

THE CHARTER BOARD OF THE CITY OF READING

IN RE: Application of Charter Section : Request Filed March 13, 2008
 706 to Organizational :
 Chart per Ordinance 63-2006 : Advisory Opinion No. 8

ADVISORY OPINION

I. PROCEDURAL HISTORY AND QUESTION PRESENTED

By letter dated March 13, 2008¹ Linda A. Kelleher, Clerk of the City of Reading, (“Clerk”) requested that an advisory opinion be issued by the City of Reading Charter Board (“Board”) pertaining to the following question presented: To which specific “heads of offices, departments and agencies” does the residency requirement² of the Charter of the City of Reading (“Charter”) apply?

To assist in our analysis, the Clerk provided the Board with a copy of the City of Reading’s (“City”) organizational chart (“Organizational Chart”) provided for by Ordinance 63-2006 and contained in the City’s Administrative Code at page 1-58.

II. DISCUSSION

The question presented by the Clerk essentially asks the Board whether or not residency applies to each department, office or agency of the City.

A. Applicable Charter Provisions

Section 601 of the City’s Charter provides:

As part of the codified ordinances, City Council shall enact and from time to time may amend an Administrative Code which shall set forth in detail the organization and administrative structure and procedures of the City, including:

(1) a specific enumeration of departments, offices, and agencies and the division of powers and responsibilities among them;

* * *

¹ The Clerk’s March 13, 2008 letter also included a request for an advisory opinion on the question of whether or not the residency requirement of Charter Section 706 applies to the heads of City authorities. That request for advisory opinion is addressed in Advisory Opinion No. 9.

² See Charter, Section 706.

The relevant portion of Section 706 of the Charter, regarding residency, provides:

The compensation of all heads of departments, offices and agencies under the direction of the Mayor shall be proposed by the Mayor and approved by ordinance.

* * * *

All such heads of departments, offices and agencies need not be residents of the City at the time of appointment, but after appointment shall reside in the City. City residency shall be required within twelve (12) months of being appointed.

B. Analysis

Charter Section 601 is self explanatory and directive in nature. The Administrative Code shall set forth in detail the organization and administrative structure and procedures of the City, including “a specific enumeration of departments, offices, and agencies and the division of powers and responsibilities among them.” (emphasis added)

A review of the current Administrative Code and Organizational Chart reveals that neither provides the requisite specificity of the “division of powers and responsibilities” among the various departments, offices, and agencies as required by Charter Section 601(1). Further, the Board takes notice that the Organizational Chart is not followed in all instances by the City and/or that it does not accurately reflect the actual, working, administrative structure of the City.

The purpose of Charter Section 601 is to mandate a certain transparency in the administrative structure of City government, so that clear lines of responsibility and accountability are established. The present Administrative Code and Organizational Chart clearly do not do this and are thus in violation of Charter Section 601. Without the guidance of an Administrative Code and Organizational Chart that are compliant with Section 601 of the Charter, the Board cannot render the requested advisory opinion.

Regarding the titles of the departments, offices and agencies referenced in the Organizational Chart, the mere title of an office holder is not the only indicator of whether or not that person is subject to the residency requirement of Charter Section 706. *Mukerji v. City of Reading Charter Review Board*,

941 A.2d 102, 105 (Pa. Commw. Ct. 2008). Immunity from Section 706 is not had merely because a person is not specifically titled as the “head” of a “department, office or agency.” If a person’s position with the City has all of the indicia and trappings of the head of a department, office or agency, such as appropriate staff, salary, responsibilities, and reporting requirements, making that person effectively the head of a department, office or agency, regardless of title, then residency under Section 706 will apply.³

C. Conclusion

The Board cannot answer the question posed by the Clerk on the basis of the Organizational Chart alone. However, certainly, on a case by case basis, with adequate factual investigation by the Board’s Investigative Officer, and after a hearing to develop the facts, the Board would be in a position to analyze and render a decision regarding the application of Section 706 to a specific department, office or agency.⁴ Certainly, the fulfillment of the requirements of Charter Section 601 by City Council would be of assistance to the Board, the People of the City and the City itself. The analysis employed by the Board and the Commonwealth Court in *Mukerji* is the analysis to be applied to all exempt employees serving as the functional equivalent of a head of a department, office or agency of the City on the question of applicability of residency under Charter Section 706.

