

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
LOCAL 97, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

and

CITY OF WAUKESHA

Case 178
No. 68398
MA-14228

(E.M. Termination Grievance)

Appearances:

Mr. Laurence S. Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appeared on behalf of the Union

Ms. Donna Whalen, Human Resource Director, City of Waukesha, 201 Delafield Street, Waukesha, Wisconsin 53188, appeared on behalf of the City

ARBITRATION AWARD

On November 10, 2008 Local 97, Wisconsin Council 40, AFSCME, AFL-CIO and the City of Waukesha filed a request with the Wisconsin Employment Relations Commission seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Hearing on the matter was held on March 4, 2009, in Waukesha, Wisconsin. No formal record was taken. The parties submitted post hearing briefs, which were received and exchanged by April 10, 2009.

This Award addresses the termination of employee E.M., for failing to comply with the contractual residency requirement.

BACKGROUND AND FACTS

E.M., the grievant, has been employed by the City of Waukesha, as a Motor Equipment Operator, since 1990. The grievant was terminated from his employment by letter dated August 13, 2008.

The City has a residency requirement, which is reflected in the parties collective bargaining agreement, as set forth below. For many years it appears the grievant resided within the residency area, which is Waukesha County. In April, 2007, the grievant purchased a Restaurant/Tavern located in the Village of Sullivan, which lies in Jefferson County, outside the defined residency area. The restaurant has 4 bedrooms, a living area, and a dinette upstairs. At the time, the grievant sold his house in Hartland, which is in Waukesha County. It was his testimony that he moved in with his sister, who resides in Wales, also in Waukesha County. At this approximate time the grievant provided the City with his sisters address and telephone number as his residence.

On, or about April 3 2008 the City's Human Resources Department received an anonymous telephone call indicating that the grievant was not residing within the City's residency area. The employer determined to follow up on the call and initiated a review of the grievant's publically available records. That inquiry revealed that the grievant's 4 vehicles were all registered in Jefferson County. His driver's license also listed his address as Jefferson County. The City reviewed Waukesha County Court documents in which the grievant listed his address, as of 6/5/07, as Jefferson County. The City contacted the health insurance provider pharmacy, and determined that the grievant had 2 prescriptions delivered to him at the Jefferson County address.

The Corporate records on file with the state, relative to the grievant's Restaurant, list the grievant as the Registered Agent, with the Jefferson County address. The Jefferson County land records list the grievant as the owner of the Restaurant, with his address listed as the Jefferson County address.

As a result of this paper investigation the City retained a Private Investigator to determine where the grievant was actually living. The Private Investigator undertook a surveillance of the grievant commencing April 24, 2008. On April 24 the P.I. followed the grievant from work to the Jefferson County address. On the morning of April 29 the P.I. set up surveillance outside the Jefferson County Restaurant at approximately 5:45 A.M. He observed the grievant in the restaurant doing some work. He subsequently saw the grievant leave the building and followed him to a point where he concluded the grievant was headed for work.

On April 5 the P.I. set up surveillance outside the Restaurant. When he saw no activity, he terminated the surveillance and proceeded to the address of the grievant's sister. He saw no activity at that address, and terminated his surveillance. He was subsequently advised that the grievant had taken the day off.

On April 7 the P.I. set up surveillance at the Restaurant and at 5:40 A.M. reports that lights went on inside and the grievant was walking around inside the Restaurant. He observed the grievant taking out bags of trash, and then leave. The P.I. followed the grievant as he drove toward work. He terminated the surveillance when he concluded the grievant was headed to work.

On May 27, at Approximately 6:08 A.M., the P.I. set up surveillance at grievant's sisters residence. The surveillance was terminated at 7:15 when no activity was observed.

On May 28, the P.I. entered the Restaurant for a light breakfast. He observed the grievant seated at the end of the bar. When the grievant left, the P.I. initiated a conversation with the employee who waited on him. The employee indicated that the boss had left, that he worked for the City of Waukesha, and that he lived on the premises. The P.I. left, and drove to the grievant's sisters home. He did not observe anything, and left.

On May 29 and May 30 the P.I. set up surveillance at the grievant's sisters' home in the early morning, and saw no one come or go.

