BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LEER DIVISION	:	Case 28 No. 48488 MA-2620
and	:	
CITY OF ALGOMA (POLICE DEPARTMENT)	:	

Appearances:

Cullen, Weston, Pines & Bach, Attorneys, by Mr. Gordon E. McQuillen, appearing on behalf of the Union.

Godfrey & Kahn, S.C., by Mr. John E. Thiel, appearing on behalf of the Employer.

ARBITRATION AWARD

The Employer and Union above are parties to a 1991-92 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested the Wisconsin Employment Relations Commission to appoint an arbitrator to resolve the discharge grievance of Cheryl Sauer.

The undersigned was appointed and held a hearing on March 16, 1993 in Algoma, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs and reply briefs, and the record was closed on June 10, 1993.

STIPULATED ISSUES:

1. Did the City of Algoma have just cause to terminate Officer Cheryl Sauer?

2. If not, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE II - MANAGEMENT RIGHTS

2.01 Scope of Management Rights: Except as otherwise provided in this Agreement, the management of the City and its business and the direction of its work force is vested exclusively in the Employer. Such rights include but are not limited to the following:

. . .

d. To discipline or discharge employees for just cause;

. . .

ARTICLE V - DISCIPLINARY PROCEDURE

5.01 Written Notice of Discharge: It is agreed that the exercise of proper and reasonable disciplinary measures belong to management and it, therefore, is agreed that the Employer may, in its discretion, discharge employees without prior warning or notice when the following offenses have been committed. The Employer shall personally deliver to the employee or send by certified mail to the employee's last known address within twenty-four (24) hours of the time of discharge, a written notice of such action with the reasons therefor, a copy of which shall be sent to the Association.

a. If an employee shall during working hours be under the influence of intoxicants or drugs not prescribed by a physician to the point that the employee's work is materially affected, or while on the Employer's premises or during working hours, possesses or consumes any intoxicant or drug not prescribed by a physician and which can potentially affect the performance of the employee's work.

b. If an employee shall engage in an act to steal or otherwise illegally acquire anything of value from the Employer, or from anyone else during hours of work.

c. If an employee shall willfully damage the Employer's property.

d. If an employee shall willfully violate a posted major safety rule.

e. If an employee shall use any City vehicle for purposes or to transport persons in violation of a posted rule.

F. If an employee shall fail or

refuse to carry out any work assignment for which the employee is qualified and capable of performing except work which exposes the employee to unwarranted danger for the employee's own safety.

g. If an employee shall become involved in a conflict of interest and continues after being given ten (10) days notice to cease following a court determination of the conflict of interest.

h. If an employee shall become convicted of any crime or serious misdemeanor.

i. If an employee shall assault any City official or supervisor or any other person while on duty.

j. If an employee shall falsify material facts in records or applications for employment.

5.02 Infractions: The following offenses shall call for progressive discipline:

a. If an employee shall be absent or tardy without good reason or without being excused by the Employer;

b. If an employee shall be negligent or inefficient in the performance of the employee's assigned duties;

c. If an employee shall violate one or more of the posted work or safety rules;

d. If an employee shall use profane or indecent language in the presence of the public under circumstances where such language is likely to be offensive;

e. If an employee hazes or taunts a fellow employee;

f. If an employee solicits or collects contributions for any purpose in working area and during work hours, except

during breaktime.

5.03 Progressive Discipline: An initial offense as specified in 5.02 will result in a written reprimand and will be followed, if repeated by a suspension of not to exceed three (3) days. On the third offense an employee may be suspended for from four (4) to ten (10) days and discharge for the fourth offense (so that violation of any four (4) infractions subjects an employee to discharge), provided the three (3) previous actions were taken within a period of one (1) year immediately prior to the date of discharge.

DISCUSSION:

In the somewhat unwieldy record the parties have amassed in this matter, virtually everything that could be disputed has been disputed. Following a close review of the facts and arguments, I have determined to stick to the essence thereof, and the finer points of the parties' many sallies will therefore be referred to only as necessary.

Grievant Cheryl Sauer was first employed by the City in 1985, and the City discharged her on November 30, 1992 over issues of residency and possible falsification of records. No allegation is made by the City that the grievant was otherwise unsatisfactory as an employe.

The grievant is a single mother with two teenage children, a boy and a girl, and this matter began to unfold when in the Spring of 1992 a relationship ended in which she was living with a man with her children in the City of Algoma. The Grievant began to search for alternative housing, beginning within the City. The record is replete with evidence that housing of some kinds is at a premium in the City of Algoma, and the evidence from newspaper advertisements, testimony from landlords, and the Grievant's own testimony stand unrebutted to the effect that three-bedroom apartments and houses in particular are hard to find within the City. The Grievant refused to have her opposite-sex teenage children share a bedroom or for herself to share a bedroom with either, and located a house for rent which will be referred to as the Highway 42 address, and which the record demonstrates is located 1.2 miles south of the City limits. In the first of a number of elements of this case which render it something less than the most believable of chains of events, the Grievant learned of the house's availability through the City's apparently effective "grapevine", and called the tenant reputed to be moving

out -- who was the City Attorney, John Becker. Becker confirmed that he was vacating the premises with his wife, and stated that his wife had the key. The Grievant obtained the key from the City Attorney's wife, called the owner's agent, rented the property, and moved in with her children lock, stock and barrel.

It is significant to the City's subsequent claim that the Grievant falsified information in an attempt to convince the City that she was a City resident that she not only obtained the key to the property from the City Attorney's wife, but obtained the help of no less than three of her fellow officers to move her household goods. Testimony from the officers involved, at the pre-discharge hearing on November 30, 1992, establishes that the Grievant was reminded of the residency clause at the time by the officers, which she concedes she knew anyway; one of the officers went so far as to say that she was committing "occupational suicide". At approximately the same time, the Grievant rented a room-with-bath at 524 Mill Street, within the City of Algoma, from one Alice Zimmerman.

The record contains much evidence pertaining to the Grievant's living habits in the subsequent months, which can be succinctly summarized as follows: the Grievant paid the rent for the space at 524 Mill Street, but never cooked or ate there, and there is no evidence that she ever took a bath in the bathroom, and little evidence that she ever slept on the premises. The Grievant had herself picked up from and dropped off at the Mill Street location by the preceding and relieving officer, as was the department's custom, but spent virtually all of her off-duty time at the Highway 42 address. Nevertheless the Grievant had her driver's license, voting registration and other documents maintained first at 524 Mill Street and later at 1411 Jefferson Street (about which more below), and used the Mill Street telephone number first in her updated listing of employe addresses and telephone numbers at the police department -- while listing also the telephone number of the Highway 42 house, which she described as her father's cottage. 1/

Shortly after moving into two different locations, the Grievant on advice of other police officers formally requested a temporary waiver of the residency ordinance. In a July meeting, the Protection of Persons and Property Committee denied the request. The grievant subsequently asked City Attorney Becker for a definition of residency, and he supplied her with a list of court cases in which the matter had been litigated. The Ordinance

1/ There is evidence that her father, a Minnesota resident, paid the rent for the cottage, but none that he ever spent significant time there.

itself was passed in 1980, and reads as follows:

> 4.19 Effective immediately after being hired by the City of Algoma policemen shall become residents of the City of Algoma within 30 days after the conclusion of the probationary period.

This Ordinance had been on the books as part of the municipal code and well known to all City police officers from 1980 to 1992, without challenge by the Union. In 1992, the Union proposed for the first time in collective bargaining to remove the residency provision, but was unsuccessful in this attempt. Testimony differed as to whether the grievant's situation alone prompted the proposal, but for reasons explained below I find this of little importance.

