STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE MADISON PROFESSIONAL POLICE OFFICERS ASSOCIATION, by it president, FRANK TROSTLE; VICTOR L. HESS; DAVID A. RICHARDSON; ROBERT USELMAN; GERALD EASTMAN; MARY WALTER; ROBERT E. RAHN; and JAMES H. RYAN;	Case XLVI No. 20976 MP-681 Decision No. 15095
Complainants,	
vs.	
CITY OF MADISON,	
Respondent.	

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, for the Complainants.
Mr. Henry [redacted]ler, City Attorney, and Mr. Gerald C. Kops, Deputy City Attorney, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above named complainants having filed a complaint and an amended complaint with the Wisconsin Employment Relations Commission, alleging that the above named respondent has committed, and is committing, prohibited practices within the meaning of Sections 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act; and hearing in the matter having been conducted at Madison, Wisconsin on November 23 and 30, 1976 and December 1 and 2, 1976, before the full commission; and the title in the caption having orally been amended at the hearing; and the commission, having reviewed the evidence and arguments and briefs of counsel, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Complainant Madison Professional Police Officers Association, hereinafter referred to as the association, is a labor organization and has its offices at Madison, Wisconsin.

2. That Respondent City of Madison, hereinafter referred to as the respondent, or Madison, is a municipal employer, and among its functions operates and maintains a police department.

3. That Complainant Frank Trostle is employed as a police officer by the respondent, and at all times material herein has been, and is, the President of Complainant Association; that Complainants Robert Uselman and Gerald Eastman have been and are employed as police officers by the respondent; that Complainant Uselman has served as a Director of Complainant Association; and that Complainants Victor L. Hess, David A. Richardson, Mary Walter, Robert E. Rahn, and James H. Ryan, at all times material herein, and at least up to and including November 10, 1976, were actively employed as police officers by the respondent.

4. That at all times material herein the association has been and presently is the exclusive collective bargaining representative

for all non-supervisory police officers and other law enforcement personnel in the employ of Respondent's Police Department; that in said capacity the association and the respondent, for the past number of years, have entered into collective bargaining agreements covering the wages, hours and working conditions of said police officers and other law enforcement personnel; that in, said regard the association and the respondent on February 10, 1976, entered into a collective bargaining agreement, effective from December 14, 1975, to at least December 25, 1976; and that said agreement did not contain any provision which clearly and unmistakably permitted the respondent to make unilateral changes in wages, hours and working conditions.

5. That the collective bargaining agreements existing between the complainant association and the respondent, effective from December 16, 1973, to December 14, 1974, as well as the agreement effective from December 15, 1974, to December 13, 1975, also did not contain any provision which clearly and unmistakably permitted the respondent to make unilateral changes in wages, hours and working conditions.

6. That at least since 1956 there has existed an ordinance, identified as Sec. 3.27, Madison General Ordinances, pertaining to the requirement that all employes, including police officers, of the respondent reside within the city of Madison; and that the portion of said ordinance, which is material herein, provides as follows:

> " * * * /N/o person shall be eligible for election, appointment or employment to any position as an officer, department head, employee or member of a board or commission unless he shall reside in the City of Madison unless permission to reside outside of the City of Madison shall be expressly granted by the Mayor. In the event that any such City officer, department head, employee or member of a board or commission shall cease to reside in the City of Madison, his office, position or employment shall be automatically forthwhile vacated . . . ."

7. That at least from 1970, in negotiating with the respondent, the complainant association has proposed that the respondent agree to incorporate, in their yearly collective bargaining agreements, including the agreement which is to expire on December 25, 1976, a provision setting forth that the employes covered by said agreements would not be required to reside in the city of Madison; and that the respondent has consistently rejected such proposals.

8. That Complainant Mary Walter was initially employed as a police officer by the respondent in 1964 while she resided with her husband and family in Marshall, Wisconsin; that Walter was given mayoral extensions to continue to reside in Marshall to enable her and her husband to sell their home; that, sometime in 1966, Walter resigned, after having been unsuccessful in the sale of said home; that Walter was reemployed by the respondent as a police officer in 1972, as a limited term employe, while still residing in Marshall with her family; that upon completion of said limited term Walter terminated her employment as a police officer; that in June, 1973, upon learning of a vacancy in a woman police officer position, Walter visited the offices of the police department and was interviewed by Lieutenant Morlyn Frankey, Captain Hiram Wilson, Inspector Edward Daley and Chief David C. Couper; that during said interview Walter was asked whether she was willing to move her family to the city of Madison; that she responded that she was unwilling to make such move and thereupon said interview was terminated; that approximately one week later Walter received a call from Inspector Daley wherein she was asked whether she, as opposed to her family, would establish a residence in the city of Madison; that upon Walter's inquiry as to how such could be accomplished, she was advised that she obtain a Madison address, receive her mail at such address, list a telephone

in the Madison telephone directory, register her car as being located in Madison, indicate said Madison address on her driver's license, register to vote in Madison; and that thereupon Walter made such arrangements, and on July 6, 1973, Walter was again rehired as a permanent police officer by the respondent, and since the latter date and continuing at all times material herein, Walter has substantially complied with such conditions.

9. That Complainant Richardson was initially employed as a police officer by the respondent in 1963 and 1964, and after a brief lapse in such employment Richardson resumed same in 1965; that from 1963 to an unidentified date in 1973 Richardson maintained his sole address in the city of Madison; that after a divorce from his wife Richardson married a woman residing in Oregon, Wisconsin, and at said time Richardson became concerned over the applicability of ordinance 3.27 should he move his residence to Oregon; that at such time Richardson had a conversation with Captain Gallas during which Richardson told Gallas of his intended move to Oregon; that Gallas then told Richardson "not to worry about it"; that Richardson also had a conversation with Mayor Soglin at about this same time during which Richardson told Soglin that (a) he owned property in Madison and paid taxes thereon, (b) his children resulting from his first marriage, attended Madison schools, (c) he retained a Madison address and telephone listing, (d) his driver's license set forth a Madison address, and (e) his car was registered as being in Madison; and that in said conversation the mayor led Richardson to believe he would be in compliance with said ordinance by the foregoing conditions; that after establishing his dual residence in Oregon, Richardson's superior officers had, on a number of occasions, contacted him in Oregon by phone; and that Richardson has substantially complied with the above noted conditions from 1973 and at all times material thereafter.

10. That Complainant Ryan commenced employment with the respondent as a police officer on February 12, 1962; and from said date until sometime in the fall of 1974 maintained his only residence in the city of Madison; that in the fall of 1974 Ryan indicated to Lieutenant, and now Captain, Morlyn Frankey that he desired to move his family to Cottage Grove, Wisconsin, where he intended to build a home; that in said conversation, after Frankey had advised Ryan that she had discussed the matter with Chief Couper, Frankey indicated that in order to comply with ordinance 3.27(a) he must register to vote in the city of Madison, (b) pay taxes in the City of Madison, (c) have a Madison mailing address, (d) have his driver's license set forth a Madison address, (e) and spend sometime at such address; and that upon moving to Cottage Grove Ryan substantially fulfilled such conditions and continued same thereafter at all times material herein.

11. That Complainant Hess was employed as a police officer by the respondent on February 20, 1974; that on such date he maintained no type of residence in the City of Madison and as a probationary employe he was granted six months in which to establish a residence within the city of Madison; that he did so within said period and he lived with his wife in the city of Madison until August 10, 1976; that prior to February 1976, because of the poor health of his parents who resided in the Sauk City, Wisconsin, area, Hess determined to purchase property adjacent to that of his parents; that, either in March or April 1976, in discussions with other police officers, including Walter, and Captain Scrivner, a supervisory law enforcement officer, Hess learned that other police officers in the employ of the respondent maintained dual residence under the conditions described above; that prior to August 10, 1976, Hess and his wife purchased

the property adjacent to his parents as described above and took possession thereof on the latter date; that at the same time Hess (a) rented a room in the city of Madison, (b) maintained a mailing address at said location, (c) kept some personal belongings at said location, (d) registered his car at said address, (e) listed his voting address at said location, and (f) listed a phone in Madison; and that Hess since August 10, 1976, has substantially complied with such conditions at all times material herein.

12. That Complainant Rahn was employed as a police officer on May 31, 1971, on which date he had only residence in the City of Madison; that in 1972 and continuing thereafter at all times material herein, Rahn retained an apartment in the City of Madison, and also maintained a residence with his wife in Oregon, Wisconsin, where he has spent a considerable portion of his off-duty time; and that Rahn has at all times since 1972: (a) continued to maintain his apartment in the City of Madison, where he has on occasion slept and ate there, and has a mailing and voting address at such location, (b) registered his car at said address, (c) listed said address on his driver's license, (d) listed a Madison phone, and (e) paid state and federal taxes on forms listing a Madison address.

13. That Peter V. Cerniglia, a member of complainant association's executive board had two conversations with agents of the respondent which reasonably led him to believe that physical presence in the city of Madison was not of especial importance for the residency requirement and that the residency requirement was met by compliance with certain criteria; that the first conversation occurred in 1971 with Charles Reott, the respondent's personnel director, in which Reott indicated that the mere listing of a Madison address was compliance with the residency ordinance; that the second conversation occurred with the mayor in about 1975 in which the mayor stated that residency at least required the employe to have (a) an apartment in Madison, (b) a Madison telephone number listing, (c) Madison voting eligibility, and (d) a driver's license showing a Madison address.

14. That prior to April 15, 1976, a difference of opinion arose among supervisory law enforcement personnel in the Madison Police Department as to the conditions necessary to comply with ordinance 3.27 and that as a result Chief Couper requested an opinion from the city attorney interpreting said ordinance; that on April 15, 1976, the city attorney issued such an opinion setting forth certain criteria to determine compliance with said ordinance; that such criteria are included in Mayor Soglin's memorandum to all city employes dated November 3, 1976, as set forth below.

15. That on June 4, 1976, respondent's labor relations director, by a letter addressed to Complainant Trostle, requested that the complainant association reopen the existing collective bargaining agreement to consider amending the article therein relating to "Benefit and Conversion Option" (Article XX); that complainant association agreed to such request; that thereafter, and on various occasions prior to November 10, 1976, the complainant association engaged in bargaining with the respondent thereon; and that during said bargaining sessions the complainant association, being aware of the possibility that the respondent intended to apply a more strict interpretation of ordinance 3.27, requested respondent to bargain thereon; and that, however, the respondent refused to bargain with respect to such request.

16. That on September 3, 1976, after representatives of both complainant association and respondent commenced negotiations leading to a collective bargaining agreement to succeed the agreement which

will expire on December 25, 1976, Chief Couper caused the following memorandum, with respect to the residency requirement to be distributed to all police department personnel:

> "It has come to my attention that some members of the department may not be adhering to the City Ordinance requiring residency for all employees of the city unless specifically exempted by the Mayor due to hardship or probationary status.
>
> "The City intends to fully enforce this ordinance.
>
> "I have enclosed a copy of a recent opinion I requested from the City Attorney. Pay particular attention to the residency 'test' in the last paragraph.
>
> "If you have a possible residency conflict, such as maintaining two domiciles, I urge you to apply this test to your situation and then, if necessary, take appropriate action.
>
> "Some points need to be emphasized:
>
> "1. Your primary domicile must be within the City limits.
>
> "a. Primary domicile is determined by where you sleep, by where your main living resources are, where you spend your time, where your children go to school, where you receive mail, messages and visitors, etc.
>
> "b. A recreational domicile is generally a secondary domicile in terms of cost, size, etc. You may sleep weekends, days off, vacations, etc. at a secondary recreational domicile but, a primary domicile should exist within the city for residency purposes.
>
> "2. Residency for voting or tax purposes may not necessarily meet the purpose or intentions of this ordinance.
>
> "Please be advised that the ordinance provides that the positions of persons not residing in the city be vacated."

