BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
THE CITY OF MARINETTE, EMPLOYER	Case 63 No. 48721 MA-7689
and	
LOCAL 260, AFSCME, UNION	

Appearances:

Mr. Robert W. Burns, Attorney at Law, Godfrey & Kahn, S.C., 333 Main Street, Suite 600, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, appeared on behalf of the Employer.

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin 54751-0364, appeared on behalf of the Union.

ARBITRATION AWARD

On January 29, 1993, the Wisconsin Employment Relations Commission received a request from Local 260, American Federation of State, County & Municipal Employees to have the Commission appoint a member of its staff to hear and decide a grievance pending between that Union and the City of Marinette. On May 17, 1993, the parties jointly agreed to have William C. Houlihan, a member of the Commission's staff, appointed to hear and decide the matter. On June 2, 1993, the Commission designated Mr. Houlihan as the impartial arbitrator to resolve this dispute. A hearing was conducted on July 14, 1993, in Marinette, Wisconsin. The hearing was transcribed, a copy of the transcript was distributed and received on July 28, 1993. The parties filed post-hearing briefs, and the Employer submitted a reply brief, which was received by November 17, 1993.

This grievance arbitration involves the discharge of employe E.T. On April 12, 1994, the undersigned sent the parties a letter indicating that the grievance was denied. This Award represents a confirmation of the result set forth in that letter.

BACKGROUND AND FACTS

In 1976, the City of Marinette promulgated the following residency ordinance:

SEC. 2-3-1 GENERAL PROVISIONS.

. . .

(f) RESIDENCY

(1) It shall be the policy of the City of Marinette to require residency as a condition of employment by the City.
(2) When hiring temporary employees, the City shall employ qualified residents of the City of Marinette prior to hiring qualified non-residents.
(3) All persons who are City employees prior to the time of the enactment of this Section may remain non-residents of the City unless they change their residence, and in the event of such a change, they shall be required to move into the City of Marinette as a condition of continued employment.
(4) All new permanent employees shall have six (6) months from the date of hire to move into the City of Marinette.
(5) Any employee who fails to comply with the residency requirements stated herein shall be terminated.

The City and the Union have been signatories to a series of collective bargaining agreements. There is a residency clause found in the 1967 collective bargaining agreement between the parties, which clause grants employes a one-year period, effective January 1, 1965, in which to move into the City. The 1976 collective bargaining agreement between the parties contains residency language which is substantively identical to the language found in the current collective bargaining agreement. Article 23 of the parties' 1991-92 collective bargaining agreement provides the following:

ARTICLE 23

MISCELLANEOUS

All employees working for the Employer must reside in the City of Marinette.

. . .

ARTICLE 17

DISCIPLINARY PROCEDURE

The following disciplinary procedure is intended as a legitimate management device to inform employees of work habits, etc., which are not consistent with the aims of the Employer's public function, and thereby to correct those deficiencies.

Any employee may be disciplined, demoted, suspended, or discharged for just cause. The sequence of disciplinary action shall be oral reprimands, written reprimands, suspension, demotion, or discharge. A written reprimand sustained in the grievance procedure or not contested shall be considered a valid warning. A valid warning shall be considered effective for not longer than a nine (9) month period.

The above sequence of disciplinary action shall not apply in cases which are cause for immediate suspension or discharge. Theft of personal or public property, drinking intoxicants during working hours, or being drunk on the job are hereby defined as cause for immediate discharge. Gross negligence or willful dereliction of duty or violation of the grievance procedure are hereby defined to be immediate cause for suspension.

Any discharged employee may appeal such action through the grievance procedure and shall initiate grievance action by immediate recourse to Step 3, within ten (10) days of notice of discharge.

Any suspended employee may appeal such action through the grievance procedure and shall initiate grievance action by immediate recourse to Step 2.

Suspension shall not be for less than two (2) days, but for serious offense or repeated violation, suspension may be more severe. No suspension shall exceed thirty (30) calendar days.

Notice of discharge or suspension shall be in writing and a copy shall be provided the

employee and the Union.

E.T., the grievant, was employed by the City of Marinette in the Department of Public Works for 18 years prior to his discharge. Mr. T. experienced a number of personal problems including personal bankruptcy, a series of marital separations, drug and/or alcohol abuse. Prior to the onset of his problems, Mr. T., his wife and two children lived in a house within Marinette city limits. As a result of the bankruptcy, Mr. T. lost his home and as a consequence of his financial and other problems, found his life to be an extraordinarily difficult one. It is his testimony that his life was a "nightmare", and that he "couldn't make ends meet" at the time. He could not find a home that he could afford, large enough to hold his family.

Facing eviction, Mr. T. was approached by an acquaintance who, knowing of his troubles, indicated there was a home that he (T.) could rent outside the city limits. Mr. T.'s wife and children moved into that home. T. moved in with his mother and father who reside in Marinette. In late 1991, T.'s wife was hospitalized for a period of approximately one month. During that time, T. moved out of his parent's home and into the residence outside the City limits. It is his testimony that he was obligated to do so in order to take care of his children. It appears that Mr. T. never moved back into town after that. He testified that he was attempting to hold his life together, hold his family together, and work things out. T. ran newspaper advertisements seeking rental housing in Marinette off and on for approximately one year. He tendered rent to his mother who essentially declined to accept it. He secured rental receipts from his mother in an effort to satisfy the residency obligation. Mr. T. has gone through rehabilitation for drug and alcohol abuse, is living with his family and attempting to move his life forward.

It was Mr. T.'s testimony that he told his immediate supervisor, Michael Mullen, where he lived, gave Mullen his new phone number, and that Mullen essentially acquiesced/approved of his living out of town. It was Mullen's testimony that T. never provided his new telephone number, that he (Mullen) secured it from a different source, that Mullen never approved of T. living out of town. Mullen did acknowledge that in the small department he became aware that Mr. T. was living out of town.

In the fall of 1991, City Attorney Richard Boren, and Mayor Robert Schacht, heard rumblings from various City employes that Mr. T. was living outside the City limits. At the time, it appears that neither the Mayor nor the City Attorney were aware of the personal turmoil in T.'s life. In September of 1991, while T. claims he was residing with his parents within the City limits, and his family was living out of town, a meeting was convened consisting of Mr. T., his union representative, the Mayor, and the

City Attorney. Mr. Boren advised Mr. T. that it was his understanding that T. was living outside the City. He went on to point out the City ordinance and the provision in the collective bargaining agreement obligating employes to reside within the City limits. He further pointed out that the penalty for non-residency was discharge. T. denied that he was living out of town. The meeting ended on that note.

Schacht and Boren continued to receive reports that a number of City employes, including T., were living outside of the City limits. They ultimately determined that they would retain a private investigator to determine where those employes were domiciled. Prior to the initiation of any investigation, the City confronted an employe by the name of Maske, and asked whether or not his residence was within the City limits. Maske, whose former domicile had been condemned and who had withdrawn pension monies to purchase a new home, had purchased that home outside the City limits. When confronted with this question, he readily admitted that this was the case. The City gave Maske three alternatives: (1) move into the City; (2) retire; (3) be terminated. Maske chose retirement and subsequently retired.

A private investigator, Mr. Nelson, preceded to conduct his investigation during the months of August and September, 1992. His investigation was directed at two employes, T. and a Fire Department employe. Over the course of this time frame, Nelson determined that T. was not residing within the City. Nelson conducted a surveillance of T. during the month of August and half of the month of September, 1992. His testimony and his notes relative to his surveillance essentially indicate that T. was living outside the City. Nelson reports that at no time did T. sleep or spend meaningful time at any residence within the City; that he commuted to and from work from his out-of-town residence. Nelson reported that T.'s child caught a bus to and from school from his out-of-town residence, and that T.'s mailing address had been changed to reflect his out-of-town residence. Nelson concluded that T. was domiciled outside the City limits.

Nelson's investigation relative to the Fire Department employe was inconclusive. Nelson was not able to determine whether the Fire Department employe was domiciled within the City. His report indicated that this individual was spending significant portions of time outside the City, but also spent portions of time in the home that he owned and paid taxes on within the City limits. Nelson reported the results of his investigation to Boren and to Schacht. It was Boren's conclusion that he was unable to prove that the fire department employe lived outside the City limits, but that he could demonstrate that T. resided outside City limits.

A meeting was convened on October 6, 1992, involving T., his union representative, the Mayor, the City Attorney, Mr. Nelson,

and a colleague of Mr. Nelson's. At the outset of the meeting, T. was confronted with the Employer's contention that there existed substantial evidence that he was living outside City limits. The City Attorney advised T. that before the City acted, or took any disciplinary measures, the City desired to hear from Mr. T. At that time, T. took a caucus with his union advisors. The Mayor and the City Attorney retreated from the conference room leaving the two private investigators alone in the room. T. returned and discussed his residence with the private investigators. Nelson and his colleague memorialized their conversation. Their memo characterized T. as "hostile and uncooperative and evasive". The memo indicates that T. in response to an inquiry as to his residence responded with the following: "I have rent receipts from my mother for the Taylor Street address." (Taylor Street is Mr. T.'s parents' Marinette address.) The memo indicates that T. contended that he had paid cash for his rent at Taylor Street. Upon further examination, T. recanted that contention. The memo indicates that T. ultimately indicated that he had not spent a single night at the Taylor Street residence for at least one and one-half years. The memo indicates that T. acknowledged that he picked up mail delivered to the Taylor Street address. The memo further indicates that T. spends his nights with his family in the Town of Grover residence. (This is an out-of-town address). The memo acknowledges that his clothes and personal items were currently kept in the Town of Grover residence. The memo indicates that during the interview T. contended that Taylor Street is a bona fide residence and that there exists a meaningful distinction between residence and domicile. T. indicated the existence of a checking account which goes to a post office box in Marinette. T. indicated that his driver's license and hunting license listed his residence at the Taylor Street address and that further he votes in the City of Marinette listing Taylor Street as his address. The memo indicates that T. ultimately acknowledged that no cash or consideration ever changed hands between himself and his mother and that the receipts were provided at his request to create evidence of residency.

Following this discussion, the two investigators went to the Mayor's office, and advised the Mayor and City Attorney that notwithstanding the results of their investigation, Mr. T. denied that he lived outside of the City limits. The men returned to the conference room where they advised T. that he was terminated and that a letter confirming that termination would follow.

That same day, October 6, 1992, Mayor Schacht confirmed T.'s discharge by letter. Mr. T. filed a grievance, dated October 19, 1992, contesting his discharge.

The parties stipulated to a number of matters. The first, is that Mr. T. was living outside of the City limits as of the date of his discharge. The second is that Mr. T. denied that fact to the City up to the point of his discharge. A third factual

stipulation is that this discharge is in no way prompted by Mr. T.'s work performance. That is, his work performance is not an issue in this proceeding.

ISSUE

The parties were unable to stipulate to the issue, leaving the framing of the issue to this Arbitrator. I believe the issue is as follows:

> Does the Employer violate any provision of the collective bargaining agreement by discharging the grievant for failure to live within the City limits?

POSITIONS OF THE PARTIES

The Employer contends that the City of Marinette was required to terminate the grievant's employment because of his violation of its duly-promulgated residency ordinance and, in any event, the City had cause to terminate the grievant as a result of his dishonesty about his residency outside the City. The City contends that under the terms of its residency ordinance, it was required to terminate the grievant. This action is not regarded as disciplinary, and therefore falls outside the scope of the contractual just cause standard. Simply stated, T. is not being disciplined. The Employer contends that by his failure to meet the residency provision, T. disqualified himself from employment with the City. The ordinance is clear and unambiguous that employes must reside within the City and is clear and unambiguous as to the consequence for those employes who fail to do so.

The City contends that the grievant's violation of and dishonesty concerning compliance with the residency provisions of the collective bargaining agreement and the residency ordinance give the City independent "just cause" for discharge. The City contends that T. was given notice of the residency requirement by Article 23 of the collective bargaining agreement and by the municipal ordinance. Furthermore, in September of 1991, more than one year prior to his discharge, the City personally informed the grievant that he must maintain a residence within the City limits, and that he would be terminated for his failure to do so. The grievant was thereafter given a lengthy opportunity to comply with the ordinance. The City characterizes its one-year forbearance as going beyond a reasonable opportunity to avoid discharge and characterized it as rising to the level of generosity, particularly in view of the grievant's false representations as to his actual residence.

The City conducted an objective investigation into the grievant's conduct, gave the grievant an opportunity to be heard, and ultimately made a reasonable determination that the grievant

was in violation of the collective bargaining agreement and the ordinance. The City hired an independent private investigation firm to objectively determine where the grievant resided. On October 6, 1992, the Mayor, the City Attorney, and the City's retained investigators conducted an interview of Mr. T. They confronted him with a claim that he was not a resident and in the face of this, T. continued to maintain he was a resident and that he had obtained rent receipts from his mother for a place of abode within the City of Marinette.

The grievant's dishonesty regarding his residency made discharge the only equitable consequence in this case. The September, 1991 and October 6, 1992, interviews (at which the grievant was represented by his Union), presented the grievant with perfect opportunities to explain any mitigating circumstances he was experiencing which prevented him from being able to comply with the residency requirement. He made no explanation. To the contrary, he was dishonest with his employer. This dishonesty adds a degree of misconduct to this case, leaving the City with no alternative other than discharge. The result of the grievant's dishonesty in this case was an expensive and lengthy investigation which unnecessarily burdened the City's personnel and resources. T. forced the City to chase and catch him.

The residency requirement was applied non-discriminatorily and the grievant's dishonesty left the City with no other alternative but discharge. The City points to the testimony relative to employe Maske who was compelled to retire. The Employer further points to the testimony relative to employe V.C., previously employed by the Municipal Court Clerk who married, changed her residence, and moved to Michigan. Employe V.C. was obligated to resign. The employer further points to employe M.D., a new hire, who came into compliance with the ordinance as required by the City after being granted an extension of the six-month period in which the ordinance permits new employes to establish residence.

It is the position of the Union that the collective bargaining agreement, and not the municipal ordinance, governs and controls this proceeding. The Union contends that the City has engaged in a mixed enforcement and understanding of the collective bargaining agreement provisions. The Union contends that the City was aware of Mr. T.'s living outside the City as early as late 1991 because T. told them of that fact. The Union finally contends that the City lacks just cause to terminate the grievant.

The Union cautions that my authority is limited to the interpretation and application of the terms of the collective bargaining agreement. The Union indicates that I lack the authority to interpret and/or apply the Municipal Code. The Municipal Code contains a provision which grandfathers employes of

the City who live outside the City prior to August of 1976. The residency agreement between the parties reflected in this collective bargaining agreement has no such proviso. The Union points to evidence relative to a Mr. Nielson, who is alleged to have lived outside the City for a protracted period of time. The City did nothing to Mr. Nielson for his failure to live within the City limits. Boren's testimony was that he believed Nielson to be a grandfathered employe. There was further evidence relative to a new employe, a Mr. Devroy, who was given six months to move into the City. That six months is created by the ordinance. The Union has never agreed to any six-month exemption from the residency requirement. No such exemption is found in the collective bargaining agreement. The Union's review of these facts leads it to conclude that there has been inconsistent enforcement of the residency requirement by the City. Specifically, the Union does not believe that the City has enforced the residency requirement of the collective bargaining agreement.

The Union points to T.'s testimony, that in 1991 when his wife was hospitalized, T. advised his supervisor, Mullens, that he would have to move outside the City to take care of his family. The grievant testified that he directly told his supervisor this, and that his supervisor had specifically given him permission to go ahead. Mullens disputes (but does not deny) this version of events, but does not dispute that he was aware of the difficulties that the employe was faced with, and that he had a pretty good idea that the grievant was living outside the City and reported this to the Mayor and the City Attorney. The net result was that he was living in the City when confronted by City officials in September of 1991, and when he moved out of the City in late 1991, the City was aware of that fact and took no action. During the period between late 1991 and his termination in October of 1992, T. made no effort to hide his location from the City. T. had every reason to believe that the City was unconcerned over his location since after the City became aware of his non-residency it took no action. This is the same treatment it afforded Mr. Nielson over whose residence it similarly took no action.

The Union contends that even if T. is found to have violated the residency provision, there exists no just cause to terminate his employment. Pointing to Article 17, the Union contends that the parties have agreed to a specific series of corrective disciplinary steps to enforce the provisions of this agreement. Since the residency requirement lacks a specific penalty for its violation, the parties must rely upon the language of Article 17 to determine the appropriate discipline for this violation. Some form of warning is appropriate under the just cause standard. Even if his conduct is regarded as gross negligence or willful dereliction of duty and thus cause for immediate suspension, the collective bargaining agreement limits that penalty to no more than 30 days.

The Union points to the grievant's 18-year seniority with the City, the absence of any disciplinary record, and seeks reinstatement of the grievant.

DISCUSSION

As a practical matter, I believe Mr. T. was on notice of the requirement that he live within the City. The ordinance exists. The residency provision of the collective bargaining agreement exists. As a practical matter, the Employer put Mr. T. on actual notice of both the residency requirement and the consequences for failure to observe it in September of 1991. While it may be that in September of 1991, T. was living in his parents' home and that the timing of the message may not have been precisely on the mark, it certainly should have flagged to a reasonable man that if he moved out of town he was placing himself in jeopardy. Accepting T.'s testimony at face value, he was put in an extreme position when his wife was hospitalized. The record is silent as to whether moving his children to his parents' home was an acceptable option. It appears to me that most management officials either knew or strongly suspected that T. was experiencing compelling personal difficulties, and that he had moved outside of the Marinette city limits. It further appears to me that the Employer was willing to wink at T.'s non-residency, and let the matter slide, in hopes that it would work out. This acquiescence occurred in the context of other employes' complaints about T. living outside the City while they were being compelled to live within the City limits.

The Employer's inaction ultimately ran aground for two separate reasons. The first is that T.'s non-residency was becoming permanent. That is, T. had lived outside of the City limits for a protracted period of time, and gave no indication of a return to the City. The second problem with this "wait and see" attitude was that the Employer could not discuss it with T. By consistently denying that he lived outside the City limits, T. pre-empted any meaningful discussion that might have led to a rational accommodation. There was no dialogue between T. and officials of the City relative to the state of Mr. T.'s life, and/or whatever efforts he was making to return to a City residence. Ultimately, from the City's perspective, it was confronted with a need to either act or to tolerate the grievant's non-residency indefinitely.

The collective bargaining agreement contains a provision requiring T. to live within the City. For a considerable period of time prior to his discharge, he did not. The question arises, to what consequence? The ordinance spells out the consequence. The Union contends that I lack jurisdiction to apply the provisions of the ordinance. I agree that I lack the authority to enforce the City's ordinance. I do not agree that the ordinance therefore somehow becomes totally irrelevant. At an absolute

minimum, it reflects the Employer's understanding as to the consequence of non-residence.

The Union contends that the collective bargaining agreement and the ordinance are inconsistent due to certain exceptions in the terms of the ordinance. While this is literally true, the inconsistency does not apply to the grievant. The grievant cannot complain of confusion arising out of the inconsistent governing rules. Under either the contract or the ordinance, he is obligated to live in Marinette. T. lived within the City of Marinette, and therefore, is not affected by the "grandfathering" clause. Similarly, T. was a long-term employe, unaffected by the six-month period allowed to move into the City. While it is possible that there exists a class of employes whose obligations under the ordinance differ from obligations created by the collective bargaining agreement, T. is not a member of that class.

The Union contends that there was inconsistent enforcement of the residency requirement. There is record evidence relative to the Employer's treatment of five employes, in addition to Mr. T. The most damning evidence is that relative to Mr. Nielson. The City Attorney indicated he believed Nielson was subject to the grandfather clause. The Union contends that Nielson was not. I find no record evidence indicating that Nielson was a member of the bargaining unit. If he was, the City Attorney is arguably incorrect. If Nielson was not a member of the bargaining unit, then his employment status would be governed by the ordinance and not the collective bargaining agreement. Taken at its worst, nothing in the record suggested Nielson was more than an administrative error on the part of City management. There was evidence relative to a new employe given six months to move into the City. Taken in conjunction with the testimony on Nielson, this suggests to me that the City is applying the terms of the ordinance, and not the literal provisions of the contract, to members of the bargaining unit. Those provisions may or may not be compatible. It is unnecessary for me to make that determination in this case. For, as stated above, the ordinance and the contract are compatible and not inconsistent as applied to this grievant. What the new employe incident suggests to me is that the City administers its residency requirement with a rule of reason. The purpose of the ordinance is to require residency within the City. I do not find that that is waived by permitting a new employe, who may or may not achieve permanent status, to secure a residency after his probationary period expires.

There was testimony relative to an employe employed by the Clerk of Courts who ultimately resigned for non-residency in the City. There was testimony relative to an employe named Maske who was told to move into the City, resign, or be terminated. There was testimony relative to a firefighter who was investigated to an inconclusive result. I do not believe that the examples set forth in this hearing paint a picture of inconsistent application of the residency requirement. I do believe that the City has attempted

to harmonize the ordinance and the collective bargaining agreement. On its face, I do not believe that this harmonization does violence to the terms of the collective bargaining agreement. The contractual residency requirement is an obligation on the employe. The Employer has loosened that obligation by application of ordinance provisions that predate the existing contract language, and which provide a measure of practical relief under fairly narrow circumstances. I do not know if the grandfather clause is meant to be applied through the contract. Similarly, I do not know whether the probationary period was intended to be excluded from strict application of the contract. Neither of these exclusions are applicable to Mr. T. The record indicates that the Union was aware of, and acquiesced in, the extension of the probationary period and non-application of the residence requirement to the new employe.

All of the employes in question were given periods of time to move into the City. I am not willing to treat these acts of accommodation as a waiver of the rather explicit provision in the collective bargaining agreement. Mr. T. was given a year to get back into the City. The Employer gave him time to straighten out his life. Opportunities for further accommodation were pre-empted by his refusal to acknowledge that he lived outside the City.

The Union contends that the City was aware, through Mullens, that T. lived outside the City. There exists a question of fact as to whether the supervisor authorized and/or approved T.'s living outside the City. I believe that Mullens knew T. was living outside the City; I doubt that he authorized it. If Mullen had authorized T. to live outside the City, it is unclear to me why T. would have denied the fact that he lived outside the City to the Mayor and City Attorney. T. secured rent receipts and a City mailbox to prove his residency. If he believed he was authorized to live outside the City, it is unclear why he would go to these lengths to establish the facade of residency. I believe that in September of 1991, T. understood that he was expected to live in the City, and that his failure to do so would have dire employment consequences.

The Union views progressive discipline as required. I disagree. The City confronted T. in September of 1991. He denied living outside the City limits. In the face of this steadfast denial, the City hired a private investigator to watch T. in order to determine where the man lived. A year later, in the face of proof of his non-residency, and an opportunity to discuss the matter and be heard, T. again denied living outside the City. It is in this context that the Union contends that a warning or a suspension is the appropriate disciplinary tool. As a practical matter, the man had a warning. He was on notice of the fact that he was required to live in the City. He went to some lengths to mask his residency. To conclude that all that is warranted here is a warning or suspension exalts form over substance. It

trivializes all of the events that have transpired in the year between the initial warning and the discharge. The City made an accommodation to Mr. T. It invited discussion to consider further accommodation. That discussion and that opportunity was precluded by Mr. T.

As a technical matter, I do not regard the list of dischargeable offenses as exclusive. For example, it could hardly be argued that unprovoked assault causing bodily harm to a supervisor did not constitute grounds for discharge because it was not contained in the list of dischargeable offenses.

The conduct involved in this proceeding is not inherently evil. It is conduct precluded by the provisions of the collective bargaining agreement. The parties have a contractual agreement that bargaining unit members, as a condition of employment, are required to live within the City. The Employer is as free to enforce this provision as the Union is to enforce the wage schedule. If the record in this matter suggested that Mr. T. was unaware of how the residency requirement applied to him, I would find some merit in the Union's claim that there ought properly to be some warning invoked. I do not find that to be the case here.

AWARD

For the reasons set forth above, the grievance is denied.

Dated at Madison, Wisconsin this 25th day of April, 1994.

By William C. Houlihan /s/

William C. Houlihan, Arbitrator