It is, however, significant to what follows to note that the evidence is persuasive that the grievant regarded the Highway 42 address as temporary during the months she lived there. Not only the testimony of the grievant, but also the testimony of a neighbor to that address, and other evidence of continuing attempts to locate three-bedroom housing in the City, attest to a degree of good faith on the grievant's part. Police chief Marvin DeQuaine gave testimony at the pre-discharge hearing to the effect that the grievant had turned down a three-bedroom apartment, later described by its landlord in the arbitration hearing as "liveable", but the evidence concerning this apartment is that the definition of "liveable" is a matter of taste. The apartment was known to the police chief because the department had evicted its previous tenant, who in the words of the grievant had "trashed" the place. The testimony of the landlord strongly suggests that the condition of the apartment immediately following its vacancy in the late spring of 1992 was unacceptable, and that it was only later in the summer after extensive work that the apartment became rentable.

The fact that the grievant did not subsequently choose to move in is somewhat counterbalanced by the fact that at about the same time she began to pursue the opportunity of a different three-bedroom residence, as the "grapevine" had resulted in her knowing (ahead of the landlord) that it would be vacant soon. In this case, the prior tenant was another officer of the department, David Cornelius. There is nothing in the record to rebut the grievant's testimony that she first asked the landlord about this apartment sometime in late August, and that at the time he had not yet heard from Officer Cornelius that he and his wife were buying a house.

In the meantime, on August 26 City Attorney Becker sent

Officer Sauer the following letter:

> By direction of the Protection of Persons and Property Committee for the City of Algoma, I hereby demand proof of your residence in the City of Algoma as required by 4.19 of the Ordinances of the City of Algoma.
>
> Proof of your residence within the city can be shown by canceled checks for rent, phone, utilities and any other information that you can supply. Copies of these canceled checks from July to present can be brought to either my office or a member of the Protection Committee. Should you not provide this information by October 1, 1992, action will be taken by the Council to terminate your employment.
>
> Should you have any questions, please do not hesitate to call.

On September 3, the grievant replied in the following terms:

> I received your letter requesting copies of my private papers to show "proof" of my residency.
>
> Enclosed is a copy of the Record Herald article that said the issue of my residency had been settled at the August 3d (sic) counsil (sic) meeting.
>
> I was also told personally by my chief that my residency requirements (sic) had been met and that the counsil had not discussed the issue because I had a residence in the city.
>
> I was told privately by my immediate supervisor that I had met the residency requirements and The Record Herald PUBLICLY reported that the issue was settled.
>
> I am asking a written reply as to why nearly one month later you are bringing up this resolved issue of my residency, nothing has changed in the last month.

During the next few weeks it became clear to the grievant that the Protection of Persons and Property Committee was not

satisfied to leave matters as they lay, and on October 1st, she supplemented her September 3 letter with the following:

> Find enclosed a note from my landlord and a copy of my current drivers license. This is the available "proof" you demanded.
>
> My landlady asks that you not mention her name in front of the camera on the day of the council meeting. She is an elderly woman who also enjoys her privacy. Please grant her request. Unless it is your intention to get me evicted.
>
> Also copies of my letters to you are no longer being sent to my chief. He again told me that as far as he is concerned by residency is established in town. He said he no longer wants anything to do with this issue and the few council members that are pushing the issue. So I am dealing straight to you instead of going through the usual chain of command.

Unsatisfied with this response, the Protection of Persons and Property Committee met and determined that the grievant should be suspended for thirty days for violation of the residency Ordinance. The letter sent to Chief Dequaine by Mayor Clement J. Theys reads as follows:

> Pursuant to Section 4.16(2) DISCIPLINARY ACTIONS of the Algoma Municipal Code, I hereby tender my written approval for the suspension of Officer Cheryl Sauer. This suspension shall be effective immediately and shall continue for a period of thirty (30) days or until such time as Officer Sauer tenders proof of her residency within the city limits of the City of Algoma to the City Attorney, as required by Section 4.19 RESIDENCY REQUIREMENT of the Algoma municipal code.
>
> Should Officer Sauer wish to confer with the City Attorney regarding what would constitute proof of her residency, she should feel welcome to do so.
>
> If you should have any questions or concerns, please feel free to contact either myself or the City Attorney.

The grievant was thereupon suspended by the City. She immediately contacted Attorney McQuillen, who pointed out to City Attorney Becker that the City's action was not in compliance with the provisions of Section 62.13, Stats., which requires due process for such discipline. On October 9, the grievant's suspension was rescinded and the grievant was returned to work with no loss of pay.

On or about the same date, Officer Cornelius closed on his new house. The grievant promptly signed a lease and paid a deposit for the rental of Cornelius' old residence at 1411 Jefferson Street within the City of Algoma, for occupancy to begin on November 1.

In the event, Cornelius was delayed in moving into his new house, and did not move out of 1411 Jefferson Street until the evening of November 4; the grievant moved in the following day. But the grievant paid rent for the entire month of November, according to credible testimony not only from her but also from the landlord, and was recompensed for the lost days' occupancy by a three-way agreement in which she ended up with ownership of a washer and dryer left behind for this purpose by Cornelius with the landlord's agreement.

On October 31, however, Chief DeQuaine filed formal charges against the grievant requesting action in accordance with Chapter 62.13, Stats., the substance of which was that the grievant was falsely claiming residence in the City and had supplied an "altered" photocopy of her Wisconsin driver's license showing the address of 524 Mill Street but obscuring the issue date of said license. On November 30, the City convened an ad hoc police discipline committee composed of the Sheriff of Calumet County, a retired assistant superintendent from the Chicago Police Department, and the Chief of Police of Green Bay, advised by an attorney also from outside the City. The Committee conducted a hearing exceeding nine hours' duration, at which the grievant was represented by Attorney McQuillen and the City was represented by City Attorney Becker. The hearing was transcribed by a court reporter, and at the conclusion of the hearing the panel rendered a decision to discharge the grievant. While the summary of reasons then given on the record by Attorney Warpinski refers specifically to falsification of records as one ground for the discharge, the detailed analysis of their findings separately given by the three members of the Committee at pp. 272-278 of the transcript clearly show that the partially obscured driver's license copy, and other such "falsification of records", was incidental to the Committee's main concern, which was the violation of the residency requirement as such. The grievant promptly filed a grievance protesting the discharge, the parties

waived the initial grievance steps, and they proceeded to this arbitration.

In more than 140 pages of briefs, the parties make a number of interesting statutory arguments, which I find to be of doubtful relevance in view of the stipulated contractual issue as well as of several striking facts in this case. The first of these is that the grievant clearly violated both the spirit and the letter of the residency Ordinance. There is in effect no serious evidence that she actually used the Mill Street address for purposes of anything more than facial compliance with the rule, or resided there as the term "resided" is generally understood.

There are, however, some mitigating circumstances. It is clear from the record that three-bedroom apartments are hard to find in Algoma, and the grievant's concern for appropriate living space for her children and herself was openly raised by her request for a temporary waiver from the City, which was summarily denied. There is evidence in the record of continuous attempts by the grievant to find suitable housing in the City, evidence that the Highway 42 rental was always intended to be temporary, and no evidence that any actual harm was suffered by the City as a result of her conduct. In this connection it is worth noting the otherwise irrelevant facts that the Highway 42 residence was hardly any further from the center of town than the more distant points of the City limits themselves, that little additional time was required to drive from the one rather than the other, and that the grievant was not assigned to duties which typically require emergency call-outs anyway, such as the tactical team.

With respect to the City's arguments concerning falsification of records, such arguments are normally raised in circumstances in which the falsification is both credible on its face and material to some actual decision of the City. Article 5.01 (j), in fact, makes explicit use of the term "material". Thus it is relevant that nothing the grievant did could seriously have been expected by anyone to have convinced the Employer that she was actually living within the City. So transparent was the situation that it undercuts the Employer's implied claim of dishonesty by the grievant. In particular, the facts that the grievant had three other police officers move her to the Highway 42 address, that she got the key from the City Attorney's wife after inquiring of the City Attorney as to availability of the property, and that she openly asked the City for a waiver, demonstrate less a serious attempt to pull the wool over the City's eyes and more an attempt to establish facial compliance with a rule she regarded as unreasonable. Meanwhile, the grapevine referred to above clearly continued to operate as everyone might expect throughout. In short, in this small town a charade was played out in which everyone knew all along what was going on.

At the same time, for the Union to claim that the grievant is entirely innocent in this matter is also strained. The record makes clear the grievant's unusual degree of obstinacy, and at the very least it is notable that the grievant flouted the residency clause rather than move into substandard housing or even share a bedroom temporarily with her daughter.

The resulting conclusion that the Employer was entitled to discipline the grievant for violation of the residency clause, and for such dissembling as to her evidence of residency as was inherent in her claim, does not necessarily justify the Employer's conclusion that discharge was appropriate. To begin with, the claim, rested on statutory grounds, that the grievant's non-residency ipso facto made her a non-employe, thus removing her from any protections, is unsupported by any precedent or analysis of the "just cause" implications of such a contention. This Arbitrator holds authority to decide a contractual question stipulated to by the parties. For purposes of an analysis of whether the Employer had just cause for the discharge, the key facts which undercut the Employer's position is that the Employer did not at first discharge the grievant, and that its abortive first attempt at discipline was nevertheless sufficient to obtain the grievant's compliance. And the Employer levied its 30-day suspension of October 6 in light of the same records, supplied by the grievant, that the Employer subsequently relied on to support the November 30 discharge.

"Double jeopardy", as traditionally defined, does not strictly apply here. But the equitable concerns underlying the theory of double jeopardy would appear relevant. Furthermore, even granting that there was an element of dissembling in the grievant's half-hearted claim to reside in the City throughout, there is a glaring fault in the Employer's case. The contract makes reference to both progressive discipline and immediate discharge, for different offenses. The parties have thus clearly bargained for the proposition that progressive discipline is an appropriate tool in obtaining employe compliance with the Employer's proper requirements as to work rules, which in effect the residency requirement is. Thus it is of special relevance that almost to the day that the grievant was given a 30-day suspension, the grievant signed a lease and paid a deposit for housing within the City. Even if the delay from November 1st to November 5 were somehow considered the grievant's fault, which the Employer argues for without evidentiary foundation, by November 5 the grievant was firmly in City housing, children and all.

The purpose of progressive discipline is fundamentally to persuade an errant employe to mend his or her ways. The Union correctly points out that if the original suspension had stood, the grievant would have been in compliance by its end. For the Employer to withdraw the suspension for lack of due process, and then discharge the grievant after she had complied with the rule,

carries an overtone of retaliation, as the Union argues. Or to put it in police terms, it is as if the City, having aimed for the arm and missed, decided next to aim for the heart. The fact that the ad hoc committee was not composed of City employes or officials does not change the fact that it acted in the function of management, and that the City itself both brought the charges and selected the panel.

For these reasons I conclude that the falsification referred to by the Employer was an inherent part of the grievant's insufficient degree of residency, rather than a serious attempt to hide the obvious. The fact of even this degree of falsification serves to excuse the Employer from rigid application of the progressive discipline series, and indeed on equitable grounds it would be difficult to support so light a penalty as a written warning for the grievant's flat-out obstinacy. In effect, the appropriateness of the Employer's first attempt to discipline the grievant, despite its failure to comply with the Statute, was plainly shown by its effectiveness in securing compliance. But at the same time, the retaliatory element in the Employer's subsequent discharge of the grievant is highlighted by the fact that the Employer proceeded to discharge the grievant after she had complied with the rule, and without any significant new evidence that aggravated the nature or the degree of the original offense. I therefore conclude that it has been demonstrated that the Employer had just cause for a 30-day suspension, but not for more.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the City lacked just cause for the discharge of Grievant Cheryl Sauer.

2. That as remedy the City shall, forthwith upon receipt of a copy of this Award, offer Cheryl Sauer reinstatement to her position or a substantially equivalent position with her full seniority, and shall make the grievant whole, less a 30-day suspension, for any loss of wages and/or benefits, by payment to the grievant of a sum of money equal to such losses less interim earnings, if any; and shall correct its records accordingly.

Dated at Madison, Wisconsin this 3rd day of September, 1993.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator