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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

STATE OF WISCONSIN

ARBITRATION AWARD

In the Matter of the Arbitration between		
CITY OF MONROE (WATER UTILITY)		
and		Re: WERC Case 19
		No. 43940
COUNCIL 40, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, MONROE CITY EMPLOYEES UNION		INT/ARB-5662
		Decision No. 26942-A

APPEARANCES: For the City of Monroe Water Utility: Attorney Howard Goldberg of DeWitt, Porter, Huggett, Schumacher and Morgan, S.C., Attorneys at Law, Two East Mifflin Street, Suite 600, Madison, Wisconsin 53703. Mr. Goldberg was accompanied at the hearing by Mr. Gerald P. Neidl, General Executive Officer, Monroe Water Utility, and Mr. Gerald Ellefson, Superintendent, Waste Water Treatment Plant, City of Monroe.

For the Union, Council 40, AFSCME, AFL-CIO, Monroe City Employees Union: Mr. Jack Bernfeld, Staff Representative, Council 40, 5 Odana Court, Madison, Wisconsin 53719. Mr. Bernfeld was accompanied at the hearing by Mr. Harold Lehtinen, Research Department, Council 40; and by Donald Miller, Chairperson, and by Mr. Jack K. Morris and Mr. Kenneth Indergand, representing the Monroe City Employees Union.

The Union was certified on September 6, 1989 as exclusive representative of the employees of the Water Utility of the City of Monroe. The parties met on several occasions in efforts to negotiate an agreement. The Union filed a petition with the Wisconsin Employment Relations Commission on April 27, 1990 requesting the initiation of binding arbitration. A member of the WERC staff met several times with the parties in efforts to mediate the dispute. On July 12, 1991, they submitted final offers to him as well as a stipulation on

matters they had agreed upon. Then on July 22, 1991, the Commission determined that an impasse existed within the meaning of Section 111.70(4)(cm)6 of the Municipal Employment Relations Act and certified that conditions precedent to arbitration under the statute had been satisfied.

The undersigned was notified of his appointment as arbitrator by letter from the Commission Chair dated August 7, 1991. A hearing was held in Monroe on October 28, 1991. The parties presented testimony from witnesses and in documentary form. They were given opportunities to cross examine the witnesses and to clarify matters in the documents. There was no record made of the hearing other than the arbitrator's handwritten notes. At the conclusion of the hearing the parties agreed to exchange written briefs and set a period for reply briefs to be exchanged. All exchanges were made by the arbitrator, the final exchange being accomplished on January 27, 1992. The hearing is considered closed as of that date.

THE ISSUES TO BE ARBITRATED

The parties have agreed that the contract should have a duration of two years. There are two issues in dispute. The first relates to the hourly rates to be paid to the classifications of Lead Operator and Operator as employed by the Water Utility. The parties are twenty cents apart on each classification in each of the two years. The second issue relates to whether the discharge of an employee during the negotiations on the initial agreement is or is not subject to the provisions of a grievance and arbitration clause that was tentatively agreed to pending negotiation of the entire agreement. The Union argues that the matter should be arbitrated. The Employer argues that until the entire contract has been signed, the grievance and arbitration clause is not effective and that the matter should not be submitted to an arbitrator.

The Union's entire final offer is attached as Addendum A. The Employer's entire final offer is attached as Addendum B The stipulations are not included here.

POSITIONS OF THE PARTIES

The parties present very different evidence to support their positions on the issue of wage rates for the Lead Operator and the Operator. The Union would use the rates paid in 1990 and 1991 in what it asserts are comparable classifications in fifteen comparable cities in southern Wisconsin. While the Employer presented some rates for comparable classifications in what it

asserts are five comparable cities, its main argument is that there is a historical differential favoring the classification of Lead Operator and Operator in the waste water operation of the City as compared with the Lead Operator and Operator in its water utility.