³ As stated by the Commonwealth Court in *Mukerji*:

Section 706 of the Charter requires that heads of departments and offices be residents of the City. The Board found that the Economic Development Manager is the head of the Office of Community Development, is at a department head level and has the same duties, salary, responsibilities, office location and staff as the former head of the Department of Community Development. In fact, the City’s Managing Director admitted that the City’s motivation in creating the Economic Development Manager title for Mukerji was, at least in part, to help Mukerji avoid the residency requirement. In this regard, if the City could help Mukerji avoid the residency requirement simply by changing his title, the City could give new titles to all department heads so that no one in a high level position with the City would have to be a City resident. Clearly, this would violate the Charter.

Mukerji, 941 A.2d at 105.

⁴ Such a scenario occurred in the Board’s Investigation No. 6 involving Adam Mukerji. In that matter a factual investigation occurred followed by a hearing and final decision and order, and a decision was made, in part, on the evidence and testimony presented regarding the specifics of Mr. Mukerji’s office. See Final Opinion and Order, *In re: Investigation of Director of Community and Economic Development Adam Mukerji*, July 24, 2006.

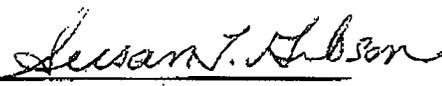
III. OPINION OF THE BOARD

The Opinion of the Board is as follows:

A. The existing information available to the Board prevents the Board from rendering a general blanket determination as to which specific “heads of offices, departments and agencies” the residency requirement of Charter Section 706 applies.

B. The analysis employed by the Board and the Commonwealth Court in *Mukerji v. City of Reading Charter Review Board*, 941 A.2d 102 (Pa. Commw. Ct. 2008), is the analysis to be applied to all exempt employees serving as the functional equivalent of a head of a department, office or agency of the City on the question of applicability of residency under Charter Section 706. See Final Opinion and Order, *In re: Investigation of Director of Community and Economic Development Adam Mukerji*, July 24, 2006, at pp. 4, 5.⁵

CITY OF READING CHARTER BOARD

By: 
Susan Gibson, Chair

Date: April 3, 2008

⁵ A copy of the Charter Board’s Final Opinion and Order in the matter *In re: Investigation of Director of Community and Economic Development Adam Mukerji*, July 24, 2006, is attached hereto as Appendix “A.”

THE CHARTER BOARD OF THE CITY OF READING

IN RE: Investigation of Director of : Complaint Filed: January 6, 2006
Community and Economic :
Development Adam Mukerji :
 : Investigation No. 6

FINAL OPINION AND ORDER

I. FINDINGS OF FACT

1. On January 6, 2006, City of Reading ("City") resident, Cherlynn M. Martin, filed a complaint ("Complaint") with the Charter Board of the City of Reading ("Board"). (R. at 13)
2. The Complaint alleged a violation of Section 706 of the City's Charter by the then Director of Community Development, Mr. Adam Mukerji ("Mukerji").
3. The Complaint specifically alleged that Mukerji's residence has been in Montgomery County, Pennsylvania, and not the City, since 1997 and that he has failed to comply with the residency requirement found in Charter Section 706. (Exhibit I.O.-1)
4. Following an investigation by the Board's Investigative Officer, Mukerji requested that the Board conduct a full evidentiary hearing by letter of May 29, 2006.
5. On June 28, 2006, the Board conducted the requested evidentiary hearing in accordance with the Charter Board Ordinance.
6. Mukerji's personnel file with Human Resources of the City provides that Mukerji resides at 263 Acorn Lane, North Wales, Montgomery County, Pennsylvania, and Mukerji admits that address to be his current and correct place of residence. (R. at 12, 17)
7. At no time relevant to this proceeding did Mukerji own or lease any property within the City, and neither he nor his family resides in the City. (R. at 18)
8. Commencing in March 2002, the City hired Mukerji as its Manager of Economic Development, a position held by Mukerji for three to five months. (R. at 16)

9. At no time since being hired by the City has Mukerji complied with the residency requirement of the Charter. (R. 66-67)

10. Commencing in the late summer or early fall of 2002, the City hired Mukerji as Director of Community and Economic Development (“Director”), a position held until June 15, 2006. (R. at 17)

11. As Director, Mukerji reported to the Managing Director of the City. (R at 17)

12. City Council, by bill no. 46-2006, passed an Ordinance signed into law by the Mayor on June 15, 2006, amending Section 1-189 of the Administrative Code by deleting the Department of Community Development and creating duties of the Economic Development Manager. (Exhibit I.O.-1)

13. The hearing revealed that, by virtue of bill no. 46-2006, Mukerji became the City’s Economic Development Manager (“Manager”) and that the position of Director was deleted.

14. The original Section 1-189 and the amended Section 1-189 are virtually identical, with the exception of the references to Director deleted and Manager inserted. (R. at 22-27, 50)

15. Mukerji’s duties, salary, responsibilities, office location and staff did not change by virtue of bill no. 46-2006. (R. at 27-31, 63).

16. Despite the change of title to Manager, Mukerji remains the “head of the Office of Community Development.” (R. at 57)

17. As Manager, Mukerji continues to report to the Managing Director, as he did as Director, and continues to do so without any intervening level of supervision or accountability. (R at 45, 57, 64; Exhibit I.O.-1)

18. Mukerji's change of position between Director and Manager is only one of title and is not a demotion. (R. at 34, 62-63)

19. Even as Manager, Mukerji holds duties, powers, workload and responsibilities at a level greater than most, if not all, other City managers, and instead being on par with department heads or directors. (R. at 36)

20. Furthermore, organizationally, the Department of Economic and Community Development existed as its own department and reported to the Managing Director, and the Office of Community Development now exists as part of the Managing Director's office and reports to the Managing Director from within that office. (R. at 70-75)

21. On April 12, 2006 the Board issued Advisory Opinion No. 1, which advised that a mere change in title from "director" to "manager" would not cause the residency requirement of Charter Section 706 to be inapplicable where the position retains the same responsibilities and salary. (Exhibit I.O.-1)

22. Bill no. 46-2006 was not introduced to City Council until after the Board's Investigative Officer commenced its inquiry into Mukerji's residency status. (R. at 51)

23. At least one of the motivating factors behind the introduction of bill no. 46-2006 was to attempt to make Mukerji compliant, with the residency requirements of Charter Section 706. (R. at 45, 46)

24. The Board conducted an evidentiary hearing on this matter on June 28, 2006.

II. CONCLUSIONS OF LAW

A. Preliminary Matters – Motion to Dismiss

Mukerji presented the Board with a motion to dismiss, which has been attached to the record as Exhibit "A." Mukerji consented to the Board issuing its ruling on the motion to

dismiss in writing in this Final Opinion and Order. (R. at 88) The Board denies the motion to dismiss.

B. Questions Presented

1. Did Mukerji violate Section 706 of the Charter?

The Board answers in the affirmative.

2. Did the passage of Ordinances 46-2006 and 47-2006 change the essential nature of Mr. Mukerji's role and therefore exempt him from the residency provisions of Section 706 of the Charter?

The Board answers in the negative.

C. Conclusions of Law

1. Mukerji never established residency in the City and has admitted such.
2. Until June 15, 2006, Mukerji served as a City department director.
3. From approximately September 1, 2003 through June 15, 2006, Mukerji violated Section 706 of the Charter by maintaining his residence outside of the City.
4. Bill nos. 46-2006 and 47-2007 altered only Mukerji's title, and, after June 15, 2006, Mukerji remained the head of a department, agency or office, and therefore continues to remain subject to the provisions of Charter Section 706.
5. So long as Mukerji maintains his residence outside of the City and continues as the head of a department, agency or office, Mukerji continues to violate Section 706 of the Charter.
6. It is clear that the compensation and residency requirements of Charter Section 706 apply to the highest tier of the administrative service in the executive branch of City government.

7. Specifically, the following three factors are determinative:

- a. if the employee is the head of a department, office or agency, regardless of that individual's official title;
- b. if the employee oversees a department, office or agency, regardless of the title given to that department, office or agency; and
- c. if the employee reports directly to either the Mayor or the Managing Director as the chief administrative officer of the City as noted in Charter Section 406(2).

8. Applying these factors to the present case, it is clear that as Director prior to June 15, 2006 and as Manager after June 15, 2006, Mukerji is subject to the residency requirements of Section 706 because:

- a. as Manager of Economic Development, he is the head of the Office of Economic Development;
- b. the Office of Economic Development which he oversees is a department, office, or agency as specified in the Charter; and
- c. he reports directly to the Managing Director, without any intervening level of supervision or accountability.

9. Whether the Office of Economic Development is a part of the office of the Managing Director, or is a separate department reporting to the Managing Director, is immaterial to the application of Charter Section 706.

10. This Board's Advisory Opinion No. 1 clearly and unequivocally addresses the issues confronted in this matter, and, despite the rendering of Advisory Opinion No. 1 two

months earlier, City Council chose to enact bill nos. 46-2006 and 47-2006, which were intended to circumvent the Charter's residency requirement.

11. Mukerji's failure to adhere to the terms and conditions of employment denoted in Charter Section 706, specifically residency, constitutes a forfeiture of his employment.

12. By not adhering to the residency requirements of Section 706, Mukerji has violated the terms and conditions of his employment and has been ineligible for ongoing employment since the late summer or fall of 2003, and his violation is continuing.

13. Each branch of City government has the responsibility to uphold and enforce those sections of the Charter entrusted to it.

14. By failing to enforce Section 706, the Mayor and Managing Director of the City of Reading actively undermined the provisions of the Charter under the guise of reorganization.

15. The passage of bill no. 46-2006 and 47-2007 by Council, and the Mayor signing those bills into law, constitute an attempt to willfully continue Mukerji's known violation of the Charter, despite the existence of an advisory opinion by this Board clearly addressing this very issue.

16. Although reorganization of the City's departments, offices and agencies may be important, it must be accomplished within the confines of the Charter, or the Charter must be amended.

17. This matter arises under the Charter and Administrative Code and is therefore within the jurisdiction of the Board.

III. DETERMINATION OF THE BOARD

We hold that from not later than late summer or early fall of 2003, Mukerji has been in violation of Section 706 of the Charter. We further hold that the mere change of title of Mukerji from a director to a manager does not make him immune from the residency requirements of Charter Section 706.

IV. PENALTIES IMPOSED

As a consequence of Mukerji's violation of Section 706 of the Charter, the Board imposes the following penalties:

A. Public Censure

The Board will, not earlier than thirty-one days from the date of this Final Order, notify the news media of this decision and provide the news media with a copy of the original of this Final Opinion and Order, and provide such other notice and information as required by Section V of the Charter Board Ordinance.

B. Administrative Fine

The maximum administrative fine of \$1,000 is hereby imposed upon Mukerji. The purpose of the administrative fine is to defray a fraction of the actual cost and expense incurred by the City in investigating, considering and deciding this violation.

C. Fine

A fine of \$1000 is hereby imposed upon Mukerji for his violation of the Charter.

D. Further Penalty

The following further penalties are imposed by the Board:

1. Suspension

Mukerji is hereby suspended from his employment with the City, without pay, for a period of thirty (30) days, commencing on the day following the date of this Final Opinion and Order. The Board orders and directs the City Auditor to withhold pay from Mukerji beginning on the day following the date of this Final Opinion and Order and continuing for a total of thirty (30) days.

2. Desist from Violating and Compliance

Mukerji shall establish residency within the City, in compliance with Charter Section 706, on the following terms:

a. Not later than thirty (30) days from the date of this Final Opinion and Order, Mukerji shall submit an affidavit, in proper form, to the Board Solicitor affirming Mukerji's intention to comply with the Final Opinion and Order of the Board and to establish residency within the City within 120 days of the date of the Final Opinion and Order.

b. Failure to submit the aforementioned affidavit to the Board Solicitor within the time period specified shall cause immediate termination of Mukerji's employment with the City, effective the thirty-first (31st) day following the date of this Final Opinion and Order.

c. Having submitted the required affidavit, Mukerji's failure to establish residency within 120 days of the date of the Final Opinion and Order shall cause immediate termination of Mukerji's employment with the City, effective the 121st day following the date of this Final Opinion and Order.

