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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

STATE OF WISCONSIN
WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Interest Arbitration Between

CITY OF MADISON

and

AFSCME LOCAL 60

Arbitrator's Decision and Award

Case 174
No. 50402
INT/ARB - 7157
Decision No. 28147-B

SCOPE AND BACKGROUND

Interest Arbitration

Under Wisconsin Statutes §111.70, Employment Relations, municipal corporations are required to bargain collectively in order to reach voluntary agreement with their employees on terms and conditions of work to be performed for said municipal corporations. If voluntary agreement cannot be achieved through negotiation, the Statute provides for an impartial tribunal through which the interests of the public, the employer and its employees may have their respective rights and obligations adjudicated.

To this end the City of Madison, Wisconsin (hereafter, "the Employer") and one of its organized bargaining units of employees, Local 60 of the American Federation of State, County and Municipal Employees (hereafter, "the Union") commenced negotiations for a labor contract to succeed that which had been governing the labor relations of the parties during the years 1992-93 (hereafter, "the Contract").

After several of such negotiation sessions, the Union petitioned for arbitration as it is authorized to do under that statute. Thereafter, pursuant to said statute, an investigator was

dispatched to verify that the parties were at impasse and he determined that they were.

It turned out that all of the issues of disagreement had been resolved but one. Again, following the terms of Wisconsin Statutes §111.70, the parties then submitted written final offers to the Wisconsin Employment Relations Commission enunciating just what it was they were seeking or offering.

Thereafter, the WERC ordered interest arbitration to be conducted and the parties selected Milo G. Flaten of Madison, Wisconsin as arbitrator. He was to determine which of the final offers of the parties was the more reasonable.

An interest arbitration hearing was held on Tuesday, March 21, 1995 in Madison, Wisconsin. During the hearing the parties presented numerous exhibits and gave testimony in support of their certified final offers. The testimony was recorded by a professional court reporter who prepared written copies of the transcript of testimony for the parties and for the arbitrator to study. Thereafter, the parties submitted written briefs and reply briefs to the arbitrator enunciating their positions on their certified final offers.

Final Offers on the Issue in Dispute

The sole matter in dispute between the parties is the issue of City residency of Union members as a condition of employment.

The Employer's final offer would add the following language to the contract:

"A. All members of Local 60 who buy a residence in the City of Madison will be granted a $500.00 Residence Purchase Assistant [sic] Payment.

This payment will be made only to employees who have been permanent employees for at least 13 months. Unpaid leaves will not count.

This payment is to provide assistance for the purchase of homes in which the employee will establish their primary residence.

B. After completion of a probationary period, employees covered by this Labor Agreement shall not be restricted in their right to choose their place of residence.

C. Any permanent employee who has a primary residence outside of the City of Madison will not be eligible for any longevity payment in excess of six (6) percent."

The Union's final offer would add the following language to the Contract:

"1.05 RESIDENCY: Employees covered by the terms of this Labor Agreement shall not be restricted in their right to choose their place of residency."

Under the statute the arbitrator is obliged to select one or the other of the final offers and may not add to or subtract from same.

THE FACTS

The Employer is a municipal corporation, the capital of the State of Wisconsin with a population just under 200,000 people. The Union represents three bargaining units working for the Employer: a general employee unit, a professional librarian unit and a para-professional librarian unit (the librarian units are not involved in this dispute). The general unit of the Union has employees working in virtually all departments of the municipality.

It is also the largest bargaining unit in the Employer's work force representing more than 775 employees covering clerical workers, blue-collar workers, professional employees, seasonal employees and crossing guards.

The Union has been subject to a residency requirement since its inception. That is, all of its members are required to reside within the Employer's municipal boundaries. The residency requirement is not covered by the Contract but rather is set forth in the Employer's General Ordinances and has been since 1956.

The Union has proposed eliminating the residency requirement of the ordinance many times during the numerous rounds of annual contract negotiations dating back to at least 1968. All of the Employer's non-Union employees (over 815) are also required to comply with the residency ordinances and to live within the Employer's boundaries.

Four of the ten organized bargaining units working for the Employer are not bound by the residency requirement. These units are the unionized employees in the Police Department, Fire Department, Street Department and the transit unit (bus drivers). Forty-four percent of the Employer's 2,100 total organized employees are required to maintain a residence within the boundaries of the Employer's municipal corporation as a condition of employment, 56 percent are not.

POSITIONS OF THE PARTIES

The Union

The Union takes the position that its members have the same right to choose their place of residence as do the majority of other represented municipal employees. It only seeks equity and fairness, it goes on, that which the Employer has voluntarily granted to other employees who work side by side with those represented by the Union.

On the other hand, argues the Union, the Employer's final offer proposes to create a non-uniform, confusing and punitive policy that is designed to defeat any choice of residence. Rather than eliminate the requirement as it has for other employees, the Union continues, the Employer wants to significantly reduce the pay of senior employees who choose, for whatever reason, to reside outside of the Employer's municipality and to continue to impose a residency requirement on others.

In its final offer, the Union argues, the Employer proposes to treat employees represented by the Union significantly different from the other bargaining units by capping the longevity pay of Union employees that choose to reside outside the City. Senior employees, the Union points out, earn an increasing proportion of the pay given to all represented City employees.

The residency requirement has been steadily eroded in recent years, the Union avers, to the point where the majority of the represented employees are not now subject to any requirement.

In the first two waivers of its policy, the Union points out, the Fire Fighters Union and the Police Officers Association, the Employer voluntarily negotiated a waiver of its policy when it granted a "me too" provision in those contracts. By such a provision, the Union goes on, the Employer agreed that if any other of its employees became exempt from a residency requirement, the employees represented in those bargaining units could become exempt as well.

The Union then goes on to relate how the Employer's transit system was operated by a private corporation not covered by the Municipal Employment Relations Act prior to 1983. As "private sector" workers, the Union continues, the transit employees were not subject to any residency requirement. Thereafter, the Union claims, the Employer and the transit workers union voluntarily reached a collective agreement which exempted certain non-resident employees from the rule. After that agreement was reached, the Union goes on, the fire fighters and police moved to enforce the "me too" provisions of their contracts.[1] Following that, the Public Works employees and the Employer went to arbitration and got a contract which also eliminated the residency requirement leaving this bargaining unit as the only one which is forced to reside in the City.

Union employees work side by side with employees who are exempt from any residency requirement, the Union argues, and there

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[1] Neither the Police nor Fire Department cases went to arbitration as Interest Arbitration cases under Sec. 111.70, Wis. Stats., but were decided through grievances.

is no reasonable basis for the Employer to treat this unit's employees differently from other employees.

Furthermore, the Union declares, in recently undertaking a massive public works project known as the Monona Terrace Convention Center, the Employer has agreed that all employees working at this facility are exempt from the Employer's city residency requirements.

All in all, the Union avers, the Employer's policy on residency is so fractured as to be virtually meaningless.

With regard to imposing a cap on the longevity pay for non-residents, the Union points out that increases in pay at regulated milestones for longevity is a long-standing benefit that has been negotiated and left unchanged in the Contract for at least 25 years. Yet in its final offer the Employer now proposes to cap longevity pay for non-residents at 6 percent simply because those employees choose, or are forced by circumstance, to reside outside the Employer's municipality.

The Employer's final offer simply makes no sense, declares the Union. For under it members can live outside of the municipality for the first 13 years of employment without a penalty. Thereafter, when longevity pay exceeds 6 percent, they must move into the municipality in order to receive their entitled pay increases. This proposal, the Union argues, has the effect of penalizing the most senior, dedicated and committed career employees.

Furthermore, the Employer has no external comparison for its final offer because no other communities impose any kind of wage or benefit penalty for non-residency, argues the Union. Not only that, the Union points out, the other large units which already have negotiated their exemption from the residency requirement did so without providing any quid pro quo. Despite what the Employer declares, the Union argues, elimination of the residency requirements for police, fire and transit workers were the products of voluntarily negotiated settlements.

The Employer is obligated to establish some justifiable reason if it intends to depart from a pattern of settlement involving residency, declares the Union. This the Employer has not done. In fact, the Union goes on, the Employer's offer is ambiguous and ill-conceived. Its labor negotiator who participated in the drafting of the final offer could not even explain the meaning and scope of it. Seasonal and hourly employees are not subject to it yet permanent Union employees are, points out the Union. Moreover, the Employer did not even know how its 50 crossing guards would be affected by their proposal.

There is no logical reason to believe that resident employees are more knowledgeable about the City than non-residents, argues the Union. Moreover, there will not be a mass exodus from the City if the requirement is lifted. For evidence shows that only 28 percent of employees now without the residency requirement have moved outside the City whereas the vast majority of them, 92 percent, live in nearby Dane County communities.

The Union next declares the detrimental effect that the residency requirement has on employees who are subject to it is clear. It restricts their ability to choose where they and their families will reside during their off hours. It would impose special hardships on employees who may need to move -- child care, family ties, school and neighborhood ties which have been established elsewhere.

Most importantly, argues the Union, the Employer has provided no evidence that it has suffered any adverse effects by permitting police officers, fire fighters, public works and transit employees to reside outside the City.

The Employer has not produced a shred of evidence to support the notion that Union employees should be treated differently from those organized employees. Yet the Employer wants to impose a harsh penalty -- a significant wage cap -- on its most experienced and dedicated employees, if they should decide for whatever reason to make their home outside the Employer's municipality.

The Union finally urges that its final offer is most consistent with the criteria which is set forth in the statutes to determine the reasonableness of the final offers.

The Employer

The Employer takes the position that its final offer is the more reasonable. In fact, it points out that this unit, the largest of all its bargaining units, has been subject to the residency ordinance since its inception. The residency requirement, continues the Employer, is not covered by the Contract

but rather is set forth in the General Ordinances where there has been a residency requirement since at least 1956.

Its final offer, urges the Employer, reflects the concerns of both parties to this dispute. It not only reflects its desire to maintain a residency requirement but also provides employees with the opportunity and flexibility to live outside the municipal boundaries if they so choose.

Thus, the Employer argues, its final offer would make residency purely voluntary. Additionally, if an employee purchases a residence within its corporate boundaries, that employee would be granted a $500 assistance payment. The only limitation to its final offer, argues the Employer, is that an employee voluntarily choosing to move outside the municipal boundaries would be subject to restrictions on longevity pay. That limitation, avers the Employer, would be imposed as an incentive to encourage employees to remain in the municipality.

Furthermore, the Employer argues that its final offer is a compromise as opposed to the "all or nothing" position of the Union. While it feels an employee remaining in the City would benefit from the long-term growth of the City, the Employer nevertheless would give the employee an opportunity to choose to move outside the boundaries. In other words, the Employer goes on, its final offer <u>does not</u> prevent an employee from living outside of the City's boundaries. It simply provides opportunities and encouragement for choosing to participate in the growth and

prosperity of the municipality not only as an employee but also as a citizen.

The Employer next declares that to maintain the internal consistency demands of all of its employees, it must continue the residency requirement for this bargaining unit. It points out that a majority of the bargaining units still require a residency within the City and that all non-represented and various hourly employees are also required to maintain residency within the municipal boundaries. It then points out the Police Supervisory unit which recently chose to remain subject to the requirement.

Those bargaining units which are currently exempt from the residency requirement are distinguishable from the one at hand, argues the Employer. It then goes on to point out how it got backed into exempting the police and fire units through the seemingly innocuous "me too" clauses that it granted back in the 1970's. This was because the bus drivers of the City-owned Madison transit system were declared by the National Labor Relations Board to be public employees. For this reason, the Employer continues, it became subject to the requirements of the Urban Mass Transit Act which bestows federal grants on municipalities. Because the residency issue of its bus drivers endangered receipt of federal funds, it, the Employer, was in effect stripped of its authority to require residency for them. Then, the Employer goes on, because of the two "me too" clauses inserted into the contracts for the police and fire units, it was required to grant residency exemptions to those two units also.

Thus, the Employer continues, when the Street Department union requested exemption from the residency requirement at its interest arbitration proceedings, the arbitrator felt the internal comparables which preceded did not give him any choice but to eliminate the residency requirement for the Street Department unit.

But in this case, however, the Employer avers that Union employees can either stay within the municipality or move out without penalty under its final offer. It is only after working for 13 years, the Employer continues, that his/her decision is impacted.

Moreover, all bargaining unit employees are currently residents of the City. As a result, argues the Employer, no employee should be markedly discomfited by a continuance of the residency requirement.

On the other hand, argues the Employer, the Union has been uncompromising in its final offer when it proposes a complete elimination of the residency requirement. For this reason alone, the Employer urges, its final offer is the more reasonable of the two.

Furthermore, the Employer declares, its final offer reflects and protects the interests and welfare of the public who also must be considered under the statute. For example, requiring residency provides social and financial stability to communities, and financial stability amounts to internal reinvestment.

The Employer then points out that every employee hired or promoted in this unit knows in advance about the residency

requirement so he/she cannot complain about a violation of his/her rights.

Furthermore, strong and convincing public support exists for the maintenance of residency requirements for public sector employees. What sort of disturbing message, asks the Employer, do employees send municipal residents when they say they don't want to live in the city, when they say they want to earn their living from the municipality but don't see the city as fit to live in?

By way of comparability, points out the Employer, the ten largest cities of the State of Wisconsin support the continued maintenance of a residency requirement. These cities, including Milwaukee, Green Bay, Racine, Kenosha, Appleton, West Allis, Waukesha and Eau Claire, all have residency requirements for their employees. Only Oshkosh has no such requirement, points out the Employer.

The Employer concludes by reiterating that its final offer contains compromise, is pivotal to the overall growth and stability of the municipality, has balance between the competing interests at stake, compares favorably with the internal units of the municipality, with the comparable cities of the State, protects the interests and welfare of the public and is simply more reasonable than the rigid "all or nothing" final offer of the Union.

DISCUSSION

By studying the evidentiary material contained in the hundreds of pages in the Employer's and Union's exhibits, the multitude of contracts governing other municipalities proffered by both sides,

the legal authorities cited, and the conflicting testimony from witnesses, it's easy to lose sight of the fact that the law has specifically set forth factors which an arbitrator must take into consideration in his decision. Of course not all of these factors necessarily come into play in this case. Because the sole issue pertains to mandatory domicile within the City, it eliminates such statutory considerations as consumer prices, vacations, compensatory time off, holiday pay or the ability of the municipality to bear the cost. On the other hand, comparisons with other municipal employees both within and without the Employer's city are always important considerations. This case is no exception. In this regard internal comparables with other City units have made the Employer's arguments rather tenuous. For over half of the Employer's organized workers have been exempted from the long-standing ordinance. This clear-cut comparison advantage clearly outweighs the moderate edge the Employer might claim by way of comparisons to other Wisconsin cities.

Despite that advantage this observer cannot ignore the very recent decision involving the City of LaCrosse.[2] There, like in the instant case, the residency requirement has failed to make it difficult to recruit, has not resulted in turnover in the work force and there are substantial numbers of applications for openings from outside the city from individuals who are aware of the residency requirement.

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[2] Arbitrator David Johnson, no case number as yet assigned.

Furthermore, this observer agrees with the concept held by most arbitrators that where possible residency requirements should be changed through bargaining, not imposed by an arbitrator. City of St. Francis, Dec. No. 26577; Manitowoc, Dec. No. 14793; LaCrosse, supra.

There is nothing in the arbitration statute which requires equality from bargaining unit to bargaining unit. Other factors such as the interests and welfare of the public are possibly even more important. In this regard, this observer agrees that a residency requirement is sound public policy which affirms an employee's commitment to public employment in general and, specifically, within the city. Moreover, to have employees living outside the City sends a certain message to taxpaying citizens who might contemplate moving.

Another factor traditionally taken into consideration in the determination of interest cases is bargaining history. At first blush it would appear that the Employer's steadfast determination to compel residency has crumbled and become progressively weaker as the other internal bargaining units have achieved waivers of the requirement in their contracts. Granting the waiver to one justifies granting it to another. But a close examination of the facts shows that the City did not voluntarily agree to waive the police and fire unions' exemptions. The mistake the City made was in innocently agreeing to the "me too" provisions six years before the bus drivers were declared by the NLRB to be public employees. When that happened the Employer faced the possibility that Urban

Mass Transit Funds might go down the drain if the residency requirement was continued. True, the Employer did not have to buy the bus company. But it did and thereafter it was clear that receipt of federal grants was threatened by a change in the labor contract. Therefore, for all intents and purposes the Employer was stripped of its authority to require residency for the bus drivers. Then the "me too" clauses left the Employer open to grievances from the Police and Fire units.

Nevertheless, the Employer's resolution on the subject of residency did not fall without a fight. In fact, in view of the trips the Employer made to Circuit Court, Courts of Appeals and to the Wisconsin Supreme Court it seems to this observer that the Employer only relinquished its residency requirements after drawn-out fights, not voluntarily.

Be that as it may, the single most important factor to be taken into consideration in reaching an ultimate decision is that of reasonableness. Here, the Employer reluctantly abandoned its 39-year policy. Instead, it compromised on its rigid requirement when it partially granted the Union's request that its members not be restricted in their right to choose the place of residency. Admittedly, it did so at a rather stiff price. Capping off a long-term employee from longevity pay after the sixth step is a severe sanction for an employee to pay in exchange for a residence change. It should be noted, however, that the Employer's policy has been in effect even longer than the longevity benefit has.

The Employer has tendered an olive branch. While it is a branch bereft of much foliage, it still is an offer of conciliation. On the other hand, the Union has remained steadfastly rigid in its demand. For this reason I am therefore of the opinion that the Employer's position is the more reasonable one.

AWARD

It is the decision of the arbitrator that the language found in the Employer's final offer is to be added to and incorporated without modification in the 1994-95 Labor Contract between AFSCME Local 60 and the City of Madison.

Dated: July 1, 1995.

Milo G. Flaten

Milo G. Flaten, Arbitrator