BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

DISTRICT COUNCIL 48, AFSCME,
AFL-CIO, and LOCAL #883

and

THE CITY OF SOUTH MILWAUKEE

Case 84
No. 50806
MA-8392
Lotharius Discharge
Civil Service
Residency Rules

Appearances:

Podell, Ugent & Cross, S.C., Attorneys at Law, 207 East Michigan Avenue, Suite 315, Milwaukee WI 53202 by Mr. Alvin R. Ugent, appearing on behalf of District Council 48 and Local Union 883.

South Milwaukee City Attorney's Office, Post Office Box 308, South Milwaukee, WI 53172, by Mr. Joseph Murphy, City Attorney, appearing on behalf of the City of South Milwaukee.

ARBITRATION AWARD

The City of South Milwaukee (hereinafter referred to as the City) and District Council 48, AFSCME, AFL-CIO and its affiliated Local No. 883 (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute over the termination of Lynn Lotharius's employment with the City. A hearing was held on June 2, 1994 at the City Hall in South Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted the case on oral arguments.

Now, having considered the record evidence, the arguments of the parties, and the record as a whole, the undermined makes the following Award.

ISSUES

The parties stipulated that the substantive issue in this case is:

"Was the separation of the grievant, Lynn Lotharius, on February 28, 1994, a violation of the collective bargaining agreement? If so, what is the appropriate

remedy?"

In addition, the City raises a question of substantive arbitrability, which may be phrased as follows:

> "Did the grievant's refusal to move back into the City of South Milwaukee in the face of a Civil Service rule requiring residency by City employees constitute a voluntary quit? If so, is the grievance substantively arbitrable?

PERTINENT CONTRACT LANGUAGE

ARTICLE I

Section I - Purpose

It is the intent and the purpose of this Agreement to define the rights and obligations of the parties hereto and to promote and improve employer-employee and economic relationships between the Municipality, its employees and their bargaining representatives, and to set forth herein agreements as to rates of pay, hours of work, and other terms and conditions of employment, to be observed by the parties hereto for the term of this Agreement.

. . .

Section 4 - Recognition

(a) The Municipality hereby recognizes the Union as the exclusive collective bargaining agent for the appropriate certified bargaining units, and as the certified representative for those employees in these bargaining units occupying the classifications as defined in the appropriate "Certifications of Representatives" promulgated by the Wisconsin Employment Relations Commission.

. . .

ARTICLE I

Agreement

The Municipality and Union agree to faithfully and diligently abide and be bound to all of the provisions of this Agreement.

. . .

ARTICLE IV

Section I - Management Functions

Except as expressly limited in this Agreement, all management functions are reserved to the Municipality. Disputes over the application of this provision shall be submitted under Article VII - Section 4 (Step III of Grievance Procedure) of this Agreement.

. . .

ARTICLE VII

Section I - Grievance and Arbitration Procedure

Only matters involving interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance under the provisions set forth below. Should differences arise between the Municipality and the Union or any employee, an earnest effort shall be made to settle such differences promptly at the lowest step. Matters pertaining to discharge, disciplinary action imposing loss of time or wages, or any other emergency matters that cannot be delayed, shall be presented as soon as possible to the appropriate Board, Commission or governing body without adherence to the provisions set forth below. All time requirements set forth in this Article may be waived or extended upon mutual agreement of the parties.

. . .

Section 6 - Final and Binding Arbitration

. . .

The function and jurisdiction of the arbitrator shall be limited to the interpretation, application and enforcement of the provisions of this Agreement. The arbitrator shall have no power to alter, add to or delete from the terms of this Agreement, or to change methods of operation or working rules of the Municipality which are not inconsistent with this Agreement. Any matter presented contrary to the function and jurisdiction of the arbitrator as herein defined shall be returned to the parties without decision or recommendation.

. . .

Section 7 - Disciplinary Action for Misconduct or Incompetence

(a) Just Cause. Any employee who is reduced in status, suspended, removed or discharged for misconduct or for incompetence may, within twenty (20) working days after receipt of such action, file a grievance as to the just cause of the discharge, suspension, reduction in status, or discipline imposed on him/her. No such action shall be taken without just cause.

. . .

ARTICLE XXX

Working Conditions

Agreements pertaining to working conditions which are mandatory subjects for bargaining and in effect as of the time of this Agreement shall remain in effect, unless changed by mutual consent in writing during the term of this Agreement.

LETTER OF UNDERSTANDING

August 16, 1971

Mr. Norman L. Rothe
Chairman, Wages, Salaries & Welfare Committee
of the Common Council of the City of South Milwaukee

Dear Mr. Rothe:

This will confirm the following understandings reached relative to negotiations of our new labor agreement.

It is our intent not to establish or attempt to preserve a status quo. This Article provides a method to change unoperational or unreasonable working conditions. The Union will be able to preserve job security and job preference through the application of seniority, and the Municipality will be able to make reasonable changes. As an example, the Union could request a change providing safer working conditions or an improved rotating shift schedule, something which could be beneficial to both parties. The Municipality could change the method of garbage and trash collection to combined, the method of disposal from incineration to landfill, or to select and purchase different types of equipment to be utilized in municipal operations. Accordingly, this clause gives the Union and the Municipality the right to retain all reasonable working conditions unless changed by

mutual agreement. However, neither party could refuse a request for reasonable change in the existing working conditions.

III. **City of South Milwaukee Civil Service Ordinance No. 556 and Personnel Rules and Policies**

. . .

(E) EXAMINATION OF APPLICANTS. (1) The Civil Service Commission shall conduct written, oral and/or performance examinations to determine the fitness of applicants for all positions within the classified service. All successful applicants hired must establish permanent residence in the City of South Milwaukee within one year from the date of employment and retain residence for the duration of employment, unless given special permission by the Common Council. The Civil Service Commission shall refuse to examine an applicant, or shall after examination remove his/her name from the employment list, if the said applicant for any reason fails to meet the qualifications established for the class of position for which he/she applies.

. . .

FACTUAL BACKGROUND

The City is a municipal corporation providing general governmental services to the people of South Milwaukee in southeastern Wisconsin. In providing these services, the City operates a Police Department employing, among others, Public Safety Officers (PSO), civilian employees who provide dispatching services. Public Safety Officers are members of the Union's bargaining unit.

The grievant, Lynn Lotharius, was employed by the City as a PSO from 1988 until February 28, 1994. Hiring for civilian positions in the City is overseen by a Civil Service Commission, which conducted a test taken by the grievant to qualify for the job. Although the grievant heard of the job through word of mouth, the Civil Service Commission had advertised the opening and the test to the general public by an announcement in the local paper:

NOTICE
The Civil Service Commission of the City of South Milwaukee
An Equal Opportunity Employer Will Accept Applications For
PUBLIC SAFETY OFFICER
(Radio Dispatch and Related Duties)
Position is Part-time (Maximum 600 hours annually)
Work- Schedule varies as determined by the Police Department.

Closing Date: September 9, 1988, 5:00 p.m.
Application forms may be obtained at:
The City Clerk's Office, 2424 15th Ave
Applicant selected must establish residency within one year

The usual procedure for Civil Service examinations is to have one or more Commission members present at examinations, and to have a member of the Commission read the job announcement prior to the beginning of the test. The residency requirement is not mentioned on the job application itself.

In April of 1992, the grievant and her husband were engaged in a search for a new house. They had been looking for a home in South Milwaukee for two years without success. Their realtor suggested that they look at homes in other communities simply for comparison purposes. They found a home in Oak Creek, an adjoining municipality, that they liked. They went back the next day to look again, and within two days they had an accepted offer to purchase the property.

After the offer to purchase had been accepted, the grievant stopped by the Police Department to inquire about the availability of extra hours. She mentioned the new house to her supervisor, Captain Tim Talaska. He told her that buying a home in Oak Creek would pose a problem with the residency requirement for City employees. She asked his advice on what to do, and he suggested that she request an exemption from the Common Council. She wrote the letter on May 12th, and was given an extension of six months to move back into the City.

At the end of the six month extension period, issues regarding residency had also arisen with the City Assessor and the Building Inspector. The Common Council decided to undertake an overall review of the residency issue. After considerable discussion, the Council voted to reaffirm the existing policy at its September 1993 meeting.

On November 10, 1993, Jon Syndergaard, the City Administrator, sent the grievant a letter regarding her non-compliance with the residency rule. She responded by letter, and the two spoke by telephone. He followed up with a letter on December 6th:

> Thank you for your correspondence of November 22, 1993, regarding the issue of residency as it relates to your employment with the City of South Milwaukee.
>
> As we discussed by telephone December 3, 1993, please be advised the City has extended your deadline to comply with the residency requirement until March 1, 1994. The City of South Milwaukee has shown a willingness to be understanding this matter by allowing an exception to this rule since you relocated to the City of Oak Creek in May of 1992.
>
> As requested, I have provided you with copies of the Civil Service Ordinances in

effect since 1956 designating the residency guideline as well as an applicable copy of the South Milwaukee Municipal Code for your review.

Please contact me with any questions or comments you may have regarding this matter.