17. That on October 5, 1976, after representatives of both the complainant association and the respondent had commenced negotiations leading to a collective bargaining agreement to succeed the present agreement, respondent's director of labor relations submitted the following statement to the Madison City Council;

> "The spirit and intent of City Ordinance Sec. 3.27 should be complied with in full by all City employees. However, it is important that in enforcing Sec. 3.27 the City be attentive to the principles and requirements of sound management-labor relations.
>
> "In discussing the subject of the City's residency requirement with various City and Union officials, I have learned that there has developed within recent years a misunderstanding among some employees as to the intent and definition of the residency requirement as set forth in City Ordinance Sec. 3.27. Some employees have sincerely concluded that they could maintain two living

places (one inside and one outside the City limits) and still be in compliance with Sec. 3.27 even if the living place outside the City limits was found to be the primary one. (Emphasis added.)

"The Wisconsin Employment Relations Commission has found that a residency requirement is a mandatory subject of collective bargaining. In light of this ruling it is my opinion that negotiations provide an appropriate forum for clarifying the intent and definition of the City's residency requirement as it applies to those employees who may have made a sincere effort to comply with the requirement but who may be found in violation. In those cases, I would recommend that enforcement of the residency requirement be administered in conjunction with the effective date of the respective 1977 labor agreements. This recommendation would not apply to those employees who are currently residing outside the City and who are not maintaining a living place within the City. These employees are clearly in violation of Sec. 3.27 and the provisions of Sec. 3.27 should be applied as such determinations are made.

"The residency requirement and the manner in which it is enforced are very much a part of collective bargaining and labor relations. It is important that the City's residency requirement be maintained and complied with. However, it is also important that the City deal with its employees according to the principles of sound management-labor relations. It is my judgment that the City's residency requirement can be enforced diligently and effectively and yet in a manner consistent with the principles of management-labor relations.

"Specific Recommendations:

"1. During negotiations for 1977, misunderstandings concerning the residency requirement should be addressed by clearly explaining that to meet the provisions of Sec. 3.27 of the Ordinances all employees must establish their domicile within the City as measured by the criteria set forth by the City Attorney in a memorandum dated April 15, 1976. In the meantime, investigations concerning possible violations should continue.

"2. In cases where a pre-disciplinary 1/ investigation and hearing determine that an employee is residing outside the City without maintaining a bona fide living place within the City, the provisionsof Sec. 3.27 should be applied.

"3. In cases where a pre-disciplinary investigation and hearing determine that an employee is maintaining a primary living place outside the City but a bona fide secondary living place within the City, disciplinary action should be deferred pending the conclusion of 1977 negotiations.

"4. In all cases involving possible violations of Sec. 3.27, the City should be attentive to the criteria for establishing just cause. A pre-disciplinary hearing should be held to provide the employee with an opportunity to be heard. Upon a review of all the facts concerning each case, the appointing authority should then determine the appropriate manner in which the penalty should be imposed."

1/ In an October 12, 1976 memorandum to the city council the director of labor relations changed the term "pre-disciplinary" to "pre-determination".

18. That on September 28, 1976, also at the request of Chief Couper, an assistant city attorney issued an opinion, based on certain facts, as to whether two employes of the police department, who were not in the bargaining unit represented by the complainant association, met the residency requirement set forth in ordinance 3.27; and that the criteria set forth in said opinion to determine compliance with said ordinance are included in Mayor Soglin's memorandum of November 3, 1976, as set forth below.

19. That on October 26, 1976, the city council adopted the following resolution:

"WHEREAS, Section 3.27 of the Madison General Ordinances requires, as a qualification for continued employment with the City, residency within the City limits; and

"WHEREAS, the United States Supreme Court in the case of McCarthy v. Philadelphia Civil Service Commission recently sustained the constitutionality of such qualification for public employment; and

"WHEREAS, it has been brought to the attention of the Common Council by the City Attorney that there may be a number of City employees who do not currently reside within the City limits; given the magnitude of the situation, it may be necessary for the City Attorney to seek additional personnel to promptly deal with it; and

"WHEREAS, similar action has been taken against other, now former, employees as information of nonresidence has been found,

"NOW, THEREFORE, BE IT RESOLVED, that the Common Council hereby expresses its intent to continue to enforce the provisions of Section 3.27 of the Madison General Ordinances requiring residency of all City employees.

"BE IT FURTHER RESOLVED that the City Attorney is hereby directed to conduct an investigation as to the residency status of City employees and to make appropriate reports to the hiring authorities, and whereas the hiring authorities are directed to take the steps necessary to enforce the provisions of the ordinance which require that should any employee cease to reside in the City, 'his office, position or employment shall be automatically forthwith vacated.'

"BE IT FURTHER RESOLVED that the investigation of the City Attorney is to be limited to those employees about whom the City Attorney receives complaints and reports as to nonresidency.

"BE IT FURTHER RESOLVED that all Department and Division Heads are directed to cooperate fully with the City Attorney in the investigation of the residency status of City employees, including providing investigatory personnel should that be necessary."

20. That on November 3, 1976, Mayor Soglin issued the following memorandum to all City employes with respect to the "City Residency Requirement":

"Please be advised that on October 26, 1976 the Common Council adopted a resolution which reads in part:

'NOW, THEREFORE, BE IT RESOLVED that the Common Council hereby expresses its intent to continue to enforce the provisions of Section 3.27 of the Madison General Ordinances requiring residency of all City Employees.'

"Section 3.27 of the Madison General Ordinances reads in part:

'Further, no person shall be eligible for election, appointment or employment to any position as an officer, department head, employer or member of a board or commission unless he shall reside in the City of Madison unless permission to reside outside of the City shall be expressly granted by the Mayor. In the event that any such City officer, department head, employee or member of a board or commission shall cease to reside in the City of Madison, his office, position or employment shall be automatically forthwith vacated . . .'

