

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL UNION 67, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

and

CITY OF RACINE

Case 724

No. 64471

MA-12911

(Pesticides License)

Appearances:

Mr. Tom Berger, Staff Representative, AFSCME Council 40, P.O. Box 044635, Racine, Wisconsin 53404-7013, appearing on behalf of Local 67.

Mr. Scott R. Letteney, Deputy City Attorney, City of Racine, 730 Washington Avenue, Racine, Wisconsin 53403, appearing on behalf of the City of Racine.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, AFSCME Local 67 (hereinafter referred to as the Union) and the City of Racine (hereinafter referred to as either the City or the Employer) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute over the City's policy requiring a pesticides license for employees engaged in spraying. The undersigned was so designated. Grievance mediation sessions were held, but the parties were unable to resolve the matter. An arbitration hearing was held on the matter on August 23, 2006, at which time the parties were afforded full opportunity to present such testimony, exhibits and other evidence as were relevant to the dispute. A stenographic record was made of the hearing and a transcript was received on September 1, 2006. The parties submitted briefs, which were exchanged through the undersigned on October 11, 2006, whereupon the record was closed.

ISSUE

The issue presented by this grievance is:

Does the City violate the collective bargaining agreement by requiring employees in the positions of arborist and equipment operator in the Parks Department to have a category 3 pesticide certificate as a condition of bidding into and being employed in the department?

RELEVANT CONTRACT LANGUAGE

ARTICLE II

CONDITIONS AND DURATION OF AGREEMENT

. . .

E. 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 and the past practices in departments covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. These rights which are normally exercised by the various department heads include, but are not limited to, the following:

1. To direct all operations of City government.

. . .

5. To introduce new or improved methods or facilities.

6. To change existing methods or facilities.

. . .

8. To determine the methods, means and personnel by which such operations are to be conducted.

. . .

BACKGROUND

The City provides general municipal services to the citizens of Racine in southeastern Wisconsin. Among the services provided is the operation of public parks and recreation facilities. The Union represents, among others, the non-supervisory employees of the Parks, Recreation and Cultural Services Department, including those in the classification of Equipment Operators and Arborists. Jack Shumann is the Assistant Director and Parks Manager for the Department.

In 1996, the City was advised of a likely change in federal law, which would require City employees spraying pesticides to obtain a Category 3 Pesticide certification. The City initially took the position that all Parks Department employees would be required to have the certification, and this led to a series of grievances. The parties addressed the issue in a May 30, 1996 Memorandum of Agreement, settling a portion of one of those grievances, filed on behalf of the Equipment Operators in the Parks Department:

MEMORANDUM OF AGREEMENT

The following stipulations shall partially resolve Grievance #5-96, that part which relates to the Equipment Operator vacancies:

- 1.) The current vacant position of Equipment Operator (Parks Dept.) shall be filled by the most senior employee desiring the job from the original position for said position (dated 2-14-96) and shall furthermore have through 12-31-96 to obtain the Wisconsin Pesticide Certification, Category 3. Said employee shall have seniority, for vacation purposes, over the employees listed in #4 below, assuming he had seniority for posting purposes.
- 2.) Said employee shall be paid at the Truck Driver rate until such certification is obtained.
- 3.) Any employee(s) not so certified by 12-31-96 shall be returned to their previous position.
- 4.) Randy Eschmann and Kevin Molbeck shall remain in the Equipment Operator position (Parks Dept.) unless a more senior applicant, who had posted for the position(s) initially, obtains a Wisconsin Pesticide Certification, Category 3 on or before 12-31-96. If such occurrence takes place, Eschmann and/or Molbeck, in reverse order of seniority, shall be returned to their original position(s) without loss of departmental (DPW) seniority. In such event, all affected employees shall return to their original positions without loss of departmental seniority.
- 5.) Effective 9-1-97, all Equipment Operator positions in the Parks Department shall only be filled with licensed employees (Wisconsin Pesticide Certification, Category 3).

In December of 1996, they revisited the issue, extending the certification requirement to Tree Trimmer/Arborists, requiring all Equipment Operators signing postings for openings in Parks to have the certification until there were at least six certified operators in the Department, and pledging mutual cooperation in getting as many current Equipment Operators as possible certified in 1997.

The certification requirement was reiterated in a 1998 Memorandum settling a grievance over the filling of Tree Trimmer/Arborist positions. In May of 2004, the parties negotiated a Memorandum which exempted Equipment Operators who bumped into the Parks Department because of layoffs from having to have the certification before entering the Department.

In October 2004, the instant grievance was filed, challenging the continued requirement of a pesticides certification, because neither state nor federal law ever changed to actually require the certification. The grievance asserted that this was a violation of Section 2(E) of the collective bargaining agreement, the Management Rights clause. The matter was not resolved in the lower steps of the grievance procedure, nor through several attempts at mediation, and was referred to arbitration. At the hearing, in addition to the facts recited above, Local 67 President Scott Sharp testified that the pesticide certification policy had been initiated because the City claimed that federal law was going to change to require certification, and that was the reason the Union acquiesced, after negotiating some restrictions. However, no change in the law ever occurred and public employees continued to be able to spray pesticides under the authority of their supervisors' licenses. Sharp stated that the City had allowed seasonal employees to spray without having a license while continuing to require a license of Equipment Operators and those wishing to post into the Parks Department. Sharp expressed the opinion that the requirement of pesticide certification was being abused by some seasonal employees, who would obtain the certification so that they would have an advantage over DPW workers when competing for openings in the Parks Department.

Parks Department Steward Tim Uick testified that he had observed many instances in which seasonal employees and other non-certified personnel were assigned to spray pesticides, working under the supervisor's certification. Uick also related an instance in which he felt the pesticides certification was manipulated to achieve a staffing change desired by management. According to Uick, a position at Horlick Athletic Field was reclassified from custodian to Equipment Operator in order to favor a junior applicant who had pesticide certification. Some years later, that Operator allowed his certification to lapse. He was removed from the job at Horlick, but two replacements did not work out, and management decided to reinstate him and waive the certification requirement.

Robby Personette, a Program Specialist with the Wisconsin Department of Agriculture, Trade and Consumer Protection testified that municipal employees spraying non-restricted use pesticides were not required to have individual certifications, unless they were spraying on school district property.

Jack Schumann testified that the City uses only non-restricted use pesticides, primarily Round Up and 24D. According to Schumann, the City and the School District have an agreement allowing for the use of each other's facilities for athletics. Thus the City's recreation programs have access to ball fields at Wadewitz and Gilmore Schools and to swimming pools owned by the School District, while the School District has access to City owned athletic fields and parks, such as Pershing Park, Horlick Field, and the Washington Park Bowl. Schumann stated that the City sprayed pesticides on the School District ball fields it used, as well as on the football fields and parks used by the District, throughout the growing season. Athletic Field Supervisor Craig Trott testified that he primarily works with seasonal employees, some of whom have pesticide certification. Trott stated that he preferred to assign spraying to employees with the certification, but if he had to, he would assign non-certified employees.

Additional facts, as necessary, are set forth below.

POSITIONS OF THE PARTIES

The Union

The Union takes the position that the requirement of pesticide certification was adopted for a specific purpose and in answer to a specific need. Both parties believed a change in federal law was imminent in 1996, and they responded to it. However, that change in law never came to pass, and municipal employees are not required to possess pesticide certification, except in the relatively rare instances when school property is being sprayed. Thus there is no valid reason for continuing the requirement. Moreover, the rule is being abused and selectively enforced. The City requires the certification when it serves its purposes to do so, and waives it when that will allow them to make the staffing decisions they desire. Seasonal employees, who do the bulk of the spraying, are not required to have a pesticide certification at all. The certification requirement no longer bears any rational relationship to the actual work of the Equipment Operators in the Parks Department. It serves only to restrict their posting and seniority rights, and as a tool for management to manipulate Department staffing. The right of management to make and enforce rules and policies does not extend to making and enforcing unreasonable and unfair rules and policies. Accordingly, the arbitrator should determine that the pesticide certification requirement is not an enforceable qualification for Equipment Operators.

The City

The City takes the position that there has been no contract violation. The Union agreed, twice, in writing, to the requirement of a pesticide certification for Equipment Operators in the Parks Department. There is no basis whatsoever for the arbitrator to overturn these negotiated Memoranda, which are right on point. There has been no material change in

the underlying circumstances. Certainly the anticipated change in the law never occurred, but neither one of the Memoranda actually condition the certification requirement on the law changing. Possession of certification is reasonably related to the duties of Parks Department employees, and the knowledge gained through the study and testing process improves the skill levels of the employees. Moreover, Parks Department employees are regularly required to spray pesticides on property owned or used by the school district. State law does require persons spraying on school district property to have certification, and thus the City can reasonably require its workers to have certification as a matter of obeying the law. For all of these reasons, the arbitrator must hold the Union to its prior agreements, and find that pesticide certification is a valid requirement for Equipment Operators in the Parks Department.

DISCUSSION

The Union challenges the City's right to require pesticide certification of Equipment Operators in the Parks Department. There are two aspects to the case. The certification requirement has been in place since 1996, and is memorialized in two negotiated grievance settlements from that year. The City points to these two agreements as specifically authorizing the requirement, while the Union challenges their continued validity because they were negotiated based on an incorrect premise – that federal law would be changed to require certification. In addition to the argument that the parties have specifically agreed to the certification requirement in the 1996 grievance settlements, the City asserts that this is a legitimate job qualification that may be imposed as a matter of management rights. The Union responds that the City has abused the certification requirement, by employing it as a device to pick and choose among the employees it wishes to allow to post into and hold Equipment Operator positions.

A. The Grievance Settlements

In 1996, the City sought to impose a requirement of state certification for certain Parks Department employees who would be engaged in the spraying of pesticides. The Union grieved the effort, and the parties negotiated several grievance settlements defining the scope of the certification requirement. Specifically, it appears that all arborists and up to six Equipment Operators would be required to have the certifications, and that the parties would cooperate in encouraging all Parks Department Equipment Operators to obtain the certification.¹

¹ The May 1996 partial grievance settlement did not set a cap on the number of Equipment Operators who would be required to obtain certification. The follow-up settlement agreement in December of 1996 continued to seek certification of all as a goal, but limited the requirement that applicants for Parks Department Equipment Operator openings possess the license as a condition of posting: “8. The parties agree that effective January 1, 1998, all equipment operators signing into the Parks Department shall have and maintain a category 3 Ornamental and Turf Commercial Pesticide Certificate until at least six (6) certified operators are in the Department.”

The Union acknowledges negotiating the grievance settlements, but contends that it did so as the result of a mistaken belief that federal law would require the certification, and argues that it should not be held to the agreements now that it is clear that there is no such legal requirement. While I do not question the Union's evidence about why the parties initially sought to bargain these agreements, the agreements themselves make no mention of a change in the law as a predicate to the certification requirement. They simply state the parties' agreement that certification will be required, up to a certain number of employees. This limit on the number of certified Equipment Operators in the Parks Department is inconsistent with the idea that the agreement was based on a belief that there would be a general requirement for the certification of all Parks Department personnel. Clearly, by December of 1996, the parties had come to an understanding that there would be no universal certification requirement.

While there is no general federal requirement of certification, the record establishes that there is a statutory requirement of certification for some of the spraying done by the City, when it treats land owned or controlled by the School District. Such treatments are a routine function of Parks Department workers. Thus there is a basis in Wisconsin law for requiring City Parks Department employees to have certification in order to perform the full range of their duties. In other words, the original premise of the agreements, that the law would require certification of at least some employees, is still valid.

From the record evidence, I conclude contrary to the Union's arguments, that the 1996 grievance settlement agreements do not expressly condition the certification requirement on a change in the law, and further that the law as it stands does impose a requirement of pesticide certification on at least a limited number of employees in the Parks Department. The assumptions underlying the settlement agreements have not materially changed over time, and the agreements therefore continue to bind the parties.

B. Management Rights and Abuse of the Settlement Agreements

The Union argues that, even if the settlement agreements continue to have binding effect, management has abused the agreements in such a way as to effectively repudiate them. Specifically, it points to the re-employment of an Equipment Operator at Horlick Field, after that person had voluntarily dropped his certification and been forced out of the position, and to the use of seasonal employees to do spraying. With respect to the re-employment of the Operator at Horlick Field, the evidence shows that the City initially enforced the certification requirement, and made two attempts to replace him, then waived the requirement when neither of the replacements worked out. The grievance settlements between the parties do not require that every Equipment Operator in the Department possess a pesticide certification. They require that Operators posting into the Department have the certification, until there are at least six certified Operators. There is no evidence about how many certified Operators were in the Department at the time of this incident, and I cannot say with certainty whether this represented a violation of the negotiated agreements. Neither can it be said that a waiver of the requirement in a given instance, which was not challenged at that time and was granted for legitimate business reasons, serves to invalidate the entire policy.

With respect to the seasonal employees, the evidence is that some of them possess pesticide certification and some do not. The fact that seasonal employees are not uniformly required to have certification does not draw the policy into question, since there is a reasonable basis on which the Employer could require higher qualifications from its permanent work force than it would from seasonal employees, and the negotiated agreements make no mention of seasonal employees. If there are specific instances in which non-certified seasonal employees are assigned to spray pesticides on property owned or controlled by the schools, the Union could legitimately question such assignments on the grounds that that spraying is reserved both by statute and agreement to the bargaining unit members who possess certification. However, as above, the need to enforce the agreement against possible violations does not, in and of itself, serve to invalidate the agreement.²

Broadly speaking, management has considerable latitude in determining the qualifications required for a position, and in determining the level of skills it will require of its workers. An employer is not required to write a job description at the lowest level of skills required to minimally perform the particular job. It can seek a higher level of training and proficiency, so long as it does not demand a degree of expertise that has no rational relationship to the actual duties.³ This is, of course, subject to the Employer's obligation to negotiate over the impact of such changes in qualifications on the wages, hours and working conditions of the affected workers. The parties in this case have negotiated over the level of training required of Equipment Operators, and have reached agreement. To the extent that the Union believes that the City has applied their agreement in bad faith in specific cases, its recourse is to grieve those perceived violations.

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

AWARD

The City did not violate the collective bargaining agreement by requiring employees in the positions of arborist and equipment operator in the Parks Department to have a category 3 pesticide certificate as a condition of bidding into and being employed in the department. The grievance is denied.

Dated at Racine, Wisconsin, this 22nd day of February, 2007.

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator

² The Union also raises a complaint that seasonal employees are obtaining certification in order to defeat the seniority of Equipment Operators when openings occur in the Parks Department. The answer to that is that there is nothing unfair or improper about an employee attempting to position him or herself to qualify for a job opening, and that the regular employees are equally free to seek certification in advance.

³ An employer could not, for example, cite the spraying of pesticides as a basis for unilaterally decreeing that Equipment Operators possess a graduate degree in chemistry.