BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between TEAMSTERS LOCAL 75 and CITY OF MANITOWOC	Linn Anderson discharge grievance dated 6-12-89 Case 78 No. 42926 MA-5850

Appearances:

Ms. Marianne Goldstein Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., PO Box 92099 (788 North Jefferson Street), Milwaukee, WI 53202, appearing on behalf of the Union.

Mr. Patrick L. Willis, City Attorney and Personnel Director, PO Box 1597 (817 Franklin Street), Manitowoc, WI 54221-1597, appearing on behalf of the City.

ARBITRATION AWARD

INTRODUCTION

The Wisconsin Employment Relations Commission designated the undersigned Arbitrator to hear and determine the abovenoted dispute pursuant to the grievance arbitration provisions of the parties' 1989-91 collective bargaining agreement (herein Agreement).

The parties presented their evidence and arguments to the Arbitrator at a hearing held at Manitowoc City Hall on November 17 and 22, 1989. By agreement of the parties, the Arbitrator recorded the hearing on cassette tape for his exclusive use in award preparation. The parties also waived applicability to this case of a contractual time limit for award issuance. Briefing was completed on January 18, 1990, at which time the hearing was closed and the matter fully submitted.

The Grievant, Linn Anderson, and her husband, Larry Shimek (herein Larry), were both discharged effective June 6, 1989, for failure to comply with the City's residency ordinance. That ordinance and the Union's express Agreement Art. XX(l) recognition of the City's right to discharge employees who do not comply with it are set below.

In very broad terms, the City contends that the grievance was not processed timely and that Grievant failed to comply with the residency ordinance because she and her husband maintained their primary and permanent abode at a home they built beginning in August of 1988 at 4215 West Lake Drive (herein 4215) in the Town of Newton some 10 miles outside of the City, rather than at any location within the City. Grievant and the Union contend, instead, the grievance was processed timely, that the City is improperly requiring more than the residency referred to in the ordinance, and that Grievant and Larry complied with the ordinance by maintaining a residence at 1150 North 39th Street (herein 39th St.) in the City except for the months of February and March, 1989, when they complied by residing at the Clipper City Motel in the City. They also rely in part on their stated willingness at various times to take other steps to more clearly comply.

Set forth below are: the issues; the Agreement and ordinance language involved; the facts, parties' positions and Arbitrator's discussion, respectively, regarding procedural arbitrability and the merits of the grievance; and finally the Arbitrator's formal decision and award.

STIPULATED ISSUES

At the hearing, the parties stipulated to the following issues:

1. Is Issue 2, below, procedurally arbitrable?

2. If so, did the City violate the Agreement by its discharge of Linn Anderson on June 5, 1989?

3. If so, what shall the remedy be?

PERTINENT PORTIONS OF THE AGREEMENT

ARTICLE VIII
DISCHARGE

Section 1. Procedure. The Employer shall not suspend, demote or discharge any employee without just cause. Where just cause would not warrant a suspension, demotion or discharge, the Employer agrees to give at least one (1) written warning.

Section 2. Warning Notice Duration. The warning notice as herein provided shall not remain in effect for a period of more than six (6) months from date of said warning notice.

Section 3. Notice. Discharge or suspension of an employee must be by proper written notice, registered, mail, return receipt,

sent to the last known address of the employee with a copy to the Union. Any employee may request an investigation as to his discharge or warning notice.

Section 4. Appeal and Reinstatement. Should such investigation prove that an injustice has been done, the employee shall be reinstated and compensated at his usual rate of pay while he has been out of work. Appeal from discharge must be taken within five (5) days by written notice to the department head and a decision must be reached within twenty (20) days from the date of discharge.

Section 5. Arbitration. The employee may be reinstated under other conditions agreed upon by the Employer and the Union or pursuant to the terms of an arbitration award. Failure to agree shall be cause for the matter to be submitted to arbitration as provided in Article XI of this Agreement.

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ARTICLE X
GRIEVANCE PROCEDURE

The following steps shall be followed in any grievance action.

Section 1. Procedure.

(a) The grievance shall be presented to the employee's immediate supervisor by the employee and/or steward within five (5) working days of the grievance or its discovery. The supervisor shall respond to the grievant and/or steward within five (5) working days.

(b) If not settled in (a) the grievance shall be reduced to writing and the steward along with the Union Representative shall meet with the Director of Public Works within five (5) working days. The Director of Public Works shall respond to the grievance, in writing, within five (5) working days.

(c) If not settled in (b), the Union representative shall meet with the Employee Relations Committee within fifteen (15) working days.

Section 2. Time Limit Extensions. The above time limits may be extended by mutual agreement of the parties.

ARTICLE XI
ARBITRATION

If a grievance cannot be resolved through the procedures outlined in Article X, either party may request arbitration within ten (10) working days. The party requesting arbitration shall notify the Wisconsin Employment Relations Commission of its desire to have that agency appoint an arbitrator from its staff to hear testimony and render a decision within thirty days. A copy of the arbitration request shall be forwarded to the other party. The arbitrator's decision shall be final and binding on all parties to this agreement. The expenses of a hearing recorded shall be borne equally by the parties.

The arbitrator shall not have the authority to change, alter or modify any of the terms or provisions of this Agreement.

. . .

ARTICLE XX
RESIDENCY

Section 1. Recognition. The Union recognizes that it is beneficial to the City of Manitowoc that all employees of the City of Manitowoc reside within the City limits of Manitowoc. The Union agrees that it will do whatever is possible to persuade employees to conform with the provisions of the Manitowoc City Ordinance regarding residing in the City and furthermore the Union acknowledges the City's rights to discharge employees who do not comply with said ordinance.

Section 2. Certain Bus Drivers. Bus drivers who are employed by the predecessors Safeway Motor Coach Company shall be exempt from this Article if they do not currently reside within the City limits of the City of Manitowoc provided, however, that in the event such employee shall ever change his residence, he shall be obligated to comply with this Article and the City shall be obligated to comply with this Article.

PERTINENT PORTION OF CITY OF MANITOWOC MUNICIPAL CODE

CHAPTER 20

CITY-EMPLOYEE RELATIONSHIP

20.01 City-Employee Relationship

. . .

(2) Employee Residence in City.

(a) All employees of the City of Manitowoc, including employees of the Manitowoc Public Utilities and Waste Water Treatment Plant, shall reside within the corporate limits of the City of Manitowoc.

(b) All present employees not residing in the City of Manitowoc at the present time must move within the corporate limits of the City of Manitowoc and be residents of the City of Manitowoc on or before November 1, 1973.

(c) Any employee not a resident of the City of Manitowoc on or before November 1, 1973, shall be subject to immediate discharge. Said discharge shall occur only if recommended by the Personnel Committee of the Manitowoc City Council and passed by the City Council at a regularly scheduled meeting. The Personnel Committee of the Manitowoc City Council shall permit any employee not a resident of the City of Manitowoc on November 1, 1973 to be heard regarding the non-residence. Said hearing shall be held at a regularly called committee meeting and the employee shall be given notice of said hearing. The employee shall be permitted to be represented by an attorney and bring any witnesses the employee so desires. The hearing shall not be formal and no formal testimony shall be taken.

(d) Any employee not a resident of the City of Manitowoc after November 1, 1973, shall be subject to immediate discharge following a hearing as described above.

FACTUAL BACKGROUND -- PROCEDURAL ARBITRABILITY

After receiving written notification of the discharge, which took effect on June 6, 1989, Grievant conferred with her Union steward, Randy Junk on June 12. They prepared, dated and signed a grievance form challenging the discharge, which Junk presented to supervision that same day. City witnesses testified that a written response denying the Grievant's request for reinstatement and back pay was given to Junk on June 16. Junk states that his records do not contain such a document and that he had never seen one until November several months,later.

In any event, Union Business Representative Danny McGowan called City Attorney and Personnel Director Patrick Willis about the grievance within five working days after June 16. McGowan testified that the grievance was important enough that he chose to call Willis about its processing without knowledge that the City had denied it, and that he has done the same thing in the past in some but not all cases. Willis was not in when McGowan called, but Willis returned the call on June 23, and Willis' long distance phone bill shows they spoke for 7 minutes. In that conversation, McGowan proposed that a meeting be scheduled to discuss the grievance. Willis replied that he thought the City's case was a strong one on the merits and that McGowan should review a transcript Willis had made of the May 23 residency hearing before the Personnel Committee before the Union decided whether to proceed further with the grievance. McGowan agreed, leading Willis to forward the transcript to him by a June 26 letter concluding, "Pursuant to our telephone conversation of June 23, I understand that you will review these documents to make a determination as to what position the bargaining unit will take with respect to Linn's grievance." There was no express discussion in that phone conversation or letter concerning a time by which the Union was to make its determination or concerning contractual time limits.

The next communication with Willis about the grievance that McGowan was certain of was sometime in the week of September 11, 1989. McGowan told Willis at that time that the Union had reviewed the transcript and the situation and had concluded that it wished to proceed further with the processing of the grievance. Willis replied that so much time had passed that the City might take the position that Union had taken too long in responding to pursue the matter further. McGowan then formally wrote Willis requesting a grievance meeting, and Willis responded that the City was unwilling to convene such a meeting because the grievance process terminated when there was no timely appeal of the City's June 16 grievance denial.

McGowan testified that after reviewing the transcript he forwarded it to the Union's law firm for its review. He further explained that between their conversations about the grievance on June 23 and in September, both he and Willis had been on vacation at various times, and the City and Union had focused their attention on contract negotiations and seniority issues. He noted that the parties' relationship had historically been one in which time limits were treated flexibly such that there had been delays of three months or more in the processing of other grievances.

Willis acknowledged that time limits have been extended by mutual agreement in the past and that untimeliness of a day or two had perhaps been waived. He stated, however that this

grievance was of substantially greater significance and potential dollar liability than those in which time limits had been extended or waived in the past. Accordingly, he expected both that McGowan would get back to him promptly if the Union intended to go ahead with the matter and that if the Union did not promptly do so that it would signal that the Union had decided not to proceed further on the grievance. While he admitted that he had no particular time frame in mind for the Union's response, he did not think that the Union would (and did not agree that the Union could) take nearly three months and then decide to proceed further on the grievance. He noted that at all times following the discharge, the Grievant was actively pursuing a claim for Unemployment Compensation, further indicating to the City by comparison that the grievance was not going to be pursued. Willis also noted that after posting and then advertising the vacancy, the City hired a replacement for Grievant on July 28 who began work on August 14, 1989, all in reliance on the Union's apparent determination not to pursue the grievance further.

POSITION OF THE CITY -- PROCEDURAL ARBITRABILITY

The Union waived its right to pursue this grievance by its failure to appeal in a timely fashion.

It is undisputed that there was no discussion between McGowan and Willis concerning an extension of time limits. Thus, unlike other cases in which the parties have mutually agreed to extend time limits, there was no express extension agreement reached here. After receiving the transcript, McGowan would have had enough time to review it and decide whether to pursue the grievance further prior to June 30 (10 working days after the June 16 denial of reinstatement), the deadline for appeal to arbitration established by Arts VIII and XI, which, taken together, constitute the applicable appeal procedure in discharge cases.

The delay on the part of the Union was nearly three months, not just a couple of days, and the grievance involved has major implications both for an existing employe and for the City treasury, making it unlike other grievances on which time limits noncompliance have been overlooked by the parties in the past, and making it unbelievable that the Union and Grievant were seriously pursuing the grievance throughout their lengthy delay.

