

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
WISCONSIN PROFESSIONAL POLICE ASSOCIATION
and
CITY OF WAUKESHA

Case 145
No. 60442
MA-11616

Appearances:

Mr. Steven J. Urso, Wisconsin Professional Police Association Executive Assistant, 340 Coyier Lane, Madison, Wisconsin, 53713, appeared on behalf of the Association

Mr. Vincent D. Moschella, Assistant City Attorney, City of Waukesha, 201 Delafield Street, Waukesha, Wisconsin, 53188-3633, appeared on behalf of the City

ARBITRATION AWARD

On October 11, 2001, the Wisconsin Professional Police Association and the City of Waukesha filed a request with the Wisconsin Employment Relations Commission requesting that the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. A hearing was conducted on January 22, 2002 in Waukesha, Wisconsin. A transcript of the proceedings was made and distributed on February 4, 2002. Post-hearing briefs, and an Association Reply Brief were filed and exchanged by March 14, 2002.

This Award addresses the termination of Police Officer Cindy Klatt, for failure to comply with the City's residency requirement.

BACKGROUND AND FACTS

Cindy Klatt (formerly Schwartzenberger), the grievant, has been employed by the City of Waukesha as a Patrol Officer since June 10, 1991. Ms. Klatt has been subject to the City

Residency requirement throughout her employment with the City. Upon commencing employment with the City she signed a "Statement of Residency Requirement" form, which is set forth below, and lived within the residency area. In April, 2001, Officer Klatt informed the Department that she had become engaged to marry an employee of the Racine County Sheriff's Department, who was also subject to a residency requirement. There is no location which satisfies both residency requirements.

Officer Klatt requested an exemption from the residency requirement from the Human Resources Committee of the Common Council. The request was denied by the Committee and the Common Council affirmed the denial on June 19, 2001. On August 17, 2001, in anticipation of her upcoming marriage, Officer Klatt moved to a Racine County address, and formally notified the City of Waukesha of her new address. Two days later she reconfirmed her new address, and indicated that she had no intention of resigning her position with the department.

On August 22, 2001 Klatt and Sgt. Andrews drove the distance from the Police station to her new home. The distance measured 33.7 miles and took 51 minutes to drive. Klatt's supervisors reported the drive information and new address to the Chief, and indicated that the new residence violated the residency requirement of the labor agreement. On August 27 Chief of Police Leslie Sharrock wrote the grievant, indicating that her residence violated the labor agreement, and that she must establish acceptable residency within thirty days or be viewed as having resigned from City employment. In response to the Chief's letter the Association filed a grievance on Klatt's behalf and requested that the Chief rescind his 30 day time limit for compliance. The grievance was denied, and moved through the grievance procedure.

Ms. Klatt was married on September 8, 2001.

On September 28, 2001 Klatt was terminated. On that date Klatt requested a one year extension of the time period established to satisfy the residency requirement. That request was denied. Her termination was based solely upon her residence.

Klatt was not the first member of the Waukesha Police Department to reside outside the contractually defined residency zone. In approximately 1980 John Dillon, a former City of Waukesha police officer was allowed to live outside the residency area for a period of approximately one year. Dillon married a Police officer who was subject to a conflicting residency clause. He requested, and received, an exemption from the then Chief of Police. Dillon subsequently moved within the residency area.

From approximately June, 1989 through September 1992 the Department allowed Dispatcher Denise Erickson an exemption from the residency rule as she experienced difficulty securing housing within the residency area.

In July, 2001 Officer Ron Grace was granted a 90 day extension to move into the residency area. He had just completed his probationary period, requested, and was granted, an extension in order to secure a mortgage on a home purchase. The extension was granted “on a non-precedent setting basis”.

ISSUE

The parties could not agree upon an issue.

The Association frames the issue as:

Did the employer violate the terms of the collective bargaining agreement when it terminated the employment of Officer Klatt? If so, what is the appropriate remedy?

The City regards the issue as:

Does Cindy Klatt qualify for employment with the City of Waukesha under Article 21.01 of the labor Agreement?

I believe the issue to be:

Did the City have just cause to dismiss Cindy Klatt?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 12 – GRIEVANCE PROCEDURE

12.01 Grievance procedure

- A. A grievance is a dispute and/or difference of opinion raised by an employee or a group of employees covered by this Agreement involving the meaning, interpretation or application of the provisions of this Agreement, and any dispute related to wages, hours and conditions of employment.

. . .

12.02 Authority of Arbitrator: The Arbitrator shall not have the authority to recommend amendment, modify, nullify, ignore, add to, or subtract from any of the provisions of this Agreement... The decision shall be based solely upon the Arbitrator's interpretation of the meaning and application of the express terms of this Agreement to the facts of the grievance presented.

...

ARTICLE 16 – RIGHTS OF EMPLOYER

16.01 It is agreed that the rights, functions and authority to manage all operations and functions are vested in the Employer and include, but are not limited to, the following:

- A. To prescribe and administer rules and regulations essential to the accomplishment of the services desired by the City Council.
- B. To manage and otherwise supervise all employees in the bargaining unit.
- C. To hire, promote, transfer, assign and retain employees and to suspend, demote, dismiss or take other disciplinary action against employees for just cause.

...

ARTICLE 21 – RESIDENCY

21.01 Employees will reside within the County of Waukesha or within twenty (20) minutes of the Police Station. New employees must comply with this residency requirement not later than three (3) months after completing their probationary period. This initial period may be extended for up to nine (9) additional months if a legal hardship would otherwise result.

RELEVANT PROVISIONS OF PRIOR COLLECTIVE BARGAINING AGREEMENTS

Prior to January, 1998 the parties' residency provision read as follows:

ARTICLE 21 – RESIDENCY

21.01 Employees will reside within twenty-five (25) minutes time of the Police Station subject to the approval of the Chief of Police. New employees must reside within twenty-five (25) minutes of the Station not later than three (3) months after completing their probationary period. This initial period may be extended for up to nine (9) additional months if a legal hardship would otherwise result.

...

STATEMENT OF RESIDENCY REQUIREMENT

I have been informed and am fully aware that as a requirement of my employment with the City of Waukesha, I must live within the residency area as designated below and that if I do not now live within such area I am required and will move into such area within the time limits of the effective date of my employment with the City of Waukesha.

SIGNATURE: Cindy L. Schwartzberger /s/

DATE: 6-10-91

WITNESSED: /s/

RESIDENCY AREA AND TIME LIMITATIONS:

21.01 Employees will reside within twenty (20) minutes time of the Police Station subject to the approval of the Chief of Police. New employees must reside within twenty (20) minutes of the Station and not later than three (3) months after completing their probationary period. This period may be extended for up to nine (9) additional months if a legal hardship would otherwise result.

...

POSITIONS OF THE PARTIES

The Association contends that the City of Waukesha has not always enforced the residency requirement consistently and uniformly for all police department employees covered by the terms of a collective bargaining agreement. The Association points to Dillon, Erickson, and Grace and concludes that the City has not been consistent in its application of the residency

rule. The Association does not argue that the grievant in this matter is not out of compliance with the City's established residency requirement. But the Association would argue that similar to other people who were granted exemptions, Klatt encountered extenuating circumstances which have resulted in the current situation, and her only recourse was to become out of compliance with the City's restrictive policy. Klatt faces competing and conflicting residency requirements, which neither she nor her husband can modify. The couple chose to honor the Racine County requirement.

It is the view of the Association that the City failed to give appropriate consideration to Klatt's circumstances when it chose to terminate her employment. Klatt's situation parallels that of Dillon. In terminating Klatt, the City failed to extend to her the considerations it extended to Dillon. Klatt requested a one year extension, which was denied. Previously Erickson was given a three year extension. The Association contends that the City has now chosen to enforce a clause it has previously chosen to ignore. The Association contends that Klatt is being penalized for the same conduct previously accommodated.

The Association contends that there is no cause for Klatt's termination. She has a discipline free work record. Her conduct was not so egregious as to warrant termination, the economic equivalent of the death penalty. This is, in effect, a first offense. There is no evidence in the record to suggest that Klatt could not perform her duty living in her new residence. To the contrary, the record establishes that she did continue to perform her duty, including being punctual, after her move, through the date of her discharge. According to the Association, the City has no basis for termination. The City simply saw an opportunity to terminate her and seized upon it.

The Association argues that the City is not free to disregard its prior exemptions simply because the contract language has changed. The Association points out that the residency requirement has existed for all of the years in question. The language change does not alter that fact. Historically, the City has granted exemptions from the requirement where circumstances caused that to be appropriate. That was not done here. In fact, an exemption was granted in 2001.

It is the view of the Association that the City has terminated an excellent employee without cause, and now seeks to hide behind the residency requirement for an otherwise indefensible action. Klatt's transgression is the desire to live with her husband. The Association seeks reinstatement and backpay.

It is the City's view that Cindy Klatt was fully aware of the residency requirement she worked under throughout her employment. She was aware of the impact of the rule upon her when her request for an exemption was denied. The City contends that the contract requires her to reside within the County as a condition of her employment. She does not.

The City points to Article 12 and notes that my authority is carefully circumscribed, and that I lack the authority to waive Article 21 or grant an exemption. As to past examples, the City notes that those incidents arose under different contract language. Under the prior language the Police Chief had the discretion to grant an exception to the application of the residency clause. That authority was deleted from the 1998 – 2000 contract, and no longer exists. It is the view of the City that the different results are a product of the different language, and accompanying standards, rather than disparate treatment under similar circumstances.

As to the Grace exemption, the contract allows for an extension for new hires. Grace was a new hire, who had just completed his probationary period at the time of his request. The sentence applicable to, and controlling, the Grace decision does not apply to Klatt. The City contends that Klatt has no relief available under the collective bargaining agreement, since she has made herself unavailable for employment by moving outside the residency area.

DISCUSSION

The facts underlying this matter are not in dispute. Officer Klatt lives outside the residency area established by the collective bargaining agreement. Officer Klatt made a conscious and knowing decision to live outside the residency zone created by Article 21. The collective bargaining agreement has contained a residency rule for the entire period of Ms. Klatt's employment. She signed an acknowledgement of that rule upon her hire, and complied with the requirement for over a decade. At the time of her move she was advised both orally, and in writing that her new residence was located outside of the residency area. She participated in the measurement of the distance, and had that measurement confirmed to her. She was also advised of the consequences of her move. Officer Klatt was given a 30 day period to re-establish residency, and declined.

The collective bargaining agreement is not ambiguous on this requirement. Article 21.01 provides "employees will reside within the County of Waukesha or within twenty (20) minutes of the Police Station...." The use of the term "will" is one of command. The Article does not allow for an exception for other than "new employees". The Association acknowledges that Klatt lives outside the residency area. There is no claim that she is a new employee, within the meaning of the contract.

The fact that officer Klatt is acknowledged to be a conscientious, competent Officer is irrelevant to this dispute. Article 21 applies universally, and not only to those deemed to be marginal performers.

My view of the issue framed for hearing mirrors that advanced by the Association. However, I believe that Article 21 provides the analysis of the just cause question. Article 16 allows the City to terminate an employee only where there exists just cause to do so. Ms. Klatt's termination presents the question as to the existence of just cause. However, under the terms of this labor agreement I am not free to independently analyze her behavior against workplace or arbitral norms. The parties have come to an agreement over the application of the just cause standard to residency matters. Their agreement is reflected in Article 21.

The Association points to the three prior incidents where the City waived application of the residency rule. The Dillon and Erickson incidents occurred under the prior contract language. That language was construed to give the Police Chief some discretion as to the enforcement of the residency requirement. My reading of the record is that the Chief exercised that discretion relative to Dillon and Erickson. That discretion evaporated in 1998. The discretion that once allowed the Police Chief to execute waivers is gone. Whatever practice or interpretive standard that accompanied the deleted words disappeared with the deletion of the words themselves.

The Association points to the extension granted Officer Grace in 2001. Grace completed his probationary period, and within the three months following completion of his probationary period, requested an extension in order to allow him to arrange financing for a home within the residency area. Such an extension is expressly addressed, and allowed by the last sentence of Article 21.01. Grace is a "new employee" within the meaning of Article 21. Klatt and Grace draw rights from different provisions of Article 21. They are therefore not comparable for purposes of a disparate treatment claim.

Ultimately, the Association would have me direct the Employer to reinstate employee Klatt, under circumstances where she lives outside the residency area, in violation of Article 21. For me to do so would emasculate Article 21 of all meaning. The contract does not contemplate that role for an Arbitrator.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 14th day of June, 2002.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

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