The Union explains that the State of Wisconsin divides city water utilities into classes A, B, C, and D. The Monroe Water Utility is Class C. The Union asserts that Class C water utilities in the following cities constitute sources of appropriate comparable classifications and rates:

Dodgeville
Edgerton
Evansville
Fitchburg
Fort Atkinson
Lake Mills
Lancaster
Middleton
Milton
Monona
Mount Horeb
Prairie du Chien
Richland Center
Stoughton
Whitewater

Among these cities Monroe is the fourth largest with a population of 10,401 in 1990. Average population among them, excluding Monroe, was 7,142 in 1990. Per capita property value was said to average $25,742, excluding Monroe, which had a per capita figure of $28,537 in 1990, fifth among the comparables. In a comparison of net quarterly bills Monroe was tenth with $23.75. The average for the other city water utilities was $24.87 for 1990. The comparable figures for 1991 were not much different.

The Union presented what were purported to be comparable water operator positions for the fifteen jurisdictions. These classifications were taken from applicable collective bargaining agreement and/or were verified with local officials. All but one (Mt. Horeb) had the same license requirement as the requirement for Monroe operators (although Middleton and Whitewater had slightly higher license requirements for what were said to be their comparable positions. Minimun, maximum and maximum plus longevity rates were presented for all these classifications. The averages for 1990 compared with the final offers in this proceeding as follows:

	Minimum	Maximum	Maximum plus Longevity
Average, 15 jurisdictions	$9.20	$10.59	$10.74
Monroe			
Union final offer	8.92	9.32	9.32
Utility final offer	8.62	9.12	9.12

For 1991 the comparisons were as follows:

Average, 15 jurisdictions	9.76	11.07	11.22
Monroe			
Union final offer	9.30	9.80	9.80
Utility final offer	9.09	9.59	9.59

According to these comparisons the operator rate resulting from the Union final offer for 1990 is lower than thirteen of the comparables while the Utility final offer would produce a rate that is lower than fourteen of the comparables. For 1991 (the figures are not reproduced here) both final offers would produce rates lower than the operator rates of thirteen of the comparables.

As for the lead operator classification, the Union found that only four of the comparable jurisdictions had comparable positions: Dodgeville, Edgerton, Fort Atkinson, and Lake Mills. For 1990 the average of the rates in the four comparable jurisdictions, as compared to the offers is shown below:

	Minum	Maximum	Maximum plus Longevity
Average	$10.09	$11.11	$11.20
Monroe			
Union final offer	9.35	9.85	9.85
Utility final offer	9.15	9.65	9.65

For 1991 these comparisons were as follows:

Average	10.54	11.58	11.68
Monroe			
Union final offer	9.90	10.40	10.4[illegible]
Utility final offer	9.70	10.20	10.20

The Union also presented tables showing similar rates (minimum, maximum, and maximum plus longevity) for waste water treatment plant operators and lead operators in the fifteen comparable jurisdictions. These data purported to show that in 8 jurisdictions water plant and waste water plant operators were paid at the same rate while in 4 jurisdictions the waste water plant operators were paid less than water plant operators. Three of the 15 communities do not have waste water treatment plants (Fitchburg, Middleton, and Monona) because this function is handled for them by the Madison Metropolitan Sewerage District. In the 4 jurisdictions where there were lead operators in both water and waste water treatment operations the rates were the same.

The Union's data were all backed up by copies of labor agreements for the respective jurisdictions.

The Employer argues that comparables of the sort presented by the Union are not relevant for two reasons: First, most of them have combined water and sewer departments, unlike Monroe where they are separate. The Employer argues that where they are separate, the waste water treatment operators and foreman or lead operators are paid more than the water operators and lead operators. The reason for this is that the license requirements for waste water treatment operators are more rigorous. Waste water treatment operators need to pass seven different tests for their licenses while water operators need to qualify in only two areas. Second, this employer has a history of paying waste water treatment operators and lead operators a differential above that of the water treatment operators and lead operators. A table of named employees was introduced purporting to show that in 1989 the waste water treatment operators were paid at a rate of $8.90 per hour while the water operators were paid $9.65.

Regarding the argument that the Union's comparables are not relevant the Employer cited factor (d.) in the statute from among the factors that an arbitrator needs to consider:

> Comparison of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services.

This proceeding is about the rates for water plant operators and lead operators. The data presented by the Union showing rates for waste water treatment operators and lead operators is not relevant because waste water plant operators are not performing similar services.

The Employer argues that the pertinent factor is (c.):

> Comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours, and conditions of employment of other employes generally in public employment in the same community and in comparable communities.

In this case the Union has already negotiated a contract in which the Union has agreed to set certain rates at the same level in both units. The example given by the Employer are the exact same wages for secretarial employees in the waste water treatment plant and the water plant. Conversely waste water treatment operators in that contract are paid a rate that maintains the historical differential between their rates and the water plant operator rates. The waste water treatment plant operators were granted a wage increase of 9.86% over the two year period. In this proceeding the Union is proposing a 12.9% increase for the water plant operators. Consideration of factor (c.) does not support such an increase nor the Union's effort to destroy the historical differential.

The Employer cites factor (h.) for further support for its position:

> The overall compensation presently received by the municipal employes, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

Although the benefits already agreed upon in the proposed agreement are the same as those in the other unit, the Employer argues that they are significant in terms of factor (h.) and while many of them existed before the unit was organized, they will now be contractually vested. The same goes for rights that will be contractually vested.

In sum, the Employer believes that it has made a fair wage offer which maintains the historical differential referred to above and which is in accordance with differentials in other communities where there are separate sewerage treatment and water plants.

REBUTTAL ARGUMENTS

The parties had agreed at the hearing to defer decisions on reply briefs until after they had seen the original briefs. Both parties later decided to file reply briefs.

The Union makes the following points in its reply brief: The Union disputes the Employer's argument that there has been a historical differential between the water operator and lead operator rates and the waste water treatment operator and lead operator rates. The evidence presented by the Employer for this is only for the year 1989. According to the Union, this is not only too short a time to show a historical differential, but it is also a period when there was no union organization. The Union cites Arbitrator Frank Zeidler's Waukesha School District award in which the arbitrator rejected a similar employer argument on grounds that unilateral determinations are not as important as pay rates in comparable districts. The Union also disputes the Employer's argument that the Union's percentage demand of 12.9% is excessive. It points out that among the rates in the other unit that were raised as a result of the negotiations were these in the waste water treatment plant: Lab Technician went from $6.20 per hour to $9.75, an increase of 57%; Laborer went from $7.40 to $8.43 per hour, an increase of 13.9%, and Secretary was increased from $5.05 to $6.89 per hour, an increase of 36%. In connection with bringing about equity in the operator rates in the two plants the Union points out that the Employer has already agreed to Operator-In-Training rates that are identical in both plants.

The Union also disputes the Employer's claim that the wastewater treatment operator should be paid more because of the greater rigor of the tests that operator is required to pass, that is, seven tests as opposed to two tests that the water plant operator is required to pass. In the first place, both operators have the same amount of time to become qualified, three years. In the second place the number of tests says nothing about their content. Two tests for the water plant operator may well be as difficult as the seven tests required of the wastewater treatment plant operator.

Finally, in way of rebuttal, the Union disputes the Employer argument that the Wastewater Treatment Lead Operator should be paid more because he is required to have a Grade 3 license. This ignores, the Union argues, the fact that in four comparable jurisdictions where lead operators are employed in wastewater treatment plants the lead water operators are paid the same rate.

In its rebuttal argument the Employer emphasizes the testimony of the director of the water utility and the superintendent of the wastewater treatment plant to the effect that the training and skills of the wastewater treatment operators and lead operators needed to be of a higher order than those of the water plant operators and lead operators. Besides re-emphasizing the historical differentials and the inappropriateness of the Union's comparisons of jurisdictions where wastewater treatment and water operations are in the same agency, the Employer questions the accuracy of the Union's comparables in the sense that only one of the labor agreements submitted (Richland Center) specifies the license requirement of the wastewater operators who are used as the Union's basis of comparison. According to the Employer this throws into question the Union's data on wastewater treatment operator rates.

The Issue of the Grievance

Both parties introduced considerable testimony concerning the other issue in this dispute, whether the discharge of one of the employees in the unit in April, 1991, was arbitrable. The issue arises because the parties had tentatively agreed on a grievance and arbitration clause prior to the discharge. They agree that certain portions of the tentative agreement are to be made retroactive when the entire agreement becomes effective. That would apply to such items as holidays, vacations, and sick leave already taken during 1990 and 1991. It would not apply to such items as life insurance and the checkoff. They disagree on the application of the grievance and arbitration clause. The Employer argues that the employer does not have a formal grievance policy and that until the agreement is made effective by this proceeding, employment is "at will" of the Employer. The Union argues that the situation is no different from what would be the principle if an old agreement with an arbitration clause had expired by its terms. In these circumstances the arbitration clause maintains its effectiveness and grievances continue to be handled as though the labor agreement was fully in effect. In this case the parties have tentatively agreed on all of the terms of the new agreement except wages and have specifically recognized that certain portions do not become effective until this proceeding is concluded. The Union argues that they did not have any understanding that the grievance and arbitration clause would not be effective when the employee was discharged and the Employer has no standing to take that position now.

DISCUSSION

The Union has produced a substantial amount of data to back up its assertion that other comparable jurisdictions pay their water plant operators and lead operators higher rates than are paid by this Employer and that in comparable jurisdictions water plant operators and lead operators are paid higher than or equal to rates paid to wastewater operators and lead operators. The Employer argues that the latter assertion is irrelevant because this proceeding does not involve wastewater treatment operators and lead operators. But its main argument is that there is a history among its own employees of a differential favoring the waste water treatment operators and lead operators over the water operators and lead operators. But it produces data for only one year, the year that the Union was certified. Despite this lacuna in the evidence it presented, I have no doubt that there has been a longstanding differential, as the Employer asserts. But as Arbitrator Zeidler stated in the case cited by the Union (Decision No. 18391-A, April 28, 1991), the unilateral provision of a differential by the Employer is hardly as persuasive as the overwhelming amount of evidence presented by the Union. Among its comparables water operators are paid at higher rates in most jurisdictions, the same in some jurisdictions, and not less in any jurisdiction. Although the Employer asserted at the hearing that where water and sewer operations are separate, wastewater treatment operators are paid at a higher rate than water plant operators, it

presented no credible evidence to support its assertion.

Nor is the Employer's argument persuasive that wastewater treatment operators and lead operators require more skill and training and a higher grade license. It is argued that the Union has not demonstrated that the classifications included in the labor agreements it presented as evidence show these higher requirements. I am a little uncertain what the Employer means by this argument. The Union has shown all the classifications and rates that are included in the units in the jurisdictions for which it presented labor agreements. Unless the classifications requiring higher grade licenses are not included in these units, then we have been shown all the classifications of employees in both wastewater treatment and water plants in the 15 jurisdictions. If the classifications the Employer is referring to are outside the units, then they should be compared with classifications in the City of Monroe and Monroe Water Utility that are outside these units. In my opinion the comparables presented by the Union meet the criteria spelled out in factors (d.) and (e.) in the statute. In connection with these criteria the Union has demonstrated that other jurisdictions pay higher rates to water operators and lead operators and that other jurisdictions pay higher or equivalent rates to water plant operators and lead operators than they pay to wastewater plant operators and lead operators. The position of the Employer on the wage issue is contrary to the evidence presented for the comparable jurisdictions.

Several of the factors that I am required to consider in making my decision were not applicable to this dispute. Neither factor (a.), the lawful authority of the municipal employer, nor (c.), the interest and welfare of the public and ability to pay, evoked any testimony or argument by the parties. Factor (b.), stipulations of the parties, has been taken care of by their stipulation agreement. I have discussed the application of factors (d.) and (e.) above. The Employer did not produce convincing arguments related to either factor. The parties did not consider factors (f.) and (g.) applicable. Although the Employer suggested that factor (h.) was an issue in the sense that employees in both units will have equal liberal contractually vested benefits and rights, I am not sure what relevance that has to the wage issue. It does not support the Employer's proposal to maintain the wage differential that is at issue here unless the appeal to uniform treatment is intended to support its argument for maintaining the historical differential. But if that is the intention, the Union has undermined it by pointing out that several much larger wage increases were negotiated in the other unit. No issue or argument was raised concerning factors (i.), or (j.).

If wages were the only issue, the Union has presented a more convincing case for choosing its final offer.

I am not certain that the Wisconsin Employment Relations Commission fully understood that it had allowed the final offers in this proceeding to include an issue concerning the application of a tentative agreement on grievances and arbitration, during the time that the agreement was being investigated by its

staff, to a discharge occurring during the negotiations. This kind of an issue is unique to my experience.

In my opinion whether the discharge is arbitrable is a procedural issue. As such, I believe that it should be decided by an arbitrator. In other words, after the conclusion of the current proceeding the parties should follow the arbitration procedure in their agreement. They should present their arguments on arbitrability and let the arbitrator decide whether to proceed to the merits or to dismiss the grievance.

AWARD

The Union has presented more convincing evidence to support its position on the wage issue. Since I believe a grievance arbitrator should decide whether the grievant has the right to have his grievance heard under the circumstances that have been described herein, the Union's final offer is accepted as the basis for a settlement of this dispute and it will be incorporated in the labor agreement between the parties.

Dated: February 18, 1992

David B. Johnson

ADDENDUM A

FINAL OFFER

OF

MONROE WATER UTILITY EMPLOYEES UNION LOCAL ___,AFSCME/AFL-CIO

July 1, 1991

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1. **APPENDIX A**

Hourly Wage Rates - effective January 1, 1991

Classification	Hourly Rate
Lead Operator	$9.85
Operator	9.32
Operator-In-Training	8.73
Office Manager	7.66
Secretary/Receptionist	6.20

Hourly Wage Rates - effective January 1, 1991

Classification	Hourly Rate
Lead Operator	10.40
Operator	9.80
Operator-In-Training	9.11
Office Manager	8.33
Secretary/Receptionist	6.50

Hourly Wage Rates - effective December 1, 1991

Classification	Hourly Rate
Lead Operator	10.40
Operator	9.80
Operator-In-Training	9.11
Office Manager	8.33
Secretary/Receptionist	6.89

A. During the probationary period of newly hired employees, the wage rate shall be $.50/hour less than the rates listed herein.

B. Employees classified as Operator-In-Training are those who are seeking to be certified by the Wisconsin Department of Natural Resources (DNR) as a Waterworks Operator Grade 1-Groundwater and Distribution (G/D). Such employees shall have thirty-six (36) months from the date of their selection to this position to become certified or shall be laid off. Employees so laid off shall be entitled to exercise all layoff and recall rights pursuant to Article 11 - Layoff and Recall of this Agreement. The thirty-six (36) months period shall be extended if, due to extenuating circumstances, said period is determined to be insufficient. The Utility shall provide employees classified as Operator-In-Training with the necessary job experience and with reasonable opportunities to attend schooling, training and testing, pursuant to Section 25.02 Certification and License of this Agreement, to allow them to successfully complete certification. Upon obtaining Waterworks Operator Grade 1-G/D certification, the Operator-In-Training will automatically be reclassified to an Operator effective as of the next payroll period after receipt of proof which verifies same.

Notes: Effective January 1, 1990, or the date of hire if it occurs after January 1, 1990, all employees are placed on the wage schedule in their classification as of that date. Employees serving their probationary period shall be paid at the appropriate probationary rate during such probationary period.

Donald Gaulrapp, Donald Miller and Jack Morris shall be classified as Operator.

Mike Kennison and Chad Peterson shall be classified as Operator-In-Training. Their thirty-six (36) month certification periods, as noted above, shall begin on the date on which the interest arbitrator's decision is rendered.

Ken Indergand shall be classified as Lead Operator.

Marvel Rosheisen and Carol Paske shall be classified as Office Manager.

Nancy Pilz shall be classified as Secretary/Receptionist.

2. The grievance filed on behalf of employee Jack Morris contesting his discipline and discharge shall be submitted to grievance arbitration, pursuant to the terms of the Agreement, as soon as possible after the date on which the interest arbitrator's decision is rendered. Just cause shall be the standard for arbitral review in accordance with Article 8 - Discipline. The Union further reserves the right to submit to grievance arbitration, on the same basis, any other grievance that it may timely file contesting the discipline and/or discharge of any non-probationary employee in the bargaining unit that occurs subsequent to the date of this final offer. In such other case(s), the Union

shall notify the Employer of its intention to arbitrate any such grievance(s) within fifteen (15) work days after the date on which the interest arbitrator's decision is rendered.

ADDENDUM B

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WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CITY OF MONROE WATER UTILITY

AND

MONROE WATER UTILITY EMPLOYEES UNION
LOCAL ___
AFSCME, AFL-CIO

1990-1991

WERC Case 19 No. 43940 INT/ARB-5662

EMPLOYER'S FINAL OFFER

June 24, 1991

Submitted by:
Atty. Howard Goldberg
DeWitt, Porter, Huggett,
Schumacher & Morgan, S.C.
Two E. Mifflin St, Suite 600
Madison, WI 53703
(608) 255-8891

Pay Classifications and Wage Increases

Attached hereto as Appendix A is a listing of the job classifications and proposed pay rates for each position in the Utility that is covered by the Agreement. Payment shall be made for all hours deemed to have been worked, and shall be calculated pursuant to the terms of the Labor Agreement as of the dates specified in the attached schedule. To the extent they have not yet already been paid, it is the intention of the Employer to make all such payments, on a retroactive basis, for all employees covered by the Agreement to the extent they are deemed to have actually worked (as defined in the Agreement) for any portion of the time period covered by the Agreement.

Appendix A

CLASSIFICATION	1/1 1990	1/1 1991
Operator-in-Training	$8.73	$9.11
Operator	9.12	9.59
Lead Operator	9.65	10.20
Office Manager	7.66	8.33
Secretary/Receptionist	6.20	*6.50

During the probationary period of newly hired employees, the wage rate shall be $.50/hour less than the rates listed herein.

* Effective December 1, 1991 the Secretary/Receptionist wage will be increased to $6.89 per hour.

Notes: Effective January 1, 1990, or the date of hire if it occurs after January 1, 1990, all employees are placed on the wage schedule in their classification as of that date, except as noted herein. The following summary includes changes in classification placement from January 1, 1990 to the date of this final offer, and other relevant notes. All changes are effective January 1, 1990, unless otherwise specified. Employees serving their probationary period shall be paid at the appropriate probationary rate during such probationary period.

Employees classified as Operator-In-Training are those who are seeking to be certified by the Wisconsin Department of Natural Resources (DNR) as a Waterworks Operator Grade 1-Groundwater and Distribution (G/D). Such employees shall have thirty-six (36) months from the date of their selection to this position to become certified or shall be laid off. Employees so laid off shall be entitled to exercise all layoff and recall rights pursuant to article 11 - Layoff and Recall of this Agreement. The thirty-six (36) months period shall be extended if, due to extenuating circumstances, said period is determined to be insufficient. The Utility shall provide employees classified as Operator-In-Training with the necessary job experience and with reasonable opportunities to attend schooling, training and testing, pursuant to Section 25.02 Certification and License of this Agreement, to allow them to successfully complete certification. Upon obtaining Waterworks Operator Grade 1-G/D certification, the Operator-In-Training will automatically be reclassified to an Operator effective as of the next payroll period after receipt of proof which verifies same.

(The Utility has hired Mike Kennison and Chad Peterson as an Operator-In-Training during the period that this Agreement was being negotiated. As to these employees,

the thirty six (36) month period shall commence on the date on which the interest arbitrator's decision is rendered.)[1]

[1] Upon receiving a favorable arbitrator's award, the Employer will implement the economic provisions of the Labor Agreement that have been tentatively agreed to by the Employer and the Union during bargaining as of the dates set forth therein. An itemization of those tentatively agreed contract provisions has been provided to the mediator and are expressly made a part of the Employer's final offer by reference. Unless otherwise noted, the Employer does not agree to implement, on a retroactive basis, certain non-economic items, such as the just cause provisions or the grievance provisions which are set forth in the list of tentative agreements. All such provisions will go into effect as of the effective date of the interest arbitrator's decision.