BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF WHITEWATER

and

WHITEWATER CITY EMPLOYEES, LOCAL 1145, AFSCME, AFL-CIO

Case 71
No. 69307
MA-14566

Appearances:

James Scott, Attorney at Law, Lindner & Marsack, S.C., 411 East Wisconsin Avenue, #1800, Milwaukee, Wisconsin, 53202-4498, appearing on behalf of the City of Whitewater.

Bill Moberly, Staff Representative, AFSCME Wisconsin Council 40, 8033 Excelsior Drive, Suite B, Madison, Wisconsin, 53717, appearing on behalf of the Whitewater City Employees, Local 1145, AFSCME, AFL-CIO.

ARBITRATION AWARD

The City of Whitewater ("City") and the Whitewater City Employees, Local 1145, AFSCME, AFL-CIO ("Union") are parties to a collective bargaining agreement ("Agreement") that provides for final and binding arbitration of disputes arising thereunder. On November 5, 2009, the City and the Union filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning a dispute regarding the contractual pay rate for the Grievant, Melody Wunderlin. The filing jointly requested that the Commission appoint the undersigned to serve as arbitrator in this matter, and the Commission did so. A hearing was held on March 8, 2010, in Whitewater, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. No transcript of the proceeding was made. Each party filed a post-hearing brief, the last of which was received on April 23, 2010, whereupon the record was closed.

ISSUE

The parties stipulated to the following statement of the issue to be decided by the arbitrator:

Did the City violate the collective bargaining agreement when it did not pay the Grievant the Grade F Wastewater Operator rate? If so, what is the appropriate remedy?

BACKGROUND

The City operates a wastewater treatment plant which employs, among others, wastewater operators. The Grievant in this case, Melody Wunderlin (hereafter Wunderlin or Grievant), is one such employee. Wastewater operators are certified to hold the operator title through the State of Wisconsin Department of Natural Resources (hereafter DNR). The DNR administrative code provides for four grades of wastewater operator certification, each of which can be assigned to an individual after the successful completion of a general examination and a certain amount of experience. These certifications are referred to in the DNR code as grades I, II, III, and IV.[1] Also, within the four certification grades, there are subclasses, each of which relates to a specific operational wastewater process.

The pay for wastewater treatment operators employed by the City has been linked in varying degrees over the years to the achievement of these general and subclass DNR certifications. In the 1998-1999 collective bargaining agreement between the City and the Union, wastewater operators with grade I, II, or III certifications received the same pay. Wastewater operators who achieved a grade IV certification, however, received an additional $.20 per hour pay under that agreement. Although the 1998-1999 collective bargaining agreement does not mention any subclass requirement, the parties agree that wastewater operators employed by the City were considered to have completed a grade IV certification, such that they were eligible for the $.20 increase, after completing the general grade IV examination and only one of the grade IV subclass certifications.

In negotiations for a 2000-2001 collective bargaining agreement, the City and the Union agreed to restructure the pay plan for wastewater operators to one that would differentiate to a greater degree between the DNR wastewater operator certifications. Non-certified wastewater operators would be eligible for pay grade “E”; grade I operators would be eligible for pay grade “E” plus $.20 per hour; grade II operators would be eligible for pay grade “E1”, and grade IV operators would be eligible for pay grade “E2”. Further, the concept of the subclass was incorporated explicitly into the pay plan, requiring the completion of one subclass to be considered grade I certified and the completion of “all” subclasses to be considered grade II or grade IV certified. Appendix A of the 2000-2001 agreement set forth the newly structured pay plan, in pertinent part, as follows:

. . .

[1] There is also a grade of “T”, which is a non-certified operator-in-training designation.

. . .

Grade E	16.69	17.07	17.44	17.81	18.18	18.56
Laborer I						
Laborer I – Mechanic						
Code Enforcement/Bldg Mtn.						
Water Operator – no certification (1) . ..						
Wastewater Operator – no certification (1)						

(1) Additional twenty ($.20) per hour upon completion and receipt of Grade I certification and one (1) subgrade.

Grade E1:	Successful completion of Grade II and all Grade II subgrades required by
[renamed	Wisconsin Administrative Code for the City of Whitewater Wastewater Utility.
"F"]	Wastewater Operator 19.15

Grade E2:	Successful completion of Grade IV and all Grade IV subgrades required by
[renamed	Wisconsin Administrative Coe for the City of Whitewater Wastewater Utility.
"G"]	Wastewater Operator 19.35

. . .

Although certain changes have occurred with regard to the above provision – specifically, the dollar amounts have changed, pay grade "E1" was renamed "F", and pay grade "E2" was renamed "G" – the other elements of the pay plan that were introduced in the 2000-2001 agreement have appeared in all subsequent collective bargaining agreements between the City and the Union, including the 2009-2011 agreement that applies to this dispute.

In the summer of 2009, the Grievant passed the general DNR grade II wastewater operator examination. She also completed two grade II subclasses. Having done so, the Grievant understood that she was eligible to be reclassified, under the pay plan, to the F pay grade. The Grievant's request to be reclassified, however, was denied by the City. This denial was grieved, which grievance led to the current case.

DISCUSSION

The City's basis for denying the Grievant's requested reclassification was that the collective bargaining agreement expressly requires, for advancement to the requested grade "F" pay classification, the completion of "all" subclasses required by the administrative code

for the City's treatment facility. It is undisputed that the Grievant had completed only two subclasses in the DNR grade II classification. The Union's position in this case is that the term "all" as used in the pay provision of the agreement is not clear under the circumstances present here and, further, that it has been the City's practice to allow wastewater operators to advance to a new pay grade with the completion of only one subclass.

At the outset, it seems fair to conclude, based on a reading of the agreement between the City and the Union, that the use of the term "all", with regard to the number of subclasses required to be considered grade II or grade IV certified, was not inadvertent. That requirement stands in noticeable contrast to the immediately preceding provision, relating to grade I certification and pay, which requires the completion of only "one (1)" subclass. Given the proximately and express nature of these provisions, it would be difficult to conclude that the parties were not consciously differentiating between the subclass requirements for these pay grades.

The Union contends, nevertheless, that the use of the term "all" is not clear in the present circumstances. The City has maintained throughout this case that the "all" subclass requirement obligates its wastewater operators to complete a total of seven subclasses. The Union argues that the City's position introduces ambiguity to the term "all" because the administrative code actually has ten subclasses for the City's wastewater operators, so the City has not been requiring the completion of all subclasses. I am not persuaded by this argument. It is simply not clear what basis the Union has for asserting that the total number of subclasses is ten rather than seven, and that assertion appears to be inaccurate.

The Union cannot be basing its assertion on the total number of subclasses listed in the relevant administrative code provisions, because there are twelve subclasses set forth there, which are identified with the letters A through L. Further, the Union does not appear to have a basis for asserting that ten (rather than seven) of those subclasses apply specifically to City of Whitewater wastewater operators. It is clear from the record in this case, including the applicable sections of the administrative code, that not every subclass identified in the code is relevant to every wastewater treatment plant. Rather, only those subclasses that correspond to the processes used at each plant are relevant to that plant's operators. The collective bargaining agreement between the City and the Union implicitly acknowledges this reality by limiting its "all" subclasses requirement to those "required by Wisconsin Administrative Code for the City of Whitewater Wastewater Utility". At hearing there was testimony from several witnesses, including witnesses called by the Union, indicating that it was understood that the total subclasses relevant to the City's wastewater treatment plant was some number less than all twelve subclasses listed in the administrative code. When the Grievant testified, she reviewed a copy of the administrative code submitted into evidence by the Union and gave testimony on direct examination indicating that seven of the subclasses, which had been highlighted in the exhibit prior to hearing with hand-written underlining, represented the subclasses that were relevant to the City's wastewater plant. The Union's contrary, post-hearing assertion that there are ten subclasses relevant to the City's plant rather than seven does not appear to have any

support from the testimonial evidence on the record, from the relevant portions of the administrative code, or from any other documentary evidence before me. That being the case, I do not find that the position the City has taken, that being that seven subclasses are required for advancement to the F and G pay grades, introduces ambiguity into the provision that requires the completion of "all" subclasses.

The Union also argues that, regardless of the use of the term "all", it has been the City's practice in the past to require the completion of only one subclass to qualify for reclassification to a new pay grade. The record in this case also does not persuade me of this point. The parties agree that, prior to the 2000-2001 agreement, wastewater operators were paid the increase that was available for grade IV certified operators after having completed only the general grade IV examination and one subclass. When the 2000-2001 agreement was implemented and required the completion of all subclasses to earn grade IV pay, there were five wastewater operators working for the City. Three of those individuals, Brown, Malone, and Thies, had been paid at the grade IV prior to the 2000-2001 agreement, though apparently none of them had completed all of the grade IV subclasses. Nevertheless, those employees were allowed to remain at the highest wastewater operator pay grade, so they would not have to suffer a reduction in pay or face a sudden obligation to meet the newly established educational requirements. Further, a side-letter agreement allowed a fourth employee, Waga, to be similarly grandfathered into the highest pay grade, in the event that he was able to complete the grade IV general test and one grade IV subclass. Such grandfathering is not unusual when dealing with existing employees who would otherwise be adversely affected by new contract provisions, and the evidence here establishes that it is a method that is commonly used by the DNR in conjunction with the kind of certification requirements at issue here.

A fifth employee, Oldenburg, represents a more confusing situation. Although Oldenburg was not already at the highest pay rate and there was no side-letter, as there had been with Waga, specifically allowing Oldenburg to earn the highest rate if he completed the grade IV general examination and only one grade IV subclass, Oldenburg also was advanced to the highest pay grade in March of 2000 for having met those minimal requirements. The Union focuses on two facts: the 2000-2001 agreement was effective on January 1, 2000, and Oldenburg did not receive his certification until sometime later in March, after the effective date; and there was not a side-letter incorporated into the 2000-2001 agreement expressly grandfathering Oldenburg into the highest pay grade under the old requirements. Thus, the Union argues, Oldenburg represents an important instance under the new, all-subclass requirements, wherein an operator was allowed to receive grade IV classification pay despite having completed fewer than all of the relevant subclasses. Despite these factors, however, I am not persuaded that Oldenburg is evidence of a past practice under the current contract language. Although Oldenburg did not receive his certification, as the Union contends, until after the January 1, 2000 effective date of the agreement, in reality he received it before the agreement was signed by the parties on March 31, 2000. City witnesses testified that Oldenburg "made it under the wire" of the grandfathering option by receiving his certification in early March of 2000 while the agreement was still being finalized. Further they testified that

the fact that his case was not specifically addressed in the agreement was a drafting oversight. I find this explanation credible. Certainly imperfect contract drafting is not unheard of. Further, the timing of Oldenburg's advancement to the higher pay grade suggests that it occurred under the grandfathering system rather than out of a decision on the City's part to ignore the newly agreed upon requirements.

Since 2000, there have been only two new wastewater operators hired by the City. One of these individuals is West. The record is slightly unclear with regard to West because it suggests that he was either an operator-in-training, and therefore would not have had a chance to seek pay at the higher grades, or that he was certified as a higher class operator, but for whatever reason had not sought advancement to a higher pay grade. In either case, this evidence does not support or refute a past practice. The record does reveal, however, that when West was first hired as a wastewater operator for the City and began to make inquiries about the method for obtaining higher certifications and rates of pay, there were discussions about how many of the relevant subclasses West would need to complete to do so. West was told at the time by the other wastewater operators employed by the City that he would only need to complete one subclass in addition to the general exam. The City's utility superintendent, Reel, took a position that is consistent with the City's position in this case and indicated to West that he would need to complete all of the relevant subclasses to reach the higher pay grades. These conversations occurred around the spring of 2009. Thus, although there are no actions relative to West's employment that shed light on the question as to whether there was a past practice of requiring only one subclass, the City's feedback to West would refute the Union's argument in that area.

The only other wastewater operator hired by the City was the Grievant, and this case exists because the City refused to reclassify her pay grade for the completion of only one subclass. Obviously, therefore, her case also does not support the Union's past practice argument.

As a general matter it seems to be absolutely true, as the Union points out, that none of the wastewater operators in the highest pay grade have completed all of the subclasses relevant to the City's treatment plant. All five of these individuals, however, appear to be at that pay grade as a direct result of the grandfathering decisions that were made at the time that the 2000-2001 agreement was being negotiated and implemented. Even if Oldenburg was considered separately, as the Union has argued he should be, from the group of grandfathered employees, the City's handling of an individual employee is not sufficient in this case to make a past practice. Aside from the five senior operators, there are only the unpersuasive examples of West and the Grievant. Whether considered separately or all together, these cases do not represent the clear evidence necessary to establish a past practice, particularly one that runs contrary to the express terms of the collective bargaining agreement applicable here.

I draw this conclusion with regard to the Union's past practice argument fully aware of the consistent understanding held by the members of the bargaining unit. The wastewater operators

employed by the City apparently all believed that the higher pay grades could be achieved with the completion of only one subclass. This evidence lacks persuasive value, however, because there is no apparent source for their impression. The most specific testimony regarding this issue came from Theis, an operator who was not part of the Union's bargaining team for the 2000-2001 agreement but testified that the entire local understood that, even after the new pay plan was implemented, the higher level pay grades could be achieved with the completion of only one subclass. But aside from this general assertion, Theis provided not one detail regarding how that understanding developed. There is no evidence in the record of any statement made by a City representative that would foster such an impression. In the absence of such evidence, I am disinclined to find that the parties negotiated a new pay plan, added language to their agreement detailing the plan, and then immediately abandoned the new requirements in favor of the prior practice. What is more likely is that the senior operators developed their collective understanding with regard to the subclass requirements because each of them was in the highest pay grade despite not having met all the subclass requirements, but that was because of the grandfathering scheme. And the less senior operators, West and Wunderlin, appear to have developed their understanding by talking to their more senior colleagues.

Nor am I persuaded that the bargaining history evidence on the record supports the Union's position. During the parties' 2009 negotiations for a collective bargaining agreement, the City proposed the following changes to the pay provisions:

> ~~(1) Additional twenty cents ($.20) per hour upon completion and receipt of Grade I certification and one (1) subgrade.~~
> (1) Wastewater Operator: Additional twenty cents ($.20) per hour upon completion of the written introductory or advanced examination for a given plan subclass and the written introductory or advance general examination, plus have one year of satisfactory subclass specific experience. This would comply with the DNR requirements for a Grade 1 operator.
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> . . .
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> **Grade ~~E~~1F:** ~~Successful completion of Grade II and all Grade II sub-grades required by Wisconsin Administrative Code for the City of Whitewater Wastewater Utility.~~
> ~~Wastewater Operator~~ 23.21
>
> Successful completion of all introductory or advanced subclass specific exams required by WDNR for operations at the Whitewater Wastewater Facility along with two (2) years of experience in each subclass. This would comply with the DNR requirements for Grade 2 operator. Subclasses are identified by the Wisconsin Pollution Discharge Elimination System Permit.

Grade ~~E2~~G: ~~Successful completion of Grade IV and all Grade IV sub grades required by Wisconsin Administrative Code for the City of Whitewater Wastewater Utility.~~
~~Wastewater Operator~~ 23.46
Successful completion of all advanced subclass specific exams required by DNR for Operations at the Whitewater Wastewater Facility along with four (4) years of experience in each subclass. This would comply with the WDNR requirements for a Grade 4 Operator. Subclasses are: Subclasses are identified by the Wisconsin Pollution Discharge Elimination System Permit.

The record indicates that the Union rejected the City's proposal, because it required the completion of all subclasses to reach the highest pay grades, and the Union asserted that these requirements were different from the existing practice. Reel had conversations with the Union's bargaining team at the time indicating that it was the City's position that the revised language was intended only as a clarification, not as a change. In the course of negotiations, the City also made a second proposal to modify the pay plan to require only five certifications. Ultimately, the City withdrew its proposal and the language remained as it has been since the 2000-2001 agreement. The Union contends that the City only would have proposed the revisions in 2009 – and particularly that the City only would have offered to accept the completion of five subclasses instead of seven – if the City believed that the practice required something short of that. The problem with this contention, however, is that it is inconsistent even with the position the City had taken outside of the 2009 negotiations, in response to West's inquiries. It is admittedly difficult to make sense of the City's offer to reduce the number of required subclasses to five, but that stand alone fact, without more context, is simply not a sufficient basis for deciding that the subclass requirement is less than the number expressly required by the agreement.

On the basis of the foregoing, I make the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 17th day of November, 2010.

Danielle L. Carne /s/
Danielle L. Carne, Arbitrator

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