On February 25, 1994, Captain Talaska met with the grievant and asked if she was going to become a city resident by the March 1st deadline. She told him that she would not, and he told her that her last day of work would be February 27th. He sent a confirming letter the next day.

The matter was not resolved in the lower steps of the grievance procedure and was referred to arbitration. At the hearing, the grievant testified that she did know that some City employees had a residency requirement, but was not aware that it applied to her until Talaska told her, after she and her husband had made an offer on the Oak Creek home.

She said she did not recall any announcement of a residency requirement at the time of the Civil Service examination, nor any mention of it by Police Department supervisors after her hire.

Civil Service Commission Secretary Anthony Tanaszczyk testified that it was standard procedure to read the job announcement at each examination including the reference to a residency requirement. He acknowledged that he had no specific recollection of reading the requirement at the examination taken by the grievant, but speculated that one of the Commissioners present would have noted a violation of Commission procedure if the announcement had not been read.

Captain Talaska testified that he customarily discussed the residency requirement with new employees, but could not say that he had a specific recollection of having told the grievant when she started her job.

Jon Syndergaard testified that two other employees, the City Assessor and the City Building Inspector, had terminated their employment with the City after receiving extensions from the Common Council.

Union Staff Representative Jim Burnham testified that he was unaware of any residency requirement before the grievant's case, and could recall no proposals dealing with residency during contract negotiations.

Additional facts as necessary are set out below.

POSITIONS OF THE PARTIES

Position of the City

The City takes the position that the grievance is not within the jurisdiction of the arbitrator, since the separation of the grievant from City employment was volitional. She was advised of the residency requirement and was given nearly two years to comply, yet she made no effort to retain her job by returning to the city. Her conduct constitutes a voluntary quit, and the contract has no provision for the arbitration of voluntary quits.

Even if the grievance was within the jurisdiction of the arbitrator, it is without merit and should be denied. The residency rule has been in existence for decades, and the City has taken every reasonable step to make it known to employees prior to their employment. While the grievant denies knowing of the rule, it was incorporated into the announcement of the job, and has always been read to applicants at the time of testing. She surely knew of it by 1992, when she received her first extension. Yet she took no steps whatsoever to move back to South Milwaukee in the two years between the extension and her separation from the work force.

Notwithstanding the Union's suggestion that the rule is somehow invalid because it was not bargained with them, it is clear that the rule pre-dates the bargaining relationship and is part of the on-going status quo. The very first side-letter appended to the contract recognizes the validity of the status quo. If the Union wishes to change or remove the residency rule, it has the burden of negotiating the change. It has not done so. The residency rule is a valid and long standing rule, which has been uniformly applied. The grievant willfully violated the rule and willfully remained out of compliance long after she was warned of the consequences. For these reasons, the City asks that the grievance be denied.

Position of the Union

The Union takes the position that the grievance is plainly arbitrable. The grievant never resigned from her employment. She was discharged, and the contract clearly contemplates the arbitration of disputes over the existence of just cause for discipline.

On the merits, the Union argues that the residency rule is a unilateral and unenforceable vestige of the days before bargaining. The contract between the parties governs the terms and conditions of employment for bargaining unit members, and the contract neither mentions residency requirements nor incorporates ordinances. The arbitrator's responsibility is to enforce the contract, and the Union asserts that the contract dictates reinstatement of the grievant since her only offense is the violation of an invalid work rule.

Even if the residency rule has some validity, the Union notes that the rule was not brought to the grievant's attention until after she was already committed to purchasing a home in Oak Creek. It is fundamentally unfair to enforce a rule against an employee who is unaware of the rule. In light of the lack of prior notice and the practicalities of the real estate market, the single six month extension given to the grievant was obviously inadequate. The City never got back to the grievant at the end of the six months, and she could reasonable have believed the matter was resolved. The City should have, at a minimum, given her a more reasonable length of time to

comply with the residency rule once it reaffirmed the policy in the Fall of 1993.

There is simply no basis for finding that the grievant, whom the City acknowledges was a good employee, should have been discharged for her choice of a home. The Union asks that she be reinstated, made whole for her losses, and receive interest on the monies she is owed.

DISCUSSION

Substantive Arbitrability

The City contends that the grievant effectively resigned her employment by refusing to take any steps to comply with the residency requirement, and that the grievance is therefore not arbitrable. The grievant was asked if she was going to meet the March 1st deadline for moving back into South Milwaukee, and said she would not. Captain Talaska then told her that her last day of employment would be February 27th. Assuming for the sake of argument that the rule is valid and may be enforced against this particular grievant, this is a classic case of insubordination. The City's contention that she knew of the consequences of not living within the city limits and "chose" those consequences is no different than saying that an employee who knows of a particular work rule and violates it has "chosen" to be disciplined. Since a rule or standard cannot generally be enforced without prior notice to employees, there is always some element of volition in discipline cases. Indeed, the whole purpose of progressive discipline is to alter the choices made by employees.

The element of choice is present in nearly every case of discipline. The typical case will involve both the employee's choice to engage in some prohibited conduct and the employer's choice to impose some measure of discipline. An employee who steals from an employer, an employee who assaults a supervisor, an employee who reports for work drunk -- all have made "choices" that would they could reasonably expect will lead to termination. Despite that element of choice, their separation from the work force is reviewable under the contract, not only as to the factual basis for the discharge, but also for the appropriateness of the employer's choice in deciding to impose a given sanction. The grievant in this case did not voluntarily terminate her employment with the City, and the fact that she could reasonably have anticipated the consequences of not restoring her residency does not operate to remove this case from the scope of the grievance and arbitration provisions of the contract.

The Merits

The Union has attacked the termination of the grievant on several grounds, including the invalidity of the residency requirement, the lack of notice to the grievant, and its unreasonable application to the grievant.

The residency requirement is not a rule that has been directly negotiated between these

parties. The Union is correct in its assertion that the establishment of a bargaining relationship constrains the City and its Civil Service Commission, and if the requirement was being offered

for the first time would plainly go beyond the inherent power of the City to unilaterally make and enforce work rules. 1/ Article XXX of the contract does, however, recognize the validity of *pre-existing* rules and regulations:

> Agreements pertaining to working conditions which are mandatory subjects for bargaining and in effect as of the time of this Agreement shall remain in effect, unless changed by mutual consent in writing during the term of this Agreement.

Residency is a mandatory topic of bargaining pertaining to working conditions, and the Civil Service regulation has been in effect continuously for decades. Thus, if the residency requirement may be said to be an "agreement", the contract recognizes that it is valid and remains in effect for the term of the contract.

The Union asserts that it was unaware of any residency requirement until this case brought the rule to light, and that it has never agreed to require bargaining unit members to live within the city limits. I do not doubt the testimony of Staff Representative Burnham that he was not aware of this requirement, but it does seem unlikely that Local Union members and leaders would have been unaware of the residency rule, given the uniform pattern of residency among bargaining unit members and the credible testimony that residency is stated as a requirement in each job announcement and at each Civil Service examination.

Even accepting the proposition that the current members and leaders of Local 883 were unaware of the residency rule, the Union and the City as institutions may be charged with historical knowledge of the agreements that have been made in the past. In this regard, the parties executed a Letter of Understanding in 1971 on the occasion of bargaining the first contract. The text of that letter, which is contained in the current contract, gives the parties the right to "retain all reasonable working conditions unless changed by mutual agreement":

> This will confirm the following understandings reached relative to negotiations of our new labor agreement.
>
> It is our intent not to establish or attempt to preserve a status quo. This Article provides a method to change unoperational or unreasonable working conditions. The Union will be able to preserve job security and job preference through the application of seniority, and the Municipality will be able to make reasonable changes. As an example, the Union could request a change providing safer working conditions or an improved rotating shift schedule, something which could

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1/ This applies to the on-going obligation to maintain residency after hiring. The Union does not purport to represent job applicants, and the contract does not restrict the City's right to insist that applicants for employment be City residents as a pre-condition to hiring.

> be beneficial to both parties. The Municipality could change the method of garbage and trash collection to combined, the method of disposal from incineration to landfill, or to select and purchase different types of equipment to be utilized in municipal operations. *Accordingly, this clause gives the Union and the Municipality the right to retain all reasonable working conditions unless changed by mutual agreement*. However, neither party could refuse a request for reasonable change in the existing working conditions. (Emphasis Added)

There was no direct evidence at the hearing concerning the context of this Letter of Understanding, but on its face it appears to authorize the continuation of the residency requirement after the execution of the initial contract, until changed by mutual agreement. This assumes, of course, that residency is a "reasonable working condition." Whether residency is a good policy is debatable, and many communities have made different choices on the subject. The City itself has bargained several different arrangements on residency for its police officers, who are outside of the Civil Service Commission's jurisdiction. On the record as it was developed in this case, however, I cannot make a finding that the rule is not a "reasonable working condition. 2/ It is a widespread condition of employment in the municipal sector and has been in place in South Milwaukee for many years. Other City employees have uniformly either abided by the rule, sought exemptions from the Common Council or left City employment. It may be that changes in the availability of affordable housing stock or other external factors have changed sufficiently in recent years to justify a review of the issue by the parties, but those facts are not present on this record.

Having concluded that the residency requirement is not in conflict with the collective bargaining agreement, there remains the question of whether its application to this grievant was somehow inconsistent with the notions of "just cause." The Union points to two flaws in the City's dismissal of Lotharius. It argues first that she was not given notice of the requirement and, second, that she should have been given additional time to comply. Neither argument is supported by the record.

The grievant heard of the job by word of mouth, and swore that she did not read the published announcement, which included the residency requirement. She also testified that she did not recall any announcement of the requirement at the Civil Service test, notwithstanding the claim of the Commission Secretary, who testified that the printed job announcement is read verbatim to the applicants before each examination. It is difficult to believe that the test taken by the grievant

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2/ This discussion is limited to the specific facts of this case, which presents the reasonableness of residency in the context of discipline for an individual employee who knew of the rule and elected not to comply. It is not the Arbitrator's intention to foreclose negotiations or grievances over the substance of the residency rule under Article XXX, the Letter of Understanding or any other appropriate contract provision.

would have been the single exception to the well established routine of the Commission in administering examinations. Given the high degree of legal regulation surrounding hiring practices, the Civil Service Commission would have a powerful stake in insuring that its standard procedures were followed in every case, in order to prevent challenges to the hiring decisions that follow from those procedures. Without questioning the honesty of the grievant's testimony, I find that it is far more likely that she did not take particular note of the announcement than that the announcement was not made. Since she was a resident of South Milwaukee at that time and the residency requirement would not have had any impact on her, 3/ her interest in making note of the announcement would have been substantially lower than the Commission's interest in being certain that the announcement was made.

Even if the grievant was unaware of the publication of the residency requirement in the newspaper, and assuming both that the Commission breached its procedures by failing to inform applicants of the requirement and that Captain Talaska did not follow his habit of telling new employees of the requirement, the grievant did have notice of the requirement in April of 1992 when Talaska told her that a move to Oak Creek would cause problems for her. She was not discharged until twenty-two months later. During that period of time, there is no evidence of any effort whatsoever by the grievant to return to the corporate limits of South Milwaukee. She She was granted a six month extension in May of 1992, and the question was then put on hold until the Common Council reaffirmed the policy in September of 1993. It was reasonable for her to refrain from taking any action through the date of the Common Council's vote. Assuming that she was somehow unaware of the Council's action in September, she was specifically notified of her obligation to comply by Syndergaard's letter on November 10th. On December 3rd, Syndergaard told her that she would have three more months, until March 1, 1994, to restore her residency.

During the three months following Syndergaard's warning, the grievant gave the City no reason to believe that she was taking steps to comply with the residency requirement, or that there was some reason to excuse compliance or grant a further extension. Certainly if the grievant's initial move to Oak Creek was made without knowledge of the policy, it is possible to imagine circumstances that would justify a delay in subsequent compliance. Unlike other work rules, a residency requirement has the potential to work enormous hardships on an employee who seeks to comply, and a delay in compliance does not interfere with the day-to-day operations of the City. A housing market or interest rate environment in which a worker would suffer a substantial loss in selling or purchasing a house, or in which a sale or purchase is not possible as a practical matter, would make immediate compliance an unreasonable demand by the City. The grievant did not suggest that she was attempting without success to sell her house or arrange housing in the city of

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3/ The grievant apparently had no reason to anticipate a future move out of South Milwaukee when she took the examination, since she testified that she and her husband restricted their search for housing to the city for two full years before deciding to look in the adjoining communities.

South Milwaukee. She simply ignored the rule.

In summary, I find that the grievant did have adequate notice of the residency requirement and sufficient time to comply with the rule. The record evidence very strongly suggests that the grievant knew of the residency rule when she was initially hired. She certainly knew of the rule by April of 1992. In November of 1993, she knew that the City intended to apply the rule to her. In December of 1993, she knew that the City had set a three month deadline for compliance. She gave the City no reason to believe that she would return to the city by March 1st or would even make an effort. Given her apparent disinterest in moving back to the city despite the warning that she would be discharged, the Union's argument that she should have been given additional time for the move must be rejected. The City is not under an obligation to bargain with itself over compliance, or to grant additional extensions in the hopes that an employee will ultimately decide to abide by the rule.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The grievance is substantively arbitrable.

2. The separation of the grievant, Lynn Lotharius, from the City's work force on February 28, 1994, was not a violation of the collective bargaining agreement.

3.3 The grievance is denied.

Signed this 16th day of September, 1994 at Racine, Wisconsin.

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator