BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between EAU CLAIRE CITY EMPLOYEES, LOCAL NO. 284, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO and CITY OF EAU CLAIRE	Case 222 No. 52857 MA-9130 Case 223 No. 52858 MA-9131

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of Eau Claire City Employees, Local No. 284, American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Ted Fischer, City Attorney, 203 South Farwell Street, P. O. Box 5148, Eau Claire, Wisconsin 54702-5148, appearing on behalf of City of Eau Claire, referred to below as the City.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in grievances filed on behalf of Peter and Jill Bell. The parties agreed that the grievances could be consolidated for hearing purposes. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on September 26, 1995, in Eau Claire, Wisconsin. The hearing was transcribed, and the parties filed briefs and reply briefs by December 29, 1995.

ISSUES

The parties did not stipulate the issue for decision. I have determined the record poses the following issue:

> Did the City violate the collective bargaining agreement by terminating the Grievants' employment on June 28, 1995?

RELEVANT CONTRACT PROVISIONS

Article 3 - UNION SECURITY AND MANAGEMENT RIGHTS

. . .

Section 3. Management Rights. It shall be the exclusive function of the City to determine the mission of the agency, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. It shall be the right of the City to direct its employees, take disciplinary action, relieve its employees from duty because of lack of work, or for other legitimate reasons . . .

Article 5 - RESIDENCE

Section 1. Any new person employed by the City shall be required, as a condition of employment, to be a resident of the City not later than six months following completion of his/her probation period.

Section 2. Any permanent employee of the City who moves outside the corporate limits shall automatically vacate his/her position with the City on the same date that the transfer of residence takes place.

. . .

Article 7 - PENALTIES

Section 1. The City shall not suspend, demote, or discharge any employee except for just cause . . .

Section 2. If, after a proper hearing, the employee is found to be innocent of the charges, the employee shall be reinstated in his/her former job with the City paying for all lost time and the employee shall not lose any benefits that he/she would normally have if work had been continuous.

. . .

Article 9 - PROBATION

Section 1. Newly hired personnel shall serve a probationary period of six (6) months . . .

Section 2. Employees who have completed the probationary period satisfactorily and are continued in employment thereafter shall have a permanent status and shall be entitled to all rights, protection, and benefits that are granted by this agreement retroactive to the original date of hire which is followed by continuous employment.

. . .

Article 13 - HOURS

. . .

Section 4. The regular hours of non-shift work will be 8:00 a.m. to 4:00 p.m. except as provided herein . . .

j. Shift employees assigned to the Water or Wastewater Plant shall work one of the following shifts:

7:00 a.m. to 3:00 p.m.
3:00 p.m. to 11:00 p.m.
11:00 p.m. to 7:00 a.m.

. . .

Article 29 - GRIEVANCE PROCEDURE

. . .

Section 6. The Arbitrator shall have no right to amend, modify, nullify, ignore or add to the provisions of this agreement. The decision of the Arbitrator shall be based solely upon his/her interpretations of the "express language" of the agreement.

BACKGROUND

Peter Bell worked for the City for eighteen years. He worked twelve of those years as a full-time employe. As of June 28, 1995, he was classified as a Waste Water Treatment Plant Operator I. His wife, Jill Bell, was originally hired by the City on January 18, 1982. As of June 28, 1995, she was classified as a Water Service Person.

On June 28, 1995, the City terminated the Bells for not being residents of the City. Both Jill and Peter Bell had signed employment application forms which included the following statement of a residency requirement:

> I understand, as required by City Ordinance, that as one of the conditions of my employment with the City of Eau Claire, that I shall maintain my residence within Eau Claire during my employment with the City. Furthermore, I understand that I am to keep my supervisor informed, and advise in writing all changes of residence address to the City Personnel Office. I further understand that if I should move outside the City limits, my position will be vacated and that my name will no longer be entitled to be on the City payroll.

Neither of the Bells had any disciplinary history, and each volunteered for overtime assignments. Each received, in August of 1994, written recommendations from their supervisors. Jill Bell's was authored by Sam Spanel, the City's Utilities Administrator. He characterized her as "an excellent employee." Peter Bell's was authored by John F. Fletty, the Supervisor of the City's Wastewater Treatment Plant. He characterized Peter Bell as "hard working" and "dedicated."

On June 28, 1995, Fletty advised Peter Bell that Spanel wished to meet with the Bells concerning residency. Peter phoned Jill, advising her of the meeting. Jill reported for work, but was not assigned any duties. Rather, her immediate supervisor, Tom Holbrook, informed her of the meeting. The Bells were, ultimately, informed by Spanel to report to City Hall. The Bells reported to City Hall with Steve Day, their Union representative, and met with James Dale Peters, the City's Human Resources Director. Peters informed them that the City believed that they were not City residents. He then afforded them an opportunity to challenge the City's belief. The Bells responded that they owned and paid taxes on a primary residence located at 731 Marshall Street in Eau Claire. They also noted that they owned property at 17947 Country Court in Chippewa Falls. The Chippewa Falls property was, they asserted, a vacation home. They noted that a chef was living at the Country Court property, and that they did their business accounting and book work at that property. Day sought, without success, to receive a copy of the evidence the City had accumulated against the Bells. After some discussion, Peters left the room to consult with the City Attorney, Ted Fischer, and with Everett Foss, the City's Director of Labor Relations. After some discussion, Peters returned to the room and informed the Bells that the City had determined they did not reside in Eau Claire and had thus vacated their positions. The Bells responded by filing the grievances posed here.

The Investigation Preceding the June 28, 1995 Meeting

In late March of 1995, Peters received a phone call from a person who refused to identify himself. Peters understood the caller to be upset with two City employes who had bragged of their ability to manipulate the residency requirement. The caller also questioned the City's willingness to enforce its rules. The caller, Peters noted, identified Jill and Peter Bell as the two employes who had prompted his call, and further stated that they lived near Lake Wissota, outside of the Eau Claire city limits. Shortly after this, Peters was informed by Brian Amundson, the City Engineer, that Amundson had received a complaint from a woman who claimed to be the wife of a member of the unit represented by the Union. Amundson understood the woman to have similar concerns to those voiced to Peters. Peters discussed the matter with the City's Director of Public Works, who informed him that the Bells' residence had become a source of discussion among unit members.

Peters relayed these concerns to the City Manager, and then determined to conduct a preliminary investigation to determine if the concerns had any basis. In mid-May of 1995, the City contracted with Kathryn Patrow of Effective Research & Investigations, to undertake that investigation on a "non-intrusive" basis.

Patrow identified the Bells' cars, and attempted to follow them to and from work. She followed Jill Bell to the Marshall property on one occasion, but was unable to find their vehicles at that location at any other time. She was able to view their vehicles at the Country Court property. She contacted Northern States Power (NSP) to determine the usage of electricity at both properties. She learned that both properties were being used on a year-round basis. Billings for the Country Court property showed winter usage from 1992 through 1995. The use of electricity at the Marshall property appeared to be low.

Patrow also found that the Bells had three mortgages issued by First Federal Savings of LaCrosse. Each of those mortgages listed the Marshall property as the Bells' mailing address. The mortgage on the Country Court property was executed on July 1, 1992, and contained the following provision:

> **6. Occupancy, Preservation, Maintenance and Protection of the Property; Borrower's Loan Application; Leaseholds.** Borrower shall occupy, establish, and use the Property as Borrower's principal residence within sixty days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing . . . or unless extenuating circumstances exist which are beyond Borrower's control . . .

Patrow also discovered that cable TV service to the Marshall property had been discontinued in 1992. Ongoing cable TV service was being provided to the Country Court property. Patrow determined that each property had phone service, through separate phone numbers. She also discovered that the Bells had purchased call forwarding for the phone number listed for the Marshall property. In early June of 1995, Patrow reported these findings to Peters, who informed her to continue the investigation, on a more "intrusive" basis, if necessary.

Patrow started this phase of the investigation by interviewing the Bells' neighbors at the Marshall and Country Court properties. She also questioned River Country Co-op, the provider of fuel oil to the Country Court and the Marshall properties. She was informed that their records showed consistent and appreciable usage of fuel oil throughout the year at the Country Court property from January of 1993 through April of 1995. The mailing address on billings for that property was, however, the Marshall property.

Patrow discovered that the Bells used their Marshall address for certain licenses, vehicle records and utility billings. Patrow did not see the Bells' cars at the Marshall address during this phase of the investigation, but did see their cars at the Country Court address. Her review of postal records indicated that the Bells and Joan Schluesner used the Marshall property as a mailing address. Schluesner is Peter Bell's aunt.

Patrow took statements from the Bells' neighbors at the Marshall property. One of those statements was made by Jennifer Washburn. Washburn lives across the street from the Marshall property, in a home next to one owned by Peter Bell's mother. Her statement notes that the Bells rented the Marshall property to two different couples after their purchase of the property, and that "Pete's mom's sister lives there now." The statement also notes:

> Pete & Jill come here about 3-4 times a month. They usually come to see their parents. Peter and Jill do not live at 731 Marshall and have not for at least 4 years.

Tim Bystedt lives "two houses from the Bells' property on the same side of the street." 1/ His statement notes that a tenant, "possibly a friend or relative," occupied the Marshall property, and that:

> I do see the owner stopping by the house or across street at parent approx. once a week. I see their truck on our street often.

Beatrice and Verna Witte live at 727 Marshall, and Patrow took the following statement from them:

> Peter gets his mail here but he don't live here. His phone is even at this address and I can't figure that out. They get the paper too. He

1/ Transcript (Tr.) at 107.

> stops in & leave right away (get mail). There was a couple that rented there first but now he rents to his aunt.

One other neighbor, Rita Dokkestal, interviewed by Patrow stated she believed Jill Bell lived at the Marshall property. The Marshall property is located on a dead-end street, and is at least partially surrounded by a large hedge.

Patrow observed both the Marshall and Country Court properties, but did not enter either one. The Marshall property consists of roughly 576 square feet and has a one car garage separate from the dwelling. The Country Court property consists of roughly 1,690 square feet and has a two car garage. Patrow learned that the Country Court property, as of June 2, 1995, had an assessed value of $90,000.00 based on an estimated fair market value of $103,100.00.

Patrow also interviewed the Bells' neighbors at the Country Court property. Sharon Roubal informed Patrow that "she really didn't know that much about them, that her hours varied." 2/ Two other neighbors Patrow interviewed similarly lacked knowledge about the Bells. One of them, a ten year old girl, stated that the Bells owned two cats and a dog, but also noted she did not see the Bells often. Patrow interviewed another neighbor who indicated he saw them only occasionally and added: "I don't see him all winter hardly at all . . . They could be gone half the time . . . I really don't know." 3/ Another neighbor noted he saw little of them, and believed "(t)hey are workaholics." 4/ He also noted they let other people use their Country Court property.

Patrow could find no one who could deny that the Bells lived at Country Court or who could affirm that they lived at the Marshall property. She did not attempt to talk to either of the Grievants at either property.

The Investigation Following the June 28, 1995 Meeting

After the meeting of June 28, Patrow continued her investigation and the City supplemented her investigation with their own efforts. In late July, on Peters' instructions, Patrow interviewed Caroline Quigley, a former resident of the cul-de-sac on which the Grievants' Country Court property is located. Quigley gave Patrow the following statement:

2/ Tr. at 109.

3/ Tr. at 145-146.

4/ Tr. at 147.

Peter and Jill Bell were neighbors of mine . . . The Bell's property was located five houses away from mine. On occasion I was able to observe their coming and going depending on which way I drove around the circle. I can't tell you exactly when they purchased the property in Chippewa Falls, but I can tell you that before they moved in the former owners told me the people that had bought the house were city of Eau Claire employees and this was their summer home.

I thought it was funny at the time when I heard it; that someone could afford to work for the city of Eau Claire and buy a summer home in addition to having a home in Eau Claire . . . Not that they bought a summer home, but that they worked for the city of Eau Claire and they could afford a summer home and especially that type of summer home. I have never seen the inside of the home but by the looks of the outside, I would not think of that property as a summer home. That's why I thought it was rather strange that they would purchase it for that reason. I don't know what they paid for it, but I will tell you that I've heard from other people that have been inside the home that it was very pretty. The master bedroom has a jacuzzi in it . . .

I have never met either party, the Bells. I could not even tell you what they look like if I saw them on the street . . .

My opinion of the use of the Bell's property in Chippewa Falls is there was activity year round, whether it was seven days a week I could not tell you that. I can only tell you that there was activity at that house year round. It wasn't during the summer months only . . .

In the winter months, I remember seeing lights on in the house when I went to work. I did think it was strange that if it was their summer home, that they were there as much as they were there, but I can't tell you how many days of the week they were there in the winter or fall. I will tell you there was activity there, but I never paid attention to if it was on a daily basis . . .

I can't tell you who the Bells associated with . . .

That neighborhood is not a close nit (sic) neighborhood . . .

> Everyone worked in the neighborhood. Ms. Bell did leave a brochure for Avon on my door . . . with her phone number on it . . . It was a Chippewa number . . .
>
> I noticed many improvements being done on that home when the Bells moved in such as an underground sprinkling system and landscaping. I can not say who was doing the improvements or who was doing the up keep of the yard work. Like I said, I never met the people and I would not know them if I met them. I do know the former owners did not keep as good of care of the home as the Bells did or do. I can't even put a body with the home itself. I did see people, but to say if it was a man or a woman, I couldn't do it. I did not pay that much attention . . .
>
> I can't say on a daily basis that there was activity . . . I just didn't pay that much attention, but I knew . . . that there was activity going on, such as in the winter months I could see lights on and in the summer months you'd see sprinkling and lawn mowing and snow plowing in the winter. But it did seem unusual, for being a summer home, that I would see activity there whenever by chance I went that way.
>
> My own personal feeling in what I observed, I thought it was strange that they spent as much time there as they did if it was their summer home.
>
> In the summer, we walked a lot. I can't say I saw people but you could tell people were up and a car parked in the driveway. You knew, lights were on, the sprinkler, you just knew, you saw comings and goings, but it's something you never really pay attention too, plus the fact that from my house I couldn't see their house, but I could see their garage and their yard. I could see the garage doors and could see vehicles parked there.
>
> There could have been days or weeks when I didn't notice any activity, but you know how you just assume people are living there.
>
> . . .

In the time period between June 28 and the arbitration hearing, Patrow and the City obtained fuel oil, gas and electric, phone and cable TV billing records which confirmed the information Patrow

had secured, in a more general fashion, from employe interviews. Ameritech records, for example, show that for the March through June, 1995 billing periods, the overwhelming majority of phone calls to the Marshall property were forwarded to the Country Court property. The City also secured a copy of the loan application the Grievants completed for the Country Court property. That form contains a section headed "PROPERTY INFORMATION AND PURPOSE OF LOAN." One of the entries under that heading lists three boxes, one of which must be checked by or on behalf of the applicants, to describe what the "Property will be." The form lists three options: "Primary residence"; "Secondary Residence"; or "Investment." The Grievants' application has the "Primary Residence" box checked.

In this time period, Patrow learned that Schluesner listed the Marshall property as one of her mailing addresses. She also, however, maintained another address in Eau Claire. The City's review of its own assessment records established that, in 1994, the Marshall property was assessed at $28,000.00. Patrow documented that the following companies had made deliveries, during the period from January 1 through March 1 of 1995 at the Country Court property: Intuit, Avon, Express Fulfillment, Lillian Vernon and LTD.

The Evidence Adduced at the Arbitration Hearing

This area of evidence is best set forth as an overview of witness testimony.

Jill Bell

Bell acknowledged she was aware of the residency requirement, and that she would lose her job if she was not a resident of Eau Claire. She thought she and her husband had complied with the requirement by maintaining a residence in Eau Claire which was not rented out. At the time of her termination, her regular work hours were from 8:00 a.m. until 4:00 p.m. Monday through Friday.

She testified that she and her husband bought the Marshall property in August of 1991. At that time, they lived at 2931 Eighth Street in Eau Claire. They bought the Marshall property for investment purposes as a rental unit. After repairing and upgrading it, they rented it to a couple who left before the following summer. The Bells further improved the property, then moved into it in August or September of 1992. They have furnished the property, and keep clothes and toiletries there. They receive their mail there, including pay checks, utility bills, credit card bills and bank statements. She is registered to vote in Eau Claire, and did so through the November election of 1994. Her driver's license, effective from March 17, 1992 through May 4, 1996, lists 2931 Eighth Street as her address. She does the family and business bookkeeping, and lists the Marshall address as her residence for income tax filing purposes. She and her husband jointly own a Chevrolet Blazer, a Ford Bronco and a trailer. The registration and title for the Blazer and the trailer were issued in April of 1994, and list the Marshall address as the residence. The title

for the Bronco, issued in April of 1992, lists the Eighth Street address as the residence. She noted she and her husband use three financial institutions in Eau Claire. The insurance on the Marshall property was issued, through a national insurer, by an Eau Claire insurance agency.

She noted that she and her husband devote their lives to their business interests. From the time they were married, in September of 1987, they have accumulated real estate and business interests. Their real estate holdings, in Eau Claire, can be described thus:

Property Address	Date of Purchase	Purchase Price	Current Value
2224 Eleventh Street	June 14, 1984	$29,000.00	$42,000.00
2931 Eighth Street	January 28, 1985	$35,500.00	$65,000.00
2750 Fourth Street	August 12, 1991	$7,500.00	$26,500.00
731 Marshall Street	August 21, 1991	$17,500.00	$28,000.00
1920 Francis Street	December 31, 1992	$14,000.00	$35,000.00
604 Dodge Street	July 6, 1993	$11,000.00	$26,000.00
3019 Eighth Street 5/	April 30, 1993	$5,000.00	$57,000.00
310 Marston Court	July 22, 1994	$37,500.00	$38,500.00

Their real estate holdings outside of Eau Claire can be summarized thus:

Property Address	Date of Purchase	Purchase Price	Current Value
6540 North Shore Drive	September 9, 1992	$7,000.00	$30,000.00
17947 Country Court	July 1, 1992	$95,000.00	$150,000.00
236 West River Street	August 3, 1994	$97,500.00	$275,000.00

The Bells sought homes which afforded the opportunity for dramatic improvement and enhancement in value. The properties at 2750 Fourth Street and at 3019 Eighth Street were, for example, fire-damaged. The North Shore Drive property involved a foreclosure. Typically, their acquisitions required considerable labor to improve. The Bells supplied that labor. Jill Bell noted they ate fast food, rarely cooked for themselves and often slept at the project they were working

5/ This property was sold in March of 1994.

on. She noted their lives revolved around work. She felt they had no spare time and estimated she would sleep four to five hours a night.

Rent payments from their properties were mailed to the Marshall property, or placed in a lock box mounted on the side porch of that residence. She noted that the Marshall property, with the one exception noted above, was never rented.

The Country Court property was purchased primarily as an investment and secondarily as a cottage. It is a waterfront property. She noted that they rented one of the bedrooms of that property to Schluesner for $50.00 per week. The cable TV service was brought in for Schluesner, who paid for it. Schluesner travels extensively and house-sits for home owners in the Eau Claire area. Schedule E of the Bell's 1993 federal income tax form lists a one room rental at the Country Court property. The Marshall property is listed on Schedule E of their 1992 tax form as a rental property, but is not listed on Schedule E of their 1993 return.

The River Street property in Chippewa Falls, known as the Sheeley House, is an historic building which the Bells determined to renovate. They hoped to generate income on the property as a restaurant and a bar. The building once served as a boarding house. They remodeled it, opening the bar before attempting to open the restaurant. The bar opened in September of 1994, the restaurant opened the following March, and they opened a banquet hall the following June. The effort involved in starting that enterprise was considerable. She noted they let one of their chefs use the Country Court property, rent-free, as a residence while they sought to bring the Sheeley House into operation. She noted that the start-up problems were a continuing problem, peaking in May of 1995, when their chef, restaurant manager and bar manager were dismissed. She noted she used the Country Court property to do all of their personal laundry as well as the laundry for the Sheeley House. She also used that property to do the books.

Bell noted that she contacted UPS, and was informed that three of the deliveries documented by Patrow as deliveries to the Country Court property had, in fact, been delivered to the Marshall property. She also noted that the mortgage for one of their rental properties, 2224 Eleventh Street, contained the same "occupancy" clause set forth above from the mortgage on the Country Court property. She also secured the following letter, dated September 16, 1995, from Carol S. Froehlich, the loan officer who handled their application for the mortgage covering the Country Court property:

> This letter is being written in response to your request to provide an explanation as to the circumstances surrounding the mortgage loan granted on your behalf for the purchase of real estate located at . . . Country Court, Chippewa Falls, WI. . . .
>
> At the time this mortgage was originated, I was the loan officer handling the transaction. Since I had handled previous real estate transactions on your behalf, I was acquainted with your personal file including your employment situations at the time with the City of

> Eau Claire. I recall that you both emphasized this was to be a secondary residence transaction due to your employment with the City of Eau Claire requiring you maintain City of Eau Claire residency as a condition of your employment. I recall explaining to you that since there is no practical differentiation in the mortgage industry in terms of underwriting primary versus secondary residences since both are considered owner occupied and since our computer system at that time did not allow me the option of completing the application other than as a primary residence even though there were in fact choices given on the application to indicate primary or secondary, we would need to complete the application as a primary residence because that was the only option our computer system made available. To my knowledge, there is no difference in the mortgage forms between primary and secondary residences either since for lending purposes, both residences are considered owner occupied.
>
> It should be noted that our previous transactions together had been to finance rental properties, other than your residence at the time at 2931 Eighth St., Eau Claire . . .
>
> I hope this provides an adequate explanation to the circumstances surrounding this transaction. If I may be of further assistance, feel free to contact me.

Bell noted she took no steps to hide their use of the Country Court property. Her immediate supervisor stayed at that property in late March or early April of 1995, while he and his wife worked through some personal problems. Her supervisor had her Marshall phone number, her cellular phone number and the phone number of the Sheeley House. The call forwarding, she noted, served mainly to assure that their tenants and their supervisors could reach them.

Peter Bell

Bell acknowledged he was aware of the residency requirement, and of the implications of not maintaining an Eau Claire residence. He did not realize he was under an obligation to spend the majority of his non-working time at his Eau Claire residence or that he was under any obligation other than to not rent it out. He affirmed his wife's testimony on the rental history of the Marshall property and on the fact that they kept personal belongings there. He also stated that he is registered to vote in Eau Claire. He last voted in the November election of 1992.

Bell noted that their real estate acquisitions required an "enormous amount of time." 6/ The 3019 Eighth Street property was fire damaged, and required "nine months day in and day out to actually get it all done." 7/ He characterized the Country Court property as "investment property." 8/ He confirmed that his aunt rents a room there, that a friend uses it on occasion, and that they had permitted their chef to use it as a short-term residence.

The Sheeley House, although progressing toward completion, consumed them for quite a while. He noted that their business activities preclude an active social life, although he does participate in an Eau Claire pool league. He estimated he sleeps four to five hours a night, and sleeps wherever he can. He may sleep at the Marshall property, Country Court, the Sheeley House or whatever rental project he may be working on. When he sleeps at the Marshall property, he puts his Bronco in the garage so no one will bother him. He estimated that in 1994 he would have split his sleeping time roughly in halves between the Marshall property and the properties in Chippewa Falls

Bell noted he has never taken action to hide his ownership of non-Eau Claire properties. He advertises the Sheeley House by putting its logo on each door of his vehicle, and has vanity plates which read "Sheeley 1." He noted he invited his supervisor to a pig roast at the Country Court property. His supervisor did not, however, attend the function. He also related an incident in which his wife had reported to social service agencies an incident in which a man, whose utility meter she read, had locked his mother in a house from the outside. He and his wife believed that man might be stalking her, and he advised Spanel and other civic authorities that she would not be staying at the Marshall property until they were convinced she was safe there.

Bell has worked varying shifts of hours for the City. In late May and June of 1995, he worked on both the second and third shifts.

The Grievants' Application for a Liquor License

The Bells had to apply for a liquor license to open a bar at the Sheeley House. They completed a form application to the City of Chippewa Falls which included the answer "no" to the following question: "Have you ever been convicted of any felony or misdemeanor (other than traffic) for violation of any federal laws, any Wisconsin laws, any laws of any other states or ordinances of any municipality?"

6/ Tr. at 275.

7/ Tr. at 276.

8/ Ibid.

Joseph S. Coughlin, the Chippewa Falls Chief of Police, responded to the Bells' application for a liquor license in a letter to the Mayor and Common Council of Chippewa Falls dated August 8, 1994, which states:

> I have reviewed the application for a Class "B" Malt Beverage and Intoxicating Liquor License for Peter J. and Jill M. Bell.
>
> In their application, both Peter Bell and Jill Bell indicate that they have never been convicted of any Wisconsin laws or any ordinances of any municipality.
>
> A background check has revealed that Peter Bell was charged with Battery in 1991 by the Eau Claire Police Department and was subsequently convicted of Disorderly Conduct. This incident involved an altercation in a tavern.
>
> Records show that in 1989, Jill M. Bell was charged with violation of the Uniform Controlled Substance Act and subsequently convicted of Disorderly Conduct.
>
> In as much as the applicants failed to accurately fill out the application and have been convicted of offenses which are substantially related to the license applied for, I would recommend denial of this license. I feel it is of great importance that those persons responsible for the operation of a licensed premises and supervision of others in the sale of alcoholic beverages be of sound character and truthful in their dealings with the City of Chippewa Falls.

In a written response to this recommendation, the Bells referred to the "inaccuracies on our application," but emphasized their desire to "preserve the heritage and atmosphere" the Sheeley House represented as "a historical landmark site." They characterized their response to the question cited above as "an honest, genuine mistake" reflecting the haste in which they submitted the application which caused them to overlook the reference to ordinance violations. The Bells sought the letters of reference cited above to submit as part of their response to Coughlin's recommendation. The City of Chippewa Falls granted them a liquor license.

Bob Horlacher

Horlacher is a Union official, who has worked for the City roughly twenty-four years. He has never owned property in Eau Claire, and rents an apartment in Eau Claire as his residence. He does, however, own a cabin in the Augusta area, outside of the City of Eau Claire. He sometimes commutes to work from this cabin, and has stayed at the cabin for periods up to four weeks.

Randy Fjelstad

Fjelstad was hired, on a full-time basis, in December of 1993. At that time he resided outside of the city limits. He originally bought a lot, hoping to build in Eau Claire, but experienced difficulty in getting sewer service extended to the lot and received notice the hours in his position might be cut. He then rented until his employment appeared more secure. During this period, he sought and received an extension of time to move into the City. Ultimately, he was able to purchase a home in Eau Claire. His wife and children, however, still reside outside of Eau Claire.

Jeff Whyte

Whyte was hired by the City in April of 1979. In August or September of 1980, the Superintendent of the Parks Department informed him that if he was not living in the City of Eau Claire he would lose his job. Whyte noted that he owns a farm and income property outside of the City, and spends considerable time outside of the City, including periods of time up to three weeks. He assumed that another employe had informed supervision of his commuting habits. He estimates he slept roughly one-half of his time in Eau Claire. His children stay with him in Eau Claire, but his wife spends a lot of time at their farm. After discussing the matter with his supervisors, Whyte heard no more about the matter.

Charlie Harvey

Harvey has worked for the City for roughly twenty-one years. He rents a room in the City, but his wife and child live in West Virginia. They are legally married, and jointly own the home in West Virginia in which his wife and daughter live. His wife moved to West Virginia to advance her own career.

Bjorn Olson

Olson was hired by the City in December of 1991. At the time he resided outside of the City limits. He was aware of the residency requirement and sought to buy a home in Eau Claire

rather than renting living space. He could not, at the time, afford a down payment and sought an extension of time to permit him to come up with a down payment and purchase a home. He did not receive any express exemption from the residency requirement, but was able to find a home he could afford. Once he had secured an accepted offer on the property, the City granted him an extension of time sufficient to permit him to close the transaction and move into the property. He and his father operate a farm outside of Eau Claire. During certain times of the year, he is required to be at the farm every night after his work with the City ends. His wife and two children live with him in Eau Claire.

Leon Bohl

Bohl was hired into the City's Transit Department in July of 1984. The Transit Department is governed by a residency requirement. During the roughly one and one-third years he worked in Transit, Bohl lived outside of Eau Claire. In November of 1985, Bohl transferred into a position in the Parks Department, which is covered by the labor agreement set forth above. After he had completed his probation period in the Parks Department, Bohl successfully posted into a job in the Street Department. After securing this position, Bohl was informed by Foss that if he did not move into Eau Claire within thirty days, he could lose his job. Bohl moved into Eau Claire during this thirty day period.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The City's Initial Brief

The City states the issue for decision thus:

> Did the Grievants vacate their positions with the City of Eau Claire by residing outside of the city, contrary to the labor agreement with Local 284, City ordinance, and the employment agreements of the Grievants?

After a review of the evidentiary background, the City argues that just cause standards are inapplicable to the grievance. The residency requirement expresses, the City notes, "a valid constitutional interest" on its part. That requirement has been, the City notes, communicated through municipal ordinance, the labor agreement and the Grievants' employment applications.

This clearly communicated requirement, according to the City, operates automatically, and thus independently of the normal disciplinary process. The City asserts that put in contractual terms, Article 5, not Article 7, governs the grievance. Put in evidentiary terms, this means that "unlike the usual discharge case, which involves the dual issues of proof of wrongdoing and amount of penalty, in the instant arbitration only the former is involved."

The City, emphasizing that only proof of residency can be considered dispositive, urges that "sufficient proof existed of non-residency." The City argues initially that there can be no persuasive claim that the Grievants cannot be expected to have understood the residency requirement. "Residency" is not, according to the City, an "uncertain" term. Judicial precedent establishes, the City asserts, that residency requires "continuous physical presence and intention." This requires an assessment of the circumstances of the Grievants' lives, and the City concludes that the evidence concerning "the acts and conduct of the Grievants . . . leads inescapably to the conclusion that Grievants were nonresidents of the city of Eau Claire."

The City acknowledges that the Grievants did demonstrate some indicia of residence in Eau Claire. Those indicia, however, "are subject to the sole control of the Grievants and thus subject to manipulation." A review of the entire record establishes, according to the City, that "the actual intent of the Grievants was to reside not at 731 Marshall Street but at 17947 Country Court and it was there that they had established their physical presence."

Asserting that one "of the primary indicators of physical presence and intent is the place to which a person habitually travels," the City notes that its investigator established that the Grievants' "normal and usual travel pattern" was to the Country Court address. Beyond this, the City notes that the Grievants' mortgage loan application "indicates in two places that the Country Court property was to be utilized as the primary residence of the Grievants." There has been, according to the City, no effective rebuttal of these representations. The testimony of the Grievants on this point was, in the City's view, "inaccurate and misleading." That one of the Grievants' rental properties also identified the property as a "primary residence" offers no guidance here, since the property was, at the time of its acquisition, their "primary residence." That the Grievants did not offer any of the mortgage notes covering their remaining rental property affords, the City asserts, further support for the conclusion that the Country Court mortgage accurately stated the Grievants' interest in the property.

The City then points to further documentary evidence establishing the Grievants did not have an Eau Claire residence. Utility records establish both "an extraordinarily low usage of gas and electricity" at the Marshall property, and "normal, consistent utility use at Country Court." Telephone records establish use of the Marshall property only as a base for "call-forwarding" to the Country Court address.

The City then asserts that interviews with the Grievants' neighbors at the Marshall and at the Country Court properties establish that "no person affirmatively told the investigator that the

Grievants were residing at 731 Marshall Street . . . (and) no one told the investigator that the Grievants were not residing at 17947 Country Court."

The Grievants' testimony will not, the City asserts, support a conclusion that they resided at the Marshall property. Jill Bell mistakenly assumed that their continued physical presence at the Marshall property was not relevant to their establishing residence at that property. Peter Bell "candidly admitted" that he and Jill slept roughly 50 percent of the time at the Country Court property. Significantly, from the City's perspective, neither asked the City if their view of residency was accurate. The City concludes that the evidence dictates the conclusion that the Grievants chose "17947 Country Court as the place where they would live, while retaining 731 Marshall Street as their official 'residence' for City of Eau Claire purposes."

Testimony offered by other employes does not, the City stresses, undercut the assertion that it has consistently applied the residency requirement. Fjelstad's and Olson's testimony is not relevant to the grievance since each involves "new hires" not "permanent employees." Beyond this, the City notes that each of these employes, unlike the Grievants, sought an extension of time to move into the City. Whyte and Harvey convinced their supervisors that they had established a City residence. Bohl's testimony establishes only that the City "acted promptly to require him to move into the city" within the parameters of Article 5, Section 1. Even if it could be concluded that the City created an exemption for Bohl, the City concludes that the evidence will not support a conclusion that the City should be estopped from asserting the residency requirement against the Grievants or that the City somehow discriminated against them. The City contends that the essential difference between the Grievants and the other employes is that the Grievants consciously chose to move their residence outside of the city. To ignore this point would, the City concludes, "render the requirement of city residence for its employes a nullity."

That the Grievants did not truthfully complete a liquor license application for the Sheeley House and testified in an inconsistent manner further underscores the strength of the City's position. The City concludes that "(t)he grievances should be denied."

The Union's Initial Brief

The Union states the issues for decision thus:

> Did the City have just cause to discharge the Grievants? If not, what is the appropriate remedy?

Noting that the Grievants did not voluntarily give up their positions and reported for work on June 28, the Union contends that the City "had disciplinary motivation" for terminating the Grievants.

It follows, according to the Union, that the terminations, each documented by the City as a "dismissal," were discharges warranting the application of Article 7. Citing arbitral precedent and focusing on an award issued by Arbitrator Vernon in the City of Madison (A/P M-92-409, 2/93), the Union argues that a just cause analysis must be applied to the grievances. Section 9.02 underscores this conclusion, according to the Union.

That the City did not afford the Grievants notice of the charges against them prior to June 28, and refused to document those charges on that date, establishes, according to the

Union, the absence of any due process for the terminations. The Union contends that the City's attempt to bolster its case against the Grievants with evidence acquired after the discharge underscores the absence of due process afforded the Grievants.

The Madison award establishes the necessity for adequate notice of an employer's determination to discharge an employe for non-residence. Essential to adequate notice is, the Union argues, an attempt "to define the criteria of residency." A review of the evidence establishes, the Union argues, that the City made no attempt to define the criteria defining residency or to communicate that definition to the Grievants prior to summarily discharging them. The evidence also establishes that the Grievants made no attempt to hide their residence from the City. The Union concludes that the City was aware of their business activities and was aware that they acted in accordance with their understanding of the residency clause. It necessarily follows, according to the Union, that the failure of the City to notify the Grievants of its desire to enforce its understanding of the residency requirement must be considered fatal to the City.

The Union then contends that testimony of other unit members establishes that "the City's own definition of residency constantly changed." Whyte's, Olson's, Fjelstad's, Harvey's and Horlacher's testimony cannot, the Union contends, be reconciled to a consistent definition of "residency." Beyond this, the Union urges that Bohl's testimony establishes that other employes had been afforded a warning prior to discharge. Such a warning could have, the Union argues, permitted the Grievants to comply with whatever definition of residency the City chose to enforce.

Characterizing the Grievants as "ambitious" employes who led a "nomadic lifestyle," the Union argues that the definition of residency must be flexible enough to accommodate modern life styles. The City's definition is, from this perspective, too restrictive to be persuasive. Beyond this, the Union contends the Grievants' life-style supports a conclusion that they were Eau Claire residents even under more standard criteria of residency. More specifically, the Union notes that the Grievants owned the Marshall property; paid taxes on the property; had two phone lines supplying the property; received mail and UPS shipments at the property; had electric service to the property; voted in Eau Claire; registered their licenses and various title forms at Eau Claire addresses; banked in Eau Claire; purchased insurance in Eau Claire; received rental payments at the Marshall property; maintained seven rental properties in Eau Claire; had fuel oil service for the Marshall property; had family in Eau Claire; used the Marshall property address on their tax forms; and socialized, to the extent they did, in Eau Claire. That they may not have "sat around" at the Marshall property cannot, the Union argues, detract from these indicia of residency. They did not "sit around" the Country Court property either. The evidence establishes, the Union concludes, that the Grievants "substantially complied with any generally accepted criteria of residency."

The Union's next major line of argument is that the City's investigation lacked fairness and objectivity at each of its phases. After an extensive review of the phases of the investigation, the Union concludes that "the whole investigation was inconclusive." Viewing the record as a whole,

the Union requests that "the grievances be sustained," and requests the following elements to the appropriate make-whole remedy: full back pay to June 28, 1995, including two full calendar weeks subsequent to the award date to permit the Grievants to wind down their business affairs; full reimbursement for the cost of all benefits which were lost during this period, including foregone medical treatment and damages traceable to an early withdrawal of deferred compensation funds; consequential damages covering late penalties and fees . . . incurred from various food and service providers"; and "(i)nterest of 12% on the total dollar amount of all the above."

The City's Reply Brief

The City challenges the Union's contention that the Grievants' terminations were disciplinary in nature. Article 5, Section 2 is, the City argues, "self-executing according to its terms." The Grievants vacated their Eau Claire residence and thus their positions with the City. The Madison decision and the arbitral authority cited by the Union confirm, the City asserts, that Article 5, Section 2 must be enforced as written. As a corollary to this, the City argues that any evidence relating to the issue of residency, whether obtained prior to June 28, 1995 or not, must be considered in addressing the grievance. Because the terminations are not disciplinary in nature, it follows, according to the City, that arbitral authority restricting an employer's case to the evidence considered at the point of termination is inapplicable.

The City then contends that the "Union misunderstands the requirements of due process," and that it complied with existing case law requirements since "(a) complete evidentiary hearing was not required." Beyond this, the City asserts that the Madison decision "offers little support to the Grievants." That Madison based its residency requirement on an ordinance supplies, the City contends, a crucial distinction between the Madison case and the grievances posed here.
Since the labor agreement imposes a joint obligation on the City and the Union, it follows, according to the City, that the vagueness of the requirement or any problems with the notice supplied the Grievants are shared responsibilities of the parties, not independent bases to deny the grievance. If the City were to have developed criteria clarifying its view of residency, the City argues that it might have exposed itself to a prohibited practice charge. For an arbitrator to impose such a requirement on the City would violate the provisions of Article 29, Section 6.

The City's next major line of argument is that the "Grievants engaged in deception" and that the City "did not acquiesce in (their) non-residency." The City argues that the Grievants' testimony cannot obscure that they attempted to hide their change of residence from the City. The phone records for the Marshall property establish that they sought to lend the appearance of residence to that property while maintaining the reality of their residence at Country Court.

A review of the record establishes, the City asserts, no inconsistency in its application of the residency requirement. Nor should "established standards of residency" be abandoned. That

the Union suggests the existing standard is "archaic," but suggests no alternative belies the lack of merit in its argument. "Physical presence" and "intent to return" must, the City concludes, be the criteria defining the residency requirement. These criteria define an all or nothing standard, and the City contends that the evidence establishes the Grievants failed to meet the requirement. That the Union argues both lack of notice and "substantial compliance" manifests, the City argues, the fundamental inconsistency of the Grievants' position.

Asserting that its investigation was "fair, unbiased and appropriate," the City argues that the Union's procedural objections paper over a lack of evidence to support their claim that they live at the Marshall property. That the Grievants could supply one mortgage on a rental property which contains the same clauses as the Country Court property does not undercut this argument. The City notes that the mortgage for the 11th Street property reflects that the property once was a primary residence, and only highlights the significance of the absence of any other mortgage using the same clauses.

In the event a remedy is found necessary, the City contends that "back pay would be the sole remedy to which they would be entitled." A necessary condition to any such payment would be, the City argues, a requirement that "each Grievant . . . file an affidavit certifying to their residency in the City." Any other remedial issue requires, according to the City, hearing on factual issues. The City concludes that the evidence will not support the granting of any remedy. Rather, the evidence establishes that "their positions with the City were vacated according to the terms of the labor agreement."

The Union's Reply Brief

The Union argues that the City "had no legitimate business interest" in applying the residency requirement against the Grievants, and that the City discharged them with "disciplinary motivation." The terminations must be considered, "at the very least" constructive discharges warranting the application of just cause.

Beyond this, the Union contends that the Grievants acted consistently with their own understanding of the residency requirement. That they were unaware that their view conflicted with the City's cannot, the Union asserts, be held against the Grievants. Nor can the City claim to lack the contractual authority necessary to specify its own view of residency, according to the Union. The City's own doubts about the issue are, the Union contends, belied by the scope and complexity of its own investigation. That investigation, the Union notes, failed to produce a single sighting of the Grievants at either location.

That the Country Court mortgage listed the property as a primary residence cannot, the Union argues, be considered dispositive. The 11th Street mortgage has a similar reference and was rental property at the time the mortgage was executed. Beyond this, the Union argues that the

significance of this reference is fully addressed by Froelich's letter. "(C)ommon knowledge" of the mortgage application process also undercuts the significance of the City's reading of the Country Court mortgage since "(a)pplicants normally just sign where the lender has put all the 'Xs.'" That the energy usage of the Country Court property exceeds that of the Marshall Street property is, the Union urges, insignificant. The Marshall Street property is smaller and was used by fewer people. A review of witness testimony establishes, according to the Union, only that the Grievants' neighbors at both properties did not see them much.

The Grievants' and Bohl's testimony establish, the Union argues, that the City's enforcement of the residency requirement is shrouded in ambiguity. The City's fear that holding this ambiguity against the City would void the requirement is "(n)onsense":

> We have only asked that reasonable criteria of residency be issued so that employees know what is expected of them. So that employees will not be flagrantly fired in the future.

The City's attempt to highlight "several substantial concessions" during the Grievants' testimony while also attacking their credibility is, the Union avers, internally inconsistent. Concluding that the City has "no factual case," the Union asks for "an expedited decision in this matter."

DISCUSSION

I have stated the issue for decision broadly enough to incorporate both parties' arguments. As their conflicting statements of the issue demonstrate, there are fundamental differences on the appropriate scope and focus of the dispute regarding the Grievants' termination.

The issue I have adopted focuses on the collective bargaining agreement. Both parties have asserted arguments which stray beyond its terms. The Union asserts the City failed to offer the Grievants due process on June 28, 1995. The City urges that it has afforded the Grievants due process and that the violation of the residency clause extends to an ordinance as well as to the Grievants' individual employment agreements.

Section 6 of Article 29 focuses arbitral review on the "express language" of the agreement. That the contract places these terms in quotation marks is something less than an invitation to constitutional or quasi-constitutional speculation. There is no persuasive evidence this provision means anything other than its constituent terms state. Resolution of the grievance must, then, begin and end with contract language. Whether or not the June 28, 1995 meeting satisfies the requirements of Eastman v. City of Madison, 117 Wis. 2d 106 (CtApp, 1983), provides no basis for the resolution of the grievances. Similarly, whether the terminations constitute an ordinance

violation or whether the Grievants' employment applications represent enforceable agreements afford no basis for the resolution of the grievances.

This conclusion does not inappropriately restrict the scope of the arbitration process. Arbitration is consensual and contractual. If bargaining parties wish an arbitrator's view of law outside of the contract, that wish should flow from the terms of the labor agreement or from their stipulation. Arbitration is designed to afford an informal, expeditious means of resolving disputes and can arguably be applied to legal disputes. A court owes, however, no deference to an arbitrator's legal conclusions. Thus, any assurance that an arbitral foray into legal issues can meaningfully be expected to resolve a dispute turns on the mutual and advance expectation of the bargaining parties. In the absence of such an expectation, law beyond the contract represents no more than another basis for disagreement.

With the dispute thus focused on the contract, the next level of the dispute concerns what portion of the contract governs the grievances. The Union argues that the Grievants, under Article 9, Section 2, are entitled to "all rights, protection and benefits that are granted by this agreement." Among those rights, the Union urges, is access to just cause under Article 7, Section 1. The City counters that Article 5, Section 2 is self-executing.

The City's termination of the Grievants cannot withstand a just cause review. Their work records are lengthy, unblemished and unchallenged. Residence is their only offense, and that offense has been punished summarily. Article 5, Section 2 can support their summary termination. Article 7, Section 1 cannot.

The language of Article 5, Section 2 does support the City's view that Article 7 is either not applicable or is limited by Article 5. The Grievants are "permanent employees." Article 5, Section 2 thus applies to them. Whatever may be said of the clarity of that section, it unambiguously governs employes who move "outside the corporate limits." More significantly, the section mandates that any employe who makes such a move "shall automatically vacate his/her position with the City on the same date that the transfer of residence takes place." This language precludes access to the progressive discipline policies of just cause. At a minimum, then, Article 5, Section 2 makes a move "outside the corporate limits" cause for termination. It is unnecessary, on the present facts, to push this point further. Article 9, Section 2 may mean that Article 5 cannot be interpreted in a manner which renders Article 7 meaningless. No conflict between these provisions is, however, apparent here. Applied to the grievances, the focus of the inquiry is not whether the City had just cause under Article 7 to discharge the Grievants, but whether they "move(d) outside the corporate limits."

A review of the evidence leaves fundamental doubt regarding whether the Grievants moved from the Marshall property to the Country Court property. This doubt is the dispositive point of the grievances. Because that doubt cannot persuasively be held against the Grievants, it follows that the City has not proven that they vacated their positions within the meaning of Article 5,

Section 2. An examination of this conclusion requires a brief overview of the "burden of proof," and an application of that overview to the evidence.

The Burden of Proof

As preface to this overview, it is necessary to stress the City does not alone bear the burden of establishing the Grievants' residence. In a residency situation, the employer cannot be faulted for lacking all the information relevant to its employes' life-styles. That information is primarily not under the employer's control, and the affected employes do not necessarily have any incentive to come forward with the information.

In Richland County (Highway Department), MA-2313 (McLaughlin, 5/82), I addressed burden of proof issues. The citations within that discussion are dated, but the principles remain viable and are applicable here:

> (I)t is necessary to distinguish two elements to the burden of proof -- the burden of persuasion and the burden of going forward with evidence. 2/
>
> Generally, the burden of going forward with evidence refers to the parties' individual responsibility to develop an adequate record, or, put another way, a party's liability to an adverse ruling for failing to present evidence on an issue. The burden of persuasion refers to the perspective of the decision maker on viewing an adequately developed record. The burden of persuasion is significant only if the parties have sustained their burdens to come forward with evidence, all the evidence has been introduced, and doubt remains on the issue to be resolved. 3/ In such a case, the doubt is resolved against the party with the burden of persuasion. 4/ The burden of going forward with evidence, unlike the burden of persuasion, may shift from party to party if the party with the burden of going forward presents sufficient evidence to provide a basis for a ruling in its favor. 5/
>
> . . .

2/ For a general discussion, see McCormick On Evidence, (1972) Chapter 36; Elkouri and Elkouri, How Arbitration

Works, (1976) at 277-279.

3/ The nature of the doubt, that is, the degree of proof required to carry the burden of persuasion, is not an issue in this grievance since, as discussed below, the ultimate facts are not in doubt.

(footnotes 4 and 5 on page 26)

4/ See, for example, United States Department of Justice, Federal Prison System, United States Penitentiary, Marion, Illinois, 82-1 ARB Section 8167 at 3780 (Edelman, 1982); Reiter Foods, Inc., 81-2 ARB Section 8541 at 5378 (Hanes, 1981).

5/ See, for example, Crown Central Petroleum Corporation, Pasadena, Texas, 79-1 ARB Section 8113 at 3485 (Fox, 1978); Chris Craft Corp., 78-2 ARB Section 8445 at 5078 (Serot, 1978).

There is no doubt this record has been "adequately developed." Each side has forcefully documented and articulated its case. It is thus necessary to apply the considerations stated above to each case to highlight the nature of the doubt raised by the grievances and how that doubt must be resolved. The BACKGROUND section above roughly mirrors the development of the cases litigated by each party, and the discussion below will follow that structure.

Application of the Burden of Proof to the Evidence

The City had, by the close of its case, produced sufficient evidence to warrant a conclusion that the Grievants had moved to Country Court. Evidence accumulated by Patrow before the June 28, 1995 meeting supported this conclusion. She had learned that the bulk of the Bells' activities seemed to center on the Country Court property. Utility records indicated the property was used on a year-round basis. Phone records indicated the vast majority of calls made from the Marshall property were forwarded to the Country Court number. The statements of the neighbors at the two properties yielded something less than a consistent account of their living arrangements. None of the Marshall neighbors could, however, corroborate their continued presence at that property. The size, location, appearance and relative value of the two properties indicated that the Country Court property provided the more desirable living space. Cable TV service was discontinued at the Marshall property in 1992, and was started, through a different provider, at the Country Court address sometime in 1992. The mortgage securing the loan on the Country Court property identified it as, for at least one year, the Bell's primary residence.

Evidence accumulated after the June 28, 1995 hearing corroborated the City's conclusion that the Bell's primary residence was at Country Court. Phone and utility records confirmed Patrow's interviews. The loan application for the Country Court mortgage confirmed that the property was a primary residence. UPS records appeared to confirm deliveries to the Country Court address.

Viewing this evidence in light of the principles set forth above, the City's presentation of its case satisfied its burden to produce sufficient evidence to warrant a decision in its favor. The burden of producing evidence thus shifted to the Union. In a residency case, this shift is significant, since the Grievants have the best access to information on the point.

The Union's evidence effectively addressed the City's. At the close of the City's case, it appeared that the Grievants had chosen the Country Court property as a more suitable residence than the Marshall Street property. Evidence and testimony submitted by the Union made this view of the Grievants' actions untenable. At the close of the Union's case, the Grievants' use of both the Country Court and Marshall properties appeared not an election between residences, but a reflection of business convenience.

The evidence produced by the parties establishes the Grievants led a "nomadic" type of existence, reflecting their then-current business interests. Up until their purchase of the Country Court property, those interests revolved around the purchase and improvement of distressed properties in Eau Claire. That activity consumed the Grievants' non-City work hours. They do not have children and do not have a home-life in the traditional sense of those terms. They ate and slept wherever it was convenient to their work.

The evidence submitted by the City to underscore a fundamental choice of residence lost its clear focus after the presentation of the Union's case. Utility records demonstrated not only year-round usage at the Country Court property, but also year-round usage at the Marshall property. The discontinuance of cable TV service at the Marshall property appears to have coincided with the departure of the Grievants' only tenants at the property. The inception of cable service at the Country Court property appears to be no more than the purchase of that service for Peter Bell's aunt. The accounts of neighbors at each property demonstrate less the continuing physical presence of the Grievants at either location than their sporadic presence at both as dictated by business interests. Peter Bell's aunt cannot be reliably rooted to either residence. She maintained several mailing addresses. The Country Court address, portrayed by the City as the more desirable primary residence actually served as temporary quarters for Peter Bell's aunt, two Sheeley House employes, friends of Peter Bell and Jill Bell's immediate supervisor. It is not clear whether UPS deliveries were made to Marshall or to Country Court as a primary residence.

The significance of the Union's rebuttal of the City's evidence should not be over-stated. It cannot be said that the Union's evidence made the City's position implausible. An examination of the strongest evidence submitted by the City, however, manifests fundamental doubt concerning its significance. That evidence concerns the mortgage documents generated for the Country Court property, records of phone usage and the physical characteristics of the two properties. The mortgage application and mortgage form for Country Court indicate it was a primary residence. Those documents are, however, forms over which the Grievants exercise less than complete control. Froehlich's letter, at a minimum, makes the representations made on that form subject to doubt. It appears she understood the Grievants' desire to comply with the residency requirement,

and did not view the forms she processed for them to do anything more than secure a loan for credit-worthy applicants. Beyond this, it is difficult to give these forms, standing alone, controlling significance. The City's "PERSONNEL ACTION" form used to document the Grievants' terminations, records the terminations as a "dismissal." This form, controlled by the City, arguably puts the terminations under the scope of Article 7. That form is, however, only a form and its significance must be weighed against other evidence of the City's intent. The mortgage form and application are no different.

Phone records from March, April and May of 1995, document an undeniable pattern of call forwarding to the Country Court phone line. The difficulty with this evidence is evaluating what that pattern means in light of the Grievants' life-style. It is apparent that difficulties at the Sheeley House regarding key managers consumed the Grievants in the latter part of this period. More significantly, the pattern does not necessarily support only the City's view of the evidence. The Grievants' use of call forwarding does not necessarily reflect anything more than their desire to be reached at whatever remote business location they were working on. In the spring of 1995, those business activities were in Chippewa Falls. Prior to that, those activities were in Eau Claire. The doubt this poses cannot be ignored. The Grievants were terminated not for pursuing business interests in Chippewa Falls, but for moving their primary residence there. The call forwarding does not, in itself, establish a residence choice. It indicates that the Grievants may have made such a choice. It also, however, indicates that the Grievants had moved the focus of their non-City work activities.

The Country Court property is the more spacious and desirable property on any objective assessment of value. This point cannot be refuted. The evidence here, however, also manifests a fundamental doubt. The Grievants' attitude toward either property is something less than residential. The Country Court property was improved, as all their properties were. More significantly, neither property was treated as a residence in a traditional sense. The Country Court property served, in many respects, as a boarding house. On balance, the evidence indicates the Grievants treated both properties less as an abode than as a convenient place to transact business.

The doubt detailed above has contractual significance. Article 5, Section 2 requires a move "outside the corporate limits" as the basis for the automatic vacation of a position. The evidence will not support a conclusion that the Grievants moved outside of Eau Claire. Rather, the evidence establishes only that the Grievants' nomadic living habits became focused, during the time period the City investigated them, on their properties in Chippewa Falls. The Grievants' use of the Marshall property as a business and residential convenience for their work on other real estate holdings appears constant on this record. Fundamental doubt surrounds the conclusion advanced by the City that the Grievants moved from the Marshall property to the Chippewa Falls property.

The doubt which surrounds the conclusion advanced by the City cannot be persuasively held against the Grievants. Traditionally, the burden of persuasion in discipline cases is

considered to be the employer's. 9/ This case has disciplinary overtones. As noted above, however, the just cause provision does not govern this dispute. In contract interpretation cases it is difficult to say either party alone bears the burden of persuasion. 10/ Thus, the resolution of the doubt referred to above requires some discussion.

The difficulty with the issue of residence rests more on a factual than a contractual basis. As discussed above, Article 5, Section 2 governs this dispute. That provision requires a factual determination whether the Grievants moved outside of the Eau Claire corporate limits. Because of the complexity of determining residency, doubt on that factual determination cannot be placed, as a general matter, on the employer or on the Union. Rather, doubt on the factual issue should be resolved against the party with the best access to the information necessary to prove the point. For example, in a case in which an employe had concealed a move outside of the corporate limits, uncertainty regarding the date of the move could more persuasively be held against the employe than the City. In this case, however, uncertainty on the move itself must be held against the City.

The most basic reason for this is that the City chose to act summarily against the Grievants. Article 5, Section 2 permits this, but the summary terminations presumed clarity in the underlying facts. No such clarity emerged from the evidence. If the City had treated the Grievants as it treated Bohl, the underlying complexity of the Grievants' living situation could have been disclosed and addressed. If the Grievant's business activities put their residence in doubt, the City could have clarified what it expected the Grievants to do to maintain the Marshall residence while working on the Country Court and Sheeley House properties. The summary terminations reflected the City's choice, and the ambiguity that choice prompted cannot persuasively be held against the Grievants.

It is also significant that the Grievants did not conceal their actions from the City. Jill Bell's supervisor used the Country Court property. Their ownership of the Country Court property and the Sheeley House was common knowledge. Peter Bell advertised the Sheeley House on the truck he drove to work. Some of the most damning evidence on the asserted move was offered by Peter Bell. He acknowledged he slept in Chippewa Falls as often as he slept at Marshall Street. The openness of their activities means the ambiguity surrounding what constitutes their primary residence turns less on the City's access to information than on the

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9/ See, generally, Employment Law Deskbook, Shawe & Rosenthal (Matthew Bender, 1995) at Sec. 9.02(5)(a); and How Arbitration Works, Elkouri & Elkouri (BNA, 1989) at Chapter 8.

10/ See, Shulman, Reason, Contract, and Law in Labor Relations, 68 Harvard Law Review 999 (1955), and Aaron, Some Procedural Problems in Arbitration, 10 Vanderbilt Law Review 733 (1957).

City's definition of what level of physical presence or what indicia of intent define residence. Ambiguity within that definition lie more within the control of the City than the Union. Thus the ambiguity surrounding what constitutes their residence must be held against the City.

In sum, the evidence establishes that the Grievants live a nomadic life-style, which is dependent on their non-City work activities. The Grievants spend the bulk of their non-City work time on-site at their various real estate holdings. The evidence will not support a conclusion that they moved from the Marshall property to the Country Court property. In the absence of such a move, they cannot be said to have vacated their positions with the City under Article 5, Section 2. Because there is no other cause for their terminations, those terminations cannot be considered authorized by the labor agreement.

Before closing, it is necessary to tie the conclusions stated above more closely to the parties' arguments. The Union asserts that the City lacks a valid business reason to assert the residency requirement against the Grievants. It is apparent on the face of Article 5 that the parties have mutually recognized that the City can compel its employes to reside within its borders. Under Article 29, no further arbitral inquiry is necessary or appropriate. Whether the residency requirement rests on a valid business basis or not, the requirement is enforceable.

The parties dispute whether "traditional" criteria of residency can be applied to the Grievants. The City draws its definition of residency from Eastman, and turns the inquiry on "physical presence and intent." This general definition can be accepted whether it is characterized as traditional or not. The difficulty with the standard, however characterized, is that it is fact driven. Intent is inevitably elusive. Olson and Whyte may intend to farm outside of Eau Claire. This intent does not deprive them of an Eau Claire residence. Similarly, Horlacher may intend to move to his Augusta cabin and Fjelstad to his farm as soon or as often as possible. Neither, however, has given up residence in Eau Claire. The absence of City employes from their Eau Claire residences for periods of up to four weeks has not jeopardized their residence. Against this background, the findings of the roughly four week investigation preceding the terminations must be considered troublesome without regard to any characterization of the Grievants' life style.

The strength of the City's case is that the Grievants lack "physical presence" in Eau Claire. The evidence, however, shows that their physical presence at the Country Court or the Marshall properties is a business, not a residence function. Their business activities dictate their physical presence. The City accurately notes that the Marshall property is less a residence than a business convenience. Their conclusion that this convenience is a ruse to evade the residency requirement remains, however, unproven. The Marshall property does not appear to have been any more physically occupied while the Grievants devoted themselves to the restoration of distressed properties in Eau Claire. Against this background, it is impossible to conclude they moved to Country Court. Rather, that property and the Sheeley House became the focus of their business concern. The terminations were founded, however, on their moving from an Eau Claire residence, not on their acquisition of non-Eau Claire business interests.

The City urges that the residency requirement will become unenforceable if it is not enforced against the Grievants. This assertion ignores, however, the City's past enforcement of the requirement and the complexity of determining the Grievant's residence. Not all of the extensions granted by the City to avoid the harshness of a rote application of the residency requirement turn on Section 1 of Article 5. Bohl was a permanent employe, yet did not have his position summarily "vacated." That the City did not act summarily did not keep it from compelling Bohl to move into Eau Claire. Similar action toward the Grievants could have permitted the complexity of their situation to be considered before their termination. Beyond this, the precedential value of the Grievants' situation is dubious. There is no evidence on this point, but it would seem unlikely that large numbers of City employes pursue real estate interests to the point that their neighbors seldom, if ever, see them. In any event, if the Grievants' Chippewa Falls business activity takes them from Eau Claire too regularly to permit their maintenance of an Eau Claire residence, then they may be forced to choose between their places of employment. That is not the case posed here, which presumed the Grievants moved from the Marshall property to Country Court. It is the unique facts of this case, not the City's resolve to enforce the residency requirement, which preclude summary enforcement. It would be an ill-advised employe who tested the City's resolve on less compelling facts.

The Union has challenged any consideration of evidence generated after the June 28, 1995 meeting. The City persuasively contends that evidence bearing on whether the Grievants moved from Eau Claire prior to June 28 must be considered whether acquired before or after June 28, 1995. The Union's argument that evidence acquired after the termination decision undercuts the reasonableness of that decision is a considerable argument. It does not, however, offer a basis to exclude the evidence from consideration. This is not to say any evidence acquired after June 28, 1995, must be considered meaningful. The evidence must be relevant to whether the Grievants moved from Eau Claire prior to that date. Put more concretely, the loan application for the Country Court property, though secured after June 28, 1995, provides some insight into the circumstances surrounding the asserted move in 1992. The distribution of Peter Bell's deferred compensation funds to the Country Court address after his termination, is, however, of no benefit. That distribution came after the termination, and offers no insight into whether he had moved his residence prior to that date. If either Grievant's post-termination activity is relevant, it would be possible for them to re-establish residency by a post-termination move. Evidence from both parties relating to whether the Grievants moved from Eau Claire prior to June 28, 1995, has been considered whether the evidence was secured prior to that date or not.

The City has challenged the Grievants' credibility, but that challenge affords little guidance here. The Grievants did not fully disclose past ordinance violations in their application for a liquor license. The Grievants argued to the City of Chippewa Falls and at hearing that this was simply an oversight. The City of Chippewa Falls apparently agreed, for it granted the license. More significantly here, credibility affords no reliable basis to resolve the issues posed. If the Grievants attempted to conceal their Chippewa Falls based activity, they did a poor job

of it. Peter Bell's admission that he slept as often in Chippewa Falls as in Eau Claire during the renovation effort at the Sheeley House is similarly difficult to reconcile with the view that the Grievants disingenuously hid their residence from the City.

No discussion of remedy is necessary or appropriate. The parties stipulated that remedial issues would not be litigated until the merit of the grievances had been determined.

AWARD

The City did violate the collective bargaining agreement by terminating the Grievants' employment on June 28, 1995.

As stipulated by the parties, I will retain jurisdiction over the grievances for the purpose of addressing the issue of the remedy appropriate to the City's violation of the collective bargaining agreement. I will retain jurisdiction over the grievances for not less than forty-five days from the date of this Award to permit the parties to discuss and, if necessary, litigate disputes regarding the issue of remedy.

Dated at Madison, Wisconsin, this 14th day of March, 1996.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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