"The City Attorney has interpreted Section 3.27 of the Madison General Ordinances to mean that a City employee must establish his/her domicile within the corporate limits of the City of Madison in order to be in compliance with the City's residency requirement. While the intention of the employee is a controlling factor, the City Attorney has set forth certain factual considerations which include but are not limited to the following:

"1. Is the employee's primary domicile located within the City?
"2. If an employee is married, does the spouse live in the City?
"3. If an employee has children, do they live in the City? Do they attend school in the City?
"4. Is the employee registered to vote in the City?
"5. For income tax purposes, is Madison given as a place of residence?
"6. Does the employee maintain a telephone in the City?
"7. Does the employee sleep and eat in the City?
"8. Are the employee's personal belongings located in the City?
"9. Does the employee and family spend most of their time within the City?

"If you have questions concerning the information set forth in this memorandum, you may wish to contact the City Attorney's office."

21. That prior to November 8, 1976, agents of the respondent conducted investigations to obtain facts pertaining to the city residency status of Complainants Hess, Richardson, Walter, Rahn and Ryan; that Richardson, during an investigatory interview with Inspector Schiro, requested that his personal attorney be present during such interview; that Schiro denied such request after it was learned that said personal attorney was unavailable at that time; that on November 8, 1976, Chief Couper conducted pre-determination hearings involving said individual complainants; that present at said hearings were representatives of complainant association, as well as supervisor officers of the police department; and that following such hearings Chief Couper concluded that none of the individual complainants resided in the City of Madison, and therefore, pursuant to ordinance 3.27, caused the position of the five individual complainants to be vacated as of the end of the work day on November 10, 1976; and that at such time the individual five complainants were terminated.

22. That from approximately July 6, 1973, and continuing through at least October, 1976, police officers in the employ of the respondent were deemed to reside in Madison, under ordinance 3.27, as interpreted and applied in the police department, by (a) a de minimus presence at a Madison address, (b) voting in Madison, (c) registering their automobiles in Madison, (d) indicating a Madison address on their income tax returns, (e) indicating a Madison address on their driver's license, (f) having a telephone listing for Madison, (g) paying rent, or providing its equivalent, on Madison property, or by substantially complying with said criteria; that respondent's supervisory agents were casually responsible for the application of said criteria; and

that at all times material herein Complainants Hess, Richardson, Walter, Rahn and Ryan were in substantial compliance with said criteria.

23. That the respondent, at the order and direction of the city council and the mayor and through the action of its various agents, has refused to bargain by: (1) refusing to bargain as requested by the complainant association with respect to the contemplated change in the interpretation and application of ordinance 3.27; (2) unilaterally implementing said change without bargaining; and (3) refusing to bargain with respect to said change after its implementation.

24. That on November 15, 1976, the complainant association requested the respondent to enter into negotiations relative to residency as it applied to the instant collective bargaining agreement; and that on November 17, 1976, the respondent, through its labor relations director, denied said request.

On the basis of the above and foregoing Findings of Fact, the commission makes the following

CONCLUSIONS OF LAW

1. That the Respondent, City of Madison, by the action of its agent, Inspector Schiro, in denying the request of Complainant Richardson that the latter's attorney be present during Richardson's investigatory interview, did not interfere, restrain and coerce Complainant Richardson in the exercise of his rights set forth in Section 111.70(2) of the Municipal Employment Relations Act, and that, therefore, the Respondent, City of Madison, in said regard, has not committed a prohibited practice within the meaning of Section 111.70(3)(a)1 of the Municipal Employment Relations Act.

2. That the Respondent, City of Madison, by the action of its various agents, by changing the application of ordinance 3.27 without bargaining such change with the Complainant, Madison Professional Police Officers Association, has committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the commission issues the following

ORDER

IT IS ORDERED that Respondent, City of Madison, its officer and agents shall:

1. Immediately offer to reinstate Complainants Victor L. Hess, David A. Richardson, Mary Walter, Robert E. Rahn, and James H. Ryan to their former positions of employment, or the substantial equivalent thereof, without prejudice to their seniority or other rights and privileges previously enjoyed by them, and make said individuals whole for any loss of pay or benefits they have suffered by reason of the termination of their employment by paying to them the sums of money equal to that which each would have normally earned or received from the date of their terminations to the date of the unconditional offer of reinstatement, less any earnings they may have received during said period, and less the amount of unemployment compensation, if any, received by them during said period, and in the event that they received unemployment compensation benefits, reimburse the Unemployment Compensation Division of the Department of Industry, Labor and Human Relations in such amount.

2. Bargain collectively with the Complainant, Madison Professional Police Officers Association, as contemplated in Section 111.70(1)(d)

of the Municipal Employment Relations Act with respect to the application of ordinance 3.27.

3. Notify the commission within ten (10) days from the date hereof as to what steps it has taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 13th day of December, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Charles D. Hoornstra, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This case arises from the November 1976 discharges of five police officers of the City of Madison for violation of the city's residence ordinance, sec. 3.27, Madison General Ordinances. That ordinance provides:

> "* * */N/o person shall be eligible for election, appointment or employment to any position as an officer, department head, employee or member of a board or commission unless he shall reside in the City of Madison unless permission to reside outside of the City of Madison shall be expressly granted by the Mayor. In the event that any such City officer, department head, employee or member of a board or commission shall cease to reside in the City of Madison, his office, position or employment shall be automatically forthwith vacated . . . ."

This ordinance has been in existence at all times material, and no mayor has excepted any of the complainants from its provisions.

Complainant Mary Walter, who first was hired as a police officer in 1964 while she lived in Marshall, Wisconsin, was given mayoral extensions to continue residing outside the city of Madison to enable her to sell her home. She was unsuccessful in attempting to sell her home, so she resigned in 1966. She again was reemployed in 1972 as a limited term employe without being required to establish a Madison residency. In 1973 the police department needed women officers, and Walter was asked if she would move to Madison. She said no, and the conversation ceased. Inspector Edward Daley had read some material that suggested spouses might lawfully have separate residences. He consulted with Deputy City Attorney William A. Jansen who advised that it is possible for spouses to have different residences. Daley then called Walter and asked if she, as opposed to her family, would establish a Madison residence. She asked what that entailed. He said she would need a Madison address, a Madison telephone number, register her car in Madison, have her driver's license show a Madison residence, be registered to vote in Madison, and receive mail at the Madison address. Walter's testimony shows that she focused critically on the criteria for residency at the time of her conversation with Daley. Having resigned seven years earlier because of the residency requirement, Walter asked Daley whether compliance with the enumerated criteria was honest. Daley assured her it was and advised that he had obtained a city attorney's opinion on point. Walter then met the criteria established by Daley and resumed her employment in July 1973. Having complied with these criteria, she was denied the right to vote in Marshall. She was discharged in November 1976.

Other officers followed Walter's suit. Officer Richardson was employed in the police department in 1963 and 1964, there was an interruption, and he resumed employment in 1965 and continued it until his discharge in November 1976 for noncompliance with the residency ordinance. He owned property on Maher Avenue in Madison. In 1973 he married a person living in Oregon, Wisconsin. Concerned about the residency ordinance if he moved to live with his new wife in Oregon, Richardson spoke to Mayor Soglin and Captain Gallus in 1973. He told Soglin that he owned Madison property, paid taxes in Madison, his children attended school in Madison, had a Madison address, had a Madison telephone number, his driver's license showed the Madison address and his car was registered to that address. Richardson testified that Soglin said he should not worry about it and that he could move to Oregon. Soglin testified he could not recall this conversation. He further testified that the various criteria -

Madison address, voting, car registration, etc. - were used by him only as evidence of residency and that he has never taken the position that compliance with these criteria themselves establish residency. Since Soglin could not recall this conversation with Richardson, there is no evidence that he explained his point to Richardson. The commission credits the recollection of Richardson to the extent of finding that Mayor Soglin affirmatively indicated that Richardson would not violate the residency requirement by living with his wife in Oregon if he also met the criteria enumerated in Richardson's testimony.

Richardson also consulted Captain Gallus, a supervisory agent of the respondent. He recounted to Gallus substantially the same facts as were given to Mayor Soglin. Captan Gallus also told Richardson not to worry about it. It should also be noted that Lt. Johnson of the police department had knowledge of Richardson's residing in Oregon as evidenced by the fact that Johnson on occasion called Richardson in Oregon to speak with him.

Officer Robert E. Rahn, employed in the police department since 1971, maintained a Madison address but also lived in Oregon, Wisconsin, since 1972. With the purchase of a new property in Oregon in 1974, he knew he would be spending a greater portion of his off-duty time there. He inquired of Assistant City Attorney Robert Olson and an individual in the personnel office as to the meaning of the residency ordinance. Receiving no answer other than being referred back to the ordinance itself, he presumed that he would be in compliance with the ordinance by leasing Madison property and meeting the other criteria referred to herein relative to telephone, vehicle, and voting record. In addition, he believed he should occasionally sleep and eat in the Madison property. Rahn voted in Oregon. On September 3, 1976, Rahn came to believe that he was being investigated with respect to his residency. To assure compliance, he made an offer to purchase a home in Madison on October 13, 1976. On about October 20, 1976, a contract was reached with the seller contingent on financing but not contingent on the sale of any other property. The financing contingency was removed. Rahn eventually presented this information showing his purchase of a Madision home to the chief of police during a hearing to determine his residency status. Also, during that hearing, Rahn told the chief it was his intent to make the Madison home his sole residence. The chief discharged him shortly thereafter.

Sergeant James H. Ryan was approaching his fifteenth anniversary as a Madison police officer when he was discharged. He and his family lived in Madison until about the summer of 1975 when they moved to Cottage Grove, Wisconsin. After moving, Ryan took a room in the city of Madison in exchange for services to the owner. He received mail there and voted in Madison. Before making this move, however, Ryan consulted then Lieutenant and now Captain Morlyn Frankey in the fall of 1974. In the first conversation he explained that he wanted to build a dwelling in Cottage Grove. According to Ryan, Frankey said it was all right to do so if he had a legal address in Madison, and that such criterion was based on a city attorney opinion. Ryan asked Frankey to check with the chief. Two or three weeks later, Ryan testified, Frankey advised him that he must meet certain criteria to comply with the residency requirement, which included voting in Madison, having a driver's license showing the Madison address, paying taxes, and receiving mail at the Madison address. In addition, Ryan said Frankey suggested it would be well to spend time at the Madison address, but she did not specify how much time was required.

Frankey testified that she had made inquiry as to whether spouses could live apart and still be in compliance with the residency ordinance, and received an affirmative answer. She recalls discussing Walter's situation with Ryan and telling him not to spend 100% of his off duty time at the Cottage Grove home. She

testified that she did not specify what portion of time should be allocated to the separate living places.

Ryan further testified that in 1971 or 1972 he had a conversation with Barry Ott, then the city's labor negotiator, relative to information that a firefighter had a Stoughton address. According to Ryan, Ott shortly thereafter said he had learned that the firefighter had a Madison address and that as long as he had such an address "we didn't care." Ott in his testimony emphatically denied having told anyone that having a Madison address satisfied the residency requirement.

Ryan also testified that he explained to Captain Wilson that he was building a Cottage Grove residence. Captain Wilson testified that on hearing Ryan's intent asked Ryan how he would get around the residency ordinance and that Ryan responded he would be doing the same thing Walter was doing. Wilson did not tell Ryan this was in any way improper. Wilson further testified that he felt the Walter situation was consistent with past practice as he understood it, but also stated that he understood that practice to require that a considerable amount of time be spent at the Madison address.

The commission need not resolve the conflict in testimony between Ryan and Ott. The commission finds, on the basis of the testimony of Frankey, Wilson and Ryan, that Ryan was told he would be in compliance with the residency ordinance by meeting the various criteria discussed above - voting, driver's license, taxes, receipt of mail - and that he also spend an unspecified amount of time at the Madison address.

Officer Victor L. Hess joined the police department in 1974. At that time he moved to Madison from Verona to comply with the residency ordinance. In August 1976 he moved to the Sauk City area but rented a room in Madison, received mail there, listed a telephone at that address, registered his vehicle there, registered to vote there, and spent some time at the Madison address. He believed said conditions were sufficient for residency purposes on the basis of conversations with other officers in the department as to their understanding of the requirement, and in particular on the basis of a conversation with Frank Trostle, the association's presdient, who had understood from a conversation association representatives had had with Mayor Soglin in about 1974 that such conditions were sufficient.

Captain Wilson testified that Mary Walter's residency situation was common knowledge in the bureau he headed, and that probably his awareness and perhaps that of other superiors also was common knowledge.

Officer Peter V. Cerniglia, a director of the complainant association for the years 1968-1971 and 1973-1975, came to believe that a physical presence at a Madison address during off-duty hours was not particularly important. He came to this conclusion on the basis of two conversations: one with Charles Reott, the city's personnel director, and the other with Mayor Soglin.

The Reott conversation occurred in 1971, at which time Cerniglia asked Reott about a firefighter who was believed to have a Stoughton address, and inquired why the latter could live outside the city. Reott checked into the matter and later told Cerniglia that the firefighter was registered as living on Oak street in Madison. In November 1976 Cerniglia asked Reott if he recalled said conversation. Reott said he did, but that it was not he who was doing the firings. Reott did not testify, and the respondent offered no explanation for

not producing Reott's version. Accordingly, the commission credits Cerniglia's recollection of these conversations with Reott in all respects.

The conversation between Cerniglia and Mayor Soglin occurred, according to Cerniglia, in about 1975 in the mayor's office. The purpose of the meeting was to discuss residency. About six police officers participated. According to Cerniglia, the first question posed to the mayor was whether the residency requirement could be repealed. The mayor said no. The second question posed, was what constituted residency? The mayor replied that it was at least necessary to have an apartment in Madison, a telephone number listed at that address, and, Cerniglia thought, a voting eligibility and a driver's license showing the Madison address.

The mayor's recollection is close to Cerniglia's, but somewhat different. The mayor believed that the conversation occurred prior to 1975. The first question was whether the residency requirement could be repealed. The mayor answered that he firmly believed in it and that he did not think that common council would change it. In the mayor's recall, the second question was, what if someone had a home out of the city but within the county? The mayor indicated "measuring sticks" to ascertain residency, to-wit: voting, driver's license registration, and others.

The mayor testified his belief was that if one were eligible to vote and met other indicia of residency, then he was a resident for purposes of the ordinance. He did not mean to say that if one in fact voted in Madison, or simply fulfilled the other criteria, he ipso facto was a resident for purposes of the ordinance. The mayor acknowledged that residency means different things for different purposes, but felt that taking all the factors together, the meaning of the residency requirement is clear.

The commission finds that, throughout the conversations with members of the police department generally and in the Cerniglia-Soglin conversation in particular, city officials failed to make clear to the officers that the criteria were merely evidentiary of the fact of residency, or that compliance therewith did not itself establish residency for the purposes of the residency ordinance. The commission further finds that the officers, in their conversations with officials of the police department and the mayor, reasonably believed they were being told that meeting the evidentiary criteria itself was compliance with the ordinance.

In making these findings the commission relies on the record of these conversations and the common thread running through them suggesting that what city officials intended to mean by their statements was not expressly and clearly communicated to the officers. Further, the commission relies on the fact that at least five police officers, and probably eight more, acted in accord with these findings. Finally, the commission specifically relies on the demeanor and testimonial credibility of the officers who testified. The alternative would require the commission to conclude that the officers knew better, that they consciously circumvented the residency requirement, and that they proceeded to establish Madison addresses, to register their cars in Madison, to vote in Madison, to have their driver's licenses reflect a Madison address, all other than in good faith. Such a conclusion is rejected as being contrary to the credibility of the testifying officers. It also requires the

incredible conclusion that these officers, sworn to uphold the law including ordinances, would jeopardize their integrity, their jobs, their years' of service, and their families' welfare.

The testimony of the chief of police is supportive of the commission's conclusions. Chief Couper testified that prior to the city attorney's April 1976 opinion on residency, he believed residency involved a weighing of various factors, such as voting and tax paying. While he always believed residency required some kind of presence in the city on off duty hours, he thought the city attorney's opinion placed a new meaning on presence by using the criterion of a "primary" living quarters. It is noteworthy that it required two city attorney opinions, one in April 1976 and the other in September 1976, to persuade the chief that Captain Scrivner and his wife, both nonunit employes of the department, were not Madison residents, inasmuch as they had a Mt. Horeb farm, where they spent their nights, visited the Madison apartment only occasionally, had a telephone number listing the Madison apartment, registered their car in Madison, had their driver's licenses show a Madison address, and filed their tax returns showing the Madison address.

The commission's findings also are supported by the October 1976 report to the common council of Timothy Jeffery, the city's director of labor relations. Jeffery reported (ex.9): "I have learned that there has developed within recent years a misunderstanding among some employees as to the intent and definition of the residency requirement . . . . Some employees have sincerely concluded that they could maintain two living places (one inside and one outside the City limits) and still be in compliance . . . ."

The commission has found that the past practice in the police department as to residency from mid-1973 to the discharges in 1976 permitted dual residency pursuant to certain criteria and that a substantial compliance with such criteria sufficed. One of those criteria has been a de minimis presence at a Madison address. Although Captain Frankey told Ryan that some presence was necessary and although Walter for a time had a presence in Madison, the commission bases this conclusion on the following considerations:

(1) Frankey refrained from giving Ryan an approximate precentage allocation of time in Madison and stated it negatively, i.e., don't spend 100% of off-duty time in Cottage Grove.

(2) The commission finds no persuasive evidence that Inspector Daley or Captain Wilson told Walter she must have a presence in Madison, although Wilson and Daley each believed a significant or considerable presence was required, whatever that may mean, and Daley admitted inability to define the necessary percentage of time.

(3) The commission is extremely impressed with the credibility of Mary Walter. We are convinced that if she had believed a significant presence was required she would have maintained it. She pointedly questioned Daley during conversations in 1973 regarding resumed employment as to the honesty of the dual residency scheme, and understandably so after having resigned seven years earlier because of the residency ordinance. Her actual presence at the Madison apartment for a time, at least for purposes of eating, is explainable as using an opportunity to be with her son who also lived there at the time. 2/

2/ Respondent contends that Walter's version is undermined by her testimony that she understood from Daley that she would "visit" her family in Marshall. The commission construes Walter's testimony in this respect to be that establishing legal residence in Madison meant, as a point of law, that she could not also be a Marshall resident and that her presence there with her family legally would be deemed visitation. Daley's testimony that he believed persons could have separate residences though they be married to each other supports this interpretation.

(4) Captain Scrivner maintained a de minimis presence in Madison. See exhibit 6. Scrivner participated in the 1973 discussions relative to the terms of Walter's rehire. In February or March 1976 he reiterated his satisfaction that she complied with the residency requirement, and he persisted in the belief that he himself was in compliance until the September 1976 assistant city attorney's contrary opinion.

(5) Inspector Daley construed the April 1976 city attorney's opinion to be at variance from an oral opinion he received from a deputy city attorney in 1973 in connection with Walter's rehire. While the precise variance in Daley's view concerned the permissibility of divided residencies between spouses, presence logically becomes significant upon such impermissibility.

(6) Officer Cerniglia had conversations with the mayor and the personnel director, set out above in this memorandum, which reasonably led Cerniglia, an agent of the association at the time, to believe that a significant presence was not important. About six officers attended the meeting with the mayor.

Thus, the requirement of presence, when discussed, was so vaguely defined as to be meaningless.

The commission also has found that a substantial compliance with other criteria sufficed. First, the city attorney's opinion of April 1976 set forth that such criteria were mere considerations to weigh. Second, the other criteria were not consistently applied. For examples: Inspector Daley did not tell Walter that paying taxes was among the criteria; Captain Frankey did not tell Ryan that registering his car at a Madison address was among the criteria; and whether one paid city taxes or indicated a Madison address on income tax returns varied.

Respondent seeks to disavow and be held harmless from the words of its supervising agents. First, it argues that its police chief and the city itself are separate from them and reserve the right to assert their prerogatives. This contention belatedly broadsides well ensconced agency principles. Second, the respondent notes that the collective bargaining agreement provides that no verbal statements supersede its terms. Such provision, however, only means verbal statements may not change what has been agreed to. Even if the residency ordinance is part of the agreement, "residency" is ascertainable by a variety of factors, as the city attorney's opinion shows. Unlike terms requiring little or no construction, its meaning is established by its application, and supervisory authorizations establish such meaning and are res gestae.

The respondent contends that there is no basis for the officers' belief that its ordinance permits such "dual" residencies. It cites the cases of: Susan Minihan, a public health nurse, who was terminated in 1975 for living in McFarland, Wisconsin, although she listed a Madison address; Jacqueline Denner Mayne, an employe of the city library, who was terminated in 1970 for living on the Middleton, Wisconsin, side of Allied Drive; Dorene Speckmann, a library aide, who was terminated in 1975 when she moved out of the city; Joseph Schaller, a master mechanic in the public works department, who listed a Madison address, but in fact resided outside the city and was terminated in 1973; and Dennis LaBrosse, who worked for the public works department and was terminated in 1970 for living outside the city.

These illustrations are inapposite. First, in each case the employe's residence in the city of Madison appears to have been totally bogus. The addresses listed appear not to have

been to properties in which the employe had any legally cognizable interest whatsoever, or they had their only residence outside Madison. Second, in the police department, as found herein, supervisors, including the mayor in two conversations, led officers to believe that dual residencies together with other criteria, noted herein, sufficed to establish residency.

The commission rejects respondent's argument that the association had notice that dual residency was proscribed since association presdient Trostle had learned about the master mechanic affair. The master mechanic's claim to Madison residency was wholly bogus, unlike the claim of the officers which is grounded on the language and example of their superiors.

The commission also rejects the respondent's contention that the practice in the police department was inconsistent with the officers' dual residencies as evidenced by (a) the practice of advising officers of the residency requirement at the time of hire, (b) the conduct of officers in moving to Madison to take jobs here, (c) the resignation of employes who moved from the city, and (d) Captain Wilson's acquisition of a mayoral exemption to live outside the city. Advising officers at the time of hire of a residency requirement is not the equivalent of apprising them of its meaning. Moving to Madison to assume city employment does not negate the existence of the practice, discoverable only after being within the department, of permitting separate residencies among spouses. The scant evidence relative to resigantions of those moving from the city suggests the conclusions either that the resignors chose not to bear the financial burden of two residences or that they moved so far away as to preclude any ties to Madison as a practical matter, and such evidence is too sparse to outweigh evidence of the contrary practice. Similarly, the sparse evidence surrounding Captain Wilson's mayoral exemption suggests that employes did not know of it and/or the captain severed all domiciliary ties with the city.

The fact that, after the city attorney issued his opinion, the common council passed a resolution calling for enforcement of the residency ordinance is evidence of a pattern of prior nonenforcement per the city attorney's criteria. While the mayor testified that he brought the matter to the council's attention to enable it to participate in the decisionmaking process, the interpretations of the residency requirement by the chief and Inspector Daley, which were inconsistent with the subsequent city attorney's opinion, together with the past practice as found herein, persuade the commission that the council resolution was calculated to implement a change in the residency requirement as practiced in the police department.

The city further contends that the association has agreed to be bound by the residency ordinance. The association's brief in 1974 relative to an interest arbitration for a 1975 collective bargaining agreement withdrew its demand that residency be dropped and agreed to be bound by it. Frank Trostle, the association's president, testified that the association always has believed the residency ordinance applied to the police department employes. Further, the city notes that the association over the years has several times proposed that the residency requirement be deleted or has proposed alternative language.

The city's argument is rejected. The association does not argue that it is not covered by the residency ordinance. Its point is that the terms of residency have been changed resulting in the instant discharges of employes who were in compliance with the past practice of applying the ordinance. The association's request to delete the requirement is easily understandable as trying

to relieve officers from the burden of maintaining two living quarters. Further, Trostle credibly testified that he had entertained the possibility that the city might change past practice by a more restrictive application of the residency requirement, and the effort to delete the requirement altogether was calculated to deter such a change. Finally, Trostle credibly testified that the association thought it could withdraw its demand that the residency requirement be dropped with relative safety inasmuch as a strict interpretation was not being enforced and supervisory personnel were award of the past practice application.

The general rule is that an employer may not make a change in conditions of employment without first bargaining on the proposed change with the collective bargaining representative. 3/ Imposition of a residency requirement is a condition of employment within the meaning of sec. 111.70(1)(d), Stats., and is a mandatory subject of bargaining. 4/ By imposing a changed meaning of the residency requirement on the association and the employes it represents without offering to bargain the change, the respondent in making a unilateral change in conditions of employment and by refusing to bargain on the subject of residency as requested by the association, has violated sec. 111.70(3)(a)4 and 1, Stats. 5/

The association has not waived its right to bargain changes in the criteria for residency as a condition of employment. In all negotiations dating back to at least 1970, and including negotiations for the 1976 agreement, the association proposed that the city drop the ordinance requirement. While the association consistently made such proposals, the city consistently rejected same, and there was very little discussion concerning the issue itself.

Given the above, the city claims that the association has sought to restrict application of the residency ordinance through the bargaining process and that the association failed to secure any such restriction. Thus, the city argues that its action in enforcing the ordinance is not a unilateral action changing a condition of employment.

The commission notes that while the association proposed that the city drop its ordinance requirement, it is clear from the record that in said negotiations the parties never bargained with respect to the definition of the ordinance or the necessary criteria to comply with said ordinance. Also significant is the fact that throughout the time the association was proposing that the ordinance be dropped, there was an ongoing practice of interpreting compliance with the ordinance by use of criteria set forth in the Findings of Fact.

3/ NLRB v. Katz (1962), 369 U.S. 736, 743, 82 S.Ct. 203, 8 L.Ed. 2d 1107; Madison Jt. School Dist. No. 8 (12610) 4/74; City of Oak Creek (12105-A, B) 7/74, City of Menomonie (12564-A, B) 10/74.

4/ Local 366, District Council 48, AFSMCE, (Sewerage Commission of the City of Milwaukee) (11228-A) 10/25/72; City of Brookfield v. WERC (Waukesha Circuit Court, No. 31923, 1974), 87 LRRM 2099, 2100, 2669, 74 CCH Lab, Cas. par. 53,400; Police Officers Assn. v. City of Detroit (1974), 391 Mich. 44, 214 N.W. 2d 803, 85 LRRM 2537; Manitowoc v. Manitowoc Police Dept. (1975), 70 Wis. 2d 1007, 236 N.W. 2d 231.

5/ The violation of sec. 111.70(3)(a)1, which consists in interfering with the protected rights of employes, is derivative of the violation of a refusal to bargain. The rationale is that a unilateral change in conditions or an outright refusal to discuss a subject of bargaining interferes with an "minimizes the influence of collective bargaining." May Department Stores Co. v. NLRB (1945), 326 U.S. 376, 385, 66 S.Ct. 203, 90 L.Ed. 145, reh. denied, 326 U.S. 811, 66 S.Ct. 468, 90 L.Ed. 495.

In light of the above practice the commission concludes that the association's repeated attempt to persuade the city to drop its ordinance requirement does not constitute a clear and unmistakable waiver of the association's right to bargain over changes of the past practice regarding the application of ordinance 3.27. Therefore, it is the commission's conclusion that the city, by changing its interpretation from a loose construction of the ordinance, wherein compliance could be secured by meeting the noted criteria without any clear guidance as to the amount of time which had to be spent in the city, to a structured interpretation, wherein one of the primary criteria required a primary domicile in Madison, unilaterally changed a working condition without first bargaining same with the association.

This case must be distinguished from a situation in which employes knowingly fail to comply with a lawfully imposed condition of employment. The commission is not holding that repeated violations of a valid condition of employment of which the employer is unaware establishes a past practice which the employer, upon learning of the violations, is unable to enforce. The distinguishing feature of this case is that the city's supervisory personnel have, by their conduct and their words, led employes in the instant bargaining unit into a course of conduct respecting their residencies which they reasonably believed was in full compliance with ordinance 3.27.

The commission rejects the association's allegation that the respondent unlawfully denied employes in the bargaining unit the opportunity to have an association representative present during the investigatory meetings with the officers prior to the hearings leading to the instant discharges. The association representatives were permitted to attend. Although the respondent in one case proceeded with an investigatory interview in the absence of an officer's attorney, the officer sought the aid of the attorney only in the capacity of his personal attorney rather than as a spokesman for the association.

The association's allegation in its amended complaint that after the termination of the officers, the city refused to bargain for their reinstatement fails for lack of proof.

The commission rejects the association's argument that the respondent unlawfully attempted to bargain with individuals by the conduct of the mayor and the police chief in posting notices of their interpretations of the residency ordinance. Such notices in fact were refusals to negotiate, inasmuch as they constituted a unilateral implementation of a changed condition of employment. Communicating such a unilateral change is essentially a refusal to bargain; it is not bargaining with the communicant.

The commission must reject the association's argument that the respondent made a unilateral change in conditions of employment by failing to give the discharged officers time in which to comply with its new construction of the ordinance. Although the former city attorney testified that such lead time regularly had been given, greater weight must be accorded specific contrary examples adduced by the respondent. Although the commission rejects the association's argument in this respect, it notes that in its experience in labor relations this commission rarely sees equal harshness on the part of employers. Respondent would have better served the legislature's objective of harmony in labor relations by adhering to the advice of its labor relations director as set forth in his memorandum to the city council as quoted in the Findings of Fact.

The commission is not holding that a residency requirement is an unlawful condition of employment. Further, the commission is not

holding that the city is required to adhere to any particular definition of residency. Rather, the commission is holding only that the respondent has imposed a changed meaning of residency without complying with the legal requirement that it must bargain with respect to said change in working conditions with the representative of the employes affected thereby.

Dated at Madison, Wisconsin this 13th day of December, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Charles D. Hoornstra, Commissioner