

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**SUPERIOR CITY EMPLOYEES' UNION
LOCAL #244, AFSCME, AFL-CIO**

and

THE CITY OF SUPERIOR

Case 182
No. 60467
MA-11623

(Call-Out Grievance)

Appearances:

Mr. James Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8480 East Bayfield Road, Poplar, Wisconsin 54864, appearing on behalf of the Union.

Ms. Mary Lou Andresen, Human Resources Director, City of Superior, 1407 Hammond Avenue, Room 200, Superior, Wisconsin 54880, appearing on behalf of the City.

ARBITRATION AWARD

The Superior City Employees' Union Local #244, AFSCME, AFL-CIO ("the Union") and the City of Superior ("the City") 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 City concurred, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide a grievance concerning the meaning and interpretation of the terms of the agreement relating to call-out assignments. The Commission appointed Stuart Levitan as the impartial arbitrator. Hearing in the matter was held in Superior, Wisconsin on June 26, 2002; it was not transcribed. The parties filed written arguments and replies, the last being received on October 15, 2002.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The union states the issue as follows:

Did the Employer violate the terms of the collective bargaining agreement (Article 19.04) and long standing past practice when it called out less senior employees before senior qualified employees?

And if so, the appropriate remedy is to make the Greivants whole for any and all lost wages and benefits and the Employer be directed to cease and desist from calling out less senior employees before more senior and qualified employees.

The city states the issue as follows:

Did the city violate AFSCME Local 244 collective bargaining agreement by not calling out the grievants (A. Miller, M. Peters, and K. Krause) to work on Wastewater Treatment Plant sewer collection system emergencies?

I state the issue as follows:

Did the employer violate the terms of the collective bargaining agreement by not calling out more senior employees in April and May 2001? If so, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE

...

**ARTICLE 3
MANAGEMENT RIGHTS**

The City possesses the sole right to operate the City Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law. These rights include:

- A) To direct all operations of the City.
- B) To establish work rules and schedules of work.
- C) To hire, promote, schedule and assign employees to positions with the City.

...

- F) To maintain efficiency of City operations.
- G) To take whatever action is necessary to comply with State or Federal law.

...

- J) To determine the methods, means and personnel by which City operations are to be conducted.
- K) To take whatever action is reasonably necessary to carry out the functions of the City in situations and emergency.

...

19.04 Should it be necessary to require overtime that working day, employees on duty when the decision to work overtime is made shall be entitled to work said overtime regardless of seniority. In the event that overtime is to be scheduled, employees will be called to work such overtime work according to seniority rights, provided such employees are qualified to perform the work scheduled. For purposes of overtime call out only, the Wastewater Treatment Operations Division and Wastewater Treatment Collections Division seniority lists will be combined (for example: On a sewer call-out, after all collections division employees have been called, all qualified operations division employees must be called prior to going unit-wide). A senior employee who was not consulted or given priority on such scheduled overtime jobs and therefore does not work such job, may file grievance to receive pay for the number of hours worked by a junior employee. Said grievance shall be filed before the end of the next working day. An employee who does not answer a telephone call, who answers by a telephone answering machine, or does not accept work when contacted shall be considered unavailable for each instance requiring overtime. The other provisions of this Section notwithstanding, any employee who has worked sixteen (16) continuous hours shall not work or receive pay for the next eight (8) consecutive hours.

A Wastewater Treatment Plant employee cannot be called for overtime if he/she has called in for his/her own illness within the last 12 hours, unless there is a declared emergency.

. . .

19.06 Employees of the Wastewater Treatment Operations Division will be offered overtime within their respective classification. Example: When overtime is needed to fill an operator's position, the overtime will be offered to the most senior operator and progress down the seniority roster through the relief operators. When overtime is needed to fill a relief operator's position, the overtime will be offered to the most senior relief operator. If personnel within the classification are not interested in the overtime, the overtime would be offered to the next senior, qualified employee.

BACKGROUND

This grievance involves the process the city used in calling out supplemental personnel to respond to weather-related emergencies affecting the sewer system in the early spring of 2001.

The City's Wastewater Treatment Plant Division (WWTP), a part of its Public Works Department (DPW), has two divisions, Operations and Collections. When flooding conditions arise after normal hours, Collection Systems personnel (the "sewer crew") are called in first, by seniority. If additional personnel is required, qualified employees of the Operations unit are called next, again by seniority, followed by qualified employees on the unit-wide seniority list.

The grievants are permanent full-time employees of the city's Parks and Recreation Division of the Public Works Department. They grieve over the city's decision to call a junior seasonal employee for WWTP overtime in April and May, 2001, rather than them.

The federal government, through its Occupational Safety and Health Administration (OSHA) and its National Institute of Occupational Safety and Health (NIOSH) has established standards and guidelines for the training and qualifications for personnel working in confined spaces such as the entryway to a sewer system. The introductory paragraph to OSHA standard 29 CFR 1910.146 states as follows:

Sewer entry differs in three vital respects from other permit entries: first, there rarely exists any way to completely isolate the space (a section of continuous system) to be entered; second, because isolation is not complete, the atmosphere may suddenly and unpredictably become lethally hazardous (toxic, flammable or explosive) from causes beyond the control of the entrant or the employer, and third, experienced sewer workers are especially knowledgeable in entry and

work in their permit spaces because of their frequent entries. Unlike other employments where permit space entry is a rare and exceptional event, sewer workers' usual work environment is a permit space.

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As part of its Human Resources Policies and Procedures manual, the city has promulgated HRP 2006D, Confined Space Entry Program, "developed and implemented in conformance with DOC 32 Subchapter VI and Title 29 CFR part 1910.146." This program, consisting of approximately 20 pages of protocols, affects all fire service employees involved in rescue operations, the professional, operations and collections unit personnel of the wastewater treatment plant, and any "Building and Grounds Crew employees when assisting the Sewer Crew only." Nomenclature notwithstanding, an employee of the Parks and Recreation division of the DPW who sought placement on the unit-wide seniority list for WWTP overtime call-out is governed by HRP 2006D.

The policy mandates that "(o)nly City designated employees will enter permit spaces," and states that "this written program is available for inspection by employees and their authorized representatives via HRD and the Wastewater Treatment Division of the Public Works Department."

For contractors and other outside companies performing services, HRP 2006D includes a Contractor Notification appendix, which reads as follows:

The City of Superior Wastewater Treatment Plant has adopted policies and procedures that will maintain compliance with OSHA's regulations and standards. According to these guidelines, all contractors and outside service personnel who perform work must be notified in writing of our Confined Space Program. We must also be informed of the Confined Entry Policy to be implemented by the contractor or outside service personnel and agree to comply with their safety procedures.

No one may enter a confined space without proper training. If more information is needed regarding Confined Space rules and regulations please contact our Safety Coordinator, Diane Thompson. The Confined Space Program is located in Diane's office.

Attached is a summary of the major points of our Confined Space Program. Upon completion of a confined space entry, the back of the summary form must be completed and returned to the WWTP staff for evaluation.

Appendix D to HRP 2006D, the Summary of the Confined Space Entry Policy, includes 18 items, the first of which is "All workers working in an around confined spaces must be trained in confined space entry procedures, first aid and CPR."

HRP 2006D also provides that the Human Resources Department "shall develop and administer an effective Confined Space Program," and "will coordinate Confined Space entry,

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basic first-aid and adult cardiopulmonary resuscitation (CPR) training programs for all City employees *with designated confined space responsibilities.*" (emphasis added)

As of the time of the grievances, the city provided CPR training for its WWTP personnel, but did not offer such training on a city-wide basis.

On October 3, 2000, city DPW employee John Krivinchuk filed a grievance, alleging that the city violated section 19.04 of the collective bargaining agreement by calling out a seasonal employee for overtime work on a wastewater collection matter. On December 11, 2000, Mayor Sharon Kotter replied to Mike Rainaldo, the union's Chief Steward, as follows:

Pursuant to our meeting on Tuesday, November 21, 2000, this is to confirm that the City and the Union wish to resolve this grievance. We agree that based on the circumstances of availability of qualified operators for the Wastewater Treatment Sewer Crew emergency call out, we need to take steps to insure that qualified operators are available. I will be recommending to the Human Resources Committee that the grievance and matter be resolved by the City agreeing to, within the next 6 months, make available to interested employees who signed up for the emergency call out, training in confined space entry, equipment orientation, record keeping and general safety precautions that would make them qualified for call out.

In addition, the Union has agreed on an interim basis, waive the section of Appendix C under Seasonal Employees that would not allow them to operate medium equipment. I will recommend to the HRC that the City agree with waiving this provision on a one-time, non-precedent setting basis. Dana Stone, a seasonal employee who is qualified to perform the required functions, may be paid the medium equipment operator rate until the training can produce qualified operators.

John Krivinchuk and the Union agree to drop the grievance in exchange for Dana Stone being paid the appropriate equipment operation (sic) rate for the period in question.

I trust this is your understanding also. This matter will be placed on the HRC December 18, 2000 agenda for consideration. If you have any questions or concerns, please do not hesitate to contact me.

On December 14, 2000, Rainaldo replied to Kotter as follows:

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Your memorandum dated 12-11-00 has been received and was discussed at our recent Local 244 Union Meeting. After closer scrutiny of the facts discussed at that meeting as well as some serious feedback from the employees in particular the WWTP employees, the membership feels that a further discussion is needed before a settlement can be reached.

Of particular concern was the feeling that management at the WWTP is and has been dragging it's (sic) feet on training required. They feel this issue has been discussed before and there has been ample time for training. More specifically, the Confined Entry training was also discussed and it is our contention that this could be done almost immediately through scheduling with the fire department and Diane Thompson at the WWTP. Jim Rigstad does the SFD training and in fact, utilized the WWTP facility for a portion of their training. In addition, we want to further clarify the requirements of re-certification that are required for confined entry rescue as opposed to simply working in confined entry. Last but not least, with some creative scheduling, why can't our own employees familiar with the specialized equipment perform on the job training for other employees interested in signing up for the call out?

It is our hope that you will be open to the idea of further discussions on this grievance in attempting to reach a settlement. If so, please schedule a meeting at your earliest convenience. Again, thanks for your time!

The record does not reflect what action, if any, the Human Resources Committee took on the proposed settlement as discussed in the Kotter memo.

The issue of training for WWTP call outs was a topic for discussion at the Public Works Labor/Management Committee of January 18, 2001. The minutes for that meeting state as follows:

1. Draft memo regarding training for collection system work and steaming work was distributed which included call out list of divisional personnel.

2. The question was raised as to whether confined entry training was required for steamer work. This question was deferred to Dan Romans and Diane Thompson. Mike Beattie suggested that it would be easier if all personnel were confined entry trained, since this was one of many requirements to perform collection system and steamer work. Vactor training and certification would be offered to as many people as possible. It will be difficult to have everyone on the call out list get the required training of 8 hours every 2 months.

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3. It was suggested that the call out list for collection system work title be changed to "Vactor Jetter Call Out List."
4. It was asked if CPR/Medic First Aid training is required for confined entry certification. Also, are there any certification requirements under the state boiler operator rules? Dan and/or Mike would follow up on this.

The minutes also show "WWTP sewer call out training" to be a topic for discussion at the committee's February meeting.

On several days in the early spring of 2001, flooding conditions occurred in the city that required immediate response from WWTP crews. Following the call out of WWTP collections and operations unit personnel, the WWTP determined that no permanent full-time DPW employee had the necessary qualifications and credentials. Accordingly, a seasonal employee, Dana Stone, was awarded the overtime opportunities. The union does not dispute that Stone had the necessary certifications and qualifications.

On April 9, permanent full-time employee Chuck Miller filed a grievance, alleging that the city violated Article 19.04 by assigning the overtime hours on April 7 and 8 to Stone. On April 23, Mike Peters filed a similar grievance, for overtime hours assigned on April 22. On May 7, Kim Krause filed a similar grievance for overtime hours assigned to Stone on May 5 and 6. All three grievances alleged that a junior employee was called before a more senior employee, and sought that the grievants be made whole. The grievances were consolidated and are the subject of the current proceeding.

As of March, 2001, Krause and Peters had completed the requisite training for confined space entry, steamer operation and safety, and Vactor operation and maintenance. As of the date of the grievances, they did not hold current First Aid/CPR certification. 1/ Krause

1/ Miller was not available at hearing. Based on unchallenged representations by the parties, it appears Miller had completed the requisite operational training as Krause and Peters, but lacked current certification in both First Aid/CPR and Bloodborne Pathogens.

testified he had taken CPR training as offered by the city in the late 1980's, but that he had received no indication from the city his certification had lapsed and thus was surprised to learn that was the case. Peters testified he had taken CPR training in April 1996, but that he was unaware of how long such certification was valid, and that nobody from the city had told him his certification had lapsed.

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On April 24, 2001, WWTP Administrator Dan Romans replied to Miller and Peters as follows:

Your grievance alleges that Article 19.04 of the working agreement was violated and further states that "Junior seasonal employee called out for overtime before full time certified (confined entry-steamer-Vactor) senior employee." It is true that a seasonal employee was called out for overtime to perform sewer work for the wastewater collection system. The process operator on duty followed wastewater divisional seniority but was not able to contact a qualified operator for the Vactor/Jetter. Unit wide seniority cannot be posted without the consent and certification of all participating Local 244 employees. For safety and contract purposes we cannot qualify an employee until such steps have been taken. Therefore the only available qualified Local 244 member was a seasonal employee. This person was called out as an alternative to calling out a contractor to respond to this public emergency.

I do not find a violation of Article 19.04 as you suggest. Management followed the Working Agreement. All qualified Local 244 employees were called out and the only qualified person was a seasonal employee.

At our grievance meeting on November 21, 2000 we discussed the issue of providing training to interested unit wide employees as an alternative to contracting of services when wastewater division employees were not available to work. We estimated the time frame required to provide training for confined entry, steaming and safe Vactor operation would take approximately 6 months to complete. As of today's date we have completed training and we are waiting for clarification from Local 244 employees regarding their sign off consent sheets before we can post the unit wide seniority list. A list of the discrepancies has been forwarded to Human Resources. I ask, in the spirit of labor-management cooperation, that Local 244 leadership might help us in completing this process.

If you are not satisfied with this decision, you may proceed to the 2nd step in the grievance process. In the event that you have other concerns, I will make myself available to answer any questions that you may have.

On May 10 and 11, 2001, Miller, Krause and Peters took and satisfactorily completed CPR training as offered by the city. Miller had previously completed the Bloodborne Pathogens certification on April 23, 2001.

On May 21, 2001, Romans gave the same response to Kim Krause regarding his grievance of May 7, 2001.

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On June 18, 2001, WWTP manager Eric "Ranger" Robert posted the following memorandum:

Re: Call outs for basement sewer back-ups

Effective today contact the following people after you reach Bryan Dunaiski on the call out list:

Chuck Miller
Michael Peters
Gary Regenfus
Kim Krause
John Krivinchuk
Keith Zowin
Randy Gunderson
David Lampert

These people would be able to be used as Ride Along Personnel on the Vactor/Jetter unit.

After these people are contacted then Dana Stone can be called if necessary. Document the response of these people on the "Master Seniority Call Out List for Vactor Ride Along Personnel." If you have any questions contact Mike Beattie or me.

On July 19, 2001, Mayor Kotter wrote to Chuck Miller, Local 244 President, as follows:

First I want to apologize for the length of time required to complete my response to you. With vacations and staff away, we were not able to document

the First Aid/CPR training date to determine whether the individuals were actually qualified as of the date of the grievance, even though the forms did not reflect the qualifications had been met.

According to our records, the three individuals were not qualified as of the date they filed the grievance. Below is listed the courses lacking and the dates they were certified.

Name Grievance Course Date Certified
Chuck Miller 4.7-8 Bloodborne Pathogens 4.23.01
First Aid/CPR 5.10.01

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Mick Peters 4.22 First Aid/CPR 5.11.01
Kim Krause 5.5-6 First Aid/CPR 5.11.01

The prior training for First Aid/CPR was given on October 30 and 31, 1997.

This training is valid for two years and would have expired on October 29 and 30, 1999. Therefore, the employees would not have been qualified as of the date of their grievance.

Based on the facts I must deny your grievances. If you wish to advance these to the next step of the grievance procedure, you must do so by filing with the Human Resources Committee. I believe that the call-out list information on individuals is now up to date and the individuals are now qualified to be called out after the Wastewater Treatment Plant employees have been called out.

On August 20, 2001, the HRC meet to consider the grievances. As reflected in the committee's memo of September 10, 2001 to Local 244 President Miller, "Motion by Dalbec, seconded by Clark, to deny the grievance, the required training not completed by the grievance dates was established by the State. APPROVED."

Subsequent to the HRC's denial of the grievances, the union submitted its request to the WERC for grievance arbitration.

On February 1, 2002, county Human Resources Director Mary Lou Andresen wrote to Local 244 business representative Jim Mattson as follows:

Attached you will find copies of the OSHA and NIOSH standards for working in confined spaces. Also find the City's policy on confined entry. Please note in the City's policy and in the standards that first aid and CPR are required

along with confined entry training. In the case of each of the three grievants, as of the date of the time slip they did not have current First Aid/Medic training. It is the City's position that they were not qualified to be called out for overtime on the date they have time slipped. Since the City has the right to determine qualifications, and the qualifications required are not an arbitrary and capricious standard but rather one recommended at the federal level, it is the City's position that these individuals have no right to overtime and therefore the grievance has been appropriately denied.

The grievants argue that the City should have arranged the training so that they would have been qualified on the dates in question. Two of the Sewer Crew, who have primary responsibility for this confined entry, received the First Aid/Medic

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training on the same days as the grievants, who are not Sewer Crew employees but rather work in the Parks Division and requested to be placed on the unit wide seniority list for callouts when Sewer Crew are not available. The differences between the grievants and the Sewer Crew employees was that the Sewer Crew employees had not let their training lapse, whereas the Parks employee's training had lapsed beyond the two year renewal standard. In addition, Miller had let his training for Bloodborne Pathogen lapse beyond the 1 year renewal requirement. At the time of the call out, the only available qualified employee was a seasonal employee who was called out and worked the overtime in question.

Based on this information, it is the City's position that the three grievants, Miller, Krause and Peters, Parks Division employees, were not qualified to be called for overtime on the date in question and therefore any request for payment for overtime not worked on the dates in question should be denied. If you have any question about the facts of this case, please contact me

POSITIONS OF THE PARTIES

The Union

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

The employer's contention that the grievants were not qualified to perform the work is highly questionable. The city is guilty of making up the rules as they went along, in that it kept changing what constituted being qualified. The city

also dragged its feet in insuring employees were kept current in meeting the qualifications the employer set.

The employees have a reasonable expectation to know what the qualifying standards set by the employer are. The assertions by the city that the grievants were lacking qualifications came as a surprise to the grievants. The grievants were never informed they were behind in keeping current with their certifications. The city failed to ensure the grievants were properly qualified. The simple truth is that it was the city who had let the certification lapse and not the employees. The grievants' testimony clearly underscores the fact that they were qualified and had all the necessary certifications to perform the job. The only fault one can find with regards to the grievants was they trusted the city to keep accurate records of certifications and to inform them when updates were

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needed. In this regard, the city grossly failed in its obligation to bargaining unit employees.

The city's own exhibits underscore its deficiencies, in that its letter listing the necessary requirements for call-out was issued six months after the grievances were filed. Union exhibits underscore the testimony of the grievants and show that without question the grievants were qualified. All three grievants knew first aid and CPR and were trained in confined entry procedures. The employer is attempting to deny them their rightful opportunity to be called out and get overtime by citing a technicality that their certifications had lapses. Who allowed the certifications to lapse? The answer is the city and not the employees who let the certification lapse.

The employees had no awareness, and could not be expected to have any, of the contents of the voluminous policy handbook. The city is being totally unreasonable if it expects all employees to have read such a massive and detailed document. To rely upon such a massive policy manual removes the employee from having any control over his working life. Rules and policies are buried in a very inaccessible bureaucratic document.

The city has a history of dragging its feet in getting employees properly trained for call outs for sewer crew functions. Perhaps if the city had implemented a training program and taken the time to review and inform employees of certification requirements, the need for filing these grievances would never have occurred.

In addition to having the individual grievants be made whole for any and all lost wages and benefits due to the city's failure to call them out for work, the city should be directed to keep employees informed in a reasonable amount of time concerning the time their certifications will be expiring and to afford employees the opportunity to receive the necessary training and/or refresher courses to keep their certifications current. The result of appropriate employer diligence will be the most senior and qualified employees will be allowed the opportunity to work call outs and be paid overtime for such work.

The City

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

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As provided for in the collective bargaining agreement and established in two prior grievances, the city has the right to determine qualifications for work. In these grievances, the city exercised its management right to determine that the qualifications necessary for non-Collection System unit employees were to be the same as those within the unit. These qualifications were discussed with the union and it was agreed that the department would offer training to interested employees with the goal of having employees fully qualified within six months. The training was discussed at the Public Works Labor Management Committee on January 18, 2001 and completed on May 11, 2001.

The qualifications include meeting the standards for confined entry, the state and federal standards for which require that individuals have current first aid certification to be able to act as an attendant. The Wastewater Treatment Plant Collection System and Operations unit employees, and the seasonal employee who performed the call out work under review, were all able to maintain the first aid training within the required time frame to retain their qualifications. However, the employees on the unit-wide seniority list, including the grievants, are not required to maintain such training for their current positions, but do need the training to be on the Collection System call out list. If these employees did not take advantage of first aid training through the City or other community resources to make themselves qualified, they would have to attend the first aid training arranged for meeting the unit wide requirements. Since none of the three grievants had all the required training as of the date of their grievances, they were not qualified to perform the duties of the overtime assignments on the dates grieved.

The city acted properly in establishing the qualifications for being called out for Collections Systems Unit overtime. The three grievants did not meet the qualifications to be called out on the date of their grievances. Therefore, the city acted properly in assigning a qualified employee to be called out, and the grievances should be denied.

In its reply brief, the union further posits as follows:

The union strongly disputes the contention that the grievants were not qualified for the call outs. The expiration of the certifications were not the grievants' fault. The grievants certainly complied with all requirements to keep and to achieve certifications. The city did not live up to its obligation by not keeping the grievants informed as to the currency of their certifications. The city is simply wrong when it states the grievants did not take advantage of first aid training.

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The city attempts to shed responsibility by noting the labor/management committee had been working on training issues. But is the list of needed training/certifications the product of cooperation or an attempt to discredit the grievants after the fact?

Had the city acted responsibly, and tracked the employees' certification histories, the grievants would have been unquestionably qualified at the time of the call outs. Not to keep the grievants informed as to the lapsing of their certifications introduces an element of unfairness into the equation. Such a broad sweeping application of management rights runs contrary to the intent of the parties' collective bargaining agreement. The grievants were qualified to perform the work on these call outs.

In its reply brief, the city posits further as follows:

The grievants were placed on the unit-wide seniority list as soon as they were qualified, which was after the dates of the call outs in questions. The qualifications for placement on the list were clearly communicated to the union in December 2000, and individuals were given a list of the qualifications when attending a training program. There is no evidence that the requirements for qualifications were, as the union asserts, changed.

The First Aid/CPR certification requirement is pursuant to state and federal standards, which the city incorporated. To say that the individual knew first aid

and CPR does not satisfy the requirements under the law, industry standards of city policy. It is the employee's responsibility to attain and maintain the qualifications to perform duties they wish to bid or sign for. The union alleges that the city dragged its feet in arranging for the training, but the city kept its commitment to completing the training process with six months.

The city acted appropriately in establishing the qualifications for being called out. The three grievants did not meet the qualifications to be called out on the dates in question. The city acted appropriately in assigning a qualified employee to be called out. The grievances should be denied.

DISCUSSION

The central question before me is whether employees whose certification in first aid and CPR had lapsed should be given overtime opportunities on emergency Wastewater Treatment Plant (WWTP) call-outs.

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The union does not challenge the city's right to establish qualifications for the work in question, nor that the qualifications the city has set are indeed reasonable and appropriate. Instead, it challenges only the city's determination that because they held no current CPR certification, Miller, Krause and Peters were not qualified. In turn, this challenge is itself two-fold: first, the union asserts that by their *prior* certification in CPR, the employees were still "qualified," notwithstanding the technicality of their certification lapsing; second, that it was *the city's* fault, not the employees', that the certification had lapsed.

I take these arguments in turn.

The union wants me to find that the employees were qualified to perform emergency CPR in a confined space, notwithstanding that they held no current certification. I cannot make such a finding on the basis of this record.

As 29 CFR 1910.146 notes, employees on WWTP call-outs work in a setting where "the atmosphere may suddenly and unpredictably become lethally hazardous (toxic, flammable or explosive) from causes" beyond their control. The phrase "lethally hazardous" means that this is not simply an academic or theoretical question - very literally, this could be a matter of life and death. Such a setting, it seems to me, is one where any doubts or ambiguities about an employee's ability to perform emergency CPR should be resolved with caution. It is an oversimplification to simply say, "better safe than sorry," but there is a reason why such advice has become a time-honored adage.

While the union offered evidence that the employees in question had *previously* taken the necessary first aid and CPR courses and had *previously* held the necessary certifications, Krause and Peters both acknowledged they were not certified as of the call-out dates in question. Nevertheless, the union maintains that their *prior* certification was good enough.

There may indeed be a unique case where an employee without a current CPR certification could be proven to be qualified. This, however, is not that case, as the union offered no evidence at all that the employees had maintained any familiarity with or knowledge of CPR after their initial training.

Krause testified he had taken CPR training when offered by the city "in the late 1980's," and that he was "surprised" to learn that his certification had lapsed. He said he had "no idea" his CPR certification had lapsed, because he had received "no indication from the city" that it had lapsed. Peters testified he had taken CPR training in April 1996, but that he "never knew how long it was good for," that "nobody from the city" told him his certification had lapsed.

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Thus, the union maintains that employees who took CPR approximately five and fifteen years prior to the call-outs were qualified to perform emergency CPR in a confined space on fellow workers who were suddenly and unpredictably overcome by potentially lethal fumes, flames or explosions.

The union correctly notes that the call-out was for work assisting the primary WWTP employees. The union incorrectly argues that this "reality check" makes their CPR responsibility somehow less than their colleague's. That the work would not have involved primary responsibility for addressing the emergency in no way lessens their need for current qualifications; indeed, since it is the WWTP worker who is more directly involved in the confined space work, it is the other employee who may have the higher need for CPR training.

I am sure that Krause and Peters attended diligently to their studies in the late 1980's and 1996, respectively, and for a period of time thereafter were qualified to give emergency first aid and CPR. However, there is absolutely no evidence in the record that they have maintained even a passing familiarity with CPR procedures since then. The union states as a fact that the three grievants "knew first aid, knew CPR." On the basis of the record, however, this is not a fact but only an assertion unsupported by any other evidence.

Accordingly, I cannot find that they were qualified to accept the overtime assignments for WWTP call-outs on the dates in question.

Which leaves the union's other argument, namely that it was the city's fault the employee's let their certification lapse. The union maintains the city should have kept track of each employee's status, and provided timely training so they could maintain their necessary qualifications and certifications.

As the union correctly states, the employees have a reasonable expectation that the employer will inform them of the qualifying standards. The union is incorrect, however, in asserting that the employer failed its responsibility in this case.

As noted above, the CPR requirements for employees engaged in confined space work is clearly stated in HRP 2006D, a policies and procedures chapter that *all* fire service - rescue operations employees, *all* WWTP operations employees, *all* WWTP collections employees, and *all* WWTP professional employees are "impacted" by. Specifically, the requirement that "all workers working in and around confined spaces must be trained in confined space entry procedures, first aid and CPR" is *the first item* on the appendix entitled "Summary of the Confined Space Entry Policy For the City of Superior Wastewater Treatment Plant."

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The union maintains the city was "being totally unreasonable" in expecting employees to have "read such a massive and detailed policy manual," and that the city cannot rely on rules "buried in a very inaccessible bureaucratic document."

Whatever the city's reasonable expectations are for employees to be familiar with adopted policies and procedures, the question here is not whether *all* employees should have read the *entire* manual. The question is whether employees seeking overtime opportunities assisting on confined space entry call-outs should have read the chapter on the confined space entry program and familiarized themselves with its provisions, as the employees in fire/rescue and WWTP already are required to and already have. Frankly, the notion that employees could maintain they were qualified to assist on WWTP call-outs without demonstrating familiarity with the *entirety* of HRP 2006D is puzzling, let alone making such an assertion while declaring total ignorance of the document's very existence. Stating a requirement as the first item on a document entitled "Summary of the Confined Space Entry Policy" is hardly keeping something "buried in a very inaccessible bureaucratic document."

That is to say, I find that it is reasonable for the city to expect that DPW employees seeking overtime work assisting the Sewer Crew would familiarize themselves with the provisions of HRP 2006D setting forth qualifications and responsibilities.

I also reject the union's assertion that the employees "acted in good faith in regard to keeping certifications up to date." As noted, Krause testified he had taken CPR approximately 15 years ago, and had done nothing since then to maintain familiarity with CPR procedures. The union may find that this constitutes "good faith in regard to keeping certifications up to date." I do not.

As noted above, HRP 2006D provides that the Human Resources Department "shall develop and administer an effective Confined Space Program," and "will coordinate Confined Space entry, basic first-aid and adult cardiopulmonary resuscitation (CPR) training programs for all City employees *with designated confined space responsibilities.*" (emphasis added)

The union's problem in assigning the city's responsibility as to these grievants is that these employees *had no designated confined space responsibilities.* As it appears on the face of the document, HRP 2006D applies to certain employees in the fire department, three groups within the WWTP (professional, operations and sewer crew) and buildings and grounds employees *when assisting the Sewer Crew only* (emphasis added).

Thus, the city's responsibility under HRP 2006D to provide CPR training for non-WWTP employees of DPW would apply only to those who were required to accept mandatory overtime for WWTP call-outs. I do not believe the union has taken the position that Krause,

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Miller and Peters were *required* to accept this overtime, or even that they *could be* required to accept this overtime, but only that they sought it.

The union argues that "it was the City had let the certification lapse and not the employees!," that the employees "trusted the City to inform them when updates were needed on certifications," and that "the City grossly failed in its obligation" to the unit personnel. (emphasis in original). Implicitly, the union's argument must mean it assigns the city the affirmative and ongoing responsibility to monitor the compliance by *all* DPW employees with the provisions of HRP 2006D, just on the possibility they might seek WWTP overtime.

Certainly, there may be a situation where an employer has the primary responsibility to monitor employee compliance with certification and licensure, and to proactively remind employees of their need for timely action to maintain accreditation. This is not such a situation, and it was not the city's responsibility to monitor the CPR certification of these employees of the Parks and Recreation division.

The limits on the applicability of HRP 2006D aside, the city has agreed to provide CPR training for those non-WWTP employees who wish to make themselves qualified to accept WWTP call-outs. As noted above, in her December 11, 2000 proposal to settle the Krivinchuk grievance, Mayor Kotter agreed that "within the next six months" the city would provide such training "to interested employees" to "make them qualified for call out." Although the record is ambiguous on the full fate of the Krivinchuk settlement, the record shows that the city provided CPR training on May 10 and 11, 2001 - precisely six months after the city's proposal.

Among those who took the training were Miller, Krause and Peters, thus becoming qualified for WWTP call-outs. Prior to that date, they were not qualified, and the city did not violate the collective bargaining agreement by passing over them for a junior, seasonal employee who did hold the necessary certifications.

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

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin, this 20th day of December, 2002.

Stuart Levitan /s/

Stuart Levitan, Arbitrator

