STATE OF WISCONSIN
WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN PROFESSIONAL POLICE ASSOCIATION,
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION

vs.

CITY OF MERRILL

Case ID: 305.0000
Case Type: MA

(Robert Caylor Residency Grievance)

AWARD NO. 7920

Appearances:

Andrew D. Schauer, Staff Attorney, Wisconsin Professional Police Association, 660 John Nolan Drive, Suite 300, Madison, Wisconsin, appearing on behalf of Wisconsin Professional Police Association, Law Enforcement Employee Relations Division.

Stephen G. Bohrer, Attorney, Ruder Ware L.L.S.C., 402 Graham Avenue, P.O. Box 187, Eau Claire, Wisconsin, appearing on behalf of the City of Merrill.

ARBITRATION AWARD

The Wisconsin Professional Police Association, Law Enforcement Employee Relations Division (hereinafter "Association") and the City of Merrill (hereinafter "City") are parties to a collective bargaining agreement that provides for final and binding arbitration of unresolved grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission provided a panel of arbitrators from which the undersigned was selected to decide the instant grievance. A hearing on that grievance was held in Merrill, Wisconsin, on April 21, 2015. The hearing was transcribed. The parties filed briefs and reply briefs whereupon the record was closed on August 19, 2015. Having considered the evidence, the arguments of the parties, and the record as a whole the undersigned issues the following Award.

ISSUE

The parties agreed there were no procedural issues in dispute but were unable to agree as to the substantive issue.

The Union frames the issue as:

> Is the Employer's ongoing order that Officer Caylor establish residence within a 15 mile radius of the City of Merrill's jurisdictional boundaries in violation of the Collective Bargaining Agreement and / or applicable state law? And if so, what is the appropriate remedy?

The City frames the issue as:

> Is the Employer's ongoing order that Officer Caylor establish residence within a 15 mile radius of the City of Merrill's jurisdictional boundaries in violation of the Collective Bargaining Agreement?

Although at hearing the Association maintained that there was a potential impact of § 66.0502, Stats., on this grievance, it subsequently concluded otherwise. With both parties in agreement that 2013 Wisconsin Act 20 is inapplicable to this case, I accept the issue presented by the City.

BACKGROUND AND FACTS

Grievant Officer Robert Caylor was hired by the City on August 27, 2012, at which time he resided in Tomahawk, Wisconsin. Caylor was subject to a one-year probationary period. During the interview process, Caylor was informed that the City had a residency requirement that he would be expected to comply with following completion of his probationary period.

Article 3 of the parties' 2012-2013 collective bargaining agreement provided that:

> All Fire Department Employees, including special paid on call personnel hired after January 1, 2008, shall reside within a 10-mile radius of Fire Station #1, 701 E. 1st Street, Merrill, WI no later than 90 days after the completion of their probationary period.

Effective July 1, 2013, § 66.0502, Stats., declared that any residency requirement in effect as of July 2, 2013 was inapplicable and could not be enforced. The law created an exception for law enforcement and fire personnel and allowed local governmental units to require that they reside within 15 radial miles of the jurisdictional boundaries of the city.

Caylor successfully completed his probationary period in August 2013 following which he continued to live in Tomahawk, Wisconsin. Caylor's residence was located 19 miles from the closest City jurisdictional boundary.

By City Council action on September 13, 2013, the City Policy and Procedure Manual addressing residency was modified as follows:

> 4-4 RESIDENCY.
>
> (a) Residency requirements apply to all law enforcement personnel, fire personnel and the Utilities Superintendent, hired after July 1, 2013. Such personnel shall reside within 15 miles of the jurisdictional boundaries of the City of Merrill no later than the end of their probationary period.
>
> (b) Any change in residence for any law enforcement personnel, fire personnel and the Utilities Superintendent shall be in conformity with the above residency requirements.

Res. #2329 9-10-2013.[1]

By at least August 2013, the parties were negotiating the 2014-2015 collective bargaining agreement. As a part of those negotiations, the parties addressed the residence language contained in Article 3, the terms of which were inconsistent with the § 66.0502, Stats.

During November 2013, Caylor communicated to City of Merrill Police Chief Kenneth Neff that he was looking to purchase a residence in the City. Caylor ultimately purchased a residence that was located just one block from his previous home in Tomahawk,

[1] The City policies contained a residency requirement that was modified by the September 10, 2013 action of the City Council. Caylor's letter to the Personnel and Finance Committee makes reference to two employees, a City park and recreational director and a police officer, who were exempted from the residency requirement. While the record does not definitively establish that the City has granted exceptions to the residency requirement in the past, Caylor's letter and the recommendation that Caylor request an exemption from the Personnel and Finance Committee before filing a grievance suggests the residency requirement had previously not been strictly enforced.

Wisconsin. Caylor's newly purchased residence is 19 miles from the City's jurisdictional boundaries.

Effective January 1, 2014, the language of Article 3 was modified to read:

> All full-time employees hired during the term of this contract, shall reside within a 15-mile radius of the City of Merrill jurisdictional limits (boundaries), no later than 60 days after the completion of their probationary period.

On or about July 18, 2014, Neff sent a letter to Caylor which included a directive that he establish residency within a 15-mile radius of the City's jurisdictional boundaries by August 1, 2014. The letter further stated that if Caylor failed to do so, he was subject to termination.

On July 28, 2014, Caylor established residency within the City limits, paying $300 per month in rent. Caylor advised Neff of his change of residence by letter dated July 30, 2014.

Caylor filed a grievance on October 7, 2014, asserting that the Neff's directive that he establish residency within a 15-mile radius of the City of Merrill jurisdictional boundaries "is in violation of the provisions of Article 3." The grievance described, in relevant part:

> Your Grievant, Officer Robert Caylor, was hired on 08/27/2012 and his 1-year probation was successfully completed 08/27/13. During the probationary period 2013 WI Act 20 (including residency changes) was enacted 06/30/2013, published 07/01/2013, and any residency restriction that conflicted with Act 20 that a local government unit had in effect on 07/02/2013 became no longer in effect, and could not be enforced. Subsequently, the City and the Association entered into the collective bargaining process. The parties bargained a new residency provision as described above, the newly bargained provision became effective on January 1, 2014. The new residency provision clearly applies only to employees hired on or after January 1, 2014. There is no other effective residency requirement which curtains the residency of the Grievant.

The requested remedy was revocation of Neff's directive to Caylor, make Caylor whole for any costs directly associated with compliance of Neff's directive, and order the City to cease and desist.

DISCUSSION

This is a contract interpretation case. The interpretative process involves ascertaining the parties' intended meaning of the terms and provisions of a collective bargaining agreement. A contract term is ambiguous if it is susceptible to more than one meaning. ELKOURI & ELKOURI, *How Arbitration Works*, 6th ed., p.434 (2002). If the words are plain and clear and convey one distinct idea, then it is unnecessary to resort to interpretation or extrinsic evidence. *Id.* Alternately, if the language is ambiguous, then extrinsic evidence and the principles of contract and statutory interpretation are utilized and serve as guides to determining the parties' intent.

This dispute arises out of the meaning of the phrase, "hired during the term of this contract." The phrase is found in ARTICLE 3 – RESERVATION OF RIGHTS of the parties' 2014-2015 collective bargaining agreement:

> All full-time employees hired during the term of this contract, shall reside within a 15-mile radius of the City of Merrill jurisdictional limits (boundaries), no later than 60 days after the completion of their probationary period.

The City maintains that extrinsic evidence establishes that the parties have differing views of what the phrase means and, as a result, the language is ambiguous. I disagree. The fact that the parties disagree as to the meaning of the language is separate and distinct from whether the language is ambiguous or unambiguous.

In contrast, the Association maintains that the language is clear and unambiguous. I concur. This is common language in collective bargaining and there is no reason not to give the words in this phrase their ordinary and popular meaning. The Restatement (Second) of Contracts provides:

> In the absence of some contrary indication, therefore, English words are read as having the meaning given them by general usage, if there is one. This rule is a rule of interpretation in the absence of contrary evidence, not a rule excluding contrary evidence.

Bornstein, Gosline, Greenbaum, *Labor and Employment Arbitration*, 2nd ed., p.9-10 (2002).

Looking to the contract language in dispute, the sentence starts by clarifying that the conditions contained in the sentence are applicable to only full-time employees. The next clause, "… hired during the term of this contract" further limits to whom the remainder of the sentence is pertinent, expressly those hired by the City during the specific time period. "[T]he term of this contract" refers to the parties' current collective bargaining agreement, the

2014-2015 labor agreement, which covers the time period between January 1, 2014 and December 31, 2015. Thus, the language is germane to only full-time employees hired between January 1, 2014 and December 31, 2015. The remainder of the sentence creates a 15-mile residency radius with a geographic measuring point and provides that full-time hires must comply within 60 days following probation. This language is not susceptible to more than one meaning. Rather, it conveys one idea and, while parole evidence can be used to establish context, when the language of the agreement is clear, the contract is entitled to enforcement according to the plain meaning of its terms.

The City argues that "this contract" refers to all labor agreements entered into by the parties since the first time the residency language was negotiated. The City is therefore asking that I conclude that "this agreement" means the stacking of the 2008-2010 agreement, the 2011 agreement, the 2012-2013 agreement and the 2014-2015 agreement. I start by pointing out "this agreement" is singular, not plural. Next, no objective reading of the two written words "this contract" allows for the interpretation the City posits. Finally, my authority arises out of Article 17, Section C, which provides:

> C. If the grievance is not settled with the Committee or the Police and Fire Commission the aggrieved party may within thirty (30) days of the answer from either commission or committee, submit a grievance to the Wisconsin Employment Relations Commission for its staff to appoint an arbitrator. The decision of the arbitrator will be final and binding on all parties, except for judicial review, pursuant to statute.

Although this labor agreement does not contain standard boilerplate language limiting the arbitrator's right to add to or modify the agreement, I respect the integrity of the negotiated document achieved by the parties through give and take at the table.

Even if I look to the bargaining history, I reach the same conclusion. During the 2014-2015 bargain, the parties modified the language of the residency requirement by changing the residency distance and the location from which the distance would be measured. The residency language is not lengthy; it is one sentence containing 35 words, and the parties discussed it during at least three negotiating meetings. Both the City and the Association called a witness to testify as to what transpired during the bargain. Ultimately, I credit Randy Ingram's testimony and his contemporaneous notes wherein the Association clarified that the residency language "… is bargainable, but we are starting from nothing." Tr.21, referring to Assoc. Ex.3. While I believe Ingram's statement is susceptible to a more global declaration in response to the legislative action declaring that any residency requirement in effect on July 2, 2013 could not be enforced and therefore the parties were starting with a blank page as compared to a statement articulated in reference to solely "new hires," the result is the same.

The City argues that finding in favor of the Association would lead to an "absurd" result. Absurdity, like fairness and commonsense, are subjective evaluations and not the basis for my decision. Rather, the basis of my authority is the written labor agreement, and as Arbitrator J. Scott Tharp explained in *Safeway Stores, Inc.*, 85 LA 475 (8/5/85):

> Thus, the clear meaning of language may be enforced even though the results are harsh or contrary to the original expectations of one of the parties. In such cases the result is based upon the clear language of the contract, not upon the equities involved. Therefore, if the contract is clear, logic and equity will be cast aside, regardless of the result.

Moreover, I firmly subscribe to the axiom that one cannot gain through arbitration what they did not achieve at the bargaining table. The City asks that I change the language of the agreement. I am not only unwilling to do this because it is beyond the scope of my authority, but it is the responsibility of the parties to maintain and protect the integrity and relevance of the labor agreement, not the arbitrator.

The remedy requested by the Association is $300 per month for the time period August 2014 to the present. This monthly amount represents the rent Caylor testified he paid to his mother to reside in her Merrill, Wisconsin, residence. The record in this case provides that Caylor and his mother purchased the Tomahawk residence on Spruce Avenue. Given this joint ownership arrangement and the need for transparency while recognizing financial privacy, I conclude that the appropriate remedy is to remand this matter to the parties to discuss and agree on the remedy and the implementation of same. I will retain jurisdiction for a period of time necessary to resolve disputes over the remedy if the parties cannot agree. The parties will have 60 days to either invoke the retained jurisdiction or request an extension of the period of retained jurisdiction.

On the basis of the foregoing, and the record as a whole:

AWARD

1. Yes, the City's ongoing order that Officer Caylor establish residence within a 15-mile radius of the City of Merrill's jurisdictional boundaries is in violation of the collective bargaining agreement.

2. The parties are to meet and confer in an effort to agree on the appropriate remedy.

3. The arbitrator will retain jurisdiction over this grievance for a period of time necessary to resolve any disputes over the remedy, should the parties be unable to reach

agreement. If neither party invokes the retained jurisdiction of the arbitrator or requests an extension of jurisdiction within 60 days of the date of this Award, the arbitrator will relinquish jurisdiction.

Signed at the City of Rhinelander, Wisconsin, this 25th day of January 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Lauri A. Millot, Arbitrator