manchester, 111 N.H. 50, 274 A.2d 789 (1971).

21. *Id.* at 52, 274 A.2d at 791.

22. 338 F. Supp. 492 (D.N.J. 1972).

23. *Id.* at 499.

24. —Cal. App. 3d at—, 104 Cal. Rptr. at 598.

possible governmental interests in the requirement, and what classifications might be justified by *compelling* interests. The court in *Ector* explained that all the traditional equal protection cases need to be re-examined in light of *Shapiro:*

> [N]o determination was made [in earlier cases] as to whether the municipality had sustained the burden of establishing not only that it had a compelling interest which justified the enactment but that the distinctions drawn by the enactment were necessary to further its purpose.[25]

II. JUSTIFICATIONS

A justification that is probably only applicable to durational residency requirements is the city's contention that residency for a period prior to employment will enable the applicant to become more familiar with the city and therefore be better qualified for the job. This argument may have some relevance for a legislator whose job is representing his community,[26] but it has not been seriously advanced in the classification of standard civil servants. This argument was made by defendant in support of the durational residency ordinance in *Sokol,*[27] but that court agreed that such arguments had been found less than compelling in *Dunn v. Blumstein*[28] and *Keenan v. Board of Law Examiners,*[29] cases involving residency requirements for voting and for bar examinations. In *Dunn,* the Supreme Court noted that this argument should surely fall under the constitutional proposition that the government cannot choose the way of greater interference with constitutional rights if there are other ways to achieve its goal.[30]

A justification for residency requirements that was accepted only in New Jersey was the belief that public employment was not a right, but a privilege for the government to bestow.[31] It is doubtful that

25. *Id.*

26. State *ex rel.* Gralike v. Walsh, 483 S.W.2d 70 (Mo. 1972).

27. Brief for Defendant at 7, Sokol v. Civil Serv. Comm'n, No. 72 C 252 (1) (E.D. Mo., Dec. 29, 1972).

28. 405 U.S. 330 (1972).

29. 317 F. Supp. 1350 (E.D.N.C. 1970).

30. 405 U.S. at 343. *See* Elfbrandt v. Russell, 384 U.S. 11, 18 (1966); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

31. *See* Mercadante v. City of Paterson, 111 N.J. Super. 35, 266 A.2d 611 (Ch. 1970), *aff'd,* 58 N.J. 112, 275 A.2d 440 (1971); Kennedy v. City of Newark, 29 N.J. 178, 148 A.2d 473 (1959).

any court would now subscribe to the proposition that public employment is a privilege which may be conditioned upon a surrender of a fundamental constitutional right.[32]

A related justification, the so-called "public coffer" theory was fairly popular under the traditional equal protection.[33] This theory stated that the city has an interest in promoting the recirculation within the city's economy of salaries paid to the civil servants. The court in *Krzewinski* said that this theory is patently unconstitutional, relying on the rejection in *Shapiro* of the belief that governments may tie economic benefits to the municipal economy.[34] The court in *Donnelly* was only slightly less negative in stating that city employees earn their salaries, and that any financial benefit to the city due to recirculation is slight compared to an interference with fundamental constitutional rights.[35] This justification seems exceedingly weak under strict equal protection standards.

An argument that encompasses the "public coffer" theory was advanced in *Sokol* where defendant referred to the "crisis of the cities" with their declining population, abandonment of property, loss of taxpayers, and declining tax bases.[36] The court replied that the city's interest in solving these problems is a possible basis for a residency requirement after employment, but a durational residency requirement might serve to accelerate the urban decay by forcing area newcomers to live and seek employment outside the city where there is no waiting period for civil service jobs.[37] This "crisis of the cities" theory has not been advanced nor accepted to any extent in recent cases.

Several justifications have relevance to specific civil servants, especially police and firemen. One that has much appeal on its face is an emergency or proximity argument which states that the city has a valid interest in quick availability of police and firemen in emer-

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32. Donnelly v. City of Manchester, 111 N.H. at 52, 274 A.2d at 791-92. *Accord,* Krzewinski v. Kugler, 338 F. Supp. at 498-99.

33. *See* Kennedy v. City of Newark, 29 N.J. 178, 148 A.2d 473 (1959); Salt Lake City Fire Fighters Local 1645 v. Salt Lake City, 22 Utah 2d 115, 449 P.2d 239, *cert. denied,* 395 U.S. 906 (1969).

34. 338 F. Supp. at 498 n.4.

35. 111 N.H. at 52-53, 274 A.2d at 792.

36. No. 72 C 252 (1) at 6.

37. *Id.*

gencies.[38] The court in *Krzewinski* rebutted this argument's applicability to city residence by pointing out that geographical proximity in an emergency cannot be logically equated with municipal borders, and that a time or radius computation would better satisfy the governmental interest.[39] The court also pointed out that in New Jersey, cities can call the on-duty forces of a nearby municipality for aid.[40] In evaluating the compelling nature of the interest in a time or radius requirement it might be relevant to examine the police and fire department records to determine how frequently off-duty officers are called, and whether the emergency might ever require more than the number of men available within the quick-mobilization area who are not compelled to live there by a residency requirement.

A second specialized justification is the argument that the presence of an off-duty officer within the city may serve to deter crime. This has been held to be a valid justification under both the traditional and the strict equal protection.[41] Certainly the courts must recognize that the compelling nature of this argument is also tempered by the fact that off-duty presence cannot be equated with residency within the municipal borders. Additionally, the court in *Krzewinski* recognized that this argument might not support a residency requirement for firemen.[42]

A third justification for police and firemen's residency is based on the city's contention that it has an interest in promoting police-community relations. This theory has also been held to present both a reasonable and a compelling interest.[43] According to this theory, living in the city might promote community cooperation with law enforcement officers, and put an end to misunderstanding and in-

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38. *See* Marabuto v. Town of Emeryville, 183 Cal. App. 2d 406, 410, 6 Cal. Rptr. 690, 692-93 (Dist. Ct. App. 1960); Hattiesburg Firefighters Local 184 v. City of Hattiesburg, 263 So. 2d 767, 771 (Miss. 1972).

39. 338 F. Supp. at 499 n.6.

40. *Id.* at 503-04.

41. *Compare* Detroit Police Officers Ass'n v. City of Detroit, 385 Mich. 519, 522-23, 190 N.W.2d 97, 98 (1971) *with* Krzewinski v. Kugler, 338 F. Supp. 492, 500 (D.N.J. 1972).

42. 338 F. Supp. at 500.

43. *See* Krzewinski v. Kugler, 338 F. Supp. 492, 499 (D.N.J. 1972); Manion v. Kreml, 131 Ill. App. 2d 374, 378, 264 N.E.2d 842, 844 (1970); Detroit Police Officers Ass'n v. City of Detroit, 385 Mich. 519, 522-23, 190 N.W.2d 97, 98 (1971); Kennedy v. City of Newark, 29 N.J. 178, 184, 148 A.2d 473, 476 (1959).

tolerance. The city interest in this relationship seems to support a police residency requirement. The urban riots of the sixties have been attributed, at least in part, to lack of good police-community relations.[44] Residency could not only improve communications through "good neighbors," but it could serve a symbolic function in eliminating disrespect for an absentee police force which governs by day but flees to the suburbs at night.[45] These arguments are somewhat inapplicable to firemen, and they are also subject to the municipal borders criticism. Nevertheless, there seems to be a compelling governmental interest in promoting police-community relations sufficient to justify a bona fide residency requirement.

Conclusion

The future of residency requirements for city employment depends on a clarification of *Shapiro* by the Supreme Court. Contrary to the views of the California, New Hampshire, and New Jersey courts, *Shapiro* is not a clear precedent for the result in *Ector*. Yet *Shapiro* did imply the test of strict equal protection for city employment residency restrictions.[46] The Supreme Court in *Dunn* pointed out that a durational residency requirement is tested separately from a bona fide residency requirement, but implied that they are both stringently tested by the compelling governmental interest standard.[47] If the Supreme Court decides to weigh all residency requirements for city employment by this standard, the continuance of durational residency requirements for employment and the bona fide residency requirements for other than police, and possibly firemen, seems doubtful due to a lack of compelling governmental interests to justify the classifications that infringe on the constitutional right to travel for residential purposes.

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44. The President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report, The Police 145 (1967).

45. *Id.* at 166.

46. The Court stated:

> We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

394 U.S. at 638 n.21.

47. 405 U.S. at 343-44.