

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1366, AFSCME, AFL-CIO

and

CITY OF FOND DU LAC

Case 147

No. 57327

MA-10593

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Godfrey & Kahn, S.C., by **Mr. William G. Bracken**, Coordinator of Collective Bargaining Services, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above are parties to a 1998-99 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear a dispute involving differential pay. The undersigned was appointed and held a hearing on June 14, 1999, in Fond du Lac, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by September 20, 1999.

ISSUE

The issue to be decided is:

Did the City violate the Article IX, Section 10 of the collective bargaining agreement in the manner in which it paid the Grievant, Alan Lietz? If so, what is the appropriate remedy?

CONTRACT LANGUAGE

**ARTICLE IX
DIFFERENTIAL PAY**

. . .

Section 10 – Water Plant and Sewage Treatment Plant Operator Licenses

The following additional pay shall be provided to operators who are in possession of valid Department of Natural Resources Licenses including training licenses.

<u>Cents Per hours</u>	<u>Sewage Plant Operators</u>
.05	Grade 1 – Subgrades a, c, e, g, i
.10	Grade 2 – Subgrades a, c, e, g, i
.15	Grade 3 – Subgrades a, c, e, g, i
.20	Grade 4 – Subgrades a, c, e, g, i

BACKGROUND

The Grievant is Alan Lietz, who filed a grievance on September 28, 1998, stating that the differential pay was not being paid properly. Lietz worked for the City an intern at the Wastewater Department from May to December of 1996. He worked 40 hours a week during the summer, and then worked part-time from September through December. The following year, he worked as a seasonal employee in the parks from April 1st through December 1st of 1997. He became a full-time employee at the City on March 1, 1998, starting as an Influent Pump Operator at the wastewater plant and remains in that job at the present time. He graduated from Moraine Park Technical College with an associate degree in water and wastewater technology. Lietz took a water and wastewater certification exam on May 6, 1998, and passed it. The exam is administered by the State’s Department of Natural Resources.

There are two levels – introductory and advanced – of exams for each of 10 subclasses. The introductory exam covers Grades 1 and 2, and the advanced exam covers Grades 3 and 4. The DNR report shows that Lietz passed the introductory exam for the mechanical sludge subclass (G) and the advanced exams for the disinfection subclass (E) and the mechanical sludge subclass (G).

The DNR regulations under Chapter NR 114 list an operator-in-training grade, denoted by the letter “T” and four grades. Specifically, NR 114.09 regarding qualifications of wastewater treatment plant operators states the following:

- (1) Five grades and 12 subclasses of wastewater treatment plant operators are established. Operator subclasses are the same as plant subclasses listed in s. NR 114.08(4). To qualify for certification in a given grade and subclass, a person shall meet the appropriate experience and examination requirements for that subclass and grade.

- (a) *Grade T*. Pass the written introductory or advanced examination for a given plant subclass and the written introductory or advanced general examination.
- (b) *Grade 1*. Completion of grade T requirements, plus have one year of satisfactory subclass specific experience.
- (c) *Grade 2*. Complete of grade 1 requirements plus one additional year of satisfactory experience in the general operation of a wastewater treatment plant. A person certified at Grade 1 on October 1, 1995 shall pass the written introductory or advanced general and written introductory or advanced examination for each subclass to be certified at the Grade 2 level, in addition to gaining the appropriate experience.
- (d) *Grade 3*. Completion of grade 2 requirements, plus one additional year of satisfactory experience in the general operations of a wastewater treatment plant, plus pass a written advanced level examination for a given wastewater treatment plant subclass and pass the written advanced general examination.
- (e) *Grade 4*. Completion of grade 3 requirements, plus one additional year of satisfactory experience in the general operations of a wastewater treatment plant. A person certified at Grade 3 on October 1, 1995 shall pass the written advanced general and written advanced examination for each subclass to be certified at the Grade 4 level, in addition to gaining the appropriate experience.

Lietz has the Grade T certification, or a training license, because he met the written requirements. He could have asked the DNR to certify him at the Grade 1 level as of May 6, 1999, when he completed one year of experience with his Grade T certification. He did not ask the DNR for such certification.

Lietz believes that under the collective bargaining agreement, he should be paid an extra 20 cents per hour because he has a training license for a Grade 4 certification. He has passed the written exams for a Grade 4 certification, but he has not spent the amount of time on the job to obtain a Grade 4 certification. The contract does not require that anyone spend a specific amount of time in a job to obtain the differential pay. Lietz also believes that his part-time experience as an intern in 1996 should count as experience toward certification. He considers himself to be a Grade 4 operator in training.

The City has paid Lietz in the same manner that it has treated other operators. It credited his full-time work for three months as an intern in 1996, added it to his full-time work in 1998, and started paying him an extra five cents per hour on December 2, 1998, giving him credit for one year's of experience including his work as an intern. During the time that Lietz worked part-time in 1996 as an intern in the wastewater plant, he worked in the laboratory and that experience was not counted toward any license.

In other words, the City treated him by December 2, 1998, as having a Grade 1 certification, even though he had not submitted his records to the DNR for such certification. The City used to wait for the proof, until the operator brought in the license, but employees often came in late with their licenses and the City had to go back into the payroll and give them back pay. Currently, the City pays the differential once a person has the necessary experience.

Utilities Director John Leonhard testified that no one would meet all five subgrades as listed in the labor contract, because they could not get the experience in all of those subgrades at the plant. So the City has paid the differential once the grade is obtained, without regard to all the subclasses. The City has also paid the grade for which an employee would be certified by virtue of experience without the employee first having obtained the DNR certification for that grade. Leonhard testified that Grade T indicates that a person has taken the tests and passed them. The DNR will not certify anyone as a Grade 1 operator until the person also has the experience to go along with it. Grade 1 means that a person has passed the entry level test and has one year of experience, at a minimum.

Leonhard said that the contract language was in place long before he started with the City over 15 years ago. He believed that the phrase "including training licenses" was added to the contract at some point, and he believed that phrase was included so that the City could keep paying employees the way it had been paying them. The DNR regulations have been changed about four times since the mid-1970s. Leonhard took his first exams in 1968.

The parties agreed to waive the time limits of the grievance procedure that require the Arbitrator to deliver the findings on the case within 30 days of the filing of the briefs.

THE PARTIES' POSITIONS

The Union

The Union contends that while the DNR may have a stricter definition than the contract of when an individual operator would be eligible to receive the differential payments, the contract language is broader and provides the appropriate level of premium for any operator who holds a training license in any of the grades. The City has taken the position that the differential pay is based upon time spent in the plant that indicates that Lietz would be entitled to the five-cent differential when he reached the one-year mark in total service, giving him credit for his internship work in 1996.

The Union is not trying to change the meaning of the contract but asks that its plain meaning be understood and applied. The contract language says nothing about eligibility for this differential being determined by length of time in a particular grade as a wastewater operator. Instead, it calls for operators holding particular grades, including those with training licenses within them, to be paid the appropriate additional pay for each grade.

The Union anticipates that the City will argue that the current procedure of determining differential pay has been in effect for a number of years and therefore has become a past practice. The Union points out that practices cannot be used to void clear contractual language. The language of Article IX, Section 10, is straightforward and simply outlines the amount of differential pay each DNR license provides employees. It specifically includes those operators holding training licenses.

In Chapter NR 114, there is no reference to the differential pay being discussed in this grievance. Chapter NR 114 discusses the training license. NR 114.03(7) states: "Grade means a number indicating the classification assigned to a person based on successful completion of an examination and experience, except that the operator-in-training grade is denoted by the letter T."

The Union states that the issue here is whether the City can create its own interpretation of when and how differential pay is applied rather than follow the language of the contract. The monetary significance of the grievance is admittedly small. The Union does not assert that paying the differential would then allow an employee to claim a higher level of DNR certification. The Union asks that the differential pay be paid according to the labor contract.

The City

The City argues that it has correctly paid the Grievant based on the clear contract language and its consistent past practice. Article IX, Section 10, required the City to pay a wage differential to those operators who have valid DNR licenses. The differential is paid to operators who have completed Grade 1, 2, 3 or 4 certification requirements. The subgrades a, c, e and g are all the same for the various grades. The only difference in the certification requirements for Grades 1, 2, 3 and 4 relate to experience. Chapter NR 114 states that to qualify for certification in a given grade and subclass, a person shall meet the appropriate experience and examination requirements for that subclass and grade.

The City notes that Leonhard testified that the DNR will not certify an operator without the appropriate years of experience. The City has required both the successful completion of the written examination requirements and the experience in paying the wage differential of Article IX. In the past, employees have been paid that the differential based on proof of satisfactory completion of training and experience.

The City gave the Grievant credit for his experience, and counted his intern experience of three months. In order to get the five-cent differential, the Grievant had to have one year of experience required for a Grade 1 certification. To receive a Grade 4 differential, the Grievant would have to have four years of experience. Because the Grievant does not have four years of experience, he cannot be certified by the DNR as a Grade 4 operator. The City has treated all employees the same.

The Grievant admitted that he did not have enough experience to be placed at a Grade 4 category according to the DNR's regulations, and that he would be at the Grade 1 category. By his own admission, the DNR would classify him as a Grade 1 operator.

In replying to the Union, the City states that the language in Article IX is clear and requires "operators who are in possession of valid Department of Natural Resources licenses, includes training licenses . . ." (emphasis added) be paid a wage differential. Contrary to the Union's contention, the contract language is not broader than the DNR regulations. The language conforms to the DNR's license requirements which include an experience component. One cannot have a Grade 4 DNR license without four years of experience. The City has consistently interpreted the contract language to be in compliance with the DNR requirements.

The Union has claimed that the contract says nothing about eligibility for the differential being determined by the length of time in a particular grade. For that interpretation to be correct, the Arbitrator would have to ignore the phrase "operators who are in possession of valid Department of Natural Resources licenses . . ." The Union is mistaken in contending that the contract is different than the DNR rule. The contract clearly relies upon and is founded upon the DNR regulations, and both provisions must be harmonized. The City does not argue that the past practice is in conflict with the contract language, but cites past practice to show that the City has always interpreted the contract to include the experience component as the contract requires. To have a valid DNR license at a particular grade, an employee must have the requisite number of years of experience. The Union admits that the grades under Chapter NR 114 include both the completion of an examination and experience. Grade T reflects no experience.

DISCUSSION

The language at issue is the phrase in Article IX, Section 10 that states:

The following additional pay shall be provided to operators who are in possession of valid Department of Natural Resources Licenses including training licenses.

There are pay differentials for Grades 1, 2, 3 and 4, but no differential for a training license. What is confusing is why the parties would use the term "including training licenses" but have no pay rate for a training license. Leonhard stated that he thought the phrase was included so that the City could continue to pay employees who held training licenses but had not submitted their experience in order to get the proper certification.

While the bargaining agreement does not define a training license, the parties agree that the DNR regulations apply to define grade operators. Under the regulations, a training license is called a Grade T, and NR 114.09(1)(a) states that to meet the Grade T, one must:

Pass the written introductory or advanced examination for a given plant subclass and the written introductory or advanced general examination.

The Grievant has written and passed a written introductory and advanced general examinations for the subclasses of mechanical sludge and disinfection, and the introductory examination for mechanical sludge. With a training license and one year of experience, he qualified for a Grade 1 Wastewater Treatment Plant Operator certificate. The City started giving him the five-cent differential pay once he reached the one-year level.

The Grievant believes that he should get the maximum differential for a Grade 4 operator, because he considers himself to be a Grade 4 operator in training and has taken an examination for a Grade 4 certification.

The record only shows that the Grievant has taken an advanced examination. The DNR's regulations show that Grade 2 requires the written introductory or advanced examinations, and Grades 3 and 4 require advanced examinations.

While the Grievant believes that he has a training license for a Grade 4 operator, there is no such specific thing as a training license for a Grade 2, 3, or 4. The Grade 1 calls for the completion of the Grade T requirements, plus one year of experience. The Grievant has met the Grade 1 requirements only. His training license allowed him to obtain the Grade 1. He can only attain the Grade 4 by completing the Grade 3 requirements, which include three years of experience and completing Grade 2 requirements. Grade 2 means completing Grade 1 requirements. When the Grievant completes Grade 1, he can move up to Grade 2.

The Grievant may believe that his training license will eventually qualify him for a Grade 4 operator, but it will qualify him for a Grade 2 or 3 operator long before he reaches the Grade 4 level of experience. While the Union correctly states that the contract does not require any level of experience, the contract requires the attainment of the *grade* in order to get the differential money. To get the grade, one must do the time.

To get the 20-cent differential pay, an employee must hold a Grade 4 license. Under the Grievant's theory of the contract, anyone could get the maximum differential simply by passing an advanced examination of any one of the subgrades. That would be contrary to the contract which calls for different rates of pay or differentials for different grades.

If the parties want to attach a specific differential rate to a Grade T or a training license, they must do so in bargaining. An arbitrator should not determine what the differential should be for a training license where the contract does not specify any particular amount. While the Grievant has asked for the maximum rate of 20 cents, why not the minimum of five cents? Why not consider the training license to be a license for training for a Grade 1? That is just as logical under the DNR's current scheme. However, where the parties

have failed to attach a monetary amount to a training license, it would be inappropriate for an arbitrator to arbitrarily decide what amount the employee with the training license should have. Surely the parties can fix this in bargaining.

There is nothing in the record that shows that the City violated the contract in the manner in which it administered Article IX, Section 10, or the manner in which it paid the Grievant. The grievance will be denied and dismissed.

AWARD

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin, this 12th day of October, 1999.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator