BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CITY OF NIAGARA

and

WISCONSIN COUNCIL OF COUNTY &
MUNICIPAL EMPLOYEES, NO. 40, LOCAL 1752-
C, AFSCME, AFL-CIO (PUBLIC WORKS)

Case 1
No. 52871
MA-9135

Appearances:

Mr. Robert W. Burns, Godfrey & Kahn, S.C., 333 Main Street, Suite 600, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, on behalf of the City.

Mr. David Campsure, Staff Representative, Wisconsin Council 40, 1566 Lynwood Lane, Green Bay, Wisconsin 54311, on behalf of Local 1752-C.

ARBITRATION AWARD

According to the terms of the 1993-1994 collective bargaining agreement and the Memorandum of Understanding covering the period 1995-1996, between the City of Niagara (hereafter City) and Wisconsin Council of County and Municipal Employees, No. 40, Local 1752-C, AFSCME, AFL-CIO (Public Works) (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as impartial arbitrator of a dispute between them regarding the proper placement for pay purposes of employe Ron Rugg. The Commission designated Sharon A. Gallagher, Arbitrator. A hearing was scheduled on November 15, 1995 at Niagara, Wisconsin. A stenographic transcript of the proceedings was made and received by December 8, 1995. The parties filed their initial briefs with the undersigned by January 24, 1996. The parties reserved the right to file reply briefs. The parties submitted their reply briefs by February 19, 1996. The record was thereupon closed.

Issues:

The parties were unable to stipulate to the issue or issues to be decided herein. However, the parties agreed that the undersigned could frame the issues based upon the relevant evidence and argument in this case. The Union suggested the following issue to be determined:

> Did the City violate the parties' agreement when it failed to pay the higher hourly rate to an employe hired under the step system for more than four hours of work performed out of class? If so, what is the appropriate remedy?

The City suggested the following issue to be determined herein:

> Did the City violate the collective bargaining agreement by paying the grievant in accordance with the negotiated step schedule? If so, what is the appropriate remedy?

Based upon the relevant evidence and arguments in this case, the undersigned finds and concludes that the City's issues shall be determined herein.

Relevant Contract Provisions:

> Article VI - Grievance Arbitration
>
> The parties agree that grievances are to be resolved as soon as possible and, in order to do so, establish this procedure.
>
> Section 1. Definition: A grievance is defined as any dispute involving the meaning, application or interpretation of the terms and provisions of this agreement. A grievance shall be processed within ten (10) working days of its occurrence or knowledge thereof, or it shall be barred.
>
> Section 2. Procedure. Step 1: An employee who has a grievance shall submit it to the Superintendent, who shall render his/her decision in writing within five (5) working days after receiving the grievance. . . .
>
> . . .
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> ARTICLE X - Job Postings and Transfers
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> Section 1. A vacancy shall be defined as a permanent job opening not previously existing or a permanent job created by the termination of employment, promotion or transfer of existing personnel when the need for such job continues to exist. . . .
>
> . . .
>
> Section 4. The employer may make an immediate temporary assignment to fill any vacancy until the vacancy has been filled pursuant to the procedure herein outlined. If a vacancy exists in a job that will be discontinued, a notice to that effect will be provided

to the employees and the union.

. . .

ARTICLE XXI - Pay Policies

Section 1. Employees shall be paid in accordance with Schedule "A" attached hereto and made a part hereof. Job descriptions shall be prepared by the Employer and provided to the Union within ninety (90) days after the effective date of this Agreement. Any descriptions provided may be processed through the grievance procedure in the event of a dispute thereon.

. . .

Section 3. An employee assigned to a higher paying job on a temporary basis shall receive the rate of such job after working four (4) hours thereon.

. . .

Schedule "A"
Wage Rates

Employees		1/1/93	7/1/93	1/1/94
Roger Brault		$16.43	$16.76	$17.43
Marvin Chamberlain		10.73	10.95	11.38
Robert Kowalski		13.27	13.54	14.08
Kerry Brault		11.30	11.53	11.99
Dennis Payette	11.30	11.53	11.99	
Larry Sanders	11.30	11.53	11.99	
Stephen Zigman		11.94	12.18	12.67
Bill Flatka		13.27	13.54	14.08

Memorandum of Understanding:

The parties entered into a Memorandum of Understanding extending the 1993-94 collective

bargaining agreement to cover the period through December 31, 1996. The relevant portion of the Memorandum of Understanding reads as follows:

MEMORANDUM OF UNDERSTANDING

The parties by their signatures below have agreed to the following modifications to the collective bargaining agreement covering Public Works in effect between the City of Niagara, Wisconsin, and Wisconsin Council of County and Municipal Employees #40, Local 1752-C, AFSCME, AFL-CIO, in effect from January 1, 1993, to December 31, 1994. All sections of the agreement not amended below are to remain in effect without change.

. . .

ARTICLE XXXIII - Termination

This Agreement shall go into effect as of January 1, 1994, and continue until December 31, 1996, and shall be considered automatically renewed from year to year thereafter, unless on or before August 1, prior to the end of the effective period, either party shall serve written notice upon the other that it desires to renegotiate, revise, modify or terminate this Agreement. . . .

Schedule "A" - Step Based Salary System

EFFECTIVE 1/1/94

		Hourly	Annual
Step 1	Year 0-1	$ 9.86	$20,498
Step 2	Year 1-2	$10.25	$21,318
Step 3	Year 2-3	$10.66	$22,171
Step 4	Year 3-4	$11.09	$23,058
Step 5	Year 4-5	$11.53	$23,980
Step 6	Year 5+	$11.99	$24,939

EFFECTIVE 1/1/95

		Hourly	Annual
Step 1	Year 0-1	$10.25	$21,318
Step 2	Year 1-2	$10.66	$22.171
Step 3	Year 2-3	$11.09	$23,058
Step 4	Year 3-4	$11.53	$23,980

Step 5	Year 4-5	$11.99	$24,939
Step 6	Year 5+	$12.47	$25,937

EFFECTIVE 1/1/96

		Hourly	Annual
Step 1	Year 0-1	$10.66	$22,171
Step 2	Year 1-2	$11.09	$23,058
Step 3	Year 2-3	$11.53	$23,980
Step 4	Year 3-4	$11.99	$24,939
Step 5	Year 4-5	$12.47	$25,937
Step 6	Year 5+	$12.97	$26,974

Additional Stipulations

1. Employee progresses to next step upon receiving satisfactory performance appraisal. Performance appraisals to be conducted annually on employment anniversary date.

2. All new employees to have one year probationary period.

. . .

Background:

Several years prior to 1993, the City had employed approximately fifteen Public Works employes. At that time, employes were hired initially as Laborers and then they moved up to Equipment Operators when openings in that position became available, based upon their seniority. Under this old system, normally Laborers did not operate back hoes, front end loaders, dump trucks or snow plows. However, during this time, Laborers were paid move-up pay under Article XXI, Section 3 when they replaced employes who normally operated equipment for more than four hours. Dennis Payette stated, without contradiction, that this old system was discontinued at least two years prior to the filing of the instant grievance because the number of Public Works employes had decreased over time, the City never replaced those who left and the City then expected and assigned all employes to do Laborer and Equipment Operator work. 1/

1/ Payette also stated that the only employe who continued to perform only Laborer work after this change by the City was Marvin Chamberlain, a developmentally challenged employe of the City Public Works Department who has been consistently paid less than other Public Works Department employes.

In May, 1993, the City approached Union representatives to seek to reopen the 1993-94 collective bargaining agreement regarding the issue of health insurance and the identity of the carrier, given the fact that health insurance premiums with the then-insurance carrier would rise dramatically. In response, the Union requested to bargain an extension of the 1993-94 agreement to cover the years 1995-96. During the ensuing negotiations, the City proposed in addition, to include a step-based pay schedule (SPS) into the extended collective bargaining agreement to cover newly hired employes. 2/ The City explained that it wished to hire at least one new employe to replace a current employe who would be promoted due to the retirement of another employe. It is clear that both the Union and the City agreed at negotiations that new employes would have to progress through the SPS from $9.86 per hour, before they could make $11.99 per hour, and that the parties agreed that new employes should gain experience and time on the job at the City before these employes should receive the same rate of pay as incumbent employes who had been working for the City for five or more years at the time of hire of these new employes. It is also undisputed that during negotiations, the parties never discussed "Schedule A" - Wage Rates and never discussed whether new employes who perform specific tasks would be entitled to Article XXI, Section 3 Pay. The SPS rate for newly hired employes was based upon a progression which was figured backward from $11.99 per hour, the pay rate of the employe who had been promoted, Dennis Payette, who at the time of his promotion made the Equipment Operator rate. It is undisputed that the City has never negotiated or established job descriptions, classifications or categories in its collective bargaining agreements with the Union. Rather, employes of the Public Works Department have merely been listed in each collective bargaining agreement by name, with a pay rate next to their name.

The parties ultimately agreed to change insurance carriers and to change certain language regarding health insurance, as well as to incorporate the SPS into the extended agreement. The Union and the City ratified these changes and the contract extension in October, 1993. 3/

Dennis Payette, who had been employed by the City for fifteen years in the Public Works Department, stated that he began working for the City as a Laborer. Thereafter, he was promoted to an Equipment Operator position, based upon his seniority, when a position became available. As Equipment Operator, Payette had operated equipment and performed Laborer duties for the City prior to October, 1994 when he was paid $11.99 per hour. In October, 1994, Payette was

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2/ The City's contract proposal to the Union regarding the SPS listed "P.W. Laborer" with the six step pay progression. Ultimately, however, the listing of "P.W. Laborer" was not placed in the contract extension document.

3/ Union President Zigman confirmed the facts regarding the bargaining discussions and bargaining history surrounding the reopener of the 1993-94 agreement and the parties' agreement to extend the contract to cover 1995-96, as amended.

promoted to the position of Municipal Coordinator in the Public Works Department. 4/ Payette's promotion was triggered by the retirement of former Municipal Coordinator Roger Brault. At the time of his retirement, Brault was paid $17.43 per hour in his Municipal Coordinator position. City Administrator Krauss stated that at the time Payette was chosen to replace Brault as Municipal Coordinator, the City Council decided to pay Payette at the same hourly rate that Brault had earned prior to his retirement. Payette's rate of pay as Municipal Coordinator is not listed in the extended collective bargaining agreement, although the pay rate of Roger Brault, Payette's predecessor, was listed in the 1993-94 contract.

On November 29, 1994 the City hired Ron Rugg pursuant to an advertisement which was run in local papers seeking ". . . applications for the position of Public Works Laborer. Prior sewer, water, street construction/maintenance experience preferred. Ability to operate heavy equipment desirable. . . ." At his interview prior to his appointment to the position, Rugg was given the following list of "Public Works Fringe Benefits":

PUBLIC WORKS FRINGE BENEFITS

1) THIS IS A UNION POSITION COVERED BY A COLLECTIVE BARGAINING AGREEMENT. PAYMENT OF DUES OR FAIR SHARE IS REQUIRED. DUES ARE APPROXIMATELY $18.00 PER MONTH.

2) THE CITY PROVIDES FULL PREMIUMS FOR HEALTH, DENTAL, VISION, AND LIFE INSURANCE. THIS INCLUDES FAMILY OR SINGLE COVERAGE.

3) EMPLOYEES RECEIVE 8 PAID HOLIDAYS PER YEAR AND 2 PERSONAL DAYS.

4) EMPLOYEES RECEIVE 112 HOURS OF SICK LEAVE PER YEAR.

5) THE CITY PAYS THE EMPLOYEE AND EMPLOYER CONTRIBUTIONS INTO THE STATE OF WISCONSIN RETIREMENT FUND.

6) POSITION HAS ONE YEAR PROBATIONARY

4/ The Municipal Coordinator position has traditionally been that of a working foreman who has consistently been a member of the bargaining unit and covered by the collective bargaining agreements between the parties.

PERIOD.

7) RESIDENCY IN THE CITY OF NIAGARA IS REQUIRED WITHIN ONE YEAR.

8) VACATION SCHEDULE

1 YEAR OF SERVICE	1 WEEK
2 YEARS SERVICE	2 WEEKS
3 TO 10 YRS SERVICE	3 WEEKS
10 TO 15 YRS SERVICE	4 WEEKS
15 TO 25 YRS SERVICE	5 WEEKS
25 YRS AND OVER	6 WEEKS

9) PAY SCHEDULE CONSISTS OF A STEP BASED SALARY SYSTEM. EMPLOYEES ADVANCE TO NEXT STEP UPON RECEIVING SATISFACTORY PERFORMANCE APPRAISAL WHICH IS CONDUCTED ANNUALLY.

		Hourly	Annual
Step 1	Year 0-1	$ 9.86	$20,498
Step 2	Year 1-2	$10.25	$21,318
Step 3	Year 2-3	$10.66	$22,171
Step 4	Year 3-4	$11.09	$23,058
Step 5	Year 4-5	$11.53	$23,980
Step 6	Year 5+	$11.99	$24,939

STEP RANGE INCREASE ANNUALLY IN ACCORDANCE WITH PERCENTAGE INCREASES CONTAINED IN COLLECTIVE BARGAINING AGREEMENTS

10) OTHER BENEFITS INCLUDE FUNERAL LEAVE, LONGEVITY PAY, AND SAFETY SHOE ALLOWANCE.

Rugg was the successful applicant for the job and he agreed to be paid according to the SPS. The Union did not file a grievance regarding Rugg's placement on the SPS or his hire without having been given a specific classification.

In July, 1995, the City changed its payroll computer software program which resulted in a change in both form and format and a deletion of previously listed job titles of each employe on

their pay stubs. 5/ The following employes had the job titles listed herein next to their names, which appeared on their pay stubs prior to July, 1995:

Dennis Payette:	Municipal Coordinator
Larry Sanders:	Equipment Operator
Marvin Chamberlain:	Semi-Skilled
Stephen Zigman:	Assistant Operator

It is undisputed that neither the City nor Public Works employes ever relied upon the job titles listed on pay stubs to dictate the proper pay rates for employes. It is also undisputed that prior to July, 1995, Rugg's pay stub listed his job title as "Laborer".

The change in the City's payroll software program amounted to a change in the entire paycheck system. City Administrator Krauss stated that he was unaware of the deletion of job titles until the issue was raised at the instant hearing. Krauss further stated that the information listed on pay stubs is under the control of the person in the City Payroll Office who inputs that information and is also controlled, in part, by the computer program which the City put in place in July, 1995. Union President Zigman stated that the Union and the City have never negotiated whether and what job titles should be listed on payroll checks and that the Union did not file a grievance regarding the change in information listed on employe pay stubs.

Facts:

After his hire on November 29, 1994, Ron Rugg became the only bargaining unit employe subject to the SPS and was paid at the start rate of $9.86 per hour. Municipal Coordinator Payette stated that at the time of his hire, Rugg was not ready or qualified to receive move-up pay for operating City equipment until at least March 30, 1995 when Payette assigned Rugg to plow snow for more than four hours. Payette stated that Rugg had not operated a snow plow alone for more than four hours prior to March 30, 1995 but that he (Payette) had assigned Rugg to perform other Equipment Operator duties alone on an as-needed basis after his hire in November, 1994. Payette indicated that Rugg had worked a total of 88 hours operating such equipment since his hire date on November 29, 1994.

5/ Prior to July, 1995, the City had listed a job title on all employe pay stubs.

It is undisputed that Rugg never made any request for move-up pay from the time of his hire in November, 1994 to date. 6/ It is also undisputed that on March 20, 1995 Rugg operated a snow plow alone for more than four hours but was paid at his normal rate of pay, $9.86, as listed on the SPS, rather than at the "Equipment Operator" rate which Municipal Coordinator Payette had requested that the City pay Rugg for the period involved. Finally, Payette stated without contradiction, that since his promotion to Municipal Coordinator, employe Larry Sanders has replaced him when he has been absent, ill, at training sessions or on vacation and that Sanders has regularly received the higher Municipal Coordinator pay rate while replacing Payette.

Positions of the Parties:

Union:

The Union asserted that job classifications have existed within the Public Works bargaining unit for many years, despite the fact that no such classifications have been listed in the labor agreements between the parties. The Union urged that because the City of Niagara is a small town and because the Public Works Department employs only eight bargaining unit employes, there was no reason for the Union and the City to include job classifications in the

parties' labor agreements over the years and a simple listing of employes' names with their pay rates was sufficient to address the issue. The Union argued that bargaining unit employes have been and are paid according to the jobs they perform and not on the basis of their length of tenure with the City, pursuant to Schedule "A" - Wage Rates, and to the seniority roster contained in the 1993-94 agreement. The Union also observed that prior to July, 1995, employe pay stubs had regularly reflected each employe's job title. Union President Zigman stated that in the past, employes were hired into specific jobs and that both postings and advertisements for jobs traditionally contained a job title, and the Union observed that the advertisement for Rugg's position listed the opening as "Public Works Laborer". The Union contended that if there were no job classifications understood to be effective between the parties, that this would render Article XXI, Section 3 and Article X (regarding posting rights for vacancies, transfers and promotions) meaningless.

6/ On April 3, 1995, Payette apparently filed the instant grievance listing in the space for the Grievant's name "City of Niagara" and listing the date of the alleged infraction as 3/20/95. Payette then signed the grievance and submitted it. As noted above, Payette is a member of the collective bargaining unit and he is an "employe" covered by the labor agreement between the parties.

The Union urged that the City's initial proposal of the SPS, using the title "P.W. Laborer", clearly indicated that only Laborers hired after January 1, 1994, were to be covered by the SPS. In addition, the advertisement for the position which Rugg was hired to fill, clearly sought a "Public Works Laborer". The Union queried why, if the City had intended to hire an Equipment Operator to replace Equipment Operator Dennis Payette, had it advertised for a Laborer. The Union concluded that the City's apparent contention that the SPS should apply to Equipment Operators was in direct contradiction with the City's advertising for a Laborer and its proposal of the SPS as applying only to Public Works Laborers. Conversely, the Union urged that any City claim that by entering into the SPS, the parties had agreed to eliminate the Equipment Operator classification should be rejected as implausible.

The Union relied upon the fact that the parties had not negotiated any exclusions to Article XXI, Section 3 by entering into the SPS. As the SPS proposal was the City's, the Union was under no obligation to identify existing contract provisions that might conflict with the SPS and to harmonize those provisions. In the Union's view, the fact that the City witness, Krauss, stated that he would have no way of knowing when employes under the SPS should be entitled to receive the Equipment Operator rate was a specious argument. The Union observed that for many years, the parties had followed Article XXI, Section 3 and the City had paid move-up pay to Laborer employes whenever they performed more than four hours of Equipment Operator work. The Union urged the evidence supported a continuation of this past practice.

The Union therefore sought an award sustaining the grievance. The Union requested that the undersigned order the City to make Ron Rugg whole by paying him the difference between his placement on the SPS and the Equipment Operator hourly rate of pay for all instances in which Rugg had performed Equipment Operator duties for more than four hours at a time since March 20, 1995. In addition, the Union requested that the Undersigned rule that any other employes hired under the SPS be paid the difference between the employe's placement on the SPS and the Equipment Operator hourly rate of pay whenever performing more than four hours of Equipment Operator work.

City:

The City urged that the undisputed purpose of the SPS was to establish a starting wage rate and a progressive schedule for new employes which was based upon current employes' pay rates and experience with the City, and that the parties had therefore agreed to a five-year wage progression for new employes to reach the experienced employe rate. Thus, the City urged, the Union's attempt to claim the highest rate of pay for Rugg due to his having performed snow plow duties on March 20, 1995 does not conform to the clear mutual intent that the parties had for the SPS. The City argued that the Union's proffer of evidence regarding how employes had been treated in the past is irrelevant due to the implementation of the SPS. The City contended that because no grievance was filed in opposition to the SPS after the parties voluntarily agreed to insert it into the extended labor contract, and because the Union failed to file a grievance regarding

Rugg's placement on the SPS or his assignment to the starting rate of $9.86 per hour at hire, the Union's requested remedies, at this late date, should be denied.

The City asserted that the labor agreements between the parties, in effect over an extended period of time, have never contained any references to job classifications and that the parties have never negotiated regarding these. Furthermore, the City urged that the change in the payroll check system which eliminated the listing of job titles on employe pay stubs should have no bearing on this case. Thus, the City noted that such listings of employe job titles have never controlled the wages paid to employes and that, in any event, the Union never filed a grievance regarding the elimination of job titles from pay stubs.

The City contended that Article XXI, Section 3 is not applicable to facts the of this case. First, the City urged that snow plowing was intended to be a part of Rugg's job responsibilities at the time of his hire and that it was clear to both the Union and the City that the City intended to replace Dennis Payette with Ron Rugg, so that the Union was on notice early on, that Rugg would be performing truck driving and snow plowing duties. Furthermore, the City observed that Dennis Payette admitted that Rugg had operated equipment prior to the filing of the grievance but that no complaint or grievance had been lodged regarding a violation of Article XXI, Section 3 prior to that which gave rise to the instant case. The City further asserted that absent a specific limitation in the management rights clause of the effective labor agreement defining the qualifications necessary for the performance of a particular position, the City has retained the sole discretion to define and measure qualifications for City positions. Because Article IV - Municipal Authority of the contract contains no limitation regarding the City's discretion to define and set qualifications for positions, the City was free to use its discretion to set the qualifications of new hires into the SPS.

The City cited and discussed several cases which it urged support a conclusion that by working in a higher classification, employes should not automatically receive a higher wage rate. In this regard, the City observed that whether an employe should receive a higher wage rate when assigned to perform work out of the employe's classification, the inquiry must be first whether there are "core" elements of the various jobs which distinguish one job from another and justify the wage rate differentials between them, and whether the actual work performed by the employe was work which constituted "core" work of the higher classification. The City noted that the Union had presented no evidence regarding the core elements which differentiate one "classification" from another in the Public Works Department. Indeed, the City observed, the record clearly showed, and Union witnesses conceded, that all Public Works employes have been expected to plow snow and perform all other duties of the Department for at least two years prior to the filing of the grievance.

The fact that Rugg was assigned to operate a particular piece of machinery did not, in the City's view, constitute a transfer of Rugg into a different classification, especially in light of the fact that the contract does not contain any job classifications. The City noted that the Union

offered no evidence of an actual formal assignment of Rugg to another classification. Such a formal assignment would necessarily have to be shown in order to prove a violation of Article XXI, Section 3, according to the City's analysis. The City denied making any formal assignment of Rugg on March 20, 1995.

Finally, the City urged that Article VI - Grievance Arbitration requires that an employe must file and pursue a grievance (emphasis supplied), and that the contract makes no provision for the filing and pursuit of a grievance by the Union. As employe Rugg failed to file and pursue the instant grievance, the Employer urged that the grievance should be dismissed. Thus, the City requested that the grievance be denied and dismissed in its entirety.

Reply Briefs:

Both the Union and the City repeated many of the arguments each had made in their initial briefs. These arguments have not been repeated herein.

Union:

The Union noted that the labor agreement specifically allows the Arbitrator (in Step 3 of the grievance procedure provision) to make recommendations to the parties regarding changes in the contract that "would add clarity or brevity or which might avoid future controversy". However, the Union pointed out that the contractual grievance procedure also provides that the Arbitrator "shall have no authority to change any portion of the Agreement . . .". In these circumstances, the Union asserted that the Arbitrator could not exclude newly hired employes from receiving move-up pay under Article XXI, Section 3, without modifying the terms of the labor agreement.

The Union contended that without specific exclusion of SPS employes from Article XXI, Section 3 move-up pay, new hires must receive move-up pay whenever it is warranted, just as other employes do. Therefore, Rugg is entitled to Article XXI, Section 3 move-up pay when he operates heavy equipment as an Equipment Operator for more than four hours. The Union asserted that its reason for not requesting move-up pay for Rugg prior to March 20, 1995 was a logical one -- Rugg was still training on the snow plow until that date. The Union observed that the parties have historically recognized a clear distinction between the Laborer job and the

Equipment Operator job and that the record evidence failed to indicate any intention by the parties to destroy the differentiation between these two positions through the implementation of he SPS. Therefore, the City's argument that the Union had failed to prove the core elements of both the Laborer and Equipment Operator jobs so as to differentiate one classification from another, was not relevant in the Union's opinion.

Finally, the Union urged that the City's argument that the grievance, not having been filed and pursued by the employe involved, is not grievable, should not result in dismissal of this case. In this regard, the Union noted that arbitrators have generally given unions wide latitude to file and pursue grievances where employe rights are concerned. The fact that a contract may require an employe's signature is not generally a persuasive argument for dismissal of a grievance, especially where an employer has failed to raise an objection on this basis, early in the grievance process. Based on these reasons as well as those given in its initial brief, the Union urged that the grievance should be sustained and that Ron Rugg should be made whole.

City's Reply:

The City urged that the SPS applies only to newly hired employes and that this is wholly supported by the record in this case. Thus, the City observed, whether an individual is hired as a "Laborer" or not is irrelevant because the collective bargaining agreement makes no reference to any job titles or job classifications under the SPS. The City further noted that because the top wage rate at step 6 for newly hired employes was based on the top rate paid to incumbent employes the Union has characterized as "Equipment Operators", Ron Rugg was therefore hired into the "Equipment Operator" classification, not into a Laborer classification (assuming such "classifications" exist). Therefore, the City asserted that the only logical way that Rugg could receive the top rate of $11.96 is by progressing, over time, to step six, representing six years of experience, on the SPS.

The City noted that the parties had mutually agreed to create a separate step-based schedule for newly hired employes which was to be distinct and different from the treatment of incumbent employes. Thus, whether Sanders is granted move-up pay when he replaces Payette as Municipal Coordinator, has no bearing upon whether Rugg should receive move-up pay if and when he replaces Sanders. In this regard, the City observed that Payette's position as Municipal Coordinator and his pay rate are not listed on the SPS, and that Payette's job responsibilities in his Municipal Coordinator position are clearly different from those of Rugg and Sanders.

In the City's view, because Rugg is essentially performing in the "Equipment Operator" classification and is being paid therefor pursuant to the SPS, he is not entitled to a higher wage rate for working in a "higher classification" because none exist. Based upon these arguments and those set forth in the City's initial brief, the City requested that the grievance be denied in its entirety.

Discussion:

The initial question that must be determined in this case is whether the instant grievance is barred by the fact that the employe involved, Ron Rugg, did not file the grievance and pursue it. In this regard, I note that Article VI - Grievance Arbitration, Section 2, provides "an employe who has a grievance shall submit it to the Superintendent. . . ." Section 1 of Article VI, also provides that "a grievance is defined as any dispute involving the meaning, application or interpretation of the terms and provisions of this agreement. A grievance shall be processed within ten (10) working days of its occurrence or knowledge thereof, or it shall be barred" (emphasis supplied).

From the above-quoted language, it appears that an employe must submit a grievance for processing. In this regard, I note that the grievance in the instant case was submitted by Dennis Payette. At the time of submission, Payette was an employe of the City and his position as Municipal Coordinator was considered a bargaining unit position. In addition, it is significant that the City waited until the instant hearing to raise the question whether the instant grievance should be arbitrable under Article VI. Finally, the Union is correct in its assertion that unions are generally given a broad latitude to file and pursue grievances where employe rights may otherwise be waived. Thus, in all the circumstances of this case, I find that the instant grievance is clearly arbitrable under Article VI.

The substantive issue in this case involves the proper interpretation of Article XXI - Pay Policies, Section 3 and the Memorandum of Understanding including Schedule "A" - Step Based Salary System and the stipulations contained therein. Initially, I note that Article XXI refers to a different Schedule "A" - Wage Rates which lists the names of the eight bargaining unit employes as well as their wage rates beginning January 1, 1993 through January 1, 1994. The Schedule "A" - Wage Rages conflicts with the Schedule "A" - Step Based Salary System contained in the Memorandum of Understanding. Also, as stated in the Memorandum of Understanding "all sections of the agreement not amended below are to remain in effect without change". Furthermore, the Schedule "A" contained in the Memorandum of Understanding fails to list the names of employes, but rather lists the hourly rates and the annual salaries to be paid, year by year, to new hires from hire through at least the first five years of employment, on the SPS. These internal conflicts between the Memorandum of Understanding and the unamended provisions of the 1993-94 labor agreement, support a conclusion that read as a whole, the labor agreement is ambiguous, that the language of Article XXI, Section 3, is equally susceptible to an interpretation in favor of the City as it is reasonable to interpret this language in favor of the Union.

In these circumstances, therefore, extrinsic evidence such as past practice and bargaining history must be looked to in order to determine the parties' true intent in entering into the Memorandum of Understanding which included the step based salary system (SPS). In regard to the bargaining history, I note that it was in fact the City's proposal to create a two-tiered salary system for its employes. In this regard, I note that it is undisputed that both the Union and the City agreed at negotiations over the Memorandum of Understanding that new employes who would be hired in the future by the City would have to progress through the SPS from $9.86 per hour over at least a five-year period to the top hourly rate of $11.99 per hour, assuming that the employes involved had received satisfactory annual performance appraisals in order to move from one step to another on the SPS. Both the Union and the City agreed at negotiations that new employes would have to gain both experience and time on the job at the City before new employes could receive the same rate of pay as senior incumbent employes. Furthermore, it is also undisputed that the top rate of $11.99 per hour (the rate which the Union contends is the "Equipment Operator" rate) was the rate used in order to create the six steps in the SPS, figuring backward from $11.99 to $9.86. It is also significant that despite the language of Article XXI, Section 1, the Employer has not prepared or provided job descriptions to the Union and that no job titles or job classifications have ever been listed in the parties' collective bargaining agreements. Nor has the Union ever filed grievances regarding these matters. Rather, the parties have been content to merely list the names of current employes and the effective pay rates in the original Schedule "A" - Wage Rates of the 1993-94 labor agreement as well as its predecessors. All of these facts tend to support the City's interpretation of the SPS as a classic two-tiered pay plan, which was intended by the parties to be separate and distinct from the method of payment and the treatment of incumbent employes.

The final copy of the agreed-upon Memorandum of Understanding also failed to contain the job category of "P.W. Laborer" that had been listed on the original proposal of the City to the Union regarding the SPS. This fact also tends to support the City's argument that in the absence of any restriction contained in the management rights clause of the effective labor agreement, the City should be free to define the qualifications for Department positions. I agree with the City that Article IV - Municipal Authority contains no limitation regarding the City's discretion to define and set qualifications for departmental positions. The fact that in the Memorandum of Understanding the parties listed the annual salary amounts next to the hourly rates for each step of the SPS, also tends to show that the parties intended to limit the newly hired employes' total hourly and annual remuneration for the work performed. Furthermore, the stipulations to the Memorandum of Understanding clearly state that employes subject to the SPS will progress "to the next step upon receiving satisfactory performance appraisal . . . to be conducted annually or on employment anniversary date". Significantly, the parties failed to mention in the Memorandum of Understanding any other means by which newly hired employes could progress from one step to the next, or otherwise receive a higher rate of pay. As noted

by the City, the parties' use of the $11.99 hourly rate as the top figure for Step 6 of the SPS, also supports a conclusion that the SPS was intended to establish a true two-tiered pay system for unit employes.

In regard to the evidence of past practice, I agree with the City's arguments that the treatment of employes in the past is irrelevant to this case. However, the record evidence regarding the past treatment of tenured employes since Rugg's hire tends to support a conclusion that the parties agreed upon a two-tiered pay system by entering into Schedule "A" in the Memorandum of Understanding. In this regard, I note that there was insufficient evidence to show that job classifications or job titles formally existed and had been agreed upon between the parties in any collective bargaining agreement or in past practice. In this regard, I note that Dennis Payette admitted that all public works employes had been assigned to perform all departmental duties for at least the past two years. The Union also failed to submit any documentation that it had either complained or grieved the fact that the City had discontinued the apparent tradition of exclusively assigning "Equipment Operators" to perform tasks with heavy equipment. The City's payroll software program change in July, 1995, is not relevant to this case. In addition, I note that Union President Zigman admitted that employes of the Public Works Department did not rely upon the job titles listed on their pay stubs to determine their proper wage rates and that the City and the Union had never negotiated regarding whether job titles should be listed on payroll checks.

The fact that incumbent employe Sanders has been transferred into the Municipal Coordinator position on a temporary basis and paid at that higher rate of pay for the period of the transfer, does not require a conclusion that newly hired employes like Rugg must be paid Article XXI, Section 3 move-up pay when they are assigned to perform tasks with heavy equipment. On this point, I agree with the City's argument that the Municipal Coordinator position is significantly different from any other bargaining unit position and that it has been consistently treated as such in the past. This evidence, demonstrating the City's different treatment of incumbent employes and newly hired employes also tends to support a conclusion that newly hired employes were intended to be treated differently from incumbent employes both now and in the future.

I disagree with the City that Rugg was hired as an "Equipment Operator". On the contrary, Rugg was specifically hired as a "Laborer". However, whether Rugg was hired as a Laborer or as an Equipment Operator is not determinative of this case because neither the labor agreement nor the SPS included in the Memorandum of Understanding refer to any job classifications or job titles so that it is reasonable to conclude, especially in light of the past

practice evidence herein, that job classifications and job titles do not exist contractually. 7/

7/ The City's argument that by listing the names of employes and their pay rates both in the 1993-94 labor agreement and its predecessors, shows that job classifications and job titles simply do not control employe pay rates.

Based upon all the circumstances of this case 8/ and in light of the fact that the Union failed to grieve Rugg's placement on the SPS, and failed to grieve the fact that Rugg had not, prior to March 20, 1995, been paid Article XXI, Section 3 move-up pay for the instances where Rugg had worked in excess of four hours in a "higher paying job", I issue the following

AWARD

The City did not violate the collective bargaining agreement by paying the Grievant in accordance with the negotiated step schedule. The grievance is, therefore, denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 2nd day of April, 1996.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

8/ The fact that at negotiations for the 1994-96 Memorandum of Understanding, the parties did not mention or discuss schedule "A" - Wage Rates, contained in the 1993-94 collective bargaining agreement and the fact that the parties also did not address whether they expected that newly hired employes who performed specific tasks would be entitled to Article XXI, Section 3 move-up pay, does not require a holding in favor of the Union in this case. In this regard, I note that a separate Schedule "A" is listed and effective for newly hired employes and that the parties retained the original Schedule "A" in the 1993-94 labor agreement which, by its terms, is effective for only incumbent, tenured employes.