Because a Union determination not to pursue the grievance was one of the possible results of the Union's review of the transcript, the City could reasonably have concluded that the grievance was not being pursued when the Union did not pursue it for so long a period of time. Especially so in the context of Larry's admission in the May 23 hearing transcript that he and Grievant did not then have a residence in the City. Compared to the great care Grievant's took not to exceed the Agreement deadline for initiating the grievance and her prompt and vigorous pursuit of UC benefits the lengthy nonaction concerning a grievance appeal further indicated an intent not to pursue the matter. It is also notable that Grievant made no mention at the UC hearing that she was still contesting the merits of her discharge. In reasonable reliance on the Grievant's and Union's inaction, the City went through a lengthy and visible hiring process and hired a

replacement for Grievant, again without any response from the Union. It would be unfair to the City and to that replacement to allow Grievant and the Union to resurrect the grievance after so long a delay in appealing it.

For those reasons, the Arbitrator should conclude that STIPULATED ISSUE 2 is not procedurally arbitrable and deny the grievance on that basis.

POSITION OF THE UNION -- PROCEDURAL ARBITRABILITY

The grievance is procedurally arbitrable. The City bears a substantial burden of establishing its timeliness defense since doubts as to time limit interpretation and as to whether they have been met should be resolved against forfeiture of the right to process the grievance. Although the grievance was unquestionably initiated timely, there is substantial doubt whether the City gave the Union a timely response since Steward Randy Junk stated that he did not see the Steckmesser June 16 response until shown it in connection with the arbitration hearing.

In any event, McGowan contacted Willis to establish an Art. X Step (b) meeting within five working days of June 16, thereby taking the necessary steps to move the grievance to Step (b). The scheduling of a Step (b) meeting was postponed only because Willis requested that McGowan first review the residency hearing transcript before deciding whether to process the grievance further. McGowan and Willis agreed to proceed as Willis had requested, without providing a specific deadline.

Had the City, as initiator and confirmer of the postponement wanted a specific deadline established, it could easily have proposed one. Agreement X expressly provides for extensions by mutual agreement even without a written confirmation. The City's assertion for the first time in its brief, that Arts. VIII and XI combine to make the Art. X inapplicable herein, is improper since the City has at all previous times claimed that both parties had been processing the grievance under Art. X. In the circumstances, then, there was a mutual agreement to extend without specific deadline, such that no violation of the contractual time limits has been proven by the City.

In any event, the Union has shown that the parties' enforcement of grievance time lines has historically been lax, making strict enforcement inappropriate absent prior notice lacking here. The evidence concerning the City's recruitment of Grievant's replacement suggests that the City had every intention of going forward with employment a replacement for Grievant regardless of the grievance or its status.

For those reasons, the Arbitrator should conclude that STIPULATED ISSUE 2 is procedurally arbitrable.

DISCUSSION -- PROCEDURAL ARBITRABILITY

The issue is whether the Union and Grievant have failed to pursue the grievance in a manner consistent with applicable Agreement time limits. Willis raised no timeliness objection during the June 23 conversation or in the June 26 letter as regards grievance processing up to that point, so the Arbitrator finds any such timeliness objection up to that point in time to have been waived. Similarly, because McGowan raised no question during the June 23 meeting about the issuance or nonissuance of a City response to the grievance, the Arbitrator also finds that the Union cannot now claim that the City failed to timely submit its initial written answer to the grievance.

The question thus turns on whether the Union and Grievant waited too long after receiving that Willis letter to be permitted to pursue the matter further under the terms of the Agreement.

The Arbitrator is satisfied from the testimony and documentation concerning the June 23 conversation that McGowan requested a grievance meeting in a manner that would be timely under Art. X. Willis did not at that time assert that the applicable procedure did not involve a meeting such that the Union's next step was submission to arbitration, reading Arts. VIII and XI together (as the City has now argued). Regardless of what the next step in processing a discharge case should have been, however, the record makes it quite clear that the grievance was not processed further at that point only because the City requested that its processing not go forward until the Union had reviewed the transcript of the residency hearing. The Union agreed to that City request.

In the Arbitrator's opinion, the June 23 agreement and the June 26 confirming letter had the effect of extending the contractual time limits for further processing of the grievance, by mutual agreement of the parties, and for an unspecified period of time into the future.

As the Union argues, the City both proposed and confirmed in writing the further processing of the grievance until the Union reviewed the transcript and decided whether it still wished to proceed further with the grievance after doing so. Had the City wished to identify a deadline for the Union's decision, it could and should have done so during that conversation or in the confirming letter, or at some point thereafter. The City did not do any of those things before the Union ultimately advised Willis in September that it intended to process the grievance further. Accordingly, the City has not shown that the Union has been untimely in its processing of the grievance in this case.

For the foregoing reasons, the Arbitrator concludes that STIPULATED ISSUE 2, is procedurally arbitrable.

FACTUAL BACKGROUND -- MERITS OF THE GRIEVANCE

Grievant first worked for the City from January, 1978 to April of 1978 and then continuously from August 1979 until her discharge. Her earlier employment was as a Bus Driver

until she was promoted to Transit Clerk on March 19, 1984.

Her husband Larry was employed by the City since September 1976. He spent the 10 years preceding his discharge as the Transit Equipment Supervisor. His was a supervisory position outside the bargaining unit.

Before his divorce in or about 1982 or 1983, Larry and his former wife owned, lived in, and raised two sons in the 39th St. home in the City noted in the Introduction, above. At the time of his divorce and for many years before, Larry also owned and spent some of his time at 4201 West Lake Drive (herein 4201) on English Lake in the Town of Newton, approximately 10 miles outside the City. When he was promoted to his supervisory position, Larry was directed to install a phone at that property so he could be reached in the event of transit equipment emergencies, and he left the phone numbers for his phones at 39th St. and 4201 with City personnel responsible for contacting him. Larry testified that it was his practice for all ten years of his employment as Equipment Supervisor to keep a slip with both his City and his Lake phone numbers on file with the City in that way. City Engineer and Director of Public Works Michael Hawley was aware that Larry owned and spent some of his time at a property located at 4201 during this period and did not question his compliance with the residency ordinance.

As a part of his divorce settlement, the 39th St. home was sold to the couple's son Jeff Shimek, who was then single and in his early twenties. Larry states that he retained ownership of the furniture in the 39th St. home and retained ownership of his property at 4201. Larry stated that he had a mobile home on the 4201 property which he stayed in at some times during the pendency of his divorce proceedings. He later built a structure on that property. Assessment documents for 4201 show that a four-room cottage with "frame" exterior, without basement and without heating, was erected on the property in 1984. That building was apparently built by Larry. The 1985 assessment of the property was $5,800 for land and $28,320 for improvements.

Larry and Grievant were married in 1986 and they lived together with three of Grievant's four children from a previous marriage, in a rented flat at 852 North 14th St. (herein 14th St.) in the City. Grievant's fourth child was already in college at that time.

By early 1987, two of the Grievant's three children living at 14th St. also left home for college, with Grievant and Larry contributing financially toward their educations. Grievant and Larry and Grievant's youngest son John (then a high school junior) then moved from 14th St. to share the 39th St. with Jeff Shimek. The house at 39th St. is a two-story home with three bedrooms on the second floor, one bedroom and bathroom on the ground floor and an additional half-bath with shower in the basement. Jeff Shimek remained the owner of the 39th St. home. However, from that time until at least May of 1989, Grievant and Larry paid the gas and electric utility bills and supplied wood for heating of that home. In addition, from early 1987 until their discharges in early June, 1989, Larry and Grievant maintained a phone in Larry's name separate from Jeff's phone and phone number, and Grievant and Larry were registered to vote, identified

on their drivers' licenses, and did their banking with 39th St. as their address. The 39th St. address also appeared on their W-2s issued by the City in 1989 for 1988.

In March of 1987, which was at or about the same time that Grievant and Larry and John moved to 39th St, Larry and Grievant purchased a second property at English Lake, this one at 4215. When they purchased it, there was already a cottage on the property. At an unspecified year prior to 1988, the assessed values at 4215 were $11,900 for the land and $22,000 for the existing improvements. Grievant testified that they paid approximately $45,000 for 4215. A portion of that money was apparently borrowed, but no specific amounts are indicated in the record.

Larry testified that they were not certain what they would do with the property when they bought it. However, later that year they decided to replace the existing structure with a new one to be built by Larry. Accordingly, Larry burned the existing structure to the ground and, in July of 1988, Grievant and Larry borrowed $54,000 in a "construction mortgage" transaction secured by the land and future improvements to be made at 4215. Larry testified that he had actually spent approximately $40,000 to build the new structure at 4215 as of the November, 1989 arbitration hearings.

Larry began building the new structure in August of 1988, though a forced-air furnace was not installed until October of 1989 and the interior finishing had not been entirely completed at the time of the arbitration hearing in November, 1989. The most recent assessment for 4215 lists $11,900 for land and $47,760 for improvements. The structure built by Larry is described in that assessment as a one-story "ranch" dwelling with full basement. It has a porch off the upper level overlooking the lake and the building is cut into a sloping lot such that the basement also faces and opens onto the lake through a swinging door. The assessment describes the building as a five room dwelling with two bedrooms, one full-bath and one half-bath. Prior to installation of a forced air furnace in October of 1989 (i.e. well after the discharges) it was equipped with electric baseboard and wood stove heating. Grievant testified that there was a wood-burning stove in the basement and a second wood-burning device on the first floor which was merely ornamental and not usable to heat the dwelling. Grievant also testified that the electric and wood-burning heating devices were primarily for the purpose of keeping the pipes from freezing over the winter, and that unless the stove was stoked at various times night and day it was not sufficient to keep the premises warm enough to be comfortable during the winter months.

City's Investigation of Grievant's Residency

Questions concerning Grievantle and Larry's residency ordinance compliance first arose in the fall of 1987 when an anonymous caller contacted Hawley on the subject. Hawley discussed the matter with Larry in the presence of DPW Superintendent Paul Steckmesser. By all accounts, Larry acknowledged that he then owned 4201 and 4215 at English Lake and that he did not own any City property, but that he intended to sell 4201 but needed a little time to do so. Hawley and

Steckmesser recall that Larry also stated that he would try to move to a City location once he sold one of the lake properties, but Larry denies saying that. By all accounts, Hawley told Larry that if he needed a little time, that was okay with Hawley and that nothing more need be said about the matter at that time. Hawley admits that he had known of Larry's ownership of English Lake property for many years prior and had not considered it to be a violation of the residency ordinance. He also admitted that he knew (and that it was common knowledge) that Grievant owned two lake properties when he questioned him about it in fall of 1987.

