

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CITY OF TWO RIVERS

and

TWO RIVERS CITY EMPLOYEES, LOCAL 76,
AFSCME, AFL-CIO

Case 74
No. 49459
MA-7962

Appearances:

Davis & Kuelthau, S.C. by Mr. Mark Olson, Attorney at Law, 111 East Kilbourn Street, Suite 1400, Milwaukee, Wisconsin 53202, appearing on behalf of the City of Two Rivers.

Wisconsin Council 40, AFSCME, AFL-CIO, Post Office Box 370, Manitowoc, Wisconsin 54220-0370, by Mr. Gerald Ugland, Staff Representative, appearing on behalf of Local Union 76.

ARBITRATION AWARD

The City of Two Rivers (hereinafter referred to as the City or the Employer) and Local 76, AFSCME, AFL-CIO, (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute over the City's decision to require certification of candidates for an opening in the position of treatment plant operator. A hearing was held on October 13, 1993 in Two Rivers, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. A stenographic record was made of the hearing and a transcript was received by the arbitrator on October 28, 1993. The record was held open to allow the parties to reach agreement on several exhibits. After very extensive discussions, they were not able to reach agreement and the hearing was reconvened on October 20, 1994. A transcript of the October 20th hearing was received on October 30th.

The parties submitted post hearing briefs and reply briefs which were simultaneously exchanged through the undersigned in April of 1995. Prior to the closing of the record, the parties indicated that they would make a joint request that the arbitrator serve as investigator of their negotiations over a 1995-1996 collective bargaining agreement. The appointment as investigator was accepted on the understanding that the record in this case would not be treated as closed until such time as the contract was ratified or final offers were certified to interest arbitration. Agreement on the new contract was ultimately reached in mediation. Ratification was completed by November 13th, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the relevant provisions of the contract and the record as a whole, the arbitrator makes the following Award.

I. Issue

The parties were not able to agree on a statement of the issue, and stipulated that the arbitrator should frame the issue in his Award. The Union asserts that the issue is:

Did the Employer violate the collective bargaining agreement by requiring waste water treatment plant operator certification of applicants to the treatment plant operator position opening vacated by Michael Wisniewski? If so, what is the appropriate remedy?

The City argues that the issue is:

Did the City violate the provisions of Article II, Article III, or Article V of the 1992-94 collective bargaining agreement when it posted the position of certified treatment plant operator as a range 8 position in February of 1993 to replace Michael Wisniewski who retired as a certified treatment plant operator? If so, what is the appropriate remedy?

There is no material difference between the parties' views of the issue, aside from the inclusion of some supportive facts in the City's version. The Union's more general statement of the issue fairly summarizes the dispute, and is adopted for use herein.

II. Relevant Contract Language

ARTICLE II - COOPERATION

The Employer and the Union agree that they will cooperate in every way possible to promote harmony and efficiency among all employees. The Employer agrees to maintain the amenities of work (e.g., coffee breaks, etc.) not specifically referred to in this Agreement. An amenity is defined as a routine practice which is mandatorily bargainable.

ARTICLE III - MANAGEMENT RIGHTS

The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised

consistently with the other provisions of this contract. These rights include the following:

- A. To direct all operations of City government.
- . . .
- C. To hire, promote, transfer, assign and retain employees.
- . . .
- F. To maintain efficiency of City government operations entrusted to it.
- G. To take whatever action is necessary to comply with State or Federal law.
- H. To introduce new or improved methods or facilities.
- I. To determine the number, structure and location of departments and divisions; and the kind and amounts of services to be performed.
- J. To change existing methods or facilities.
- K. To determine the methods, means and personnel by which operations are to be conducted.

. . .

ARTICLE V - EMPLOYMENT

It is the policy of the Employer to recognize competence and ability when hiring new employees and to provide genuine opportunities for careers in municipal service to all in its employ. City employees are expected to live within the City limits.

All City positions are filled on the basis of ability, except as hereinafter provided. As provided by State law, no consideration shall be given to race, religion, color, or residence when hiring new employees.

. . .

- I. Promotions:
 - 1. Job Posting: Higher positions will be filled from within the Service whenever possible.

Announcements of opening (Notice of Position Vacancy) will be made on employee bulletin boards and will be posted for a period of five (5) working days. An employee interested in a position posted for promotion shall sign his/her name on the posting form as evidence of his/her desire for the promotion and the time and date that he/she signed his/her name.

2. Job Award:

a. The most senior applicant, if qualified, shall be given the promotional opportunity within a reasonable time after the completion of the posting period.

...

4. Disputes: Disputes in regard to employee qualifications, satisfactory completion of the trial period, and non-recognition of seniority shall be determined in the grievance procedure. It is agreed that job qualifications shall be on a fair and practical standard related to the work of the position. Should an applicant (aggrieved) prevail in a grievance hearing, upon the satisfactory completion of a trial period, he/she shall receive all lost wages and benefits he/she might otherwise have received.

...

APPENDIX A

**CITY OF TWO RIVERS
A.F.S.C.M.E. - LOCAL 76**

JOB CLASSIFICATION AND PAY SCHEDULE

...

Position	Range	HOURLY RATE		
		1992	1993	1994
Janitorial Aide	A	\$ 6.24	\$ 6.49	\$ 6.75
...				
Plant Operator Treatment Plant Mechanic Equipment Mechanic	5	\$11.59	\$12.05	\$12.53

. . .

Certified Plant Operator	8	\$12.11	\$12.59	\$13.09
Certified Plant Operator/Wastewater Treatment Plant Lab Technician**				
Certified Plant Mechanic				

. . .

Position	Range	HOURLY RATE			
		1992	1993	1994	
Unassigned	14	\$14.61	\$15.19	\$15.80	
Third Class Lineman	L-3	\$12.57	\$13.58	\$14.67	
Second Class Lineman	L-2	\$13.51	\$14.59	\$15.76	
First Class Lineman	L-1	\$14.01	\$15.13	\$16.34	
Expert Lineman	L-E	\$14.61	\$15.78	\$17.04	
Head Lineman	L-H	\$15.17	\$16.38	\$17.69	

**One position, only

. . .

Linemen

Initial employment in a lineman classification shall be subject to the posting procedure. Advancement through the lineman classifications ranges shall not be governed by the posting procedure, but shall be controlled by a reasonable testing procedure established by the City. Once employed in a lineman classification, an employee may advance through the ranges to the position of expert lineman upon satisfaction of the established procedures.

Tests for the lineman will be made available by July 15, 1981. Qualifications to take the examination shall be six (6) months worked in the next lowest classification.

III. Background

There is little dispute over the underlying facts of this case. The City provides general governmental services to the people of Two Rivers, Wisconsin. The Union is the exclusive bargaining representative for the employees in a variety of City Departments including Public Works, Parks, and the Water and Wastewater Utilities. Among the employees represented by the Union are plant operators at the utilities. The wage appendix of the 1992-94 collective bargaining agreement listed three different classifications of plant operator. Pay Range 5 included "Plant Operator". Pay Range 8 included the higher paying classifications of "Certified Plant Operator" and "Certified Plant Operator/ Wastewater Treatment Plant Lab Technician".

On February 24, 1993, the City posted a notice of vacancy. The vacancy had been created by the retirement of Michael Wisniewski, who had held the job of Certified Plant Operator at the wastewater treatment plant. The job was posted as a Certified Plant Operator at the wastewater treatment plant, and included a job description which required that applicants hold DNR certification as a Class 4 wastewater treatment operator with subclasses a, c, e, f, g, i and j. This differed from the prior job description from 1983 which was drafted to cover both certified and non-certified plant operators, and applied to both the water plant and the

wastewater plant. That description required non-certified applicants to obtain the certification "as soon as possible", but did not make it a pre-condition for applying for the job. Wisniewski had possessed the Class 4 certification for some 20 years before his retirement.

Among the persons applying for the job were Kevin Perry and Larry Lambries. Perry was the senior internal applicant, but did not possess a Class 4 certification. Lambries did possess a Class 4 certification, although he did not possess subclasses "e" and "g". Lambries also had five years of experience in a similar plant. The position was awarded to Lambries. The instant grievance was thereafter filed, asserting that the job qualifications were unreasonable, and had the effect of denying senior qualified applicants the chance to fill the vacancy. The City denied the grievance, and the matter was not resolved in the lower steps of the grievance procedure.

Additional facts, as necessary, will be set forth below.

IV. Positions of the Parties

A. The Position of the Union

The Union takes the position that the City unilaterally changed the job description for wastewater treatment plant operator and thereby violated the contract. Employees had customarily been allowed to claim open treatment plant operator positions on the basis of seniority, and to then work towards certification after being awarded the job. Certification was not a prerequisite for posting, and if an otherwise satisfactory employee failed to obtain certification, it did not affect his right to retain the job. In this case, the City abandoned its prior practice, to the detriment of senior applicants.

The contract allows changes in the job descriptions, so long as the new qualifications are based on "a fair and practical standard related to the work of the position". There is no justification for the City's change in the operator's job description. The change was authored by Mike Lewis, the Director of Public Works, supposedly because of new DNR regulations requiring certification for plant operators. However, the DNR regulations do not require more than one certified operator, and specifically exclude "shift operators and shift supervisors". Ray Schultz, the Wastewater Superintendent, conceded that the Two Rivers plant operates under his certification, not that of the plant operators. Moreover, the successful applicant, Mr. Lambries, did not possess the two subgrade certifications specified in the regulations. Thus the City could not rationally have passed over the other applicants on the basis of certification -- it was not required and the man chosen did not have the certification.

The Union dismisses the other bases cited by Lewis, including the frivolous claim that since he had changed the job title to Certified Plant Operator, he needed to add a certification requirement. Lewis also claimed that operation of the belt press could only be done by someone

with training gained in the certification process. This arguments is at odds with the evidence showing that every operator, certified or not, has been trained to operate this press. The Union also notes that Lewis claimed to have work off an old job description that was shown at hearing to have included the second page of a completely different job description. This draws his credibility into question, to say the least.

The true reason for the change in the job description, the Union suggests, was that Lewis viewed Lambries as the most qualified applicant for the job and wanted to draw up a list of qualifications that only he could meet. He repeatedly referred to Lambries as the best qualified candidate, ignoring the fact that the contract requires selection of the most senior qualified candidate. The arbitrator should disregard the pre textual basis for these changes, in order to protect the clear rights of bargaining unit employees under the posting provision.

The Union is content to have Lambries stay in the job, and seeks only a prospective declaration of rights in order to prevent future violations of the agreement. The evidence amply justifies such a declaration, and the Union therefore asks that the grievance be granted.

B. The Position of the City

The City takes the position that the grievance is without merit and should be denied. The City has retained the right to set the qualifications for bargaining unit positions, and the addition of a certification for plant operators is well within the reserved rights of management. The management rights clause recognizes that the City alone determines the methods of its operations and when and how to change and improve those methods. Article V of the contract further amplifies these rights, specifically conditioning the right to pass on possession of the qualifications for the job, and allowing the City to set qualifications which are fair and practical. Thus the contract gives the City broad discretion in this area, and the certification requirement falls within the City's area of discretion.

The City recognized that plant operators are often alone in the plant and are for all practical purposes in charge of the plant. Failure to have a certified operator in charge of the plant would expose the City to penalties and fines that could amount to millions of dollars. The City is entitled to protect itself and its citizens from these potential liabilities. In addition to the legal protection afforded by a certification requirement, the City considered the fact that plant operator duties are constantly evolving and becoming more difficult. The advantage of certification has long been recognized in this position, and the City notes that new operators have been required for years to obtain certification immediately upon completing training. An "up-front" requirement of certification is not the radical change that the Union suggests.

Many arbitrators have endorsed the right of management to determine and change qualifications to meet changing technologies and regulations. The only specific limit in this contract is that the qualifications be fair and practical, and the City has proved that these conditions

underlay the decision to post the position as a Pay Level 8 Certified Plant Operator. The City notes that this position was in existence before this posting, and that the Union never challenged it. Thus it is possible to view this as no change at all. Whichever mode of analysis is used, the City argues, the grievance has no merit.

The steps taken by the City in this case were similar to the upgrading of the Engineering Aide position several years before. The qualifications, duties and pay were all upgraded without protest by the Union. The City points out that past practice is powerful evidence of present rights, and argues that the disposition of the Plant Operator dispute should follow along the same lines as that of the Engineering Aide. The Union did not challenge the City's actions in that case because it recognized the scope of management's rights. That scope is unchanged through the dates of this grievance. For all of these reasons, the grievance should be denied.

C. The Union's Reply Brief

The Union rejects the City's attempt to rewrite the Wisconsin Administrative Code. The City claims that it could be fined if its plant operators are not certified, but the plain language of the administrative rules governing plant operations make it clear that only one certified operator need be on staff. As noted in the initial brief, Ray Schultz holds the license under which the City's treatment plant operates, and the City would have faced no liability whatsoever had it posted this job without a certification requirement. The City cannot reconcile its argument with the language of the rules, nor can it explain why Christopher Behrendt has been able to continue in his job, despite his lack of a certification. The answer, of course, is that the requirement argued by the City is non-existent.

The Union argues that the arbitration cases cited by the City are all distinguishable. One of them turned on an oral agreement, while another was decided on an arbitrary and capricious standard. The contract here contains an express standard for qualifications. A third involved an attempt to transfer work out of the bargaining unit, which is not an issue in this case. The fourth turned on the rapid change in technology. Technology in wastewater treatment plants is changing, but not at a pace that prevents current non-certified personnel from learning the changes and continuing to perform their jobs at a high level of competence. Many of the newly required tests are performed by the lab technician, not the operators. Others require minimal training. The newest piece of equipment, the belt press, is operated by all personnel, certified and non-certified alike. Even high school students employed as seasonal and replacement workers are allowed to perform this job, and the City's claim that the technology is too complex for anyone but certified personnel is simply not true based on their own actions in managing the facility.

D. The City's Reply Brief

The City characterizes the Union's position as absurd on its face -- that the City cannot replace a certified operator with another certified operator. There is a distinction between certified operator and non-certified operators. The City did not change the job description for non-certified operators, it merely decided to hire someone at a higher level. The Union has conceded that the

City can choose which job it wishes to post, and that the City can change and upgrade job descriptions if the changes fairly and practically relate to the work to be performed.

The Union's argument that the City may hire at an uncertified level without being fined or sanctioned ignores the fact that mistakes made by any personnel can lead to substantial penalties. The City has the right to avoid this exposure by upgrading its hiring standards, and is not required to operate at the lowest permissible standards in order to avoid a grievance.

V. Discussion

Management retains the right to determine an applicant's qualifications for a job, but has agreed that "job qualifications shall be on a fair and practical standard related to the work of the position." (Article V, I(4)). The qualification at issue in this case is the City's requirement that applicants hold DNR Class 4 Certification as a wastewater treatment plant operator, a requirement that the Union argues is not necessary for the actual work performed by operators at the plant. 1/

The job description posted in 1993 differed from the description used in previous postings. The former job description was a consolidated job description, covering both the Treatment Plant Operator and the Certified Treatment Plant Operator positions at the Water Plant and the Wastewater Plant. The duality of the description is reflected in the rather generic wording of the "Nature of Work" portion of the 1979 description:

This is *semi-skilled or skilled work* in the maintenance and operation of a *water or sewage treatment plant* and related facilities on an assigned shift. Work involves a variety of tasks utilizing skills acquired on the job and through special in-service training courses. *Non-certified operators assigned to Water Filtration Plant operation* will be expected to obtain certification as a Grade 1, Class S Operator under Chapter NR 114 of the Wisconsin Administrative Code as soon as possible. *Non-certified operators assigned to Wastewater Treatment Plant operation* will be expected to obtain certification as a Class 4, subclass a, c, e, f, g, i and j Operator as soon as possible. The work is performed in accordance with established procedures but requires some knowledge of operating and adjusting a variety of mechanical equipment. Supervision is received through inspection and discussion of operating problems,

1/ This is a policy grievance. The Union challenges the decision to post the job as a Certified Plant Operator, rather than the selection of Larry Lambries for the position. Thus it is not necessary to address the implications of the City's decision to hire Lambries despite the fact that he did not possess the certification subgrades supposedly required for the job.

review of operating records, and evaluation of test results. [Union Exhibit #1 - emphasis added]

The 1993 job description was narrowed to apply only to Certified Treatment Plant Operator at the Wastewater Treatment Plant:

NATURE OF WORK

This is a skilled work position in the maintenance and operation of the wastewater treatment plant and related facilities on an assigned shift basis. Work involves a variety of tasks in the operation, maintenance and repair of wastewater treatment facilities utilizing skills acquired on the job and through special training courses. Certification as a DNR class 4 wastewater treatment operator with subclasses a, c, e, f, g, i and j is required. The work is performed in accordance with established procedures and requires knowledge of operating and maintaining a variety of mechanical equipment. Works under the supervision of the Water/Wastewater Superintendent and Director of Public Works. [Joint Exhibit #6]

The old description speaks of non-certified operators obtaining certification as soon as possible, which suggests that the certified operators were required to have the certification before assuming their jobs. That requirement is also implicit in the title of the position and the fact that it is paid at a higher rate than plant operator. Given that the parties themselves have negotiated the higher rate for certification, there can actually be little argument that certification is a qualification which is fairly and practically related to the duties of a Certified Plant Operator.

Each party argues, at least to an extent, that there was a change in the job description. Assuming, as I do, that the Certified Operator has always had to actually be certified, the "change" at issue in this case is not a change in the qualifications for the position but a change in the format of the job posting. The old job description posted for vacancies described four different positions, two each at the Water Plant and the Wastewater Plant, while the new description applies to only one of the jobs. The practical impact of this change is to limit the pool of applicants for openings, since posting the former, more generic description would allow persons without certification to seek the opening, while narrowing the posting to "Certified Treatment Plant Operator" permits only those who already hold certification to apply. The true essence of the Union's argument is that the City should not have posted the higher rated job, since the operating needs of the plant could have been met by bringing in a non-certified operator.

The management rights clause reserves to the City the right to "determine the . . . kind and amounts of service to be performed" and "the methods, means and personnel by which operations are to be conducted", so long as these rights are exercised in a manner which is consistent with the

other provisions of the contract. The contract does contain a commitment by the Employer "to provide genuine opportunities for careers in municipal service to all in its employ" (Article V, Preamble) and to fill higher positions "from within the Service whenever possible" (Article V, Sec. I(1)). A close review of these provisions leads me to conclude that posting the position of Certified Plant Operator is consistent with Article III and does not contravene either of the commitments made in Article V.

The evidence introduced at the arbitration hearing establishes that the course of study for certification is available and open to any person, and that one need not be employed as a plant operator in order to seek certification. Thus any bargaining unit employee interested in the position may obtain the necessary qualifications at any time prior to posting. Moreover, even

though the certification requirement may represent a hurdle to career advancement, a finding that the Employer must post the lower rated position of plant operator would create an absolute cut-off of virtually every bargaining unit member's right to seek the Certified Plant Operator's job. Under the Union's theory of the case, the Certified Plant Operator is purely a promotional position for persons already employed as plant operators. If the position cannot be posted, no bargaining unit employee outside of the wastewater treatment plant may ever obtain it. This represents a far greater curtailment of promotional opportunities for the bargaining unit as a whole than does the position taken by the City. Nothing in the posting provision suggests that the parties intended to exempt this particular job from the general rule requiring the posting of promotional opportunities.

2/

2/ The only such exemption in the contract is found in Appendix A:

Initial employment in a lineman classification shall be subject to the posting procedure. Advancement through the lineman classification ranges shall not be governed by the posting procedure, but shall be controlled by a reasonable testing procedure established by the City.

Once employed in a lineman classification, an employee may advance through the ranges to the position of expert lineman upon satisfaction of the established procedures. . . . Test for the lineman will be made available by July 15, 1981. Qualifications to take the examination shall be six (6) months worked in the next lowest classification.

The Union's interpretation would create almost exactly the same situation for advancement in the Plant Operator classification. The fact that the parties are able to clearly state the existence of an exemption from the posting procedure for the Lineman classification strongly indicates that they did not intend such an exemption for the Plant Operator classification.

Certified Plant Operator is a negotiated classification. The title, the rate of pay, and the terms of the old job description all indicate that possession of a Class 4 certification was and is a necessary qualification for that classification. The vacancy at the wastewater treatment plant was created by the retirement of a Certified Plant Operator. There is no express provision of the contract which requires the City to replace a certified operator with a non-certified operator, and imposing such a requirement would not only entail amending the contract under the guise of interpretation, it would sharply limit the job posting rights of the vast majority of unit employees in favor of the small number already employed as plant operators. This result is inconsistent with both the management rights clause and the job posting provisions of the collective bargaining agreement. Thus the grievance must be denied.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The Employer did not violate the collective bargaining agreement by requiring wastewater treatment plant operator certification of applicants to the treatment plant operator position opening vacated by Michael Wisniewski. The grievance is denied.

Dated at Racine, Wisconsin this 5th day of January, 1996.

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator