BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 366, AFSCME, AFL-CIO DISTRICT COUNCIL 48	Case 279 No. 49156 MA-7845
and	
THE MILWAUKEE METROPOLITAN SEWERAGE DISTRICT	

Appearances:
Mr. Alvin R. Ugent, Podell, Ugent & Cross, S.C., Attorneys at Law, 611 North Broadwa
Mr. Donald L. Schriefer, Senior Staff Attorney, Milwaukee Metropolitan Sewera

ARBITRATION AWARD

Local 366, AFSCME, AFL-CIO, ("the Union") and the Milwaukee Metropolitan Sewerage District ("the District") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The union made a request, in which the district concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance concerning the meaning and application of the terms of the agreement relating to pay increments. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Milwaukee, Wisconsin, on October 15, 1993. A stenographic transcript of the proceedings was provided to the parties on or about November 5, 1993. The Union filed written argument on January 14, 1994 and waived its right to file a reply; the District filed a written argument and a reply on March 16, 1994 and March 28, 1994, respectively.

ISSUE:

At hearing, the parties agreed to the following statement of the issue:

> Is the District entitled to move employes who have transferred into the monitoring crew position and undergo a six month training period, are they required to move those employes to the second increment after one year in the department, i.e., six months of training plus six months as a full fledged worker or one year after completion of the six month training period?
>
> If not, what remedy?

The parties further agreed that I was empowered to revise the foregoing in the interest of clarity. I restate the issue as follows:

> Did the employer violate the collective bargaining agreement by not advancing successful monitoring crew trainees to the second pay increment until one year after their completion of a six-month training period?
>
> If so, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE:

SCHEDULE A

A.RATES OF PAY.

. . .

3. Unless otherwise agreed, employees shall move from the minimum step in the pay range to the maximum step in annual increments.

. . .

SECTION II

A. Unless otherwise provided and for other than entrance positions, the District, when filling a regular full-time position with a regular appointment, shall select among qualified applicants according to the following procedure:

. . .

2. Applications from unit employees who meet the posted qualifications will be considered. If no qualified and physically able unit employee applies, the District may hire from an outside labor source.

3. Qualified applicants will be ranked in order of hiring date seniority unless otherwise provided herein. When ranking by the selection criteria found in the various bidding ladders contained herein, the employee's regular classification at the time of application will be used to assign the employee within the bidding ladder preference level. Employees serving probationary periods will be assigned to a bidding level based on their most recent regular classification. Employees serving initial probationary periods will be considered as an outside labor source without regard to seniority.

. . .

6. The employee, if not serving his/her initial probationary period as defined in Schedule A, Section P, 2, shall serve a thirty (30) working day probationary period in the classification. During that thirty (30) working day probationary period, the employee may return to his/her former classification by:

a. Waiving the position in writing.

b. At the discretion of management if the employee fails to adequately perform the duties and responsibilities of the position.

When an employee returns to his/her former classification as in a or b above, employees who have been promoted or assigned to the vacancies (and subsequent vacancies) created by the promotion of that employee will be backed down to the classification they held previously.

. . .

8. If the final wage increment of a vacant position is equal to or lower than the final wage increment of the eligible bidder's classification, the employee shall be paid at the first (1st) increment rate upon assignment to the new classification. Employees assigned to rotating shifts shall be eligible for the second (2nd) increment rate after the thirty (30) working day probationary period or rotating shift.

. . .

10. Employees who are promoted to a higher level classification shall receive the first increment, if it results in a pay increase, or the closest increment which would generate a pay increase. If the final wage increment of a vacant position exceeds the final wage increment of the eligible bidder's classification, the posted position will be considered a promotional opportunity within the meaning of this language.

11. If the employee is interested and at the discretion of management, an employee may be assigned for training to another classification or job. During such training, the employee will be paid at the wage rate of the employee's regular assignment.

BACKGROUND:

This grievance involves the intervals at which monitoring crew workers who undergo a six-month training period receive increment pay raises.

Previously, the position of monitoring crew workers was one which required relatively little technical expertise, and was one which unit members bid into directly. Greater environmental regulation then brought the need for more technical skills in such areas as flow gauge. The employer thus sought the institution of a six-month training period, to which the union agreed.

In 1989, the union filed three grievances concerning the distribution of overtime for employes who were in their training period as monitoring crew workers and whom the employer was not including in overtime assignments because it felt they were not qualified for the work. After a series of discussions from late winter to fall, 1990, the parties on September 21, 1990, agreed to a voluntary settlement of these grievances, as follows:

MONITORING CREW GRIEVANCE SETTLEMENT

The undersigned, being the duly authorized representatives for the parties hereto do agree that the following resolves Grievance Nos. 89-21, 89-31, and 89-32, and does establish the procedures for filling vacant monitoring crew positions with less than fully qualified personnel.

1. The above referenced grievances are hereby denied. However, in the pursuit of a voluntary resolution in this matter, the District agrees to adjust the wages for the following individuals to the first increment of the Monitoring Crew Worker classification effective the date of their transfer into that department. The employees are Gerald M. Hertlein, Dennis J. Maranowicz, James R. Gruenwald, and Gale M. Pyszka. Their departmental seniority, if necessary, will be adjusted to the date upon entering the Monitoring Crew Department.

2. Local 366 and the employees agree to drop their claim relative to unequal distribution of overtime as stated in the above referenced grievances.

3. In the future, it is agreed that if no Local 366 represented employee fully meets the experience qualifications for the position of Monitoring Crew Worker, the District may proceed to fill the position by allowing employees who lack the appropriate experience in sewer flow gauging and/or sewer sampling, but who appear to be able to meet the other job qualifications within a short period of time, to voluntarily request this assignment in accordance with the provisions of paragraph 11 of Section II A. of the contract. It is noted that the District will continue to use a written test as a means of ascertaining whether the interested applicants possess the required mathematical skills determined necessary for successful job performance in this classification. Each

employee selected in this manner will have to successfully complete a six-month training program during which time he/she will be in a probationary status with regard to their position in this department and can be returned to his/her former classification at the discretion of management. The employee may also return to his/her former classification during this training period at his/her request. This provision will be so stated in the Notice of Job Opening.

4. During the six-month training period, the employee will not be eligible for overtime until having successfully accomplished the following:

a. Be certified on CPR techniques,
b. be certified on multimedia first aid,
c. be certified by the District on confined entry,
d. had experience in a confined space, and
e. be qualified to perform the task required during the overtime period.

This does not include incidental overtime while in training.

5. The employee shall be compensated in accordance with Section II A. paragraph 11 of the collective bargaining agreement during this six-month training period.

6. At the conclusion of the six-month training period, the normal 30-day probationary period as prescribed under Section II A. paragraph 6 of the collective bargaining agreement shall be waived.

7. Qualifications for entrance into this training program on a voluntary basis will be dependent on a pass/fail test score of all interested applicants in accordance with bid ladder preference for the position of Monitoring Crew Worker.

8. Employees assigned under these provisions to the Monitoring Crew Department will begin departmental seniority on the first day assigned.

For MMSD:		For Local 386:	
James L. Johnson /s/	9/21/90	Wm. Mollenhauer	9-20-90
James L. Johnson Human Resources/ Labor Relations Manager	Date	William Mollenhauer Staff Representative	Date
Bernadette D. Berdes /s/	9/21/90	Robert Vandehei /s/	9-20-90
Bernadette D. Berdes Manager of Industrial Waste	Date	Robert Vandehei Local 366 President	Date

Payroll records kept by the District indicate that, in the period from 1981 to the grievance settlement referenced above, six employes went through the monitoring crew worker training program and into permanent assignment. These records indicate that upon completion of the six month training period the employes were promoted to monitoring crew worker and were awarded the first

increment, and that they received the second increment one year after the first increment.

On June 15, 1992, Union steward Steven St. Louis filed a group grievance, in which he asserted that, "the employer is refusing to pay certain monitoring crew workers the second increment as specifically set forth in the collective bargaining agreement." As the specific clause of the contract alleged to have been violated, St. Louis cited Page 13, Schedule A, 3, and "all other specific and appropriate clauses." As remedy, he sought that "the monitoring crew workers affected by the above grievance should be made totally whole."

On July 14, 1992, Labor Relations Manager James L. Johnson denied the grievance, stating, in part, that "employes in question voluntarily entered into a training program in accordance with the grievance settlement and paragraph 11 on page 61." He further explained that these employes "are not considered permanently classified as a monitoring crew worker until the completion of the training period," and that they therefore "advance through the wage schedule based upon their date of permanent appointment to the classification."

On July 22, 1992, Labor Relations Manager Johnson wrote to David Wozniak, a Monitoring Crew Worker, as follows:

> In reviewing our records, we detected an error made in your receiving the second increment on January 2, 1992. According to the Local 366 Contract, Schedule A, A. Rates of Pay, #3, "movements in the pay range are in annual increments."
>
> You became a Monitoring Crew Trainee on January 2, 1991 and became a Monitoring Crew Worker on July 2, 1991. The second increment should have been one year from July 2, 1991 instead of January 2, 1991. Based on that error, you will receive the third increment on July 2, 1993 to make up the early payment of six months. We are doing this so that you are not required to repay the early payments.
>
> We apologize for this error. If you have any questions please call Trina De Leon-Simpson at ext. 2117.

A summary of payroll records kept by the District, relating to the period 1990-1993, indicates that during the six month period between the temporary assignment date and permanent assignment date those employes in the training program continued at their job title and the hourly rate of pay for the position they held as of the day prior to their temporary assignment. The payroll records also indicate that these successful trainees received their first increment six months after their date of temporary assignment, and their second increment one year after the date of the first increment (eighteen months after their temporary assignment date).

With the employer's non-precedental waiver of a timeliness objection, this matter was subsequently brought to grievance arbitration.

POSITIONS OF THE PARTIES:

The following is the complete text of the argument made by the union in support of its position that the grievance should be granted:

> The contract states that "unless otherwise agreed" the employees shall move from the minimum step in the pay range to the maximum step in annual increments". There

is no agreement that says otherwise so the contract language applies.

When the employees complete their 6 month training period, it is nothing more than a probationary period and in fact, they are on probationary status during their training period. When they complete their training/probationary period, they receive seniority retroactively, from the first day they come on the job. The six month training period is the probationary period because there is no requirement that the employee must serve a 30 day probationary period after the 6 month training/probationary period. The normal or usual 30 day probationary period is waived if the employee completes the 6 month period.

A directly comparable situation results when an employee completes the usual 30 day probationary period. In that event, the employee must work only 11 months following the first 30 days to get the 2nd increment. In other words, he/she gets credit for the first 30 days toward the increment. This is the way it has been handled for many years. Why should the 6 month probationary period be treated any differently? When the employee completes the 6 month training/probationary period, he/she should be entitled to the second increment after an additional 6 months. In other words, the increment should be given after one year on the job. Not 18 months as management would like to require.

As a matter of fact, Management agreed with the Union position at first and later changed its corporate mind, calling it an error. It was no error, and Management's belated effort to find a loop hole in order to cheat the employees out of an incremental pay increase should not be allowed. See: employers Exhibit 1

In support of its position that the grievance should be denied, the district asserts and avers as follows:

A plain reading of the relevant contract language supports the district's position. There is nothing ambiguous about the language of Schedule A, Section A.3, which, absent agreement to the contrary, provides for movement along the pay range in annual increments. No such agreement to the contrary has been alluded to by the union; no such agreement to the contrary exists. Movement along the pay range occurs in annual increments, and only in annual increments.

Relevant past practice is consistent with the district's position. The pertinent language has not changed in over a decade, during which time the district has consistently paid any successful bidder into the crew position at the employe's pre-transfer wage during the training period; begun paying successful trainees the crew position wage only at the end of the six-month training period; begun paying such employes the second increment of the crew position only one year after completion of the training period (eighteen months after initial transfer).

The union has not raised any credible arguments in support of its position. Apparently, the union argues that movement from one increment to another within the monitoring crew classification should be linked to department seniority, and that the six months in training constitutes a probationary period which somehow counts towards determining eligibility for second increment pay. A major problem with these theories is that nothing in the contract or elsewhere supports them, and they are plainly inconsistent with past practice.

In light of relevant, undisputed facts, unambiguous contract language, and past practice which is entirely consistent with the contract language, the grievance should be denied.

The union declined to file a reply brief. In its reply brief, the district responds to the union's brief by stating that it is inappropriate to compare monitoring crew workers with workers in other classifications, in that "the two groups are not comparable for the simple reason that only monitoring crew workers, and no other classifications, undergo a six-month training period before they begin to receive pay at the first increment."

DISCUSSION

This grievance involves the movement of monitoring crew personnel from the first pay increment to the second. Its resolution requires review of the language of the collective bargaining agreement and the terms of a prior grievance settlement.

The union's argument seems to draw an analogy between the six month training period for monitoring crew personnel, which it describes as akin to a probationary period, and the usual 30 day probationary period for other classifications. Since other employes work only 11 months after the completion of the probationary period -- in effect, getting credit for their time on probation -- the union suggests that the monitoring crew trainees should likewise get credit for their six months on "probation." Why, the union asks, should these trainees be treated any differently?

To the extent that these trainees are treated differently, it is because their positions and conditions of employment were the matters at issue in a prior grievance settlement. The Monitoring Crew Grievance Settlement of September, 1990, provides that, in the event there are no union-represented employes who fully meet the experience qualifications for the position of Monitoring Crew Worker, the District may allow employes to voluntarily request this assignment in accordance with the provisions of paragraph 11 of Section II A. of the collective bargaining agreement, which paragraph provides that, during a training assignment "to another classification or job," an employe "will be paid at the wage rate of the employe's regular assignment." The settlement also waives the 30-day probationary period for successful trainees.

The collective bargaining agreement requires the advancement of employes along the pay range steps "in annual increments." As I understand that phrase, it means the passage of one year between increments. That is precisely how the employer is administering this aspect of its operations. As provided for in Section II, A. 11, monitoring crew trainees are paid at the wage rate of their regular assignment during the six month training period. Upon completion of the training, they go to the first increment. One year after going to the first increment, they go to the second. That is advancement along the pay range "in annual increments."

The union's real dispute, it seems, is not so much the passage of time between the first increment and the second, but between the time training commences and the second increment. The union says it should be only twelve months; the employer says it should be eighteen (assuming a full six-month training period). For the union to prevail, it would be necessary to find that a first increment occurred on the date of the temporary assignment as a trainee. That, of course, is not the case, as Section II, A. 11 of the collective bargaining agreement, as explicitly referenced in the 1990 settlement, clearly provides that an employe remains at the prior wage rate during the training period. The first increment occurs upon the completion of the training period; the second increment occurs twelve months thereafter. Such a system is consistent with the collective bargaining agreement.

Accordingly, on the basis of the collective bargaining agreement, the record evidence, and the argument of the parties, it is my

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin this 24th day of June, 1994.

By Stuart Levitan /s/
Stuart Levitan, Arbitrator