In January of 1988, Hawley was contacted by a City Alderman concerning Larry's residency compliance. Hawley communicated that to the Willis, the Mayor and perhaps the Personnel Committee, and Willis took charge of the issue. At the direction of the Personnel Committee, Willis and Hawley questioned Larry on the subject on May 25, 1988 and Willis sent a May 26 letter with the information to the Committee. The information so communicated to the Committee by Willis was as follows:

> Mr. Shimek currently owns two parcels of land on English Lake. In 1962 Mr. Shimek had purchased a cottage on English Lake located at 4201 West Lake Drive. He still owns this property but is in the process of trying to sell it. He purchased a second property, which is located at 4215 West Lake Drive, in 1987. Shortly after the purchase he burned the cottage which had been located on that property and built a new one. The new cottage is a two bedroom house which Mr. Shimek is still working on himself. He and his wife spend time living in this house.
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> Larry Shimek, his wife, his wife's 18 year old son and his 26 year old son also spend time living at 1150 South 39th Street. Larry Shimek purchased this house around 1960 and sold the property to his son in 1984. He also sold a vacant lot next door to another one of his sons. Mr. Shimek does not pay any rent to his son for the time he spends living at 1150 South 39th Street. However, he does pay the utilities for service at that address. He maintains voting registration at 1150 South 39th Street and also lists that address on his drivers license. His bank statements are sent to 1150 South 39th Street.
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> Mr. Shimek has a telephone at 1150 South 39th Street and at 4215 West Lake Drive. He has call forwarding at 1150 South 39th Street which permits calls to be forwarded to his English Lake address.
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> Mr. Shimek indicates he currently sleeps more often at the

> English Lake address than the City of Manitowoc address because he is still working on his cottage. He estimates that he spends about 50% of his waking time at each address.
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> The son who owns the property at 1150 South 39th Street is 26 years old. He is engaged to be married in April of 1989. Mr. Shimek indicated that when his son gets married he, his wife and his wife's son will probably have to look for other rental property in the City of Manitowoc. He feels that he owns enough land already and does not expect to purchase land in the City.
>
> I indicated to Larry Shimek that I would pass the information gathered at our interview to your Committee. I informed him that any decision to take further action would be up to the Committee. Section 20.01(2)(a) of the Municipal Code provides that "all employes of the City of Manitowoc . . . . shall reside within the corporate limits of the City of Manitowoc. Generally, a person's residence is the place where he lives and where he intends to live indefinitely in the future. If the Committee feels based on the information available that Larry Shimek may not currently be a City resident, a hearing would be held before the Committee pursuant to Section 20.01 (2)(c) of the ordinance. If your Committee does not feel that the facts warrant a hearing under the ordinance, no further action need be taken. . . .

The Committee thereafter directed Willis to convene a residency hearing concerning both Larry and Grievant. Willis wrote both of them on July 7, 1988 to schedule such a hearing, enclosing copies of the ordinance and of his abovequoted May 26, 1988 memo to the Personnel Committee. In that July 7 letter, Willis specified that the hearing would be "pursuant to Section 20.01(2)(c) of the Municipal Code to make a determination of the residency question," and further notified them as follows:

> As stated in the Ordinance, you will be permitted to be represented by an attorney during the hearing and you may produce witnesses if you desire. Although the ordinance provides that no formal testimony shall be taken, the committee will permit you to produce any information you so desire regarding the question of residency and will allow your attorney to ask questions and have you give answers in order to provide the committee with information.
>
> . . .

> It is my understanding that sometime last fall you discussed the residency question with Mike Hawley and indicated you would be moving into the City. I am certain the Personnel Committee would prefer that you clearly establish residence in the City of Manitowoc in order to retain your employment and avoid the need for a hearing.

There followed communications between Willis and Attorney Steven R. Alpert who was at first representing only Larry but who later was representing Grievant as well.

On August 13, 1988, Larry and Grievant sold the 4201 property for $55,OOO. According to Grievant, the entire proceeds of that sale were applied to reduce the outstanding loan balance on 4215 to approximately $30,000.

On August 24, Alpert wrote Willis that "Larry is willing to cooperate with the City in any reasonable request to resolve the [residency] question. We requested that the committee give Larry direction concerning the changes that need to be made to resolve the question concerning his residency."

Willis responded on August 25 that "the Committee was pleased to hear that Larry is interested in complying with the residency requirement. The Committee felt the best way for Larry to demonstrate his intent to become a City resident would be to purchase a residence in the City of Manitowoc and live in it. As I explained over the telephone, I believe a City employee can still own a cottage at a lake and be a City resident."

On September 29, Willis wrote Alpert with copies to Larry and Grievant expressing the Committee's "extreme disappointment" at a previous proposal Alpert had submitted when representing only Larry and further stating that "the Committee is also disturbed that Larry and his wife were once clearly residents of the City of Manitowoc but have apparently moved from the City to English Lake." Willis' letter went on to state that a residency hearing was being scheduled for November 29,, 1988, noting, "The Personnel Committee hopes they will be able to demonstrate City residence at that time. However, if it is determined at the hearing that the employees are not City residents, the Personnel Committee will recommend their immediate discharge to the Common Council. There will be no further extensions."

Thereafter, Willis wrote Alpert confirming their agreement that the November 29, 1988 session would be converted to a meeting among all concerned including the Committee members, "to discuss what steps your client can take to establish a residence in the City of Manitowoc. If no agreement is reached, a hearing will be held . . . on . . . December 12, 1988 to resolve the matter."

Willis opened the November 29 meeting by reviewing the ordinance and orally reading some selected case law definitions of the term "residence." Willis testified that he knows that residence can have a variety of meanings depending on the legal context involved and that he selected definitions that conformed to his understanding of the meaning of the Manitowoc residency ordinance. The quotations he referenced were as follows:

> the place of domicile or permanent abode, as distinguished from temporary residence.
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> established by personal presence in a fixed and permanent abode with the intent of remaining there.
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> Indicates permanency of abode as distinguished from mere lodging or boarding.
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> There must not only be physical presence at some place in the state, but also the intention to make such locality a permanent abiding place.
>
> A permanent abode is necessary to constitute a residence. "Residence" and "permanent abode" are synonymous terms. One cannot have a residence in two places at the same time.
>
> Domicile. That place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning.

From Willis' notes of the meeting it appears that Alpert responded by urging the Committee to consider granting Grievant and Larry a hardship exception based on the facts that Larry and Grievant have worked 12 and 11 years for the City respectively, and have 2 grown children and 3 children in college, respectively; that both were City residents for many years in the past; that Jeff purchased Larry's home and is soon to be married; that in several previous cases hardships have been recognized as sufficient to warrant waiver of compliance with the residence requirement; and that Larry and Grievant's combined income is approximately $39,000. Larry added that he had always spent 50% of his time at English Lake and.that he was not told of a residency requirement when he was hired.

The City's ultimate response was that Grievant and Larry would each have to become a resident, either by buying or renting a dwelling unit not shared with any relative, and that they must do so by January 15, 1989. Grievant and Larry agreed to those terms but asked for more time. Ultimately, February 1 was agreed upon.

Following that meeting, Willis forwarded a write up dated November 30, 1988 containing his understanding of what had been agreed to by Larry and Grievant and requested that they sign and it by December 9 to acknowledge their agreement with the terms contained therein. That write-up, which Larry and Grievant both signed and dated on December 13, 1989, read in pertinent part as follows:

> The parties agree to postpone the hearing scheduled for December 13, 1988 upon agreement by Larry and Linn to comply with the following:
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> 1. The agree to become residents of the City of Manitowoc on or before February 1, 1989.
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> 2. They can establish their residency by purchasing or renting a dwelling unit in the city of Manitowoc. However, Larry and Linn must actually live as City residents in the City of Manitowoc whether they purchase a home or rent in the City. If they would not actually live as residents, the matter would again be open. It is understood that they would not be simply sharing living facilities with a relative.
>
> If this letter actually reflects your clients' understanding of the agreement reached at the meeting, please have them sign a copy of the letter which is enclosed and return it to me by December 9, 1988.
>
> The Mayor and Personnel Committee feel that both Larry and Linn are good employees and are pleased that an agreement could be reached.

Thereafter, Hawley clarified the agreement by sending the following memorandum to Larry and Grievant on December 16:

> Subject: Residency
>
> . . .
>
> You express concern to me that even though you live in the City, you may still receive complaints about where you live and where you are spending your time. I am sending this memo to indicate my understanding of the agreement and what I believe is acceptable to the Mayor and the Personnel Committee.

> There are other City employees who have cottages, and having a second home is certainly not prohibited. I believe the Mayor and the Committee expect you to stay overnight and live in the City during the work week and on weekends when you have the duty. I think it is understood that during the summer months you may be spending more time at your second home as some other employees do. The agreement only requires that your primary residence be in the City of Manitowoc.
>
> . . .

Beginning February 1, 1989, Larry and Grievant rented a furnished unit at the Clipper City Motel at $125 per month. Their unit consisted of two rooms, a combined living room-bedroom and a bathroom. There were no kitchen facilities on the premises, but there was a restaurant across the street. There was no private telephone line to the room, but incoming and outgoing calls could be made through the motel office. The owner of the motel and his wife resided in one of the units; a couple related to the owners rented another; and a single man rented a third. The other units were apparently rented on a day-to-day basis.

In late March, on instructions to all department heads from the Mayor to check on the residency of all personnel in their departments, Hawley asked Larry for his in-City address. Larry said he would have to speak with Attorney Alpert before responding to Hawley's question. Larry did not ultimately reply directly to Hawley's question. Rather, Hawley reported Larry's response to Willis, who directly contacted Alpert and asked for the couple's new in-City address. Alpert responded with the Calumet Avenue address of the Clipper City Motel. When the Council learned that that address was a motel, it again directed Willis to schedule a residency hearing. On May 4, 1989, Willis wrote Alpert setting a residency hearing for May 23 and stating, among other things,

> . . . The Council feels there is reason to suspect that Larry and Linn are deliberately violating the residency ordinance and that a hearing should be held promptly to resolve the matter.
>
> . . .
>
> The Personnel Committee members would certainly have preferred that Larry and Linn would have clearly established residence in the City in order to put this matter to rest. If they have taken some additional steps to establish residency in the City of which the Common Council is unaware, please provide me with that information. Otherwise, the members of the Personnel committee and the Common Council were rather emphatic that this matter

should proceed to a prompt conclusion.

. . .

On May 18, 1988, Grievant and Larry then wrote Willis (copy to the Mayor) as follows:

> Because of our present mortgage payments and other financial responsibilities, we cannot afford to rent a so called "proper dwelling" in the City of Manitowoc. We were also led to believe that we could use the cottage during the summer months.
>
> We now feel, whatever rental property we would find will not meet with the committee's approval as a "proper dwelling", because of our present financial condition.
>
> We are, at this time, asking you to approach the Personnel Committee of the Common Council with the following proposal: we are offering to put the cottage up for sale with a copy of the sale agreement to you.
>
> . . .
>
> Please let us know if you can bring this to the attention of the Personnel Committee on Tuesday, May 23, 1989.

Willis never responded directly to Grievant and Larry about their May 18 letter. However, Willis and Alpert did communicate in further attempts to explore settlement possibilities.

The May 23, 1989 Residency Hearing

Willis caucused with the Committee members at the outset of the gathering on May 23 to determine whether the terms discussed with Alpert were acceptable to the Committee. Willis then responded that Larry and Grievant's offer as presented by Alpert was not acceptable to the Committee and he stated the City's bottom-line settlement position which was ultimately unacceptable to Larry and Grievant.

Willis then began the fact-finding portion of the hearing by reading the pertinent provisions of the ordinance concerning the purpose and nature of the hearing. He noted that although no formal sworn testimony would be taken, a cassette tape record was being kept. (A transcript of that tape was received as Exhibit 30 in the arbitration, along with the tape.)

Willis then reviewed the terms of the agreement signed by Larry and Grievant on December 13, 1988, and stated that the City had reopened the matter for a residency hearing upon learning that the Larry and Grievant were claiming that they had become residents at a Calumet Avenue address that turned out to be the Clipper City Motel. Willis noted that since the terms of the ordinance provide that the employe shall be heard regarding the nonresidence, he was turning it over to Alpert to state in what fashion the employes would like to be heard.