E. Considerations of the Board

In determining the penalties assessed against Mukerji, the Board considered each of the factors set forth in Section V(B)(2)(a)(i) of the Charter Board Ordinance. This matter concerns a continuing violation over a period of nearly three years. Viewed on a daily basis, this matter concerns nearly 1,000 separate daily violations. The violation of the Charter is clear, admitted by Mukerji, willful and intentional. Mukerji's violation of the Charter is not the result of mere oversight or mistake. Left unaddressed, this violation threatens to weaken the Charter and the City and would provide an untenable precedent for other heads of departments, offices and agencies. Finally, Mukerji declined to heed this Board's Advisory Opinion No. 1, which clearly addressed the issues presented by the Complaint.

V. ORDER

The Charter Board enters the Order attached hereto.

CITY OF READING CHARTER BOARD

By: *Susan J. Gibson*
Susan Gibson, Chair

Date: 7/24/2006

THE CHARTER BOARD OF THE CITY OF READING

IN RE: Investigation of Director of : Complaint Filed: January 6, 2006
Community and Economic :
Development Adam Mukerji :
: Investigation No. 6

ORDER

AND NOW, this *24th* day of July, 2006, after conducting an evidentiary hearing in accordance with the Charter Board Ordinance, the Charter Board of the City of Reading ("Board") finds:

1. that since not later than the late summer or early fall of 2003 Adam Mukerji ("Mukerji") violated Section 706 of the Charter of the City of Reading ("Charter"); and
2. that the mere change of title of Mukerji from a director to a manager does not make him immune from the residency requirements of Charter Section 706.

In accordance with the Final Opinion and Order, the following is **ORDERED**:

- A. Mukerji shall be publicly censured as provided by Section V of the Charter Board Ordinance;
- B. An administrative fine of \$1,000 is hereby imposed upon Mukerji;
- C. A fine of \$1,000 is hereby imposed upon Mukerji; and
- D. The following further penalties are hereby imposed:
 1. Suspension

Mukerji is hereby **SUSPENDED** from his employment with the City of Reading, without pay, for a period of thirty (30) days, commencing on the day following the date of this Final Opinion and Order. The Board **ORDERS** and **DIRECTS** the City Auditor to withhold pay from Mukerji beginning on the day following the date of this Final Opinion and Order and continuing for a total of thirty (30) days.

2. Desist from Violating and Compliance

Mukerji shall desist from violating the Charter and shall establish residency within the City, in compliance with Charter Section 706, on the following terms:

a. Not later than thirty (30) days from the date of this Final Opinion and Order, Mukerji shall submit an affidavit, in proper form, to the Board Solicitor affirming Mukerji's intention to comply with the Final Opinion and Order of the Board and to establish residency within the City within 120 days of the date of the Final Opinion and Order.

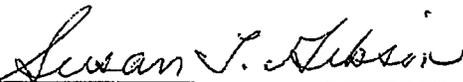
b. Failure to submit the aforementioned affidavit to the Board Solicitor within the time period specified shall cause immediate termination of Mukerji's employment with the City, effective the thirty-first (31st) day following the date of this Final Opinion and Order.

c. Having submitted the required affidavit, Mukerji's failure to establish residency within 120 days of the date of the Final Opinion and Order shall cause immediate termination of Mukerji's employment with the City, effective the 121st day following the date of this Final Opinion and Order.

E. Copies of this Final Order shall be transmitted to the following:

1. Mr. Adam Mukerji
2. Charles Younger, Esquire
3. Jason B. Hopp, Esquire, Investigative Officer
4. Complainant, Cherlynn M. Martin
5. Thomas McMahon, Mayor of the City of Reading
6. R. Leon Churchill, Managing Director
7. Mr. David Cituk, City Auditor
8. Eric B. Smith, Solicitor, Charter Board

CITY OF READING CHARTER BOARD

By: 
Susan Gibson, Chair