

Brooks #2

**AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL**

IN THE MATTER OF THE ARBITRATION BETWEEN:

Union

-and

CITY

Gr: Residency Requirement/ Employee 1

DECISION AND AWARD

DECISION

The issue in the case is whether the Employer's denial of Grievant's request for a waiver of the Employer's residency requirement for its employees constituted discrimination under Article XXXIII, Section 1 of the Agreement on the basis of marital status. Article XXXIII, Section 1 states:

The parties hereto agree that they shall not discriminate against any person because of his/her race, creed, color national origin, age, sex, marital status, or number of dependents. There will be no discrimination against any employee because of his/her duties as a Union official, steward, or committee member.

BACKGROUND:

The instant grievance, filed on January 13, 1981, alleges that Article XXXIII, Section 1 was violated on the ground that waivers of the residency requirement were granted on the basis of hardship to married couples, but refused to Grievant under similar circumstances. The

grievance was denied at the first step of the grievance procedure (Article IX, Section 3, Step 1) on January 26, 1981, and appealed to arbitration on March 26, 1981.

A hearing on the matter was held before the undersigned arbitrator in City A, Michigan on July 9, 1981. Article IX, Section 3, Step 2.B., Arbitration, (b) of the parties' Collective Bargaining Agreement, which covers the period of July 1, 1980 through June 30, 1982, provides that the arbitrator's decision "shall be final and binding on the employee or employees involved, the Union and Management." This subsection also provides that the powers of the arbitrator are limited to the interpretation and application of the express terms of the Agreement.

At the hearing, the parties were afforded full opportunity to call, examine, and cross-examine witnesses, and to offer relevant material and documentary evidence. Witnesses who testified were sworn. The Decision and Award herein are based upon the undersigned's study and consideration of his notes of the testimony adduced before him, documents admitted into evidence, and the briefs of the parties which were filed on September 4, 1981.

DISCUSSION:

Grievant was hired by the Employer on January 22, 1978 as a waste water operator. He became a neighborhood service agent in August, 1979, and, during the week of the arbitration hearing, because his status was affected by cutbacks in his department, he "bumped" into a sewage plant operator #2 position at the Waste Water Plant.

Grievant, a single man, has been engaged for about two years to a divorcee with three children, ages 15, 11, and 10. When they became engaged, Grievant and his fiancée decided to sell their respective homes. Grievant lived in a one bedroom house within the City A city limits and it was sold soon after it was placed upon the market.

His fiancée lives in a comparatively large four bedroom house on a large lot in an area located outside of the City A city limits and approximately seven miles from City Hall. Her house was listed with a real estate agent on March 18, 1980 with an asking sale price of \$74,900.00. The listing was renewed on September 18, 1980 and remained in effect until November 22, 1980, when it was taken off the market.

After the house remained unsold for a while, in an effort to increase its marketability, a portion of the rear of the lot was parceled and sold for \$8500.00 and the sale price of the house reduced to \$65,900.00. However, the house has remained unsold to date.

Grievant has been living with friends within the City A city limits since he sold his house. When their two houses were placed upon the market for sale, Grievant and his fiancée anticipated buying a house in City A after both houses were sold, getting married, and moving into the new house, together with his fiancée's children. In November, 1980, because of intervening events discussed below, Grievant had a change of heart and, since then, has sought a waiver of the residency requirement.

The residency requirement has been in existence, in the form of an Employer ordinance, since 1972. Chapter 5, Section 1.153 of the Ordinance Code states:

Residence Required. All officers and employees appointed or employed after January 1, 1972, are required to become residents of the Employer prior to the expiration of the probationary period specified in Title VII, Section 8 of the Charter of the Employer, and maintain a bona fide City A Employer residence. Exceptions to this residence requirement may be made by the Civil Service Board for the following reasons:

- (1) The duties of the employee require him to work outside the Employer; or
- (2) The employee is diligently seeking housing inside the Employer; or
- (3) Housing suitable to the employee's needs is not available; or
- (4) The employee would suffer an unusual hardship to himself or his family.

Such exceptions as granted by the Civil Service Board may be a waiver of this residence requirement or extensions of time in which to gain residence.

On November 12, 1980, the CITY Commission, the governing body of the Employer, reversed an earlier decision by the Employer's Civil Service Board and granted a waiver (permanent exemption) of the residency requirement to Police Officer Person 1. On the basis of this action, Grievant and his fiancée agreed that he would request a similar waiver and that, upon approval and after their marriage, he would move into his fiancée's home.

On December 12, 1980, Grievant filed a written request with the Employer's Civil Service Board for a permanent exemption from the residency requirements on the ground of hardship. The exemption was to apply to his residence in his fiancée's present home but not elsewhere outside of the city limits. On December 18, 1980, the Civil Service Board formally granted an exception to the residency rule to Grievant, but for only one year. It was explained to Grievant at the earlier hearing before that Board that this would provide the time needed for Grievant's fiancée to sell her house and for Grievant to buy a new one in the Employer. On December 17, 1980, the day before the Civil Service Board's official response to Grievant, in anticipation of the ruling, he filed an appeal to the Employer Commission seeking a permanent exemption (waiver) of the residency requirement. The Employer Commission allowed the Civil Service Board's ruling to stand and, accordingly, Grievant's permission to reside outside of the city limits will expire December 31, 1981.

Article IX, Section 1 (a) of the Agreement defines a grievance as a matter which concerns the meaning, interpretation, or application of the Agreement or any terms thereof. Further, as we have seen, Article IX, Section 3, Step 2.3. (b) restricts the arbitrator's authority to the interpretation and application of the express terms of the Agreement. Finally, in this respect, the grievance document states, "Nature of Grievance: 'Article XXXIII, Section 1.'" Thus, the sole question before the undersigned is whether the City engaged in discrimination against Grievant

on the basis of marital status by denying him a waiver of the residency requirement. Whether the Employer's action in respect to Grievant was compassionate, intelligent, or otherwise proper, when measured by criteria which are external to the requirements of the Collective Bargaining Agreement, is not a matter before the undersigned.

The Union bases its claim that Article XXXIII, Section 1 was violated upon the alleged inconsistent action which the "Employer took in respect to Police Officer Person 1. Her husband, Person 2, has been a City A police officer since before January 1, 1972 and hence, under the "grandfather clause" in Section 1.153 of the aforementioned Ordinance, he is exempt from any residency requirements. On the other hand, Person 1 became a City A employee after January 1, 1972 and is subject to the Ordinance. They married after January 1, 1972 and resided in City A. The house they owned in City A developed major flaws and they decided to sell it and the new house they selected was located outside the city limits. Person 1 filed a request with the Employer's Civil Service Board for a permanent exemption from the residency requirement on the ground of undue hardship and it was denied. However, when the matter was brought before the Employer Commission, that body granted the permanent exception.

The theory of the Union is that the Person 1 case and Grievant's case are basically similar and, accordingly, when the Employer Commission treated them dissimilarly in respect to the residency requirements, the Commission discriminated against Grievant on the basis of gender and marital status. However, in the opinion of the undersigned, there are significant distinctions between the two situations.

Person 2 was employed by the Employer before the residency ordinance was adopted. If the Employer were to attempt to require him to reside within its corporate territorial limits, it might be confronted with court holdings that residency requirements retroactively applied i.e.,

applied to individuals who were employees before the requirements were adopted, are unconstitutional.

Person 2's wife, Person 1, enjoyed no similar constitutional protection because she became a police officer after the Ordinance was enacted. However, if the Employer enforced the residency rules against her, Person 2 would have faced the dilemma of either surrendering his right to live outside of the Employer or surrendering his right to live under one roof with his spouse. In practical effect, Person 2 would have been forced to surrender an existing right to live where he wished if the Employer had imposed the residency rule against his wife.

Grievant's case is different: As a single man who started his employment with the Employer subsequent to the effective date of the Ordinance, he does not enjoy both the right to live outside of the Employer and to retain his Employer employment. He seeks, as a fruit of his impending marriage, to acquire a right which he presently does not possess but which Person 2 always has. In the opinion of the undersigned, this is a vital distinction and the Employer's action of granting a permanent exception to Person 1 because her husband had been "grandfathered" and denying a similar exception to Grievant constituted a valid classification by the Employer relative to Article XXXIII, Section 1.

Nor is it significant in the undersigned's opinion, contrary to the argument in the Union's brief that Person 1 applied for the exemption, rather than her husband. There was no occasion for her husband to apply because he already possessed the right to live where he wished. The relief Person 1 sought successfully was based on a right her husband possesses but Grievant's fiancée does not.

To the extent that the Employer has ruled on requests for extensions or waivers of the residency requirement in other situations, its actions have been consistent with that taken in

Grievant's case. There have been 25 such requests before the Employer's Civil Service Board, including Grievant's. Five were denied entirely, one employee was granted a one week extension, one was granted a thirty day extension, one was granted a sixty day extension, six were granted three month extensions, eight were granted six month extensions, one was granted a nine month extension, and one was granted a one year extension. In one of the instances in which the request was denied entirely, the employee sought a waiver of the residency requirement because of a conflict in his marriage stemming in part from his wife's resistance to living in the Employer.

In several of these instances, a second extension was granted when the employee was unsuccessful during the original extension in completing the necessary arrangements to live in the Employer. The Employer committed itself at the hearing before the undersigned arbitrator to give careful and fair consideration to any request which Grievant might make for an extension beyond December 31, 1981 to reside outside the Employer if, prior to that date, sincere efforts by him and his fiancée to sell her house and to purchase another within the city limits are unsuccessful.

Grievant testified that it is his belief that the special circumstances of his case constitute an unusual hardship to himself and his potential family within the meaning of Section 1.153 (4) of the Ordinance. Grievant suggested in his testimony that the state of the economy, and especially the extremely high interest rates which presently prevail, make it most difficult to sell a house of the type his fiancée owns. According to Grievant, the difficulty is accentuated by a "divorce lien" upon his fiancée's house which requires her to compensate her former husband in the amount of \$20,000.00 immediately upon her "non-occupation" of the premises. (This lien was reduced to \$13,000.00 when \$7,000.00 of the proceeds from the earlier mentioned sale of a

portion of the lot were delivered to her former husband.) Grievant also observed that the effect upon the three children of the effort to sell the house was negative: Uprooting the three children from the only home in which they have ever lived would not be in their best interests from the standpoint of their emotional development.

As earlier indicated in this Decision, the arbitrator's authority is limited to determining whether the Agreement has been violated and, more specifically, whether Article XXXIII, Section 1 has been breached. Whether the Employer properly interpreted Section 1.153 of the Ordinance in its application to Grievant's situation is not before the arbitrator except to the extent that the Employer's action pursuant to the Ordinance might have constituted a violation of Article XXXIII, Section 1 of the Agreement.

It is also noted, as the Employer correctly observes, that the circumstances in which the Union here seeks permanent exception to the residency rule exist in a significant portion of all situations in which the rule comes into play. Whenever an individual who seeks employment with the Employer is married, has children, and resides outside the CITY, the basic problems of hardship which Grievant has raised here exist in one respect or another and to one degree or another. If it were determined that Grievant's grounds for requesting the exemption were adequate, similar determinations would be expected in comparable situations. This would create a broad exception to the residency rule, and, to a significant extent, the public policy embraced by the Ordinance would be defeated.

JEROME H. BROOKS

Arbitrator

September 25, 1981

American Arbitration Association

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

UNION

-and

EMPLOYER (MICHIGAN)

AWARD OF ARBITRATOR

HE UNDERSIGNED Arbitrator (X), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated December 10, 1980, and having been duly sworn and having duly heard the proofs and allegations of the Parties.

AWARDS as follows:

Grievance No. XX, dated January 13, 1981, and alleging a violation of Article XXXIII, Section 1 of the July 1, 1980 - June 30, 1982 Collective Bargaining Agreement between the Employer and Union by the Employer's refusal to grant Employee 1 a permanent exception to the residency requirements of Chapter 5, Section 1.153 of the Ordinance Code of the Employer is unmeritorious for the reasons indicated in the Decision above.

The Grievance is denied.

The Union is the party which has lost the appeal to arbitration within the meaning of Article IX, Section 3, Step 2.3. (c) of the Agreement and, pursuant to that provision, the arbitrator's fees and expenses are assessed against it.

STATE OF MICHIGAN

On this 25th day of September 1981, before me personally came and appeared JEROME H. BROOKS to me known and known to me to be the individual(g0 described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.