Alpert chose to begin by reviewing what the parties' concluding settlement positions had been and to press the Committee members to respond directly why Larry and Linn's last offer had been unacceptable.

From Alpert's remarks and questioning during the hearing and from a review of the various exhibits and other testimony concerning the settlement discussions, the Arbitrator finds that Larry and the Grievant offered: to become the owners of and to make their principal abode at the 39th St. home by June 9, 1989; to have Jeff and Patricia move out of that home by no later than October 31, 1989; to have Jeff and Patricia build a new home on a lot they had already unconditionally contracted to purchase; to agree that Larry and Grievant were not presently residents of the City and that the City could so find without need of a residency hearing if Grievant or Larry failed to live up to the terms being offered; and that Larry and Grievant would be free to own their English Lake property but would have to maintain their primary residence in the City. The City had found those terms acceptable if but only if Grievant and Larry agreed, in addition, to rent a separate dwelling in the City until Jeff and Patricia moved out of 39th St.; to allow City supervision to inspect that separate dwelling as regards its suitability as a bona fide principal residence; and to agree "Under no circumstances will Larry Shimek and Linn Anderson share living quarters with any adult member of either of their families." Grievant and Larry were unwilling to agree to those additional terms.

After Alpert's opening comments, Willis responded that because a settlement had not been achieved, "the real issue here tonight is to determine whether or not Larry and Linn are on this date residents of the City. And, I think what we would like to see . . . testimony, evidence, or you know, giving the right to be heard would be evidence about exactly where they do reside today. . . . Are they residents of the City of Manitowoc at this time as required by the ordinance, or not. . . . [W]e have to try and elicit some facts to determine whether or not they are residents of the City of Manitowoc."

Willis also stated that he had been

> careful to tell the Committee and would caution the Committee again this evening that their decision has to be based on whatever evidence may be produced tonight. . . . [Tlhe last information that was made available to us is that Larry and Linn own a home on English Lake, which is outside of the City limits of

> the City of Manitowoc, and that other than the fact that at some point one or both of them rented a room at the Clipper City Motel, that is all of the knowledge the Committee has right now about where they reside.

Alpert then reluctantly agreed that since the City was unwilling to discuss the settlement terms, "we will proceed and we will make a record" as Willis was insisting, but Alpert requested and was granted an unrecorded recess to talk with his clients before doing so.

Following the recess, Alpert chose to present information to the Committee in the form of questions and answers of Larry. In that format, Larry stated that he would try to answer the questions as best he could both for himself and for his wife, and that he understood that although he was not under oath, it was important that he tell the truth.

Larry stated that they had attempted to comply with the December 13, 1988 agreement by renting a dwelling unit beginning on February 1, 1989. He described the unit. He stated that, "It was probably the easiest thing we could do at the time and the most affordable." He stated that he did not view it as a permanent residence. When asked what his living arrangement plans were, he stated, "I don't know if I misunderstood our first meeting here or not, but, the way I took it, if we had a place for the winter, established a residence we would have the summer to spend at the cottage and we could look for, what we would call a suitable place to live." Larry noted that he directed a snowplowing operation out of the Clipper City in the week of March 3 and did not miss a phone call or a minute's work in doing so and neither did his wife. He stated that he actually stayed overnight at the Clipper City and that "You can't ask for something better than that on a temporary basis." He stated that they moved out of the Clipper City upon receiving the City's May 4 letter questioning its sufficiency as City residence under the ordinance. He stated that he and his son Jeff, on the Friday preceding the residency hearing, "came to an agreement" that Grievant and Larry would purchase his 39th St. home for $40,000 and that Jeff had that same day entered a binding, noncontingent agreement to purchase a lot where Jeff planned to build his new home. He stated that he and Linn were prepared to complete the purchase of 39th St. by June 9, so that they were only asking for two more weeks to buy the home. He stated that he thought he had been complying at all times, noting, "When all this started. . . . I didn't know that you actually have to reside, the way I was explained, four nights a week to make you a resident. I thought owning a home and spending some time there, that you were a resident, but I didn't know there was a certain amount of time that has to be spent there." He stated that he and Alpert had discussed the fact that the case law "refers to continuous personal residence and intention to make it, to establish a residence."

In response to questions from Willis, Larry acknowledged that the only real estate they owned was 4215, and that they had not owned property in the City for some seven years. In answer to the question, "Where did you live before moving to English Lake at 4215?", Larry answered "852 No. 14th." Larry acknowledged that at the November 29 meeting Willis had

discussed what residency meant and had stated that that "while residence did not require that you own the home where you make your residence, that residence involved physical presence at some location with the intention of making that place your permanent living quarters." He answered the question, "Have you since [spending some time at the Clipper City Motel] lived in any other location in the City of Manitowoc that you intended to make your residence or permanent place of abode?" by stating, "Not right now." However, Larry readily agreed when Alpert interjected, "I think there might be some confusion here, correct me if I'm wrong Larry. You didn't intend the Clipper City to be your permanent residence. But you were making an effort to make the City of Manitowoc your permanent residence."

Larry asked if by "permanent" the City meant he could not move to a different abode in the City to better himself, and Willis commented that that was beside the point, but nonetheless responded, "the ordinance requires and the Committee's position has always been as long as you can maintain your residence in the City of Manitowoc, the committee doesn't care what house it is. It's a question of do you intend to live in one place permanently. . . . It's where you intend to live indefinitely, recognizing that a year from now your plans could change."

Larry also stated that after he and Grievant received the City's May 4 letter they started looking for another place in the City to live. Finally, he stated that he could not remember whether or not, before the November, 1988 meeting, he had any discussions with Mike Hawley about the residency ordinance or about the need for Larry to move back into the City.

Alpert then summed up, noting that during the lengthy and numerous discussions surrounding the residency issue, City found 39th St. unsatisfactory because Jeff was living there and because it appeared that Larry was spending a lot of time at their cottage; that an agreement was reached in November and signed in December that by February 1 they would become residents; the City did not want to require them to sell their place at English Lake and just wanted them to rent or own property in the City and actually live there; and that Larry and Grievant attempted to comply by getting a residence at a residential hotel, and obviously spent some time there given the snowplowing operation example. Alpert ended by noting that Grievant and Larry had now offered to obtain ownership of the 39th St. home, as well, such that the City was being unreasonable by conditioning its approval of that arrangement on their also renting another place until their son and his wife leave the 39th St. home.

There followed a wide range of questions by Committee members. Among other things, those questions reflected Committee member doubts that Grievant and Larry would in fact live in the 39th St. home with Jeff and Patricia prior to Jeff and Patricials departure, even if they agreed to do so; disagreement with Larry's reference to the November-December 1988 agreement as solely "a winter deal"; skepticism as to whether Larry was in fact staying at the motel four days out of seven or that "a man and wife could be living in the same room, and eating out every meal;" skepticism at the claim of financial inability to rent a suitable dwelling for a few months (or even long term) when Larry and Linn were prepared to purchase a $40,000 home; questioning

what Larry meant when he claimed there was an "agreement we could go weekends and whatever out there [at English Lake]", to which Larry responded, "You know we didn't have to say what day we were going. We could go, Pat said we didn't have to punch a clock at that meeting, you know, as long as we spent time at both."; and asserting that it appeared illegal for Larry to have maintained 39th St. as his voting address given that he neither lived there nor paid taxes there.

The Committee then deliberated without Willis (but with the Two Rivers City Attorney whom Willis had asked to advise the Committee during its deliberations). The Committee then announced that it would recommend discharge of both Larry and Grievant.

The Suspension and Discharge

The next day the City suspended Grievant and Larry with pay until further notice, with a copy of the notice to that effect sent to Local 75.

Alpert sent the Council a June 2 letter outlining the situation from Grievant and Larry's point of view. The focus of that letter was on the development and ultimate content of the parties' positions in settlement negotiations. It contained no assertion concerning the compliance or noncompliance of the Grievant and Larry with the residency ordinance. Regarding the City's additional proposed settlement terms with which Grievant and Larry would not agree, Alpert noted,

> We were advised that the Committee's reasoning for these last changes were that the prior residency problems arose when Larry and Linn gave this same address as their primary residence. My clients, at this point, felt that it was unreasonable to rent a dwelling when they had already agreed to purchase one. Further, Jeff and his wife would no longer be living at the premises after October 31st.

On June 5, Willis drafted and forwarded the Personnel Committee's report to the Council, which read in pertinent part, as follows:

> The Committee heard testimony from Larry Shimek regarding the residence of Larry and his wife. Mr. Shimek testified that as of the date of the hearing he and his wife owned a home on English Lake outside of the Manitowoc city limits and had no address of any kind within the City limits. Mr. Shimek also testified that following a meeting with the Personnel Committee in November of 1988 he and his wife rented a room at the Clipper City Motel which had no kitchen facilities. He testified at the hearing that he and his wife did not intend this to be a permanent

> residence but that at some point in the future he and his wife intended to find a suitable place to live in the City limits.
>
> Mr. Shimek also testified that prior to the time he and his wife moved to English Lake they did maintain a residence in the city limits of the City of Manitowoc.
>
> Linn Anderson declined to testify individually.
>
> The evidence presented at the hearing was tape recorded and a written transcript of the unsworn testimony is available in the City Attorney's office.
>
> Following the presentation of the evidence, the Personnel Committee unanimously determined that Larry Shimek and Linn Anderson are currently in violation of the residency requirement. Based on this violation of the ordinance, it is the unanimous recommendation of the Personnel Committee that their employment be terminated by action of the Common Council as provided for in Sec. 20.01(2) of the Municipal Code, effective June 6, 1989. . . .

The Council approved the Committee's recommendation of discharge on June 5, and the Grievant's were notified of the termination by letter dated June 6, 1989.

It is undisputed that the Union was not privy to the meetings correspondence and other communications exchanged between the City and the Grievant and her attorney. The first notice to the Union concerning the matter was when it was sent copies of the abovenoted notices of suspension and discharge at the time each was issued.

Following the discharge, Grievant and Larry did not go through with a purchase of the 39th St. property. They produced a cancelled check dated September 8, 1989 to them from Jeff and Patricia in the amount of $500 which they testified was a repayment of earnest money in that amount advanced to Patricia and Jeff on their April 15, 1989 wedding day, regarding the future purchase of the home. At the UC hearing in early July, Larry denied the City's suggestion that the check was wedding gift, and stated that Jeff and Patricia would be reimbursing the earnest money to them in the future. At the arbitration hearing Grievant testified that she and Larry gave the younger couple $200 toward a trip and paid for a rehearsal dinner and contributed toward wedding expenses as their wedding gift to them.

Other Arbitration Hearing Evidence

At the arbitration hearing and at the later UC hearing, Grievant testified that she and Larry

had ended their Clipper City Motel stay as of April 1, 1989. In contrast, as noted above, Larry had asserted at the residency hearing that they had given up the Clipper City shortly after and because of receiving the City's May 4,, 1989 letter. Because the sole Clipper City Motel receipt of record covered only the months of February and March, it follows that Grievant was correct and Larry was in error in that regard. In her sworn testimony at the UC hearing, Grievant explained their decision to leave the Clipper City after the months of February and March noted on the motel receipt, as follows:

> Q: (by Mr. Alpert) After that time, did you make any change of residence and why?
>
> A: I believe it was late in March of 1989, Larry was contacted by the supervisory personnel requesting our address, our current address and I-- we discussed the possibility of having another hearing and decided that we should return to our 1150 S. 39th St. address.
>
> Q: And you would have done that on or about April lst?
>
> A: Between April lst and April 15th we returned to that address.

UC hearing tape #2, near beginning.

At the arbitration hearing there was also testimony and documentation bearing on where Grievant and Larry spent their waking and sleeping offduty hours at various points in time. Specifically, Grievant testified that from the beginning of 1988 through the end of January of 1989, she: spent most of her non-work time at 39th St. and kept her work clothes there; spent some of her time at 4215, mostly on weekends, sleeping there "infrequently" during the week, but with Grievant or Larry going out there daily during the winter to make sure the electric heat was keeping the pipes from freezing; and spent only a little of her time at 4201 before it was sold. Grievant testified that from February 1, 1989 until the end of March of that year, she kept her work clothes at the Clipper City Motel and spent most of her non-work time there; spent some time at 39th St., including eating most evening meals there; and spent some time on weekends at 4215, in addition to the daily checks noted above. Grievant further testified that from the time they returned to 39th St. sometime between April 1 and April 15, 1989, until her discharge, she spent most of her time and kept her work clothes at 39th St.and spent some time on weekends in good weather at 4215.

Larry did not dispute Willis' May 24, 1988 memorandum quoting him in May of 1988 as stating that he was sleeping more often at English Lake than at 39th St. in May of 1988 because he was working on the 4215 structure and that he and his wife were spending some time living in

4215 at that time. However, Larry testified Grievant was out there less than Larry because he was building the place and Grievant was not.

Larry further testified that at the time of the May 23, 1989 hearing, he and Grievant were in fact spending their off-time on weekdays at 39th and weekends at 4215. On cross-examination, Larry admitted that at the residency hearing he had not told that to the Personnel Committee, explaining that he believed the Committee would have discharged them had he told them (as he asserts was true) that he and Grievant were again sharing 39th St. with his son Jeff. On that subject on redirect, Larry further stated that he had framed his residency hearing answers in terms of the City's previously stated view that residency could not include sharing living quarters with a relative, rather than in terms of his own views about what where he in fact was residing at that time.

Grievant and Larry admit that, from the date of their discharge on, they have lived exclusively at 4215, installing a forced air furnace in October of 1989. Jeff and Patricia sold the 39th St. home in July of 1989 and moved out and rented while awaiting completion of their new home. Grievant testified that upon reinstatement she would rent an apartment in the City in order to comply with the residency ordinance.

It is undisputed that Grievant and Larry filed joint income tax returns for calendar years 1987 and 1988 on February 1, 1988 and January 30, 1989, respectively, declaring on both that their address was 4215. They apparently filed their 1986 income tax returns in early 1987, while still living at 14th St., because that was the address that had been supplied on the pre-prepared Wisconsin Department of Revenue's label they used on their 1987 State return. On the 1988 State return, Larry and Grievant entered Township of "Newton" and School district number "5866" (corresponding to the Valders District west of the City rather than 3290 corresponding to Manitowoc Public Schools) in response to the instruction, "Check proper box and fill in name of City, village or township, the county, and number of school district in which you lived at the end of 1988." Those entries were left blank on the 1987 State return.

The City presented telephone billing records as regards the telephone numbers listed in Larry's name at 39th St. (Wisconsin Bell bills covering January 25, 1988 - May 26, 1989 when service was discontinued) and at 4215 (Lakefield Telephone Company bills covering approx. August 22, 1988 approx. August 21, 1989). Comparative records were presented as regards the period August, 1988 through May of 1989. As compiled by the City, those records show that 26 long distance calls were initiated from those phones during the period for which the records overlap, August 22, 1988 until May 26, 1989, and all 26 were initiated from the phone at 4215 as follows:

	Weekdays		Weekends
8-22-88	Monday	3:26 PM	

8-22-88	Monday	3:28 PM			
8-22-88	Monday	3:36 PM			
9-10-88			Saturday	8:46 AM	
10-8-88			Saturday	9:55 AM	
11-8-88	Tuesday	5:32 PM			
11-18-88	Friday	7:20 AM			
11-21-88	Monday	6:57 PM			
11-23-88	Wednesday	12:56 AM			
11-23-88	Wednesday	4:00 PM			
11-28-88	Monday	6:00 PM			
12-6-88	Tuesday	7:14 PM			
12-18-88			Sunday	11:04 AM	
12-18-88			Sunday	7:51 PM	
12-22-88	Thursday	3:00 PM			
1-3-89	Tuesday	3:52 PM			
1-7-89			Saturday	3:08 PM	
1-10-89	Tuesday	3:27 PM			
2-1-89	Wednesday	6:28 PM			
2-2-89	Thursday	6:58 PM			
3-4-89			Saturday	10:52 PM	
3-6-89	Monday	9:35 AM			
4-16-89			Sunday	11:46 AM	
5-7-89			Sunday	2:12 PM	
5-24-89	Wednesday	12:15 PM			

The number of local calls initiated from Larry's and Grievant's 39th St. phone number was specified on the portion of the Wisconsin Bell covering December 25, 1988 - May 24, 1989, but there is no corresponding information on any of the Lakefield Telephone Company bills for the 4215 phone. The available local usage information for 39th St. shows the following number of local calls initiated during the following periods:

time period	local calls placed from 39th St.
12-25-88	1-24-89……16
1-25-89	2-24-89……18
2-25-89	3-24-89……28
3-25-89	4-24-89……25
4-25-89	5-24-89……23

The City presented testimony from Richard Pitsch, the individual who was promoted to Larry's supervisory position after Larry was discharged. Pitsch testified that when Larry purchased a semi-trailer load of wood that was delivered to 4201, Pitsch paid Grievant for one-third of that load, and that Larry was burning some of the remainder at 4215 and some at 39th St. Grievant had earlier testified that Larry had paid $665 for the load, but that she was uncertain how it had been allocated.

The City also presented testimony from Transit Manager Richard White concerning conversations Grievant and Larry had in his presence in late 1988 and in 1989 that suggested to him where they were living. White testified that because Larry started work at 7:00 A.M. and Grievant at 8:30 A.M., when Grievant arrived she would deliver Grievant's lunch to him and they would often converse either at 8:30 or during a shared lunch period at noon. White recalled "numerous" conversations in the both the winter months as well as in warmer weather, in which Grievant made reference to what she had seen while taking walks at the Lake, including such items as the boat landing, the swamp, and geese. He also recalled that when it was colder, Grievant would mention whether she had stoked the wood-burner before she left. He also recalled one occasion late in 1988 when Larry told Grievant in the morning that he would be going to the Lake at noon to make sure the fire was going, and that Larry in fact did so during his lunch period on that day. White could not recall when or what day of the week the conversations occurred. The only thing White stated he heard Grievant or Larry say about residing at 39th St. was on at least one occasion they stayed there during a bad storm during the 1988-89 season. White admitted on cross-examination that at no time did he tell Grievant that it was inappropriate for her to be spending time at English Lake as she appeared to be doing, because that was not his responsibility.

The City also presented testimomy of Alderman Tom Musial concerning the history of administration of the residency ordinance. The ordinance originated in 1973, a year before Musial was first elected. However, Musial stated that based on his 12-13 years on the Personnel Committee through the present, it has been his understanding that employes are required to make their primary and permanent residence in the City, though it varies how soon after hire the employe has in practice been required to comply. He admitted that there had been no residency hearings before Grievant and Larry's and that no questions of the sort posed by this case had arisen under the ordinance prior to the present case. He is certain that in no case has an employe been found to be in compliance by having an apartment in the City and an owned home elsewhere.

On cross-examination, Musial admitted that ordinance compliance could be established by renting as well as by owning property in the City, and that renting in the City with an intention later to purchase a home in the City was also not violative of the ordinance. He also stated that the ordinance would permit owning and spending time at a lake cottage outside the City so long as it was not such as would render the cottage the employe's primary residence.

POSITION OF THE CITY -- MERITS OF THE GRIEVANCE

If the grievance is deemed procedurally arbitrable, the term "resident" as used in the ordinance means the equivalent of "domicile."

Unlike the unpublished City of Prescott award on which the Union has relied, this case involves interpretation of a legislated residency requirement in the City's ordinance, which was later recognized by the Union in the Agreement, rather than solely an interpretation of a negotiated residency arrangement. The Arbitrator cannot alter the requirement established by the City Council in that ordinance.

While residence can have a variety of meanings, it is tantamount to "domicile" in Wisconsin in several statutory contexts such as divorce, public assistance, state hiring preferences, and voting. Significantly, the Wisconsin Court of Appeals held in a published case factually very close to this one that "residency" in a city residency ordinance meant "personal presence at some place of abode with no present intention of definite and early removal" and found that "the maintenance of apartments and voter registrations in Madison, in light of the totality of the circumstances, establishes neither the intent nor presence necessary for residency . . . ." Citing, Eastman v. City of Madison, 117 Wis 2d 106, 119 (CtApp IV, 1983). The Court based its decision in part on residency criteria Madison had given employes one of which was "the employee's primary domicile."

Similarly, here, the City put Grievant on notice that such was the meaning of the ordinance by its July 7, 1988 letter enclosing the May 26 memo ("a person's residence is the place where he lives and where he intends to live indefinitely in the future"); by its letter to Alpert of August 25, 1988 (the best way for Larry to demonstrate his intent to become a City resident would be to purchase a residence in the City and live in it); by Willis' oral explanation at the November 29 meeting with attorney Alpert present (residence meant the equivalent of domicile which, in turn, "that place where a man has his true, fixed and permanent home and principal establishment and to which whenever he is absent he has the intention of returning"); by Hawley's December 16, 1988 memo (agreement to become a resident . . . only requires that your primary residence be in the City of Manitowoc."

The Union's reliance on cases from outside the realm of public employe residency requirements are of no significance as compared to the Eastman case. The interpretations shared with Grievant and Larry were all consistent with the Alderman Musial's understanding of the ordinance over the years as requiring employes to maintain their primary and permanent residence in the City. Larry's reluctance to state his residence address when Hawley asked him for it and Larry's admitted felt need to lie about where they lived during the November 23, 1989 hearing are further indications that Grievant and her husband were well aware of what the ordinance meant. Grievant ought not now be heard to say that it means something else.

The evidence in this case should be limited to that which was produced before the Personnel Committee at the May 23, 1989 hearing. The ordinance provided Grievant with a full

opportunity to present information bearing on her compliance with the residency requirement. That was the whole purpose of the May 23 pre-termination hearing. It is absurd and unfair to permit Grievant to rely upon additional, and in this case quite different, information from that on which the ordinance required the Committee to base its recommendation. The Committee was told that it had to consider only information presented at that hearing, and it was advised during its deliberations by outside counsel rather than by Willis. The fact that Grievant did not choose to have the Union represent her at that hearing was Grievant's own doing. That choice on her part cannot be allowed to render the May 23 hearing meaningless. It is unfair to the City and to Grievant's replacement to allow Grievant to pursue back pay or reinstatement based on a different set of facts than she and her attorney presented to the City during the pre-termination hearing afforded her under the ordinance.

Grievant was not a resident of the City on May 23, 1989 based on the evidence produced at the May 23, 1989 hearing. That evidence showed that Grievant and Larry owned property only at English Lake; that they had moved there from 14th St.; that to comply with their November-December, 1988 Agreement to become residents they rented a unit at Clipper City Motel and terminated that arrangement sometime prior to May 23; that just a few days before the hearing and nearly a year after the May, 1987 investigative interview of Larry by Willis, Larry had talked with his son Jeff about buying the 39th St. home. Most significantly, Larry stated that at the time of the hearing neither he nor Grievant had any residence in the City. Given that information, the Committee could reach only one conclusion, that Grievant was not a resident. Indeed, "As of the May 23 hearing, neither the grievant nor her husband had taken any action to establish a bona fide residence in the City of Manitowoc." City brief at 23.

Even if all of the evidence received at the arbitration hearing is considered, Grievant was not a resident of the City on May 23, 1989. That additional evidence shows that when Grievant was promoted to Transit Clerk in 1984 she lived in the City and signed an agreement acknowledging her obligation to maintain residency as a part of the routine application process. When Grievant and Larry married, both were City residents. Larry's cottage at 4201 was a true summer cottage which had not been winterized. In early 1987 the couple bought 4215 for $45,600, gave up their 14th St. flat, and moved to 39th St. where they paid only utilities and heat and admittedly saved money relative to the rent they had been paying. Within a few months they destroyed the existing cottage at 4215 and signed a $54,000 mortgage to build a new home on the property. When questioned about residency by Hawley in fall of 1987, Grievant told them his finances were tight and he needed some time to comply with the residency requirement. While it is disputed, City witnesses recall that Grievant said he would move into the City when he sold 4201. Following an interview of Larry by Willis about residency, various discussions with Grievant and Larry's attorney and the November 29, 1988 meeting at which the meaning of residency was discussed, Grievant and Larry signed an agreement that they would actually live as residents and not simply share living facilities with a relative, the latter referring to the Grievant's 39th St. arrangement with Larry's son, John. Grievant claims she signed against her will, but she was represented by counsel in the matter and never before claimed that the agreement was not

voluntary on her part. The Clipper City rental, with no cooking facilities and no direct telephone rental, and coming after Hawley's "primary residence" clarification memorandum, was not even a good faith attempt to comply with that agreement. Especially so in light of Larry's failure to list that address with the City after February 1, 1989 and Larry's stating that he would have to talk to his attorney before answering Hawley regarding where his in-City residence was located.

Viewed objectively, the foregoing shows Grievant and her husband always intended to make their permanent home at English lake with 39th St. as only a temporary stop over. Their initial and continuing financial commitments for 39th St. were quite small compared to those for 4215. Only a few pieces of the 39th St. furniture were moved to 4215 when Grievant and her husband moved out following the May 23 hearing, even though Larry had retained ownership of the furniture in the home following his divorce. After Patricia and Jeff were married on April 15, 1989, two adult families would have been sharing the 39th St. home which had one bathroom on first floor where John (and Patricia) slept, but no bathroom on the second floor which Grievant and Larry said they had to themselves. Grievant and Larry had call forwarding only from 39th St. to 4215, but not vice versa. The structure they built at 4215 was more than a summer cottage, it was a dream home. The testimomy of Dick White and Richard Pitsch and the available objective evidence casts doubt on on the testimony of Grievant and Larry about their day to day living. The phone records indicate that they spent a great deal of time at English lake during all months of the year, and not just on weekends. From January 1988 until May 26, 1989, Grievant and Larry initiated no long distance calls from 39th St., whereas from August, 1988 through May of 1989, 26 were initiated from 4215. Sixteen of the 26 calls were made from Monday-Thursday, and several were made during the winter months. Notably, when Grievant and Larry declared their residence on their tax returns for 1987 and 1988, it was at 4215, crediting that location rather than the City in the formula for distribution of state aids to municipalities.

If Grievant had not owned another home, or had owned a cottage up north and used only on vacations, she could easily have been a resident at 39th St., even though it was owned and occupied by her adult stepson. Here, however, the Grievant and Larry's major financial committment to a winterized dream home located close to the City and used by them frequently rendered 4215 their primary residence rather than 39th St. In that context, "the grievant had to do something to demonstrate that her permanent primary residence was in the City of Manitowoc." City reply brief at 5. While she and Larry talked about becoming residents and agreed to do so in various ways, their actions do not constitute even a good faith effort to do so. Especially in light of that history of broken promises and bad faith noncompliance, the City was not required to find her in compliance on the basis of belated offers concerning possible future steps toward compliance. Indeed, Grievant moved out of 39th St. immediately after the May 23 hearing and states that she would take up some unspecified type of apartment arrangement when reinstated. That confirms that she intends to continue to maintain her primary and permanent residence at English Lake rather than in the City even after reinstatement.

For those reasons, the grievance should be dismissed and the Grievant's requests for

reinstatement and back pay denied.

POSITION OF THE UNION -- MERITS OF THE GRIEVANCE

The discharge was not for just cause. Under the Agreement's "just cause" standard, the City bears the burden of proving wrongdoing on Grievant's part.

The Agreement and the residency ordinance to which it refers requires employes to "reside" in the City. "The term 'reside' or 'residence' has a precise meaning which is well articulated in this state and is consistent with usage throughout this country. . . . It is quite clear that in Wisconsin there can be no merit to the contention that 'residence' implies a primary or exclusive dwelling. Quite to the contrary, Wisconsin has adopted the ancient common law rules that domicile (not residence) is the permanent fixed place of dwelling, and that residence may be a temporary dwelling, less than permanent, but more lasting than a mere sojourn." Union Brief at 14-16, citing, Black's Law Dictionary (5 ed, 1979) residence; 25 Am Jur 2d, Domicil, Secs. 1 and 4 (1966); In re Will of Heymann, 190 Wis. 97, 99-100 (1926); Estate of Daniels, 53 Wis.2d 611, 614-615, 619. "Residency" requires only acutal physical presence without a present intent of definite and early removal. "Domicile" is a more demanding, multi-faceted concept defined in Black's as "the place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning." It is irrelevant whether the residence in question here would also be sufficient to establish domicile. citing, Penfield v. Cheasapeake Ohio and Southwestern Railroad, 134 U.S. 351 (1890). This residence vs. domicile distinction has been recognized in public sector grievance arbitration in Wisconsin, as well, citing, City of Prescott, unpublished grievance award (1986) ("It seems reasonable to believe that the steps taken by the grievant [filing taxes, voting and living at rented in-City quarters during workweek though living with family at owned out-of-city home on weekends] meet the requirement of residency under the contract since he meets at least one definition of residence and the policy underlying the requirement. To allow the employer to insist that the grievant establish domicile appears to give the employer something it did not bargain for.")

The preponderance of the evidence establishes that Grievant did reside in the City. She and Larry lived with Larry's adult son Jeff at 39th St. They voted, banked, paid utility bills in the City and were physicially present (slept, ate, and dressed) a substantial period of their time at 39th St. with an indefinite intent to remain in the City. The same was true of their time at the Clipper City Motel, to which they moved only because the City expressed dissatisfaction with their living with Larry's son. Though Larry stated that he did not view the Clipper City Motel as a domicile or permanent residence, the location nonetheless constituted a residence within the meaning of the ordinance, which does not preclude employes from moving from one in-City residence to another. They returned to 39th St. from Clipper City only after the City notified them that the latter was not satisfactory to the City. The cottage Larry built at 4215 was not comfortably usable during the winter months except on weekends because the wood stove required frequent stoking that could

not be maintained when Grievant and Larry were working.

The City has based its rejection of Grievant's residency compliance on an insistence that Grievant not live with an adult member of her or her husband's family and on the fact that Grievant and Larry also maintained a second residence outside the City. The ordinance simply does not and probably could not lawfully prohibit employes from living with a relative. Nor does the ordinance provide that employes must maintain their domicile in the City. The City's attempt to require more than the requirement of residence that the Union agreed to recognize is clearly shown by the City's inclusion and reliance on the Black's Law Dictionary definition of "domicile" (as distinct from residency) during the November 29, 1988 meeting. Notably, it was the dictionary definition of residency and not that of domicile that the Court in the Eastman case relied on in the case so heavily relied upon by the City.

Recognizing the tacit message presented to them, Grievant and Larry offered to sell the English Lake cottage. However, the City repeatedly stated that owning and spending time at a cottage would not violate the residency requirement. On the basis of those representations they maintained the cottage, only to find, in the end that it had cost them their jobs. If the City was going to rely as they have herein on the $59,000 value of the 4215 premises and on the fact that Larry once mentioned leaving work at lunch to check the fire and that Anderson had mentioned walking around the lake, then the City should have accepted their offer to sell the 4215 property.

Grievant and Larry were faced with shifts in the nature of the residency requirement, even though no changes were negotiated with the Union. They sought to establish residence at 39th St. where they lived initially with Grievant's son John and stepson Jeff. When that was not acceptable, the moved to the Clipper City Motel to establish residence apart from adult relative Jeff. When that was not acceptable, they returned to the shared home with Jeff and arranged to purchase 39th St. when Jeff left it. However, even this was not sufficient to meet the conditions added by the City. In sum, there have been good faith efforts by Grievant and her husband to comply with these changing requirements, even though they believed at various times that the City was requiring more of them than they should have had to do.

The Agreement and ordinance give the City only the right to require residency. They do not allow the City to additionally require that employes establish domicile in the City or that employes avoid living with adult family members. The City therefore cannot discharge the Grievant for her failure to meet those additional requirements.

The fact that Grievant and Larry moved out of the City after they were discharged was a direct result of the City's depriving them of the financial ability to maintain City residence. That move therefore cannot be given any weight in assessing the merits of the grievance.

The City's effort to limit the Arbitrator to considering the evidence adduced at residency hearing is without merit. The Union, which did not participate in the May 23 Personnel

Committee hearing, has a right to adduce evidence beyond the scope of that presented in its absence to the Personnel Committee. Especially so where, as here: the Grievant did not testify at that hearing; the ordinance calls for an informal rather than necessarily an evidentiary-type hearing; and there was no effective separation or independence between the Committee and the City Attorney. Moreover, the transcript of that hearing shows that Grievant, Larry and their attorney focused primarily on whether the matter could be settled rather than on presenting a case in final adjudication form. They viewed the question of whether Larry was a resident of Manitowoc not in terms of whether he met the legal requirements to be a resident but whether he was the living up to the City's expectation that he live apart from adult relatives. Hence, Larry answered the questions not on the basis of his own understanding of "residence", but on what he understood was being required of him by the City: to establish a home not shared with an adult family member. Accordingly, the Union does not understand Larry's arbitration hearing testimony to have been that he intentionally lied to the Committee during the hearing. Notably, before the UC Appeal Tribunalls Administrative Law Judge where the focus was on the legal requirements of residence rather than on reaching a settlement, the evidence adduced provided a far clearer picture of Grievant's living arrangement and produced the straightforward conclusion (now being appealed by the City) that Grievant and Larry had not willfully failed to comply with the residency requirement.

In the end, the City has sought, through its residency requirement, to control what its employes buy and rent and whom they live with as well as whether or not they live within the City boundaries. In those regards, the City has exceeded its authority under the ordinance and violated the Agreement.

For those reasons, the grievance should be sustained and the Grievant ordered reinstated with full back pay and benefits.

DISCUSSION -- MERITS OF THE GRIEVANCE

Applicable Standard for Determining Residency

The parties present sharply differing assertions as to the state of the law regarding the proper interpretion of the terms "reside" and "residence" and "resident" as used in the City's residency ordinance. The Arbitrator's review of the authorities cited by the parties and of numerous additional authorities confirms the basic validity of the legal principles asserted by the City and does not support the Union's contrary contentions.

"Residence" has many shades of meaning from mere temporary presence to the most permanent abode," and its meaning depends on the context in which it has been used. 17A Am Jur 201. To the same effect, see generally, 25 Am Jur 2d Domicil, Sec. 4. More specifically, "Whether the word 'residence' is synonymous with 'domicil' is a question of some difficulty, and the ultimate decision must be made from a consideration of the context in which it is employed and

the subject matter involved. [citations omitted]" Id. at 8.

When that term has been interpreted in the context of legislated residency requirements in statutes and ordinances affecting public employes, it has been interpreted as requiring the employes to establish their principal (or primary) and permanent residence, i.e., their domicile, within the specified boundaries.

In Wisconsin, as the City has noted, the Court of Appeals in a published decision in Eastman v. City of Madison, 117 Wis.2d 117, 342 N.W.2d 764 (CtApp IV, 1983), above, upheld the municipality's interpretation of "reside" in its employe residency ordinance where the mayor had informed employes that "Is the employee's primary domicile located within the City?" was the first of several criteria by which residency would be evaluated. 342 N.W. at 766, n.2. The Eastman Court stated, "Continuous personal presence and intention establish residency," citing two cases, including Kempster v. City of Milwaukee, 97 Wis 343, 347, 72 N.W. 743, 744 (1897). In Kempster, the Wisconsin Supreme Court held that "residence" as used in a city charter ordinance requiring the commissioner of health to have resided in Milwaukee continuously for one year prior to his appointment was "used in the broad sense of domicile requisite to citizenship." The Supreme Court went on to state in that public employment residency case, "In one sense a person may have more than one place of residence, but he can have only one which has the element of permanency essential in a legal sense to his domicile. He can have only one domicile at one time." Id. at 347-348.

In jurisdictions outside Wisconsin, the same approach--equating public employment residency requirements with "domicile"--has been taken in cases involving legislated public employe residency requirements. See, e.g., Fagiano v. Police Board of City of Chicago, 98 Ill.2d 277, 456 N.E.2d 27 (1983)(reviewing public employe residency ordinance and statute cases decided in various jurisdictions and concluding, " . . . one must conclude that the courts, looking to the obvious purposes of the laws, perceived that the enactments, requiring employes to reside within the city, required them to establish their principal residence, their domicile, in the city. 266 A.2d 611, 613, ("Since the [firefighter residency] requirement we are considering is intended to foster the public interest, no casual residence was intended but rather a real and principal residence, in short, domicile. Nothing less will create that "identity with the community," [citation omitted] which may well have been a legislative goal the advancement toward which was sought by this requirement. . . ."), aff'd, 58 NJ 112, 275 A.2d 440 (1971) (per curiam); McCarthy v. Philadelphia Civil Service Commission, 19 Pa. Commwlth 383, 339 A.2d 634 (1975) (equating "bona fide residence" in civil service ordinance with "domicile," and stating, "It is well settled that a person can have more than one residence, but only one 'legal residence' or domicile.") , aff'd on other issues, 424 U.S. 645 (1976 (per curiam). See also, additional cases cited at 4 ALR4th 380, 405-407 and 410-414.

The Wisconsin appellate decisions cited by the Union are from other legal contexts than public employment, and hence they do not detract from the more pertinent authority supporting the

City's interpretation. The City of Prescott grievance award cited by the Union involved interpretation of a negotiated agreement provision unrelated to any ordinance. As such, that award is not persuasive where, as here, interpretation of an ordinance is involved, in light of the foregoing decisions in Wisconsin and elsewhere dealing directly with legislated residency requirements in ordinances and statutes.

The Arbitrator is satisfied that the City is on firm ground when it contends that the requirement the Union has agreed to, and the requirement that the Grievant had to live up to, was to have her primary and permanent abode located within the City limits. The language of the ordinance supports that interpretation, particularly in view of the express reference in (2)(b) of the ordinance to the necessity for nonresident employes to "move" into the City and be residents on or before November 1, 1973, in order to comply. The City's various oral and written explanations to Grievant and her attorney of the City's interpretation of the term residency are consistent with the case law noted above. While the Union cannot be deemed to have agreed with those communications to which it was not privy, it is nonetheless bound to them because they are consistent with the case law regarding legislated public employment residency requirements discussed above. The City is not getting more than it bargained for when the residency ordinance and the Art. XX reference to it are interpreted consistent with that case law.

In sum, the Arbitrator concludes that the City's residency ordinance required that Grievant establish and maintain her primary and permanent abode in the City.

It can also be noted that, "Among the factors which are chiefly important in determining the domicile of a person who has more than one residence are the physical characteristics of each, the time spent and the things done in each place, the other persons found there, the person's mental attitude toward each place, and whether there is or is not an intention, when absent, to return." Mercadante above, 206 A.2d 611 at 613, citing, Restatement, Conflict of Laws, Sec. 13c.

Propriety of Consideration of Evidence Besides That Offered At Residency Hearing

In determining whether Grievant met the applicable decisional standard for residency described above, the Arbitrator does not find it appropriate to limit the evidence considered to that presented to the Personnel Committee. Neither the ordinance nor the Agreement provides that an Arbitrator reviewing a residency determination is so confined. The informal nature of the residency hearing as prescribed in the ordinance seems inconsistent with the notion that it was intended to foreclose a de novo development of pertinent facts in the more formal adversarial process associated with the just cause grievance arbitration contemplated by the parties in the Agreement.

However, that conclusion has not prevented the Arbitrator from taking note of what was said and not said at that residency hearing, both in determining the true facts regarding the

Grievant's living arrangement and in determining an appropriate remedy for an Agreement violation if one is found. When the transcript and other evidence concerning the May 23 hearing is reviewed, the following conclusions can be reached.

First, the fact that the Union was not present was primarily Grievant's choice. While Art. XX gave the City an opportunity to seek out the Union's assistance in obtaining residency compliance, the Union has not contended that the Agreement required that the City notify the Union of the residency hearing. Rather, it was up to Grievant to decide by whom she would be represented at the hearing and she chose Alpert.

Second, the City put Alpert and his clients on clear and sufficient notice as to the nature and purpose of the hearing. While it appears clear that it was Alpert's preference to explore the settlement possibilities further during the recorded portion of the gathering, Willis insistently sought to put the focus on the facts bearing on the employes' current residency. Ultimately, Alpert recessed with his clients and proceeded to make a record on that subject. The extent to which the question and answer presentation that followed the recess was a continuing attempt to bring about a settlement was a matter of strategic choice by Alpert and his clients. Any failure on their part to present the facts bearing on the basic legal question of residency was certainly no fault of the City's.

Third, Grievant cannot rely on the fact that she did not personally provide information at the hearing. That was obviously her choice, and she is as responsible for the nature and content of the information that was presented on her behalf by Larry and Alpert as she would have been had the words come directly from her.

Fourth and finally, the Arbitrator finds that Larry was not forthright at the May 23 hearing about where he and his wife were then living. Larry did not tell the Committee that they had resumed their arrangements at 39th St. after giving up their unit at the Clipper City Motel. Nor did they fully describe their living arrangements at 39th St. or why they thought those arrangements constituted residency compliance. No doubt the City's broad and unqualified November-December, 1988 agreement language concerning not sharing living quarters with a relative contributed to Grievant's, Larry's and Alpert's decision not to talk straightforwardly to the Committee about their 39th St. living arrangement, compared with their testimony at the UC hearing and before the Arbitrator. Nevertheless, it was their decision not to be straightforward with the Committee in that regard, and that decision left the factual record inaccurate and without an arguable basis on which to view the employes as currently residing in the City. The Grievant's lack of forthrightness before the Personnel Committee, then, is a factor to be considered in determining the appropriate remedy for a violation if one is found.

Application of Residency Standard to the Facts of this Case

The City bears the burden of establishing that Grievant failed to maintain her primary and

permanent abode in the City.

It is not disputed that Grievant and Larry had their primary and permanent abode at 14th St where they lived with three of Grievant's children until early 1987. The record does not support the City's specific contention that they were paying $200 a month for the 14th St. flat, but whatever they were paying it was more than the utility bills (approx. $45/mo.) and wood heating expenses (less than $440 per heating season) that they undertook at 39th St. when they gave up 14th St. in early 1987 and began sharing 39th St. with John. Nevertheless, the evidence does not establish that Grievant was at that time failing to maintain her primary and permanent abode at 39th St., despite her husband's ownership of and practice of spending some of his time at 4201.

Rather, the turning point in Grievant's residency came thereafter. Despite owning a cottage on English Lake at 4201 and neither owning nor formally leasing any property in the City, Grievant and Larry purchased 4215 for $45,000 and destroyed an existing 4215 structure which then had an assessed value of $22,000. In July 1988 they took out a construction mortgage loan of which they ultimately spent some $40,000 building a two bedroom, one-and-one half bathroom "ranch" dwelling with heating arrangements sufficient to keep the pipes from freezing all winter and (at least when stoked frequently would also support comfortable winter living and sleeping, as well. In August of 1988, they sold 4201 for $55,000 with the proceeds applied to loans outstanding against 4215, leaving a $30,000 mortgage loan balance for them to pay on thereafter as regards owned property assessed at $59,000 in 1989.

The new structure at 4215 was easily accessible from the Grievant's workplace, being just a 10-minute drive or so from the City. Compared with 39th St, it was newer and had a much more attractive location and geographic surroundings, and it offered the privacy of exclusive occupancy and the convenience of unshared kitchen and bathroom facilities.

Those facts--when combined with the substantial capital and personal investment Grievant and Larry had in English Lake and in the structure at 4215--constitute strong evidence that 4215 rather than 39th St. was Grievant's and Larry's primary and permanent abode.

A comparison of 4215 with the rental unit at the Clipper City Motel produces a parallel conclusion. As clean and attentively-managed as the Clipper City may have been, it constituted a one-room dwelling plus bathroom, had no cooking facilities, and had the added inconvenience of telephone communications only indirectly through the motel office. While it cost somewhat more than the heat and utilities at 39th St. (which Grievant and Larry appear to have continued to pay while renting at the Clipper City), that financial committment still paled in comparison with their investment and ongoing financial commitment at 4215.

Indeed, for both 4215 and Clipper City, the foregoing comparative evidence alone is strong enough to shift the burden onto Grievant and the Union to prove that 4215 was not Grievant's primary and permanent abode.

In the Arbitrator's opinion, the Grievant and union have not met that shifted burden.

The Grievant's and Larry's arbitration hearing testimony about the amounts of time they spent at 39th St. and the Clipper City Motel as compared to 4215 constitutes significant evidence tending to show the primacy of their in-City residences as compared with 4215. They basically described Grievant and Larry staying in the City on most weeknights and at 4215 on weekends and infrequent weeknights. Their testimony in that regard is corroborated at least to a limited extent by the records showing between 16 and 28 local calls per month being placed on their separate phone at 39th St. from December 25, 1988 to May 24, 1989 and by the undisputed facts that they were at 39th St. during at least one bad storm in the winter of 88-89 and at Clipper City during another. That evidence surely supports the notion that Grievant and Larry have in fact been spending some of their time at 4215 and some of their time at in-City dwellings. It is further supported by intention evidence consisting of their driver licenses, voter registrations and separate telephone and phone credit cards associated with their 39th St. address.

On the other hand, neither the Grievant nor Larry nor the Union in its written arguments has offered any explanation for the stark comparison of long distance telephone records during the period August 22, 1988 to May 26, 1989. All 26 of the calls placed were from 4215, none from 39th St. Moreover, the majority of those calls were on various weekdays, with several of those during the winter months. This unexplained objective evidence raises significant doubts as to the accuracy of Grievant's and Larry's estimates of their time allocation between 4215 and their City dwelling places, strongly suggesting that those estimates were too heavily weighted in favor of the in-City locations. Such doubts are corroborated somewhat by the prevalence of talk about 4215 rather than about 39th St. in Grievant's conversations at work in the presence of Richard White, which neither Grievant nor Larry denied. The tax returns in evidence are particularly significant intention evidence given the tax return's expressed emphasis on truthfulness of the contents and given the affirmative designation of Town of Newton and the Valders School District on the 1988 return Grievant and Larry signed on January 30, 1989.
(Notably, the UC ALJ was not presented with the telephone records or White's testimony, and it appears from the dispute that arose about the May 23 transcript near the end of her hearing that she may not have considered the testimony given at the residency hearing to be properly before her for consideration. In any event, the ultimate decision reached in the UC forum would not be persuasive herein since the issue in that forum is not whether the discharge violated the Agreement.)

In addition, neither Grievant nor Larry disavowed Willis May 24, 1988 memorandum quoting Larry as saying he was splitting his waking hours about evenly between 39th St. and 4215 and sleeping more often at 4215 because he was working on the place. They asserted, instead, that Grievant was at 4215 comparatively less than Larry because he (and not Grievant) was doing the building there. However, when Alderman MacDonald questioned Larry during the residency hearing about whether Grievant and Larry had in fact been living together at the Clipper City

Motel, Larry replied simply, "We're married," as if to suggest that they would seldom be apart. Furthermore, both Grievant and Larry testified that the interior finishing work on the house was not complete even as of the arbitration hearing in November of 1989, suggesting that Larry's actual schedule in May of 1989 might well have more resembled that in November of 1988 than that which he described in his testimony. Taken together these facts raise further doubts as to the accuracy of Grievant's and Larry's estimates of their allocation of time between abodes.

On balance, given the significant doubts raised as to the validity of Grievant and Larry's estimates of their time allocation between abodes, the Arbitrator does not find the those estimates or the other evidence supporting them sufficient to overcome the stronger evidence noted above indicating that 4215 has been the couple's primary and permanent abode since at least late fall of 1988.

Accordingly, it is the Arbitrator's conclusion that Grievant was not in compliance with the residency ordinance on May 23, 1989 or for a substantial period of time prior to that date.

Just Cause Determination

The City would, no doubt, have the conclusion immediately above end the matter in light of the Union's express and unequivocal Art. XX recognition of the City's right to discharge employes who do not comply with the residency ordinance. However, STIPULATED ISSUE 2 asks generally whether the City violated the Agreement by the discharge, and Art. VIII requires just cause for discharge. While Art. XX clearly implies that residency noncompliance is, by agreement, just cause for discharge, there are some limits on that right. To be consistent with just cause, the City cannot have prevented or significantly impeded the residency compliance it is discharging the Grievant for failing to achieve. Rather, the City's right to discharge for nonresidency must be exercised in a manner that comports with the covenant of good faith and fair dealing implied in all agreements.

The Union has argued that the City has exercised its residency discharge right unfairly because that the City discouraged Grievant and Larry from selling their 4215 property and because the City improperly insisted that Grievant and Larry not share living quarters with any adult relative. It is necessary and appropriate to assess these and related equitable considerations in determining whether the City has exceeded the abovenoted limitations on its right to discharge for nonresidency.

It is true that the City told Larry and the Grievant that maintaining a second abode on a lake outside the City was not prohibited by the residency ordinance. Thus in Willis' August 25, 1988 letter, he confirmed to Alpert, "As I explained over the telephone, I believe a City employe can still own a cottage at a lake and be a City resident." Moreover, Hawley in his December 16, 1988 clarification memo (with copies to the Mayor and to Willis) told Grievant and Larry that Committee that "There are other City employees who have cottages, and having a second home is

certainly not prohibited." Indeed, Hawley compounded these assurances somewhat by adding the rather ambiguous statement, "I think it is understood that during the summer months you may be spending more time at your second home as some other employees do."

While all of those statements were true, they failed to highlight an important distinction in Larry and Grievant's case, which the City has persuasively relied upon on the merits of the residency question, to wit: the nature of their particular lake property effectively imposed a greater burden on them in establishing a primary and permanent in-City abode than would be the case if they had what the City refers to in its arguments as a true summer cottage somewhere up north. On the other hand, the City's above-quoted assurances appear to have been prompted by an effort to be even-handed relative to what the City was permitting others with cottages to do. They also appear to be an effort on the City's part to point the way to achieving ordinance compliance while still accommodating Grievant and Larry's longstanding attachment to English Lake generally and their substantial attachment to the new home they built on 4215, in particular. By making those statements, then the City does not appear to have intended to mislead the employes or to have intended to prevent them from achieving compliance by making those statements.

The only written offer on Grievant and Larry's part to sell 4215 was that dated May 18, 1989. (There are some other vague references to discussions on that subject at times previous, but none of those is sufficiently specific as to date or content to be given weight herein.) The City does not appear to have shown any interest in that offer, though settlement ideas going a different direction were exchanged thereafter between the parties. That offer is significant because, if it had led to a sale of 4215, it would have removed any doubts about the employes' residency compliance. Without their ownership and use of 4215, Grievant's living arrangements in the City whether at 39th St. or at the Clipper City Motel would have constituted their primary and permanent abodes. They would then have had no abode outside the City at all. As the City has variously acknowledged: the ordinance does not require ownership as opposed to rental of one's primary and permanent abode, only that it be in the City; and the ordinance does not require living apart from one's adult relatives as opposed to sharing living quarters with them, only that the employe must maintain his primary and permanent abode in the City.

The offer to sell 4215 would only be significant if it represented a serious intention on the Grievant's part to sever her connections with 4215. The City apparently did not take it as a serious one, and the City's viewing in that way is quite understandable in the circumstances. For, the May 14 offer came very late in what had been a very long residency investigation/ negotiation process. The offer itself made no specific provision for listing the property with a realtor or for otherwise promoting the likelihood that 4215 would in fact be sold within any particular time frame. While the City could have countered with tighter terms to meet that sort of concern, the offer as it was advanced did not on its face show that that Grievant and Larry were serious about selling 4215, let alone serious about selling it quickly. In light of those factors, the City's lack of specific interest in that offer did not reflect an intent to prevent the employes from attaining compliance.

While the Arbitrator has concluded that the City had a right to insist that Grievant and Larry establish their primary and permanent abode in the City, the Union asserts that the City unfairly overreached when it forced them to agree, on threat of discharge, not to share living quarters with any adult relative in either of their families. The Union refers both to the terms of the November-December, 1988 agreement and to the City's settlement position on May 23, 1989. As noted, the ordinance does not prohibit employes from living with relatives, adult or otherwise. The City agrees that is so, but agrues the reasonableness of its positions in the context of the particular facts of this case. An overview of the long and tortuous history of the City's investigation shows that the City was not intent upon discharging the Grievants or upon forcing the Grievants to live separate from their adult relatives, per se, but only intent upon getting Grievant and Larry to establish their permanent and primary abode in the City as required by the ordinance. After all, the City was proposing that limitation in a situation where Grievant and Larry were going to be free to retain ownership of an expensive, attractive and close-to-the City lake home at which they had been spending significant amounts of time (as indicated by Willis' earlier investigative interview memorandum) while claiming that they resided with their adult relative Jeff, at 39th St. As the questioning by Aldermen at the residency hearing indicates, the Committee was skeptical that Grievant and Larry would in fact make 39th St. their principal abode while it continued to be occupied by Larry's son, Jeff. The City's skepticism in that regard was not unfounded either in November of 1988 given the information Larry have provided in the May 1988 interview, or in May of 1989 given employes' apparent failure to live up to their November-Decmeber, 1988 agreement by selecting the Clipper City Motel as their means of compliance. Thus, while the City's insistence on those methods of providing some more tangible means of assuring that Grievant and Larry would in fact be living in the City enough to establish and maintain their primary and permanent abode intruded somewhat on the employes' private living arrangement choices, it did so only for the purpose of assuring true compliance with the basic requirement of the ordinance in circumstances where the employes had given the City good reason to doubt the efficacy of merely obtaining their written promise to do so.

In any event, whatever equities favoring Grievant are represented by the aspects of City conduct cited by the Union above are outweighed by equities against the Grievant arising out of her own conduct.

As the Arbitrator has concluded above, Grievant has in fact failed to achieve actual residency compliance for a substantial period of time. While the City may have contributed to a limited degree to that failure as noted above, the City also tried in various ways to encourage compliance and gave the Grievant and Larry a great deal of time and leeway within which to comply. The primary responsibility for the noncompliance clearly rests with Grievant and her husband, themselves, and not with the City.

Furthermore, Grievant entered into the November-December 1988 agreement whereby she was to become a resident by February 1, 1989, with knowledge of the City's interpretation of

residency as discussed at the November 29 meeting in the presence of Grievant, Larry and their attorney. Then, despite Hawley's memo reminding her that that agreement required her to maintain her primary residence in the City, she and Larry rented a one room plus private bath unit with no private phone and no cooking facilities as their means of complying with the residency standards the City had taken pains to discuss with them during the November 29 meeting and to clarify in Hawley's memo. The shortcomings of the Clipper City as a primary and permanent abode are so clear as to call into question Grievant's good faith in selecting it as a means of complying with the November-December, 1988 agreement and the ordinance.

The evidence also indicates that Grievant and Larry did not firmly believe that the Clipper City Motel was sufficient to bring them into compliance with the ordinance or the November-December, 1988 agreement. When Hawley asked Larry for their current address in late March of 1989, Larry replied that he would have to talk to his attorney before responding, and Larry ultimately never did respond because Willis got that address directly from Alpert. Then, according to Grievant's UC hearing testimony, she and Larry discussed Hawley's request for their address, concluded that it signaled the possibility of another hearing, and decided on that basis to end their stay at the Clipper City Motel and move back to 39th St.

In addition, as noted earlier, Grievant, through the presentation made on her behalf to the Personnel Committee on May 23, was not forthright with the Committee about her then-current living arrangements. As a result, the record on which the Committee proceeded was factually inaccurate about those arrangements and did not contain even an arguable basis on which the Committee or the Council could have concluded that Grievant was a then a resident within the meaning of the ordinance.

In sum, the extent to which the City can be said to have contributed to Grievant's noncompliance with the ordinance was modest at best, especially in the context of the City's other lengthy, patient and repeated efforts to encourage the Grievant and Larry to achieve compliance and the employes' apparent lengthy failures to comply. Moreover, Grievant is not in a favorable posture to rely on such equities in light of questions about her own good faith arising out of her selection of the Clipper City as a means of complying with the November-December 1988 agreement and in light of the Grievant's failure to be straightforward and factual with the Committee during the residency hearing.

For the foregoing reasons, the Arbitrator is persuaded, upon consideration of the record as a whole, that the City did not exceed the implied limitations on the City's Art. XX right to discharge for residency noncompliance and did not violate the Art. VIII just cause provision. Accordingly, there is no basis for either reinstatement, back pay or any other remedy in this case.

DECISION AND AWARD

1. The issue, "Did the City violate the Agreement by its

discharge of Linn Anderson on June 5, 1989," is procedurally arbitrable.

2. The City did not violate the Agreement by its discharge of Linn Anderson on June 5, 1989.

3. The grievance is denied.

Dated at Shorewood, Wisconsin this 22nd day of May, 1990.

By Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator