BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
BROWN COUNTY EMPLOYEES LOCALS 1901-B, C, D, E, F	:	Case 401 No. 42509 MA-5706
and	:	
BROWN COUNTY	:	

Appearances:

Mr. Richard V. Graylow, Lawton & Cates, S.C., Attorneys at Law, appearing on behalf of the Union.

Mr. Dennis W. Rader, Mulcahy & Wherry, S.C., Attorneys at Law, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above are parties to a series of collective bargaining agreements which provide for final and binding arbitration of certain disputes. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance concerning residency. The undersigned was appointed and held a hearing on January 30, 1990, in Green Bay, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. Following the distribution of a transcript, the parties completed their briefing schedules on May 2, 1990, and the record in the case was closed at that time.

ISSUES:

The Union frames the issues as the following:

> Do the provisions of the applicable labor agreements exempt bargaining unit members from the residency provisions of the Brown County Code? Is the Employer violating the collective bargaining agreements by requiring bargaining unit employees to comply with the residency requirements of the Brown County Code? If so, what is the remedy?

The County frames the issues as this:

> Do the collective bargaining agreements with the County prohibit the County from enforcing the residency requirements which are found in the Brown County Code?

The parties agreed that the Arbitrator may frame the issues, and I have framed the issues as follows:

> Do the provisions of the bargaining agreements for Brown County Employees Locals 1901-B, C, D, E, and F exempt bargaining unit members from the requirements of the residency provisions of the Brown County Code? If so, what is the appropriate remedy?

BACKGROUND:

This grievance concerning residency is a consolidated grievance of five bargaining units of Brown County Employees Locals 1901-B, C, D, E and F. It follows on the heels of an arbitration award issued by Arbitrator Coleen Burns in Brown County Mental Health Center Local 1901, AFSCME, AFL-CIO and Brown County (Mental Health Center), MA-4792 (May 31, 1989), in which the Arbitrator ruled that the provisions of a collective bargaining agreement exempted bargaining unit members from the requirements of the residency provisions of Chapter Four of the Brown County Code, unless and until the parties negotiate otherwise. Arbitrator Burns ordered the County to cease and desist from violating the provisions of a 1987-1988 bargaining agreement by requiring bargaining unit employees to comply with the County residency requirement.

Following the Burns Award, James Miller, Staff Representative for Wisconsin Council 40, AFSCME, sent a letter on June 20, 1989, to Gerald Lang, Personnel Director for Brown County, advising him that the Union did not agree with the County's position that the residency requirement was enforceable in the five units called Locals 1901-B through F. Both parties agreed that grievances concerning residency could be consolidated into one grievance, that the grievance procedure steps would be waived and the issue submitted to arbitration.

The current dispute centers around the County's proposal during contract negotiations in 1981 to delete an appendix to some contracts that contained a residency requirement -- an item that the Union had proposed during bargaining in the late 1970's. Two of the bargaining units at issue here were organized

before the 1981 negotiations, one was in the process of getting a first contract, and two had not been organized at that time. Miller organized all of the units during the late 1970's and the 1980's.

Local 1901-B covers library professional employees, and was organized in either 1977 or 1978. The 1978-79 bargaining agreement (the first one) contained the following item in Appendix A:

> 10. Recognition is given to the provisions of Brown County Board of Supervisors Resolution No. 20, adopted June 16, 1976, requiring that all future full-time regular employees of Brown County establish residence within the County prior to expiration of the probationary period.

The same language appeared in the 1980 bargaining agreement, but not in the 1981 or subsequent agreements.

Local 1901-D covers library paraprofessionals and was organized in 1979, and the 1980 contract contains the same language in Item 10 of Appendix A as noted in Local 1901-B's contract. The language was deleted in 1981 and does not appear in successor contracts.

Local 1901-E covers registered nurses at the Mental Health Center and was organized in 1980. The first contract covering 1980-81 does not contain any reference to a residency requirement, nor do the successor contracts. Miller testified that the first contract for the RN's was settled in 1981. The Union submitted the same contract that was in effect for other bargaining units, and its proposal included an appendix with a reference to a residency requirement. However, it was during 1981 that the appendix language was deleted in the other contracts. Miller testified that since the parties had settled the other units, they agreed to use the same language for the RN's first contract. Therefore, the appendix language was not put into the first contract for this unit.

Local 1901-F covers shelter care employees and was organized in 1982. Neither the first contract in 1983 nor the successor contracts contained a reference to a residency requirement.

Local 1901-C covers library pages and was organized in 1987. The first contract covered a period of April 2, 1987 to December 31, 1988, and neither the first contract nor the current 1989-1990 contract contain any reference to a residency requirement.

In 1978, the County adopted a County-wide Code which contained the following two items relevant to this dispute:

> 4.04 COLLECTIVE BARGAINING AGREEMENTS. This chapter applies to employees not covered by collective bargaining agreements and to employees so covered when specific contracts do not apply to the contrary.
>
> 4.112 COUNTY RESIDENCE. All employees of Brown County hired after July 1, 1976 must reside within the physical boundaries of the county. Any employee who has not established residency within Brown County at the time of his/her employment shall establish residency prior to the expiration of the probationary period in any job classification. Any exceptions to this residency policy must be sufficiently justified and approved by the Personnel Committee and referred to the Brown County Board of Supervisors for final approval.

On March 18, 1981, the County adopted a revised section on residency, which is the following:

> 4.103 COUNTY RESIDENCE. All employees of Brown County must reside within the physical boundaries of the county, except that persons who were employed by the county as of the passage and publication of this ordinance* and who resided outside of the county on that date and immediately prior thereto shall be allowed to continue to reside outside of the county. If any of those employed by the county at the passage and publication of this ordinance, subsequently move into the county, they shall then be required to thereafter continue their residence within the physical boundaries of the county as long as they are employed by the county. Any employee who has not established residency within Brown County at the time of his/her employment shall establish residency within 3 months of successful completion of the probationary period in any job classification. Any exception to this residency policy must be sufficiently justified and reviewed by the

> Personnel Committee and referred to the Brown County Board of Supervisors for final approval.
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> *Note: The above section was adopted by the Brown County Board of Supervisors on May 18, 1981, (except last sentence).

The above section is contained in Chapter Four of the Brown County Code, revised June 20, 1982. Section 4.04 noted earlier from the 1978 Code remains unchanged.

The parties do not dispute the fact that during the 1981 contract negotiations, the County made a proposal to delete all of Appendix A which included the residency requirement among other things. 1/ The Union readily agreed. Neither party discussed with each other its intentions or expectations regarding the deletion of the residency clause of Appendix A.

Miller testified that Lang proposed removing the language of the Appendix from the labor agreement, and he agreed within about 30 seconds. From that point on, he took the position that the Union negotiated itself out of the residency requirement. Lang testified that the other work rules of Appendix A really belonged in the body of the labor contract and not in an appendix. Therefore, it was the County's proposal to clean up the contract by eliminating that appendix and putting various items of the appendix into specific articles of the contract. The County had just adopted the revised ordinance dealing with residency, and the County's position at the bargaining table was that the reference to residency in the contract referred to an ordinance in 1976 which no longer applied because it was obsolete. Items in Appendix A -- other than the residency requirement -- were put into the body of the labor agreement at that time.

The parties agree that there were no discussions regarding residency when they bargained for the first contracts of the two units last to be organized -- Locals 1901-C and 1901-F.

On July 20, 1983, the County Board of Supervisors once again revised its code regarding the residency section to the following:

> Section 4.103 of the Brown County Code is hereby repealed and recreated to read as follows:
>
> COUNTY RESIDENCY.
>
> (1) All employees of Brown County, hired after June 30, 1976 are required to establish and maintain their actual bona fide residence within the boundaries of Brown County within 90 days after completion of their probationary period. Anyone employed by the County prior to June 30, 1976, who subsequently moves into the County shall be required to thereafter continue their residence within the physical boundaries of the County as long as they are employed by the County. This requirement has been established to enhance efficiency of operation and to provide for effective recall of employees during emergency situation.
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> . . .
>
> REVIEW OF VIOLATIONS.
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> (3) Department heads are expected to enforce the residency requirement in their own departments. The Personnel Committee is hereby authorized to investigate complaints made to the County with respect to the residency of employees of the County and may initiate any such investigation on its own motion. Whenever such investigation shall be made, the Personnel Committee shall make a finding with respect to whether or not such an employee is or is not actually a resident of the County in accordance with the requirements set forth herein. No consideration shall be given by the Personnel Committee to the fact that such employee intends to maintain residency in the County if actually the employee does not maintain such a residence as herein provided for. Whenever the facts disclose the existence of dual residencies, the decision of the Personnel Committee shall be final with respect to whether or not such employee's

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1/ The parties refer to a bargaining agreement in the singular form; the record does not reflect which particular contract they refer to. Miller testified that the contracts are not bargained together but are done at separate times, and that items that are settled in one contract normally go to the other contracts. There is no evidence which contract was the lead contract in the 1981 bargaining when the appendix was deleted.

residence satisfies the above enumerated provisions and requirements.

NOTIFICATION.

(4) All County employees shall report the address of their current residence and telephone number to their department head. Any subsequent changes must be reported to the department head within ten (10) days of the date the change occurred. The department head will notify the Personnel Department which will maintain a current roster of employees together with their addresses and telephone numbers.

VIOLATIONS.

(5) After a determination of the status of an employee's current residency, upon the finding of a violation of this policy, the Personnel Committee shall make a recommendation to the County Board, whose decision shall be final. The recommendation of the Committee can include any form of discipline, to include suspension or termination.

The above revised ordinance was posted at the Mental Health Center on a bulletin board next to a time clock. Both RN's and the nonprofessional employees at the Mental Health Center use the time clock. By virtue of the Burns Award, nonprofessional employees are not required to reside within the County.

When the County posts notices that jobs are open, a sheet indicating the position, location, and salary is posted with information on the back side of the sheet which includes a notice that an employee must become a resident of the County within three months of completing his or her probationary period. The County has sent letters confirming offers of employment to prospective employees, and such letters reiterate the residency requirement. Once an employee is hired, the employee is given a check list which notes that he or she has read and understood the personnel manual. The check list also includes the residency policy as one of several items to be checked by the employee. The County also keeps personnel manuals, which include the residency requirement, available at the Library and the Mental Health Center.

The County has made exceptions to the residency requirement for nurses due to the current nursing shortage. New hires for RN's can currently be hired without having to move into the County. However, it is uncertain whether the exceptions would apply to employees already on staff who wished to move out of the County. There is some evidence that certain supervisors live outside the County's boundaries. There is no evidence on the record to indicate whether any bargaining unit employees live outside the County, and there is no evidence that the County has imposed any discipline on employees for not following the residency rule, or that the County has attempted to enforce a residency requirement.

THE PARTIES' POSITIONS:

The Union:

The Union asserts that the County bargained away the residency requirement during the 1981 negotiations when it asked that the residency requirement be removed from the bargaining agreement. The Union contends that this case has already been decided through the Burns Award. The facts and parties are substantially the same as in that case. The Union believes that the Burns decision controls all of the labor agreements, because what is done in one bargaining agreement is carried over to the rest. The practice of maintaining consistency is evidenced by the fact that the original draft of the RN agreement in 1980 contained an Appendix A with the residency requirement, but the final RN agreement did not include the Appendix because it had the same terms and conditions as the rest of the agreements in existence in 1981. Thus, there is a continuity of contracting history, each agreement evolving in unison with all other units, and an interpretation given to an earlier agreement applies with equal force to the later agreements. Because Arbitrator Burns already settled this matter in favor of the Union, the residency requirement does not apply to any of the bargaining units.

The Union asserts that when later units were formed, the agreements were based on provisions already in other agreements. Because the residency clause was removed in 1981, agreements after 1981 never included it. Neither party brought it up in negotiations. The County never enforced the requirement against any employee, and the Union thought the matter was resolved. It was the County that caused the clause to be deleted, and it cannot unilaterally change an issue that has been decided at the negotiating table. Whether the County intentionally or unintentionally removed the requirement, it is bound now by the contract.

The Union opposed all attempts by the County to assert a residency requirement, and the County never responded to the Union's protests. By its

silence, the County indicated it did not take issue with the Union's position.

The County:

The County asserts that the Management Rights clauses of the labor agreements give it the authority to establish a residency requirement. It retains the right to adopt and publish reasonable rules which may be amended from time to time.

The County submits that the Union has waived the right to claim that the County's application of the residency requirement constitutes a violation of the labor contracts. Since 1976, the County applied the residency requirement to all employees, before the organization of the five bargaining units in this case. Until this dispute, no grievances were ever filed by any of the units challenging that requirement. The Union was aware of the residency requirement. The County has notified bargaining unit employees of the requirement via the personnel manual. Moreover, the job postings for the five bargaining units include a provision setting forth the residency requirement, and these job postings are distributed to all County Departments and posted in all Department locations. Since 1983, the County has posted the latest version of the residency requirement, which includes the fact that discipline could be imposed for violations, on the bulletin board at the Mental Health Center next to the time clock used by RN's and shelter care employees. Bargaining unit members acknowledged that they were made aware of the residency requirement when they were hired. Written offers of employment to new employees further set forth the residency requirement, and new employees are made aware of it through orientation proceedings by means of marking off on a check list that they have read, understood, and agreed to abide by that requirement.

The County contends that the Union acquiesced to the residency requirement and that the parties carried over the requirement as a condition of employment following the organization of the bargaining units. Miller was aware that unorganized employees were subject to the residency requirement but made no attempt to bargain on the issue during negotiations, even when bargaining for the units organized after the 1981 round of negotiations.

The parties never intended to exempt Union employees from the residency requirement, according to the County. During the 1981 negotiations, Miller was aware of the residency requirement, but when Item 10 of Appendices A was deleted, the Union never raised the issue of whether the requirement still applied to Union employees. The County asserts that the parties' intent in deleting Item 10 from the labor agreements of Locals 1901-B and 1901-D was not to relieve members from compliance with the residency requirement, but to relocate the Appendices A items into provisions of the labor agreements. The County's proposal was simply intended to clean up the agreements. There is no evidence that the application of the residency requirement to bargaining unit members had been specifically bargained away.

The Burns decision does not apply to the contracts for Locals 1901-C, E, and F because that decision hinged on the deletion of the residency provisions from contracts negotiated for 1980-81. Since the contracts for Locals 1901-C, E and F were negotiated after 1980-81, they never had residency references deleted from those contracts. Furthermore, the Union knew that these employees had been covered by a County residency code, and by not challenging the application of the residency ordinance when the first contract was negotiated, the Union waived its right to object to it later.

The Union's Reply:

In its reply brief, the Union submits that the County continuously failed to cite the case that controls between these parties -- the Burns Award. The Union also submits that the County waived its right to argue that the Union waived the right to make the present claim, as the County never raised the defense based upon laches at the hearing. The Union disputed the application of the residency requirement any time the County tried to subject the bargaining unit employees to the requirement. Arbitrator Burns considered and rejected this precise argument at length under the same facts as this case presents, and the evidence demonstrates that the Union never waived its rights.

Arbitrator Burns also rejected the County's argument that because employees knew of the residency requirement in the Code, it therefore applied to them. The Arbitrator interpreting the same facts under the same contract provisions must find the County's argument invalid. Burns further rejected the County's argument that the parties never intended to exempt Union employees from the residency requirement.

While the County argues that because the Burns Award hinges on the deletion of the residency provisions and therefore the residency requirement applies to subsequent agreements, this argument would eliminate the context in which the later agreements were formed. Those later agreements were negotiated by the same parties and by the same individuals. The Union asserts that the same meaning to later provisions may be inferred from the earlier, and the later agreements would not have a residency requirement because it had already

been deleted. It was a resolved issue. The Union concludes that the meaning given to agreements based on the bargaining history of the earlier agreements should thus be accorded to the later agreements.

DISCUSSION:

The collective bargaining agreements for Locals 1901-B and D fall squarely within the rationale of the Burns Award. This grievance concerning residency involves the same factual setting and the same parties. The only thing different is that there are different employees involved because these are different bargaining units than the unit presented in the Burns decision. However, there is nothing unique about these employees vis-a-vis the employees in the prior case -- there is no evidence that different standards might have been applied regarding residency for these employees.

The Burns Award has great persuasive force in this case, particularly to the bargaining agreements of Locals 1901-B and D, and, as will be noted later, to Local 1901-E. In International Paper Company, 83-1 CCH ARB Para. 8277 (Arbitrator Williams, 1983), the Arbitrator notes at length the importance and effects of a prior award, considering all the principles of stare decisis, res judicata, and when exceptions might apply. Arbitrator Williams quotes from Arbitrator Sembower in North Shore Gas Co., 40 LA 37, the following:

> . . . While arbitration awards are not precedential to the same degree as court decisions, it is generally recognized that in the interest of uniformity of procedure and to save the time and expense of repetitious presentation of issues, due respect should be accorded a well-reasoned award on like facts in the same plant and between the same parties, in the absence of intervening circumstances of a different nature or undue passage of time . . . .

Arbitrator Williams goes on to note the following:

> Thus, particularly when same language, parties, plant and issue are involved, arbitrators often have considered prior awards to be a part of the terms or the language of the agreement. It is an award, which is not to be lightly set aside, and there should be compelling reasons for doing so. Overall, it is argued by many that the need for consistency and stability in arbitration mandate that authoritative force be given to such prior awards.

If, in my opinion, the Burns Award was a matter of bad judgment, or new or different evidence was put forth in this case, the Burns Award would have no force. However, I have concluded that the Burns Award is a well-reasoned opinion and find nothing that the parties have presented before me to compel a different conclusion. Without restating all of the applicable reasoning of the Burns Award, I find that the prior award clearly controls the instant dispute as to Locals 1901-B and D.

Moreover, it is appropriate to apply the rationale of the Burns Award to the bargaining agreement for Local 1901-E. This agreement was first formed during the bargaining of 1981. The Union proposed an Appendix A which included a residency clause to mirror the language of the contracts for Locals 1901-B and D, already in existence. It was when the County proposed to delete the Appendix during the 1981 bargaining that the appendices for all three contracts disappeared. Therefore, I conclude that the labor contract for Local 1901-E has the same terms and conditions as the other contracts, and that the parties bargained away the residency clause.

However, the last two bargaining units to be formed -- Locals 1901-C and F -- present a different problem. Those contracts, having been formed in 1987 and 1982 respectively, never contained an Appendix A or had any references to a residency requirement. The parties never brought the issue to the bargaining table. The County argues that the Union knew that these employees had been covered by the residency code, and the Union has waived its right to object to the application of the code now where it did not challenge it when the first

contracts were negotiated. The Union argues that the same meaning applied to earlier contracts should be applied to the later contracts, based on the bargaining history.

Miller testified that what is generally settled in one contract carries over to other contracts, even though the bargaining units negotiate separately for their contracts. Miller noted that the contract language is basically the same for all contracts, although there may be some variations to cover a particular situation unique to one bargaining unit.

The Arbitrator is left with a situation of determining the parties' intent when they negotiated the latter two contracts in this dispute, with both parties claiming different intentions regarding the residency issue. The County never indicated to the Union that the residency code would not apply to the last two bargaining units to be formed; however, it never took the position that the residency code did not apply to the other three contracts either. The Union took the position that the residency issue had been solved by bargaining it out of the earlier contracts, and that it was a done deal by the time the latter two contracts were formed. Both parties consistently took inconsistent positions but skillfully avoided the issue by their conduct through the course of negotiations during the 1980's, at least after the 1981 bargaining.

Therefore, the better method to resolve this dispute is to rely on the parties' bargaining history to determine their intentions regarding residency for the contracts for Locals 1901-C and F. Admittedly, there is not a lot of bargaining history that went into these contracts.

The County does not dispute the Union's assertions that the general practice is to carry over the settlements of one contract to the other contracts. In fact, the bargaining over the contract for Local 1901-E -- the RN agreement -- reinforces the bargaining history of resolving matters by carrying over into one contract those items settled in other contracts. The bargaining over the RN agreement, in my opinion, has increased significance in this case to determine the status of the bargaining over the contracts for Locals 1901-C and F. The Union originally proposed a residency requirement as part of Appendix A in the RN contract, but because the parties deleted the Appendix as part of the bargaining for another contract, the RN contract contained no Appendix A, and no residency requirement. Therefore, it is apparent that the parties intended to carry over the same terms and conditions of employment into the RN contract as were settled in Locals 1901-B and D. The Arbitrator agrees with the Union that there is a continuity of bargaining history with interpretations given to earlier agreements applying with equal force to the later agreements.

Moreover, the same individuals negotiated the later agreements. They were aware of their bargaining history. There is no evidence whether, during the formation of the first contracts for Locals 1901-C and F, the parties intentionally side stepped the residency issue, whether they forgot about it, or whether they intended to apply their individual interpretations to the past bargaining history. By their conduct, the best assumption is that the parties intended only to apply terms and conditions resolved in earlier contracts to later contracts. Because the terms and conditions of the earlier contracts have been found to eliminate a residency requirement, the same holds true now for the later agreements, based on the bargaining history of the parties.

Accordingly, I find that based on the persuasive force of the Burns Award and the parties' bargaining history, the provisions of all of the bargaining agreements consolidated in this grievance exempt the bargaining unit members from the requirements of the residency provisions of the Brown County Code unless and until the parties negotiate otherwise. Because the record does not show that the County has taken any adverse action against any bargaining unit members based on residency, there is no need for any other remedial relief in this case.

AWARD

The provisions of the bargaining agreements for Brown County Employees Locals 1901-B, C, D, E and F exempt bargaining unit members from the requirements of the residency provisions of the Brown County Code, unless and until the parties negotiate otherwise.

Dated at Madison, Wisconsin this 14th day of June, 1990.

By _____
Karen J. Mawhinney, Arbitrator