

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**IOWA COUNTY MUNICIPAL EMPLOYEES  
UNION LOCAL 1266-C, WISCONSIN COUNCIL 40,  
AFSCME, AFL-CIO**

and

**THE CITY OF DODGEVILLE**

Case 24  
No. 61104  
MA-11806

*(Mark Wasley Posting Grievance)*

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Appearances:

**Mr. David White**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

**Mr. Brad Glass**, City Attorney, on behalf of the City.

**ARBITRATION AWARD**

The above-captioned parties, herein “Union” and “City”, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Dodgeville, Wisconsin, on June 24, 2002, at which time the parties agreed that I should retain my jurisdiction if the grievance is sustained. The hearing was not transcribed and both parties presented oral arguments in lieu of filing briefs.

Based upon the entire record and arguments of the parties, I issue the following Award.

**ISSUE**

The parties have agreed to the following issue:

Did the City violate Article 10 of the contract when it failed to select grievant Mark Wasley for the vacant Wastewater Treatment Plant Foreman position and, if so, what is the appropriate remedy?

### **BACKGROUND**

The City in September, 2001, posted the following job opening (Joint Exhibit 3):

...

#### **WASTEWATER TREATMENT PLANT FOREMAN**

The City of Dodgeville is accepting applications for the full time position of Wastewater Treatment Plant Foreman. Starting wage, \$14.48 per hour during a 60 day probationary period. After completion of a satisfactory probationary period, the hourly wage is \$17.05 per hour.

Requirements for this position include:

1. Graduation from a standard high school or vocational school, preferably supplemented by short courses in treatment plant operations.
2. Experience in treatment plant operation, maintenance and mechanical repair work.
3. Possession of a Wisconsin Wastewater Treatment Plant Operator's License, Class 3, with appropriate subgrades for wastewater. Will accept a Class 2 Operator who is willing to secure Class 3 licensing within a reasonable time as determined by the Common Council.
4. A commercial driver's license is required with A, B, C, D and N classification.

...

Grievant Wasley, Brian Ritchie, and another employee bid for that position. The City awarded the position to Ritchie who has a seniority date of April 5, 1999. Wasley's seniority date is April, 1988, thereby making him more senior than Ritchie. Ritchie was classified as an Assistant Sewer Foreman in the City's wastewater treatment plant and he then had a Grade 2 state certification to work in the wastewater treatment plant. Wasley, an Assistant Foreman in the City's water department, had no certification to work in the wastewater treatment plant.

He about once a month worked a weekend shift which included taking meter readings in the wastewater treatment plant for about two hours.

Wasley on or about November 26, 2001, grieved over the City's refusal to award him the posted position (Joint Exhibit 2). That grievance was subsequently denied by Dan Oleson, the Chair of the City's Administration and Personnel Committee, who wrote (Joint Exhibit 6):

...

The Administration and Personnel Committee of the City of Dodgeville denies the above grievance for the following reasons:

1. Grievant does not have a Grade 1 or Grade 2 certification.

Sec. 281.17(3), Wis. Stats., provides in part:

"No person may operate a water systems, wastewater treatment plant or seepage servicing vehicle without a valid certificate issued under this subsection".

"The owner of any wastewater treatment plant shall be, or shall employ, an operator certified under this subsection who shall be responsible for plant operations, unless the department by rule provides otherwise".

The City of Dodgeville operates a Class 2 sewer treatment plant, which requires a Grade 2 operator, with a possibility of a Grade 1 operator for one year, if he or she is making progress toward full Grade 2 certification and the plant is in compliance with all terms and conditions of its WPDES permit. (See copy of letter attached from Jack g. (sic) Saltes, DNR Basin Wastewater Engineer and a copy of NR114.12(1), (2) and (3)).

Because grievant does not have Grade 1 or 2 certification, he is not qualified and placing him in the position of operator would violate state law.

2. Grievant does not have adequate experience operating the sewer treatment plant on a full time, on going basis.

...

In this connection, Chapter NR 114 of the State Administrative Code entitled “Certification Requirements for Waterworks, Wastewater Treatment Plant, Septage Servicing And Water System Operators” (County Exhibit 2), mandates that there be an “operator in charge” for the kind of wastewater treatment plant found here and that he/she must be certified no lower than a Grade 2 and that such a Grade 2 Operator must obtain a Grade 3 certification within a year. Section 281.17(3), Wis. Stats., also states that a valid certificate is necessary in order to operate such a plant.

Jack Saltes, a Basin Wastewater Engineer with Wisconsin’s Department of Natural Resources, testified about the need for a certified operator at the wastewater treatment plant which he said is “very close” to a major treatment plant needing highly qualified personnel because of its complexity. He said that he was “flabbergasted” at the claim that merely taking meter readings can qualify as needed experience and added that he did not know whether the City legally could have selected a non-certified person to serve as the foreman in the plant if it designated someone else who was certified as the “operator in charge”.

Saltes also testified about the October 12, 2001, letter he sent to Mike Bisbach, the head of the City’s Department of Public Works (County Exhibit 1), which stated:

...

Dear Mr. Bisbach:

The chief operator vacancy at your wastewater treatment facility offers the City an opportunity to professionally staff the plant. This will require a person with good interpersonal and communications skills and technical skills that can bring a level of pride and professionalism to your facility. Such a person should be a good leader and able to instill teamwork and a sense of operational ownership among plant staff in daily operations. You have a newly upgraded facility and given its size and complexity, the facility would greatly benefit from the professional staffing of it. It’s a facility the community should be very proud of and should be staffed accordingly.

The City of Dodgeville owns and operates a Class 2 wastewater treatment facility requiring a chief operator be certified at Grade 2 for the following subclasses: general wastewater, activated sludge and phosphorous removal. Because of the biological complexity of your plant in removing conventional pollutants (BOD, TSS) and nutrients (ammonia and phosphorous) with relatively restrictive limits, it is critical you have well trained, knowledgeable and competent operators to run it. This is of paramount importance in a chief operator position for a facility such as yours. Wisconsin Administrative Code

NR. 114.12 requires that “*the operator-in-charge of a subclass of operations* (activated sludge and phosphorous removal for your plant) *shall hold a valid certificate for the corresponding subclass at a grade the same as, or higher than, the plant class*” (Class 2 plant = Grade 2 operator). The code does allow for an operator-in-charge to be one grade lower than the class of the plant for one year, provided that the operator is making progress towards full certification and the plant is in compliance with all terms and conditions of its WPDES permit (NR 114.12(1)b). For your facility, this means that the operator-in-charge needs to be a Grade 2 operator but can operate the plant for a year at Grade 1 while working on his Grade 2 certification. NR 114.09 lists the qualifications for the different grades.

...

DPW Director Bisbach testified that he has a college degree and that the plant was totally reconstructed in 1998 at a cost of about \$4,300,000. He said he recommended that Ritchie be awarded the disputed position because he had at least two years experience in running the plant and because he has an “intimate working knowledge” of its operations; because Wasley’s once a month meter reading duties do not qualify as sufficient experience; because Wasley had “no day to day working knowledge or experience” as to how the plant operates; and because Wasley will not get a Grade 1 license until about another year. He also stated that he never considered giving Wasley the posted position and then designating Ritchie as the “operator in charge” as suggested by the Union because that would violate the “chain of command” and because Ritchie’s license then would be “on the line”.

Ritchie, who now has a Grade 3 certification, testified about his qualifications, experience, and certification and said that he formerly served as the “operator in charge” whenever the former plant operator was absent. He also testified about the plant’s complex operations and his extensive duties which he has recorded (City Exhibit 7).

### **POSITIONS OF THE PARTIES**

The Union claims that the City violated Article 10 of the contract when it failed to award the posted position to Wasley because that proviso states employees cannot be disqualified from posted positions because of their failure to possess required licenses. It also asserts that the City has erected a “smokescreen” by claiming it was required to award the position to someone who was already certified and that the City, in fact, could have designated Ritchie as the “operator in charge” if Wasley were awarded the foreman’s position; that Wasley has gained the needed experience by reading meters on weekends; and that the City’s counterargument effectively deletes Article 10 from the contract, which is why its argument must be rejected. As a remedy, the Union asks that Wasley be awarded the position and that he be made whole.

Acknowledging that Wasley is an “excellent employee”, the City nevertheless asserts that it was required under state law to award the position to a licensed operator and that Wasley in any event failed to meet posted requirement no. 2 in the job posting which required an applicant to have “Experience in treatment plant operation, maintenance and mechanical repair work.” The City also contends that it “defies logic” to have an “operator in charge” report to a non-certified foreman which is what the Union is seeking, and that Wasley’s failure to testify leaves unrebutted the City’s claim that he lacks needed experience for the job.

### DISCUSSION

Article 10 of the contract states:

#### ARTICLE 10 – JOB POSTING

- 10.01 If a permanent job vacancy should occur in the bargaining unit which the City desires to fill, said vacancy shall be posted for seven (7) calendar days. The job posting will set forth the prerequisites for the position. Employees desiring to fill such vacancy shall sign the posted notice. If any applicants are qualified, the qualified applicant with the longest service shall be given the first opportunity to qualify for the vacancy. The employee selected by the City to fill the vacancy shall serve a sixty (60) calendar day trial (sic) period during which time, the employee may be returned to his/her former position if found unqualified to fill the new position, or if the employee so desires, he/she may return to the former position during the trial period.
- 10.02 **Licenses.** Bargaining unit employees posting on jobs that require licenses will not be disqualified for said jobs due to his/her failure to possess such licenses. Such unlicensed employees shall be afforded a reasonable opportunity as established by the Common Council to secure all necessary licenses following appointment to the vacancy. (Emphasis added).
- 10.03 **New Positions:** In the event the City creates a new position, full-time or part-time, the City shall advise the Union of its bargaining unit status. If the City determines that the position is not to be included in the bargaining unit of Local 1266-C, the City shall advise the Union of the basis for the non-union status.

The underlined phrase in Section 10.02 certainly supports the Union's claim that the City could not disqualify Wasley because he did not have the required state certification to operate the plant. However, it also is true that applicable state law such as Sec. 281.17(3), Wis. Stats. and Chapter 114 of the State Administrative Code require that someone in the plant must have the required state certification to operate the plant. The Union seeks to skirt around this problem by claiming that Wasley should have been given the posted foreman position pursuant to Article 10 and that Ritchie then could have been designated as a licensed "operator in charge" even if he was the assistant foreman reporting to Wasley.

In other words, the Union wants Wasley to be paid more as a foreman than Ritchie as an assistant foreman even though Ritchie, as the "operator in charge", would have far greater responsibility than Wasley, his nominal supervisor. That simply makes no sense, as it in effect wipes out the contractual wage differential provided for in Appendix "A" of the contract which calls for a foreman to be paid more than an assistant foreman because the foreman has greater responsibility than the assistant foreman. The Union's argument therefore turns upside down this important wage differential and contractual provision.

All this is why Article 10 must be read alongside Appendix "A". When that is done, both provisions in effect cancel each other out since the situation here is so unique.

But this case does not need to be decided upon whether the City under applicable state law could or could not have chosen Wasley as the foreman if it then designated Ritchie as the "operator-in-charge". DNR specialist Saltes testified that he did not know whether that could be done and there simply is no way of knowing at this point what is the correct legal answer.

Hence, this case must be decided upon whether Wasley met requirement no. 2 in the job posting (Joint Exhibit No. 3) which called for "Experience in treatment plant operation, maintenance, and mechanical repair work." As to that, I credit Bisbach's testimony that Wasley has had "no day-to-day working knowledge or experience" in the wastewater treatment plant. I also credit Saltes' testimony that mere meter reading duties of the kind performed by Wasley once a month do not represent the required experience it takes to run such a sophisticated and complex operation. Indeed, Saltes added that he was "flabbergasted" at such a suggestion. Since the testimony from Bisbach and Saltes stands uncontradicted, and since there is no contrary evidence showing that Wasley in the past had ever helped operate, maintain, and/or repair the wastewater plant, it follows that he lacked this essential qualification which is why he was unqualified for the position and why the City properly passed him over even though the City itself acknowledges that Wasley is an excellent employee.

In light of the above, it is my

**AWARD**

1. That the City did not violate Article 10 of the contract when it failed to select grievant Mark Wasley for the vacant Wastewater Treatment Plant Foreman position.
2. That his grievance is therefore denied.

Dated at Madison, Wisconsin, this 28th day of June, 2002.

Amdeeo Greco /s/

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Amedeo Greco, Arbitrator



