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VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the
Arbitration Between:

CITY OF PONTIAC

-and-

PONTIAC POLICE SUPERVISORS
ASSOCIATION

ARBITRATION PANEL OPINION AND AWARD

APPEARANCES:

FOR THE CITY OF PONTIAC:

Douglas C. Dahn, Attorney
Harold J. Warell, Personnel
Labor Rels. Director
James Hildebrand, Chief of
Police
Ernest Allen, Sr., Councilman

FOR THE PONTIAC POLICE SUPERVISORS
ASSOCIATION:

John A. Lyons, Attorney
Larry R. Feneley, Pres. P.P.S.A.
Merton H. Kesselring, Lieutenant's
Representative
Branton E. Dennis, Jr., Captain's
Representative

The City of Pontiac and the Pontiac Police Supervisors Association (PPSA), representing the command officers in the Pontiac Police Department, entered into negotiations for a successor contract to the agreement between the parties that expired on June 30, 1981. The parties reached impasse and as a result submitted certain unresolved issues to this Panel for resolution under the procedures and guidelines of Act 312 of Public Acts of 1969, MCLA 423.231 et seq.; MSA 17.455(31) et seq., except that the parties decided not to utilize the services of the Michigan Employment Relations Commission (MERC), but instead selected the Chairman as a neutral delegate and chose Harold Warell as the City

Pontiac, City of

Raumell, George T.

delegate and Larry Feneley as the Association delegate. On October 27, 1982, this Panel issued its Opinion and Award concerning the issues of holiday pay, bonus program, and residency. As noted, however, in that Opinion, the question of residency, or what the parties have called "adoption by reference", was left to a separate hearing requiring a separate Opinion and Award. The Panel now addresses itself to the issue of residency or adoption by reference. The term "adoption by reference" refers to a provision in the 1978 through 1981 Collective Bargaining Agreement which provided at Article X, Section 7:

The parties further agree that all provisions of the City Charter, Ordinances and Resolutions of the City Commission, as amended from time to time, relating to the working conditions and compensation of officers are incorporated herein by reference and made a part hereof to the same extent as if they were specifically set forth.

This meant that the City Charter provisions, except as the parties specified otherwise in their Collective Bargaining Agreement, were adopted as part of the Agreement. This in turn meant that provisions in the Charter as to requiring members of the Association to be residents either in the City of Pontiac or certain areas adjacent thereto were adopted by reference.

The history of residency for Association members and police in general is interesting. At one time, apparently, officers¹ were required to live within the city limits of Pontiac. From 1967 to 1974, this requirement was relaxed to require residency within a ten mile radius of the intersection of Saginaw and Huron Streets. In 1974, the police officers, through the referendum process, prevailed upon the

1. As used hereinafter, the term "Officers" refers to command officers in the Pontiac Police Supervisors Association bargaining unit.

citizens of Pontiac to pass an amendment to the Charter permitting residency in Oakland County. This amendment was passed in either 1973 or 1974, with the obvious result that residency from that period to May 1982 was to be in Oakland County.

In the fall of 1979, the citizens of Pontiac passed a resolution favoring the establishment of a new City Charter, and elected a Charter Commission. The Charter Commission proceeded to write and propose a charter.

Ernest Allen, Sr. was an elected Charter Commission member. The charter commissioners elected Mr. Allen Secretary of the Commission. Mr. Allen noted that the Commission, in each of the seven council districts of the City (the City Council was elected on a district basis), held an open meeting inviting members of the public to discuss proposed Charter amendments. A typical agenda was that used in District 1 attached hereto as Appendix A. That agenda contained the following statement: "District Residency-Pros and Cons".

Mr. Allen described that at each meeting, including the District 1 meeting, the citizens did discuss residency. The agenda item did not suggest which way the issue of residency was going to be aimed, and was not a suggestion of how the citizens should react. Nevertheless, in each district the citizens of Pontiac apparently overwhelmingly endorsed the concept of residency for city employees, including the police command officers. In fact, Mr. Allen without contradiction, suggested that this was the one area in which the

citizens appeared to be unanimous in their view. Subsequently, a proposed charter was adopted. This proposed draft as to residency provided:

Residency

An appointee (other than to a board or commission) or an employee of the City, if not a resident at the time of appointment or hire, shall become a resident within one year thereafter and shall remain a resident while so employed. Violations of this requirement by an appointee or employee shall be grounds for dismissal from employment.

The continued employment of an employee employed before the effective date of this charter is not subject to this requirement, but compliance with the requirement shall be a condition to the promotion of any such employee.

Upon a specific finding that the interests of the City and its residents would be best served in a given case by granting relief from this section, 5 members of the City Council, subject to the Mayoral veto contained in Section 3.112(f), may grant appropriate relief.

It is clear that the draft did suggest a grandfather clause, namely, that no present employee of the city, including police command officers, would be deprived of their jobs because of their failure to live within the City limits of Pontiac. The only caveat to this was that they would lose the opportunity of promotion. Again, the Charter Commission had a meeting in each district with the citizens to discuss the proposed charter draft. Mr. Allen testified that again at these meetings the citizens unanimously endorsed the concept of residency as expressed in the proposed draft of the charter.

The proposed draft as set forth above became the final language in the charter that was submitted to the people of the City of Pontiac to vote upon.

The election for the proposed City charter was held on September 15, 1981. During the week prior to the election, the command officers as well as the other uniformed unions within the City, published ads in the Oakland Press, a daily newspaper circulated in Pontiac, urging the defeat of the charter. These ads are attached hereto as Appendix B and C. Despite these efforts, which presumably was an attack among other things on the issue of residency, the citizens of Pontiac voted for the Charter including the residency provision.

Subsequently, Mr. Allen was elected to the City Council from District 6. As secretary of the Charter Commission who attended the meetings described above with the public, and now as a member of the City Council, Mr. Allen has urged on behalf of the City the adoption of the Charter provision as to residency into the Collective Bargaining Agreement. Mr. Allen conveyed to the Chairman in testimony that the position now taken by the City is not only the position as expressed by the public through the Charter Commission meetings and the voting on the Charter, but it is also the view of the City Council.

It is against this background that the Chairman must analyze this situation. Pontiac's new charter became effective May 3, 1982. It does provide for residency as aforesaid. However, the Michigan Supreme Court has held that under the Public Employment Relations Act

of 1965, MCLA 423.201 et seq.; MSA 17.455(1) et seq., there is a duty on the part of a public employer to bargain on the issue of residency. Detroit Police Officers Association v. City of Detroit, 391 Mich 44; 214 NW2d 803 (1974). In addition, the Supreme Court has held that a charter provision cannot supersede an issue such as residency covered by a collective bargaining agreement. Local 1383, International Association of Fire Fighters, AFL-CIO v. City of Warren, 411 Mich 642; 311 NW2d 702 (1981). Thus, despite the adoption of the Charter now operative in the City of Pontiac, the Charter provision is not binding on the parties until it has become incorporated by agreement in the parties' Collective Bargaining Agreement. The City wisely has recognized this proposition for the City has agreed to bargain on the issue and has submitted, through the vehicle of Act 312 of Public Acts of 1969, although utilizing a panel privately selected by the parties, the issue to binding interest arbitration.

In support of its position favoring residency, the City not only presented the testimony of Mr. Allen, but also the testimony of the Chief of Police, James Hildebrand. The thrust of Mr. Allen's testimony was the emphasis on the will of the citizens of Pontiac, as expressed not only in the meetings described above, but by their vote at the ballot box, despite the advertising campaign against the Charter by the uniformed services including the command officers.

Chief Hildebrand's testimony was interesting. He has been Chief of Police in Pontiac for two years. Previously, he served for 28 years in the police department of the City of New York, having

reached the rank of captain. He admitted that at one time the City of New York required residency but that after the war, because of recruitment problems, this requirement was relaxed. However, in one of the boroughs of New York, Staten Island, where he served as a command officer, Chief Hildebrand explained that over 4,000 police officers of the City of New York Police Department lived on Staten Island. He believed that the fact that so many police officers lived in one area served to deter crime in that area.

The Chief also suggested that officers living within the city limits of Pontiac, for example, would have quicker response time. He also suggested that it would improve community relations if the community knew that the officers lived among them.

The City also introduced an article by Dennis C. Smith entitled Police Attitudes and Performance: The Impact of Residency, 15 Urban Affairs Quarterly 317 (March, 1980). In this article, Mr. Smith noted at page 322:

Some improvement in police effectiveness is expected to flow simply from the greater amount of time resident police spend in the community. Citizens may feel safer if their neighbor is a policeman. Thus, resident police are expected to be more responsive to citizen calls for service, more restrained in their use of force against citizens in the community, and more civil in their dealings with citizens.

The question is: Are these expectations supported by evidence?

Mr. Smith found in part at page 323:

The percentage of officers in a department who reside in the jurisdiction it serves is related (Pearson's r) to a number of measures of performance. As Tables 1-3 [omitted] show, residency is positively related to the percentages of citizens

who rate their police services "outstanding," who have been assisted by police, who perceive restraint in police use of force, and who perceive fairness and courtesy in police treatment of local citizenry. The percentage of citizens who express confidence in the competence of their police and the percentage reporting that police respond quickly when called also vary directly with residency. Residency does not appear to be related to crimes reported to police (FBI Uniform Crime Index), but there is a relationship between residency and clearance rates, especially clearance of lesser crimes. (footnote omitted).

Admittedly, Chief Hildebrand's testimony was opinion testimony. Yet, it is supported by at least an article written by a national author, Mr. Smith, and the Chief himself has had considerable police experience.

The testimony of the Association is based upon the proposition that command officers are interested in their professional advancement, and that when they joined the Department and subsequently, they knew they could live in Oakland County. Many of the command officers were born and raised in Pontiac. They scoff at the suggestion that they do not know the City. According to the testimony of Lieutenant Feneley, a member of this panel, the reason he moved out of Pontiac was because he raised horses and could not find suitable land in the City for said purposes.

The testimony revealed that there has never been a problem with response time by a command officer. The only problems relative to response time involved those officers who live within the City limits of Pontiac because of snow conditions clogging the streets of Pontiac.

The Association also noted that the housing market is a buyer's market. Thus, if officers who purchased homes outside the city limits are now required to sell their homes and move back in order to be promoted, they would suffer financial hardship, and in some cases the increase in pay for the remainder of the officer's career as a result of a promotion may not compensate for the loss in the sale of the officer's house.

There is no question that, in one of the more famous Act 312 arbitration opinions dealing with residency, Arbitrator Harry Platt, serving as chairman of the arbitration panel between City of Detroit and Detroit Police Officers Association, wrote when concluding a residency requirement was proper at page 58 of the Opinion and Award:

After the most thoughtful and painstaking consideration of the whole record in this case in light of the several factors set forth in Section 9 of Act 312, as discussed at length above, it must be concluded that there is competent, material and substantial evidence to support the City's position that police officers should continue to be required to reside in Detroit as a condition of their employment. It should be noted that this finding continues a long-standing, uniformly applied policy which bears a reasonable relationship to the valid objects of municipal government, promotes the interest and welfare of the public, and which the City had lawful authority to enact and apply. 1/

1/ In a subsequent Act 312 proceeding between those same parties, a panel chaired by George Bowles issued an Opinion and Award dated December 20, 1978, which provided for a hardship exemption to the residency requirement. This portion of the Opinion and Award was vacated in City of Detroit v. Detroit Police Officers Association, 408 Mich 410, 496-499; 294 NW2d 68 (1980) because the panel failed to compare "the residency requirements for other employees performing similar services and for other employees generally in both public and private employment in comparable communities..." Here, the City has shown substantial evidence, considered by the Chairman, indicating many other similar communities have a residency requirement for police officers and other public employees.

And there is merit to the position that residency represents a valid municipal policy. One can understand with the changing demography of Pontiac a desire of its citizens to have its police officers live in Pontiac regardless of the various merits pro and con presented by the parties in testimony.

The most tell-tale evidence is the views expressed by the citizens of the community. True, the Charter as voted upon by the people, as noted, cannot supersede the requirement to bargain collectively on an issue. Local 1383, International Association of Fire Fighters, AFL-CIO v. City of Warren, 411 Mich 642; 311 NW2d 702 (1981). However, the fact that the people have clearly spoken on the subject must be persuasive to a chairman of an Act 312 panel. Couple this with the testimony presented by Chief Hildebrand, the article by Mr. Smith and the words of Arbitrator Platt, one must conclude that residency is and should become a fact of life in Pontiac.

Perhaps the most conclusive evidence of this is the fact that in 1974 when the police officers wanted to extend the residency requirement to Oakland County, they went to the public for an amendment to the charter. Here, the proponents of residency did the same in 1981. Since the command and police officers were willing to rely on the public in 1974, they likewise should rely on the public in 1983. This fact and the fact that many other communities have a residency requirement, is substantial evidence that this Agreement should contain a residency requirement. A list of the various communities having residency requirements as introduced in this record, is attached hereto as Appendix D.

The Chairman of the panel appreciates, however, that in many of the examples given there are a number of built-in exceptions and that if the only evidence that the City presented was the list in Appendix D, the City's case would not as such be well taken. The real critical evidence here is the vote of the people of Pontiac.

Having said the above, however, the Chairman of the panel recognizes certain equities in favor of the command officers. One is concerned over the fact that there is a basic inequity in the system. An officer can wish to be promoted yet have a substantial investment in his home outside of the City relying on a previous charter. Because of the serious recessionary trends in the metropolitan Detroit area, an officer may not be able to sell his home and at least break even in the transaction. Such a condition is unfair to the officer, particularly a command officer who has devoted his life to the police department and expects an opportunity to be promoted. As pointed out, foregoing the opportunity to be promoted cannot only be economically disadvantageous to the officer, but also professionally.

The panel has declared through the Chairman that the issue of residency is not an economic issue within the meaning of Section 8 of Act 312, MCLA 423.238; MSA 17.455(38). Thus, the panel has discretion, based upon the applicable factors enumerated in Section 9 of Act 312, MCLA 423.239; MSA 17.455(39), in adopting a position on this matter.

The problem that the panel has is to harmonize the respective equities of the parties. As matters stand now, most members of the Association live outside of the City and own homes. They would be

hindered, as discussed above, financially from accepting a promotion. Yet, the citizens have spoken. The best way to harmonize the competing equities is to recognize as the Chairman has, that residency has become a fact of life in Pontiac and to provide: (1) those officers now employed who own houses outside of the City shall be grandfathered so that they may be promoted even if they live outside of the City of Pontiac. (2) If the officers that now own a home outside the City buy another home during the life of the Agreement, or are not now home owners but living outside of the City of Pontiac and buy a home during the life of the Agreement, they shall abide by the Charter. In other words, in order to be promoted, if an officer chooses to buy another home or chooses to switch from a renting situation into a home situation, the officer must purchase in the City of Pontiac to be promoted. (3) Officers now renting outside of the City may remain outside the City and still retain the opportunity to be promoted; however, if said officers move and rent again, they must rent in the City of Pontiac. (4) An exemption to the above requirements shall exist for an officer whose spouse's employment requirements mandate residency within a city besides Pontiac. (5) A command officer who in writing states that he/she will retire from city employment within three years of said purchase may move into a purchases home or condominium outside the City limits of Pontiac but in Oakland County provided said home or condominium is intended to serve as his/her residence for post Pontiac employment. If said command officer does not retire at the time so stated he/she may be, at the sole discretion of the City, demoted to the officer's former rank or classification he/she held.

There was also a suggestion that officers could very well make a profit in selling homes outside of the City of Pontiac which they could not utilize in buying a home in Pontiac because of the difference in price structure. This according to the claim made would result in certain income tax consequences to the employee putting the employee at an economic disadvantage to the point where

the employee may not economically be able to afford a promotion. The fact is that under Section 121 of the Internal Revenue Code, a taxpayer age 55 or over may elect to exclude up to \$125,000 of the gain realized on a sale of a personal residence. This once-in-a-lifetime election is available to a taxpayer who has used the residence as his or her personal residence for a period of at least three years during the five-year period ending on the date of the sale.

Such an approach recognizes the equities of both parties. It recognizes the overwhelming sentiment expressed by the citizens and expressions the officers have relied on in the past for residency. Likewise it protects the officers' financial interest and does not deter their opportunity for promotion because of financial considerations. As for officers renting outside the City, there has been no showing that rental inside the City will produce financial hardship or that rental space is inadequate within the City.

Within the spirit of this Opinion, it must be made clear that any command officer who as of the date of this Award lives in Pontiac, must comply with the Charter effective May 3, 1982.

Obviously, the exceptions outlined herein to the residency rule have been applied to existing officers in the bargaining unit. This is the situation where the City is imposing a residence requirement which previously did not exist. This is the reason why the Chairman has opted for these exceptions. This is somewhat different than the situation faced by arbitrators who were asked to continue existing residency requirements. New employees to the bargaining unit shall comply with the May 3, 1982 Charter provisions as to residency unless the collective bargaining agreement of the City unit from which they came provides exceptions to the May 3, 1982 Charter provisions; adopted at any point during the life of this Agreement provided for in the award and in that case the exception provisions provided in this Award would apply to said employees.

This is only fair because new employees did not rely on an Oakland County residency requirement as did the present command officers when they took their jobs or promotions.

To repeat, the City may believe that this residency requirement has been filled with exceptions. But this is necessary when one has had a history of an Oakland County residency and is trying to bring it back down to a City of Pontiac residency.

The Chairman emphasizes that the retirement exception referred to above has been inserted in recognition that this situation is reversed of the usual residency issue. It was an attempt to impose a more restrictive residency requirement than what previously existed. Obviously, this exception only applies to officers in the bargaining unit. It does not apply to new members to the bargaining unit. For as just mentioned, their equities are not the same as current members of the bargaining unit.

This is a unanimous opinion. Not because the City or Command delegates are completely in agreement but because of the insistence of the Chairman of the panel that unanimity was necessary in such a delicate matter. Otherwise, either side could have lost completely.

The Award that follows will reflect the above analysis.

A W A R D

The Charter's May 3, 1982 residency provision will be incorporated into the Pontiac Police Supervisors Association 1981-1985 Agreement with the following exceptions:

1. Any officer may be promoted even if living outside of the city limits of Pontiac, if at the time of this Agreement he or she is an owner of a home outside the City in which he/she resides.

2. Any officer who is not a homeowner but lives outside of the city limits of Pontiac still retains the opportunity to be promoted; however, if said officer moves subsequently, said officer must comply with the Charter.

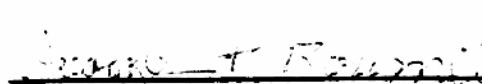
3. Any officer who after the adoption of this Award lives outside of Pontiac in a home he/she owns, and then sells his/her home and continues to live outside of Pontiac, will be subject to the provisions of the Charter as adopted.

4. Any officer presently residing within the City must comply with the Charter.

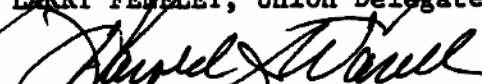
5. An exemption to the above requirements shall exist for an officer whose spouse's employment requirements mandate residency within a city besides Pontiac.

6. A Command officer who in writing states that he/she will retire from city employment within three years of said purchase may move into a purchased home or condominium outside the City limits of Pontiac but in Oakland County provided said home or condominium is intended to serve as his/her residence for past Pontiac employment. If said command officer does not retire at the time so stated he/she may be, at the sole discretion of the city, demoted to the officer's former rank or classification he/she held.

7. New employees to the bargaining unit shall comply with the May 3, 1982 Charter provisions as to residency unless the collective bargaining agreement of the City unit from which they came provides exceptions to the May 3, 1982 Charter provisions; adopted at any point during the life of this Agreement provided for in the Award and in that case the exception provisions provided in this Award would apply to said employees.


GEORGE T. ROUMELL, JR.
Chairman


LARRY FENELEY, Union Delegate


HAROLD J. WARELL, City Delegate

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