The grievance response summarizes a meeting that occurred on June 18, as follows:

On June 18, 2008, a meeting was held with Mr. M. and his union representative, Keith Johnson. At that meeting the Human Resources Manager explained to Mr. M. that a call had been received questioning his residency in Waukesha County. Ms. Whalen explained that the public documents obtained all carried an address of -----, Sullivan, Wisconsin which is located in Jefferson County. Mr. M. stated that he owned a bar in Sullivan and that he listed that address for convenience. He stated that he rented the living quarters above the bar to employees but that he had no rental agreements or other evidence which he could present to verify that assertion. Mr. M. denied living above the bar in Sullivan, Wisconsin. He also stated that he paid rent to his sister in Wales. When Dr. Abadi asked where he lived when he were not at work, Mr. M. stated that he lived in different places: with friends; with his sister; "all over." The City requested that Mr. M. provide whatever information he could to show that he actually resided in Wales (Waukesha County).

A follow-up meeting was scheduled for July 2, 2008. At that time the grievant provided the City with a number of documents which supported his contention that he resided within the residency area. Those documents included 8 checks made out to the grievants sister. The dates, amounts and notations of those checks are as follows:

1.	2/27/06	\$600
2.	4/7/06	\$395
3.	6/7/06	\$350
4.	6/30/06	\$500
5.	7/12/07	\$650 (rent)
6.	9/24/07	\$425 (rent)
7.	2/1/08	\$150
8.	4/5/08	\$300

Additionally, the grievant provided his voter registration, which listed his residence as his prior Hartland address, i.e. the home he had sold.

The grievant provided a letter from the Security Department of the City's healthcare provider, a statement from that healthcare provider, a paycheck direct deposit slip, a letter from the Waukesha City Attorney's office, a letter from the Jefferson County District Attorneys office, a letter from a Financial Consultant, a Wisconsin Retirement System statement, and various correspondence from the Unemployment Compensation Division, all addressed to the Wales address.

Additionally, on or about July 21, the union President provided the City with a signed and notarized statement from the grievant's sister which provides:

To Whom It May Concern:

This letter verifies that my brother E.M. took residency at (address deleted), Wales, WI effective March of 2007. He is paying \$300 monthly. Due to financial difficulties with child support and trying to establish a new business this varies at times.

Sincerely,

/s/

The City Human Resources Director, Donna Whalen testified that she was not satisfied that the feedback established that the grievant lived within the residency area. She attempted to contact the grievant's sister to follow up on the letter and her perception that many of the checks pre-dated the March, 2007 residency date set forth in the letter. Whalen contacted the grievant's sister's employer to arrange for an interview during the work day. Following that, the grievant's sister agreed to meet during a work day, but called back a few minutes later to cancel the meeting. She expressed the view that she did not feel comfortable meeting on a matter such as this during work. A second meeting was scheduled to take place at the sister's house, after work. Whalen arranged to have the local union president accompany her to the meeting. That meeting was also cancelled, when John Maglio, Staff Representative for the Union, called Whalen and told her that there would be no meeting. It was Whalen's testimony that the grievant was angry that his sister had been contacted, and that the local union president was to be present. Whalen testified that Maglio indicated that there would be no rescheduling of the meeting and no more information forthcoming from the grievant or his sister.

The City reviewed the evidence and concluded that the grievant did not live within the residency area. He was terminated by letter dated August 13, 2008.

It was the testimony of Don Roberts, City Street Supervisor, that during the winter of 2007-08 the Department could never reach the grievant at the telephone number he had provided (the number for his sisters house). The Department would call at 3 - 4:00 A.M. to attempt to contact employees to plow snow. It was Roberts' testimony that there was never an answer. Roberts testified that if the grievant was contacted during the work day about plowing he would come in.

The grievant's sister testified. It was her testimony that the grievant moved into her home around March, 2007. She indicated that he paid her when he could, that he got some mail there, and that, "at some point, he slept there". She testified that she cleaned his quarters and that he was a part of her household. She testified that some of the checks in the record represent repayments on a loan she made to the grievant. She indicated that her family screens all telephone calls. She further noted that she had provided a sworn affidavit on behalf of her brother. She testified that she was not comfortable with the manner in which Whalen approached her. She felt intimidated when Whalen went to her employer first to arrange an interview.

The grievant testified. He explained that when snow plowing calls came in, he listened to the voice messages, and then responded to the calls. He explained that he registered one of his cars in Jefferson County because the car would not pass the more stringent Waukesha County inspection. Once he registered one car in Jefferson County, he followed up by registering all of them in the same place. It was his testimony that he had his prescriptions delivered to the Restaurant because he spent many of his waking hours there working. He testified that he did not live in Jefferson County, but rather that he did live with his sister's family, in Waukesha County.

ISSUE

The parties stipulated the issue to be:

Did the Employer violate any provision of the Agreement by discharging the grievant for failing to reside within Waukesha County's geographic boundaries?

If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 2 – MANAGEMENT RIGHTS

2.01 The Union recognizes that except as specifically limited by this Agreement, the City has the right to manage and direct the work force which includes but is not limited to the right to hire, promote, layoff, demote or transfer employees, discipline or discharge employees for just cause.

...

ARTICLE 7 – PROBATIONARY PERIOD – EMPLOYMENT STATUS

7.01 Residency. Employees must, within twelve (12) months of the date of initial hire, maintain their actual physical residence in Waukesha County.

POSITIONS OF THE PARTIES

It is the position of the Union that the City bears the burden of establishing that the grievant did not reside within the residency area defined by Article 7 of the Agreement. The Union contends that the City has failed to meet its burden. The Union notes that the City began its investigation based on an anonymous tip. It proceeded to employ an inadequate surveillance that did not monitor the grievant for a continuous 24 hour period. The Union believes that the City disregarded the affidavit of the grievant's sister, which it believes to be the most persuasive evidence in the record.

It is the view of the Union that the grievant provided explanations for the documents that list Jefferson as his residence, but that the City is unwilling to adjust its mindset to fairly treat his explanations. It is the view of the Union that the City should not be allowed to discharge a 19-year employee because the employees sister did not cooperate in its investigation.

It is the view of the City that Article 7 provides the contractual definition of just cause as it is applied to residency matters. The City points to the documents that list Jefferson as the grievant's residence, and contends that they support the conclusion that the grievant did not reside within the residence area. The City points to the voter registration, and argues that the old address confirms that he grievant did not intend to make Wales his permanent address. Most of the documents sent to the Wales address are from the City or from an entity that took the grievant's address as it was provided by the City.

The City contends that the grievant was unable to provide any proof that he had renters for his Restaurant living quarters. The City notes that many of the cancelled checks provided pre date the March, 2007 date when the grievant allegedly moved in with his sister. The City further points to the testimony of the grievant's sister who testified that the grievant was repaying a loan.

The City points to the result of the surveillance as demonstrating that the grievant lived in Jefferson. The City points to the testimony that the Department could never reach the grievant by phone, as reinforcing the fact that he did not live in Wales.

DISCUSSION

The parties agree that this case turns on the question of whether the grievant resided at his sisters Wales address or had taken up residence over the restaurant in Jefferson. Both point

to the Wisconsin Court of Appeals decision in *EASTMAN V. CITY OF MADISON*, 117 Wis. 2nd 105, 342 N.W. 2nd 764 (Wis. App. 1983) as providing guidance as to what constitutes residency. Under *EASTMAN*, the determination of where a person resides requires a look at the “acts and conduct of the person.” The declaration of intent to establish residency is not conclusive, but rather is simply evidence of an “attitude of mind”.

I believe that the great preponderance of evidence relating to the acts and conduct of the grievant supports a conclusion that the grievant had taken up residency in Jefferson County. He represented Jefferson County as his address for several important documents, including his various vehicle registrations, drivers license, the Waukesha County Court system, his Corporate Restaurant records, and his business land title. His testimony offered an explanation for one car. He has either made misrepresentations of fact to the Waukesha County Court system, the State of Wisconsin (Department of Transportation and Department of Financial Institutions), and Jefferson County Land Records, or he has misled his employer as to where he resides. Either serves to undermine the credibility he brings to this proceeding.

The documents he has submitted do not provide a counterbalance. As noted by the City most documents advanced were generated from the address he provided the City as his residence. To accept them as proof of residency is, at best, circular. The voter registration lists an address that all parties agree is not the grievant’s residence. The financial consultant letter was “junk mail”. The grievant testified that he had no business relationship with the sender. The Unemployment Compensation correspondence involves this dispute, and was sent to the address provided by the grievant. It demonstrates nothing.

The letter sent by the Jefferson County D.A. is addressed to the Wales address. It responds to the address provided. It essentially stands alone. It is not persuasive in the context of the totality of documents in this record.

The grievant submitted 8 cancelled checks. Four of those checks precede the date the grievant contends that he moved into his sisters home. It is not clear why they were submitted. Two of the checks have a note that indicates they represent rent. I find them supportive of the grievants claim. One check is for \$300. This is the last check, dated April 5, 2008, and the amount corresponds to the amount referenced in the July residency affidavit supplied by the grievant’s sister. I think the checks do prove something. It appears to me that the grievant did live in his sisters’ home for some period of time.

The probative value of the checks is undermined by the fact that there are so few of them. From March, 2007 to August, 2008 is a period of 17 months. There are 4 checks. It is possible that a couple of those checks cover more than a one month period. It is possible the rent was forgiven for much of the period. There are simply not enough checks to provide a compelling record of payments that document the claim that the grievant lived with his sister through the period in question. The grievant’s sisters testimony that some of the checks represent repayment of a loan also compromises their value as presumptive rent receipts.

The grievant advised the City that he rented the upstairs of the Restaurant. There were no records of that relationship produced. Such records would be tax records. No statement or testimony of those individuals was offered.

A good deal of circumstantial evidence points to Jefferson County as the grievants residence. The grievant had his prescription drugs sent to the Jefferson address. The Department was unable to reach the grievant by phone in the middle of the night. The explanation that the family screens all calls, and that the grievant listened to all the messages, and then responded, seems unlikely. It is more plausible to believe that the messages were retrieved and passed along to the grievant.

The report of the P.I. supports a finding that the grievant was physically domiciled in Jefferson County. I agree with the Union that the report was less than comprehensive. However, all of the observations in Jefferson are consistent with the conclusion that E.M. lived in the Restaurant. None of the observations in Wales support the contention that he lived there. The statement from the waitress is damning. I recognize the statement to be hearsay in this proceeding. However, there is no indication in the record that the grievant ever attempted to contradict the statement. The grievant, facing discharge, was given an opportunity to come forward with evidence. The waitress was in his employ. If her statement was misunderstood or the product of investigator error, I would think some correction would have been forthcoming.

The grievant testified. His testimony provided only partial explanations of the record evidence. Much was left unexplained. Some of his testimony, i.e. relating to the snow plowing calls, lacked credibility.

The grievants sister provided the City with a statement in July and testified in this proceeding. The affidavit uses the term "residency", without definition. The term is lifted from the title of Article 7 of the contract, without elaboration. The document goes on to list a rent, and then to modify the rent reference. The probative value of the affidavit is undermined by the subsequent refusal to meet with Whalen.

I accept the testimony that the grievant's sister did not want to meet with Whalen at her work place during working hours. I am further prepared to accept that the sister was offended that Whalen would contact her boss to arrange the meeting. I accept further that the grievant and/or his sister found the local union president to be an unacceptable participant in the meeting. With all that said, Whalen's request to talk with E.M.'s sister was reasonable under the circumstances. There was a good deal of evidence indicating the grievant did not live with his sister. The affidavit is conclusory in its reference to residency. Whalen was prepared to have a Union representative as the third party observer. She was willing to meet at the sisters' home, after work hours.

I do not understand how efforts to convene such a meeting could be summarily rejected. This meeting provided the opportunity to actually discuss the facts surrounding the grievant's residence.

The testimony offered by the grievant's sister is the most compelling testimony advanced by the Union. Her testimony was that E.M. lived in her home. She did indicate that "at some point, he slept there" and she further indicated that her brother "has a crazy schedule". She indicated that she did not keep track of him. Based upon her testimony, I believe that the grievant did live in his sisters home, either for a while or intermittently. I do not believe that her testimony supports a conclusion that the grievant lived in her household as his primary residence for the 17 month period in question.

Based upon the record as a whole, I believe the grievant used the Restaurant as his primary residence. His residence was not within the area set forth in Article 7. His failure to reside within Waukesha County constitutes just cause for discharge, within the meaning of Article 2.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 7th day of August, 2009.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

WCH/gjc
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