BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 1075, AFSCME, AFL-CIO	Case 100 No. 45537 MA-6638
and	
CITY OF WISCONSIN RAPIDS (CITY HALL)	

Appearances:

Mr. Guido Cecchini, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2249 College Avenue, Stevens Point, Wisconsin 54481, and Lawton & Cates, S.C., 214 West Mifflin Street, Madison, Wisconsin 53703-2594, by Mr. Richard V. Graylow, on brief, appearing on behalf of the Union.

Ruder, Ware & Michler, S.C., Attorneys at Law, 500 Third Street, Wausau, Wisconsin 54402-8050, by Mr. Dean R. Dietrich, and Mr. Ken Hill, City Attorney, City of Wisconsin Rapids, appearing on behalf of the City.

ARBITRATION AWARD

Local 1075, AFSCME, AFL-CIO, hereafter the Union, and the City of Wisconsin Rapids, hereafter the City or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission, hereafter Commission, to appoint a staff member as single, impartial arbitrator to resolve the instant grievance. On May 6, 1991, the Commission appointed Coleen A. Burns, a member of its staff, as Arbitrator. Hearing was held on July 9, 1991 in Wisconsin Rapids, Wisconsin. The hearing was transcribed and the record was closed on November 5, 1991, upon receipt of written argument.

ISSUE:

The Union frames the issue as follows:

> 1. May the City vacate the position in question in light of the collective bargaining agreement and if so . . . .
>
> 2. . . . Was Ms. Jensen-Garrells a resident of the City at the time of vacation?

The City frames the issues as follows:

> Whether, with respect to the Grievant, the City's enforcement of the residency requirement, as embodied in the City Ordinance, violated the terms of the Collective Bargaining Agreement? If so, what is the appropriate remedy?

The undersigned frames the issue as follows:

> Did the City violate the collective bargaining agreement when it enforced the residency ordinance against the Grievant?

RELEVANT CONTRACT LANGUAGE

AGREEMENT

> THIS AGREEMENT, made and entered into at Wisconsin Rapids, Wisconsin, pursuant to the provisions of Section 111.70, Wisconsin Statutes, by and between the City of Wisconsin Rapids, a municipal corporation, as municipal employer, hereinafter referred to as the "City" or "Employer", and the Wisconsin Rapids City Employees Local 1075, American Federation of State, County and Municipal Employees, AFL-CIO, hereinafter referred to as the "Union".
>
> WITNESSETH:
>
> WHEREAS, both parties to this Agreement are desirous of reaching an amicable understanding with respect to the Employer-Employee relationship which exists between them and to enter into a complete Agreement covering rates of pay, hours of work, conditions of employment, and incidental matters respecting thereto; and
>
> WHEREAS, the parties do hereby acknowledge that this Agreement is the result of the unlimited right and opportunity afforded to each of the parties to make any and all demands and proposals with respect to the subject of rate of pay, hours of work, conditions of employment, and incidental matters respecting thereto; and
>
> WHEREAS, it is intended that the following Agreement shall be an implementation of the provisions of Section 111.70, Wisconsin Statutes, consistent with the legislative authority which devolves upon the Common Council of the City of Wisconsin Rapids and the Wisconsin Statutes; and
>
> WHEREAS, it is intended by the provisions of this Agreement that there be no abrogation of the

duties, obligations, or responsibilities of any agency or department of City government which is now expressly provided for respectively by the State Statutes and the ordinances of the City of Wisconsin Rapids, except as expressly limited herein; and

WHEREAS, it is intended by the parties hereto that the Employer-Employee relationship which exists now and has heretofore existed by and between the City and members of the Union, who are employed by the City, shall continue to be the same in the event this Agreement is terminated or by virtue of its terms becomes terminated.

. . .

ARTICLE 3
MANAGEMENT RIGHTS - CONTRACTING AND SUBCONTRACTING

A. The Union recognizes that the management of the City of Wisconsin Rapids and the direction of its working forces is vested exclusively in the City, including, but not limited to, the right to hire, suspend or demote; discipline or discharge for proper cause; to transfer or lay off because of lack of work or other legitimate reasons; to determine the kind, type and quality of service to be rendered to the City; to determine the location of the physical structures of any division or department thereof; to plan and schedule service and work programs; to determine the methods, procedures and means of providing such services; to determine what constitutes good and efficient City service, subject to the terms of this Agreement. Any unreasonable exercise of the Management's rights by the City as set out in this paragraph may be appealed by the Union through the grievance procedure.

. . .

ARTICLE 4
GRIEVANCE PROCEDURE

Any grievances, differences, or misunderstandings as to the meaning, interpretation, or application of this Agreement, which may arise between the Employer and an employee or between the Employer and the Union, shall be handled as follows:

. . .

ARTICLE 30
DURATION

This Agreement shall become effective as of January 1, 1990, shall remain in full force and effect until December 31, 1991, and shall automatically renew itself from year to year thereafter until such time as either party desiring to alter, amend, or otherwise change this Agreement serves written notice upon the other, not later than the first day of August of any year. In addition, this Agreement shall remain in full force and effect until a subsequent agreement has been reached between the City and the Union.

ARTICLE 31
ENTIRE AGREEMENT CLAUSE

The foregoing, plus the "Classification of Accounts" set forth hereinafter in this Agreement, constitutes an entire agreement between the parties, and no verbal statement shall supersede any of its provisions.

BACKGROUND

On August 10, 1971, the Common Council of the City of Wisconsin Rapids approved the following ordinance:

ORDINANCE NO. MC 135

A GENERAL ORDINANCE CREATING SECTION 3.09 OF THE MUNICIPAL CODE TO BE ENTITLED "CITY EMPLOYEE RESIDENCY REQUIREMENT". SAID ORDINANCE REQUIRES THAT ALL EMPLOYEES HIRED BY THE CITY BE REQUIRED TO MOVE INTO THE CITY WITHIN ONE MONTH OF THE COMPLETION OF THEIR PROBATIONARY PERIOD OR WITHIN SIX MONTHS OF THEIR DATE OF HIRE IF NO PROBATIONARY PERIOD APPLIES TO THEIR JOB.

NOW, THEREFORE, THE COMMON COUNCIL OF THE CITY OF WISCONSIN RAPIDS DO ORDAIN AS FOLLOWS:

SECTION 1. Section 3.09 entitled "City Employee Residency Requirement" is hereby created to read as follows:

3.09(1) All personnel employed by the City of

Wisconsin Rapids shall be required to reside within the City limits within one month of the date of the completion of their probationary period or within six months of their date of hire if no probationary period applies to their job.

3.09(2) All personnel presently employed by the City of Wisconsin Rapids and who reside within the City limits shall be required as a condition of their employment to remain residents of said City as long as they remain employed by said City.

SECTION 2. All ordinances or parts of ordinance in conflict herewith are hereby repealed.

SECTION 3. This ordinance shall be in force and effect from and after its passage and publication.

The Ordinance was published on August 17, 1971.

On July 12, 1977, the Common Council of the City of Wisconsin Rapids approved the following ordinance:

A GENERAL ORDINANCE CREATING SECTION 3.09 OF THE MUNICIPAL CODE TO BE ENTITLED "CITY EMPLOYEE RESIDENCY REQUIREMENT". SAID ORDINANCE REQUIRES THAT ALL EMPLOYEES HIRED BY THE CITY BE REQUIRED TO MOVE INTO THE CITY WITHIN ONE MONTH OF THE COMPLETION OF THEIR PROBATIONARY PERIOD OR WITHIN SIX MONTHS OF THEIR DATE OF HIRE IF NO PROBATIONARY PERIOD APPLIES TO THEIR JOB.

NOW THEREFORE, THE COMMON COUNCIL OF THE CITY OF WISCONSIN RAPIDS DO ORDAIN AS FOLLOWS:

SECTION 1. Section 3.09 entitled "City Employee Residency Requirement" is hereby created to read as follows:

3.09(1) All personnel employed by the City of Wisconsin Rapids shall be required to reside within the City limits within one month of the date of the completion of their probationary period or within six months of their date of hire if no probationary period applies to their job. (Current employes who are not residents shall become residents within six (6) months of the date of passage and publication of this ordinance)

3.09(2) All personnel employed by the City of Wisconsin Rapids shall be required as a condition of their employment to remain

residents of said City as long as they remain employed by said City.

SECTION 2. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

SECTION 3. This ordinance shall be in force and effect from and after its passage and publication.

The Ordinance was published on July 16, 1977.

On January 8, 1985, the Common Council of the City of Wisconsin Rapids approved the following Ordinance:

A GENERAL ORDINANCE CREATING SECTION 3.08 OF THE MUNICIPAL CODE TO BE ENTITLED "CITY EMPLOYEE RESIDENCY REQUIREMENT". THIS REAFFIRMS THE RESIDENCY REQUIREMENT OF THE CITY.

NOW, THEREFORE, THE COMMON COUNCIL OF THE CITY OF WISCONSIN RAPIDS DO ORDAIN AS FOLLOWS:

SECTION 1 Section 3.08 of the Municipal Code entitled "City Employee Residency Requirement" is hereby created to read as follows:

3.08(1) All personnel employed by the City of Wisconsin Rapids shall be required to reside within the City limits within twelve months of their date of hire or within the time limit set forth in said employee's employment agreement.

3.08(2) All personnel employed by the City of Wisconsin Rapids shall be required, as a condition of their employment, to remain residents of said City as long as they remain employed by said City.

SECTION 2 This ordinance reaffirms the previous policy of the City as previously established by Ordinance No. 209 previously passed on July 12, 1977.

SECTION 3 This ordinance shall be in force and effect from and after its publication.

The Ordinance was published on January 16, 1985.

On August 2, 1984, Karen Jensen, hereafter the Grievant, began employment with the City as a Police Communications Aide. 1/ The notice of the vacancy in the Police Communications Aide position contained the following:

1/ Karen Jensen is now known as Karen Jensen-Garrells.

RESIDENCY

City ordinance requires all newly hired employees to reside within the City of Wisconsin Rapids within seven (7) months of the date of their employment.

The Grievant signed an application for employment on July 9, 1984. The paragraph located above the signature line stated as follows:

I. FOR APPLICANTS LIVING WITHIN THE CITY LIMITS:

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

The paragraph located below the Grievant's signature stated as follows:

II. FOR APPLICANTS LIVING OUTSIDE THE CITY LIMITS:

I understand, as required by City Ordinance, that I shall establish residence within the City limits of Wisconsin Rapids within 1 month after the completion of my probationary period. I further understand that, if I move outside the City limits of Wisconsin Rapids, my position will be vacated and my name dropped from the City's payroll.

On January 10, 1991, Mr. James Jansky, the City's Personnel Director, sent the following letter to the Grievant:

It has been brought to the attention of my office that you may not be in compliance with City Ordinance 3.08(b) which reads as follows:

> "All personnel employed by the City of Wisconsin Rapids shall be required, as a condition of their employment, to remain residents of said City as long as they remain employed by the City."

On September 29, 1989, you submitted a "Personnel Action Form" indicating a change in address and telephone number to 481 Maple Manor, Wisconsin Rapids, Wisconsin, and a phone of 423-8070. My office has been informed that although you have given this address and phone number you are actually residing in Pittsville. An investigation into this matter indicates the house

at 481 Maple Manor is owned by a Leslie and Marcia Bach and that they reside at that address along with their children. The telephone number you gave to the City is listed to Leslie Bach. I am told the City has not been able to reach you at that phone number.

Karen, there is established case law to follow in determining if an employee meets the City residency ordinance. Although each situation must be decided on its own facts there are certain criteria which are applied in most cases. Some of these items include:

1. The number of adults, not considered a member of the immediate family, who live at the address.

2. The number of days per month the employee sleeps at the address.

3. Where the person normally eats.

4. What share of the employee's personal belongings are customarily kept at the address.

5. Where the employee spends most of his/her off-duty time.

6. Where is the person customarily located on a regular basis if it is necessary to call that person in for duty.

7. Who is the owner of the residence.

8. Who is paying the rent.

9. Who is paying property taxes on the residence.

10. Who is responsible for utilities (telephone, water, light, etc.) at the residence.

The City believes it has cause to question if you comply with City Ordinance 3.08(b), Residency. City policy on this matter requires my office and the City Attorney to make a determination if in fact you do or do not comply. To enable us to make a determination it will be necessary for you to complete and return the enclosed certification by January 18, 1991.

The matter of residence within the City of Wisconsin Rapids is assumed by the Common Council to be of serious matter and by no means should be taken lightly. If you are not now a resident of the City, you are

> hereby notified Common Council policy allows you two weeks from receipt of this notice to comply with the residency requirement. Failure to comply with this requirement means that you will automatically vacate your position with the City.
>
> Please contact me or City Attorney Kenneth Hill if you have any questions regarding this matter.

The Grievant sent Personnel Director Jansky a letter dated January 15, 1991 which stated as follows:

> In response to the aforementioned certified letter, this is to inform you that the personnel action form submitted on September 29, 1989 is accurate. My residence is with my sister, Marcia Back and her family at 481 Maple Manor Drive. My phone number is 423-8070.
>
> I feel the other questions are personal and I do not need to answer them.
>
> My Local 1075 Union Staff Representative, Guido Cecchini, will be contacting the City Attorney's office in regards to this matter.

In a letter dated February 8, 1991, the Grievant's attorney advised Personnel Director Jansky, inter alia, that "For your purposes, you may consider her a resident of Pittsville, Wisconsin." The Grievant's attorney further stated as follows:

> It is our position that the City Residence Ordinance is invalid as it relates to the employees in her bargaining unit. Residence is a mandatory subject of bargaining, relating to terms and conditions of employment, and the labor agreement between the City of Wisconsin Rapids and Local 1075, AFSCME, AFL-CIO, is silent on the issue of residence. The City cannot bypass the bargaining process and unilaterally impose a residency requirement with an ordinance.

In a letter dated February 11, 1991, Personnel Director Jansky advised the Grievant's attorney as follows:

> Your letter of February 8, 1991, regarding the above matter is acknowledged. In reference to your position regarding the mandatory subject of bargaining please be advised the item was part of the Union's proposal in contract talks for the last three contracts. There has been considerable discussion on the item and the Union withdrew their proposal in all three contract negotiations.
>
> The Common Council's Personnel Committee has set a meeting for 5:00 p.m. on Wednesday, February 20, 1991, to further address the residency of Karen Jensen.

> Karen and her representative(s) are invited to attend this meeting.

In a letter dated February 21, 1991, Personnel Director Jansky advised the Grievant, inter alia, as follows:

> The purpose of this letter is to confirm our oral conversation of February 20, 1991, during which you were told you would be removed from the City payroll. As discussed, the Personnel Committee instructed me to inform you that you vacated your position by failing to comply with the City Residency Requirement and that you would be removed from the payroll upon completion of your shift at 10:30 p.m. on February 20, 1991. You should turn in any City property in your possession to Carole Rustad not later than February 26, 1991.

On February 25, 1991, a grievance was filed alleging that the Grievant was discharged without just cause in violation of Article 3 and requesting that the Grievant be reinstated and be made whole. The grievance was denied and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

City

In response to the Union's claim that the City committed an unfair labor practice by refusing to bargain with it in regard to the residency requirement, the City submits that it is not the function of the Arbitrator to determine whether or not any unfair labor practice has been committed. The City maintains, however, that the City has bargained with respect to the residency requirement.

The City's enactment and enforcement of the residency requirement was a proper exercise of the City's management rights under Article 3 of the labor agreement. The labor agreement does not contain any language which limits the City's right to enact and enforce a residency ordinance.

The residency requirement is incorporated into the labor agreement by the introductory clause to the labor agreement, which provides, in part, that ". . . it is intended by the provision of this Agreement that there be no abrogation of duties, obligations, or responsibilities of any agency or department of city government which is now expressly provided for respectively by the state statutes or any ordinances of the City of Wisconsin Rapids, except as expressly limited herein . . . .". Arbitrators have long recognized that where a residency requirement is enacted pursuant to municipal rules and/or regulations, and the labor agreement at issue incorporates those rules and regulations within it, the residency requirement constitutes a valid condition of employment.

The City's residency ordinance has been in effect, in one form or another, since 1971. The Union has been fully aware that the residency requirement is a valid and enforceable condition of employment as applied to bargaining unit members.

In each of the last three sets of contract negotiations, the Union

submitted proposals which would have exempted bargaining unit members from complying with the residency requirement. In each case, the Union withdrew these proposals as part of a voluntary settlement reached by the parties. By such conduct, the Union has recognized the residency requirement to be a valid and enforceable condition of employment, and one within the City's contractual authority to adopt.

While the City maintains that the Grievant voluntarily vacated her position by refusing to comply with the residency requirement, the City has proper cause to terminate the Grievant's employment. The grievant was aware of the City's residency requirement and refused to comply with it. The City conducted a full and fair investigation with regard to the noncompliance.

The Union's contention that the Grievant is a City resident is contrary to the party's stipulation and the evidence in this dispute. At hearing, the parties stipulated to the fact that the grievant was not a resident of the City, but rather resided in Pittsville. If the grievant disputed the City's contractual right to require her to reside within the City limits, she should have complied with that requirement and then grieved the issue.

The Union misrepresents the evidence when it argues that the collective bargaining does not incorporate the residency ordinance and when it states that the City has refused to bargain with the Union in regard to the residency ordinance. The Union's reliance on Article 31, the entire agreement clause, is misplaced because (1) the labor agreement specifically incorporates all ordinances of the City of Wisconsin Rapids, without distinction, and (2) the residency ordinance is not a verbal statement.

The Union's claim that the Grievant received disparate treatment is without merit and based upon a misrepresentation of the evidence. The credible evidence demonstrates that the ordinance has been applied consistently and uniformly to both union and non-union employes alike.

The Union's reliance upon the prior Brown County cases is misplaced. The parties' collective bargaining history in regard to residency is nearly opposite of that relied upon by this Arbitrator and Arbitrator Mawhinney in the prior Brown County cases. Moreover, based upon the rationale of the Brown County decisions, the facts presented in this dispute compel denial of the grievance. The grievance is without merit and should be denied.

Union

The subject of residency is a mandatory subject of bargaining. The City has refused to bargain this subject, maintaining that the subject of residency is not negotiable. The Union has not waived any right to bargain the subject of residency.

As provided in Article 31, Entire Agreement Clause, the collective bargaining agreement is the exclusive and entire agreement between the parties. Since the residency ordinance is not incorporated in the collective bargaining agreement, the City may not enforce the same against the members of the Union's collective bargaining unit.

The essence of due process is that equals must be treated equally. Employes working for the Library, Water and Light, and the Band are not covered by the residency ordinance. The City discriminated against the Grievant when

it terminated the Grievant for noncompliance with the residency ordinance. Accordingly, the City does not have just cause to discharge the Grievant. Assuming the ordinance is enforceable, the Grievant was a City resident.

The Arbitrator has previously considered a substantially similar matter in Brown County and concluded that Brown County's residency ordinance was unenforceable. Arbitrator Karen J. Mawhinney also concluded that the Brown County residency ordinance was not enforceable. The same result is required in the present case.

The "whereas" clause relied upon by the City is a mere recital. It confers no rights; it creates no duties and obligations. The City's argument that this clause incorporates the residency requirement into the contract is contrary to law and the admissions of its own Personnel Director, who testified that the current labor agreement does not contain a residency clause.

The City's arguments ignores the clear language of Article 31. If the City wanted to devote a new article of the collective bargaining agreement to the subject of residency it could have done so. It if wanted to insert specific incorporation language into the collective bargaining agreement it could have done so. It chose not to do so. The passage of the collective bargaining agreement by the Council implicitly or explicitly repealed the residency requirement then in existence.

The residency ordinance is not enforceable against the Grievant. The Grievant is entitled to reinstatement. Appropriate remedial orders must be entered forthwith.

DISCUSSION

As the City argues, this is not the proper forum to raise or decide the issue of whether or not the City has violated any statutory duty to bargain on the residency requirement. The issue to be decided herein is whether the City violated the collective bargaining agreement when it enforced the residency ordinance against the Grievant.

As the City further argues, the issue of whether or not the Grievant was a resident of Wisconsin Rapids when the City enforced the residency ordinance

against the Grievant is not before the Arbitrator. At hearing, the parties agreed that, for the purposes of this proceeding, the Grievant was a resident of Pittsville, Wisconsin. 2/

Since August of 1971, the City has had a residency ordinance which, on its face, has been applicable to the members of the Union's bargaining unit. At hearing, Personnel Director Jansky stated that the residency requirement has been applied to all City employes. 3/ As discussed more fully below, the record does not demonstrate otherwise.

When the parties negotiated the collective bargaining agreement which was to be effective on January 1, 1986, the Union proposed, inter alia, "City to recind (sic) residency requirement". When the parties negotiated the collective bargaining agreement which was to be effective on January 1, 1988, the Union proposed, inter alia, "Drop the residency requirement". When the parties negotiated the agreement which was to be effective on January 1, 1990, the Union proposed, inter alia, " Residency: Employees shall not be required to reside in the City of Wisconsin Rapids. " According to Personnel Director Jansky, each of these proposals were dropped by the Union during the contract negotiations. The record does not demonstrate otherwise.

At the time that the City enforced the residency ordinance against the Grievant, the parties were subject to a collective bargaining agreement which, by its terms, was effective from January 1, 1990 through December 31, 1991. As the Union argues, this collective bargaining agreement does not expressly reference the residency ordinance. 4/ Contrary to the argument of the Union, however, such contractual silence does not preclude the City from requiring the Union's bargaining unit members to comply with the residency ordinance.

The evidence of bargaining history discussed supra demonstrates that since at least 1986, the Union has been aware that members of its bargaining unit were subject to a residency requirement. The residency requirement which was applied to the Union's bargaining unit members is, and has been, embodied in the City's ordinances. Applying the principals enunciated by the Wisconsin Supreme Court in Madison v. Madison Police Ass'n, 144 Wis. 2d 576 (1988), the undersigned is persuaded that the City's residency ordinance is valid and enforceable upon the Union's bargaining unit members unless the evidence demonstrates that the parties have bargained an exemption from the residency requirement.

2/ T. - 4.

3/ T. - 11.

4/ Indeed, it is not evident that the parties initial contract, which was negotiated in 1971, or any subsequent contract, contained any language which expressly recognized that bargaining unit members were subject to the residency requirement. In Brown County, Case 339, No. 39355, MA-4792 (Burns, 5/89), relied upon by the Union, the evidence of bargaining history established that the County had incorporated the residency requirement into the contract and that this requirement was subsequently bargained out of the contract. As the City argues, the instant case and the Brown County case are distinguishable on the facts. Accordingly, the Union's reliance on the Brown County case is misplaced.

The Union does not argue, and the record does not demonstrate, that the 1990-91 collective bargaining agreement contains any language which expressly exempts the Union's bargaining unit members from the residency ordinance. The Union, relying upon the language of Article 31, maintains that since the residency requirement is not expressly contained in the contract, it cannot be enforced against the Union's bargaining unit members. The undersigned does not find the Union's argument to be persuasive.

Article 31, Entire Agreement Clause, of the 1990-91 agreement states as follows:

> The foregoing, plus the "Classification of Accounts" set forth hereinafter in this Agreement, constitutes an entire agreement between the parties, and no verbal statement shall supersede any of its provisions.

The purpose of Article 31 is to affirm that the parties' contractual rights are embodied in the written agreement and to prevent conduct which is external to the contract from being given effect as an implied term of contract. In the present case, the City's right to enact and enforce a residency requirement is not founded upon a past practice which has become an implied term of contract. Nor is it otherwise based upon a contractual right. Rather, the City's right to enact and enforce the residency requirement stems from the City's legal authority as a municipal corporation. Accordingly, the language of Article 31 is not controlling.

In summary, neither the evidence of the parties' bargaining history, nor the terms of the relevant collective bargaining agreement, demonstrates that the parties have bargained an exemption from the residency ordinance for the Union's bargaining unit members. Accordingly, the undersigned is satisfied that the the City had the lawful authority to enforce the residency requirement against the Grievant.

The Union argues that the residency requirement has not been enforced against City employes who work in the Library, Water Works and Lighting and the Band. The Union maintains, therefore, that the City's enforcement of the residency requirement against the Grievant is discriminatory.

Despite the Union's assertions to the contrary, the record does not establish that the City is the employer of either the Library employes or the Water Works and Lighting employes. Thus, assuming arguendo, that these employes have not been subject to a residency requirement, such a fact would not establish that the City has discriminated against the Grievant.

The evidence establishes that Band employes work from June through Labor Day. 5/ Sec. 3.08(1) of the residency ordinance provides as follows:

> 3.08(1) All personnel employed by the City of Wisconsin Rapids shall be required to reside within the City limits within twelve months of their date of hire or

5/ Unlike the Library employes and the Water Works and Lighting employes, the City does not deny that the Band employes are City employes.

> within the time limit set forth in said employee's employment agreement.

Since it is not evident that the Band employes have any employment agreement which addresses residency, it is reasonable to conclude that the residency ordinance permits the Band employes to reside outside the City for twelve months from the date of their hire. Since the Band employes are employed for less than twelve months, such employes leave their employment with the City prior to the event which triggers the residency requirement. Since the Grievant had been employed by the City for more than twelve months prior to the enforcement of the residency ordinance, the Grievant and the Band employes are not similarly situated employes. Assuming arguendo, that Band employes have resided outside of the City, it would not be discriminatory to enforce the residency requirement against the Grievant, but not the Band employes.

The uncontradicted testimony of Personnel Director Jansky demonstrates that when the City Personnel Department has had reason to believe that an employe has not been complying with the residency requirement, the matter has been investigated and the affected employe has been advised of his/her obligation to comply with the residency requirement. The record further establishes that employes who have been subject to such an investigation have either complied with the residency requirement or have resigned their City employment.

Contrary to the argument of the Union, the record does not establish that the City has denied the Grievant due process. As the Grievant acknowledged at hearing, when she obtained her employment in 1984, she was aware of the residency requirement. In the present case, as in the past, the City's Personnel Department investigated the issue of the Grievant's residency when the Department became aware that there was a question as to whether or not the Grievant was complying with the residency ordinance. 6/ When the Personnel Director issued his letter of January 10, 1991, informing the Grievant that the City believed that it had cause to question whether the Grievant complied with the residency requirement, the Grievant was advised that "If you are not now a resident of the City, you are hereby notified Common Council policy allows you two weeks from receipt of this notice to comply with the residency requirement." Following the issuance of this letter, the Grievant and the Union were afforded an opportunity to meet with City representatives and the City Council to address the residency issue. The Grievant, who was a resident of Pittsville, did not comply with the residency requirement within the two week period set forth in the Personnel Director's letter of January 10, 1991, nor at any other time prior to the issuance of the letter of February 21, 1991, in which Personnel Director Jansky advised the Grievant that she had vacated her position with the City by failing to comply with the residency requirement.

6/ City employes, such as the Grievant, are required to advise the City of all changes in address. On September 29, 1989, the Grievant had submitted a "Personnel Action Form" indicating that she resided within the City of Wisconsin Rapids. This address was on file at the time that the City began its investigation of the Grievant's residency.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The City did not violate the collective bargaining agreement when it enforced the residency requirement against the Grievant.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 10th day of January, 1992.

By _____
Coleen A. Burns, Arbitrator