BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

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

and

CITY OF SUPERIOR

Case 141
No. 53703
MA-9437

Appearances:

Mr. James Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Ms. Mary Lou Alexander, Human Resources Director, City of Superior, appearing on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the City or Employer, respectively, are signatories to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on March 13, 1996, in Superior, Wisconsin. The hearing was not transcribed. Afterwards, the parties filed briefs and the Union filed a reply brief, whereupon the record was closed May 13, 1996. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

> Did the Employer violate the terms of the collective bargaining agreement when the Employer eliminated four Wastewater Treatment Plant positions, thus forcing the affected employes to bump to lower-paying positions in the Public Works Department, and paying them at the lower rate of pay for new positions than what the rate of pay was for the Wastewater Treatment Plant positions?

PERTINENT CONTRACT PROVISIONS

The parties' 1994-96 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 5
CLASSIFICATION

5.01 The Union may at any time request in writing to the Mayor for a review of the allocation of any position. An investigation shall be made of the position and the Mayor may affirm or alter the allocation with the approval of the Labor, Wage and Classification Committee and City Council.

5.02 The pay range for the various classifications shall be established as agreed upon by Local 244 and the City of Superior, and shall automatically become a part of this Agreement, see Appendix A.

5.03 Regular seasonal, part-time and full-time employees will be fully classified for the entire year and will not receive less per hour when working in lower classifications. When working in higher classifications than his/her permanent or yearly rate, he/she will receive the pay attached to the higher classification. The exception to the requirements mentioned herein is stated in 5.06 below.

5.04 The permanent classification is based upon the one in which the employee spent the majority of his/her total hours during the preceding calendar year.

5.05 All employees hired after July 1, 1986, and all employees on the seniority roster of the Waste Water Treatment Plant, will not be covered by the permanent rate in 5.04. They shall be covered by the yearly rate in 5.03.

. . .

ARTICLE 9
LAYOFFS AND REHIRING

9.01 In the event the City of Superior considers scheduling a

layoff, the matter shall first be submitted to the Union Committee so that the parties can agree on an orderly, acceptable process. Strict application of unit-wide seniority will prevail, providing that the remaining are qualified to perform the available work or unless exceptional circumstances occur which would prohibit the parties from following the unit-wide list. The following procedure shall be utilized:

A) When a layoff is scheduled in any particular department, those youngest in point of service in that department shall be laid off according to their departmental seniority, providing however, that the remaining employees are qualified to perform the available work.

B) The laid off employees will then exercise their unit-wide seniority to bump into a job classification that they can hold and are qualified to perform.

C) The laid off employee must be qualified for the classification into which they are bumping. If they are not considered qualified by the Employer, they will be placed in a classification for which they are deemed qualified by the Joint Committee of the Union and the Employer.

. . .

APPENDIX "A"

WAGE RATES EFFECTIVE 1/1/94, 1/1/95, AND 1/1/96.
STREET, GARBAGE, SEWER, SIGN, PARK, EQUIPMENT DEPOT, AND WASTEWATER TREATMENT PLANT

	(3%)	(3%)	(3%)
CLASSIFICATION	**1/1/94**	**1/1/95**	**1/1/96**
. . .			
Laborer I #2701 = 100% (Includes old Laborer I,	$11.79	$12.14	$12.50

Laborer II, Laborer III,
Equipment Op. I and
Equipment Op. II)
note: Presently have one
(1) employee at the
landfill (Scaleman) in
this rate.

Light Equipment Operator . . . . . .
#3401 = 100%
(Includes old rate 6 & 7.
Red circle 2 present
employees at old rate 7. . .

. . .

Medium Equipment Operator . . . . . .
#3501 = 100% . . .
(Red circle James Severson
at this rate.). . .

Heavy Equipment Operator . . . . . .
#3601 = 100% . . .
Grandfather present 9H
employees. . .

. . .

Assistant Wastewater
Treatment Plant Operator/
Relief Assistant Operator
#4401 = 100% $13.10 $13.49 $13.89

FACTS

In the spring of 1995, the City decided to eliminate four maintenance positions at the City's Wastewater Treatment Plant. All four of these positions were filled at the time. Thereafter, city officials and local union representatives met to discuss the matter. During this meeting, the parties decided that four other then-vacant positions in the Department of Public Works (DPW) would not

be posted and filled at that time. Instead, the four vacant positions would remain unposted and unfilled so that the four employes whose positions were going to be eliminated at the Wastewater Treatment Plant could bump into them (i.e., the four vacant DPW positions). Thus, the parties agreed that the four displaced Wastewater Treatment Plant employes would be given the four vacant DPW positions. No discussion occurred at this meeting about the wage rate which would be paid to the four displaced Wastewater Treatment Plant employes after they moved into their new positions.

On October 18, 1995, City Human Resources Director Mary Lou Alexander notified Walt Benjamin, Mark Mohr, Dave Lambert and Joe Nelson in writing that their maintenance positions at the Wastewater Treatment Plant were going to be eliminated effective November 1, 1995. This notice indicated that the City and the Union had previously agreed that the four employes could use their seniority to bump into other positions within the DPW. This notice indicated that the DPW positions which were available were one relief assistant operator position at the Wastewater Treatment Plant and three laborer positions in the Street Division. The four employes were directed to decide which position they wished to fill and to advise the Human Resources Department of their decision by October 25, 1995. This notice contained the following final sentence: "You should be made aware that your pay will be at the level of your new assignment."

The four employes subsequently informed the Human Resources Department which position they wished to fill. The most senior of the four (Benjamin) elected to bump into the relief assistant operator position at the Wastewater Treatment Plant, while the other three (Mohr, Lambert and Nelson) elected to bump into the laborer positions in the Street Division.

On October 25, 1995, Human Resources Director Alexander sent the following memo to Local 244 President Chuck Miller regarding the layoff of the Wastewater Treatment Plant staff:

> This letter will serve to document the City's position in regards to the layoff of four individuals performing the maintenance function at the WWTP due to an elimination of four positions. The effect on salary assignment of any of these individuals will depend upon their choice to exercise their bumping rights to another position in the Public Works Department.
>
> The four individuals impacted are considered to be laid off effective October 31, 1995, however they may choose to elect to use their master seniority to bump to another position in the department for a position to be effective November 1, 1995. As we discussed there are four available vacant positions in the department, one at the WWTP and three in the Street Division. If they elect to bump to another position, they will be placed at the salary of the new

> position, as has been the past City practice upon elimination of positions and employees exercising bumping rights into another position.

This memo was copied to the four affected employes, among others.

October 31, 1995 was the last day for the four affected employes in their old positions at the Wastewater Treatment Plant. The very next day (November 1, 1995), the four employes moved into the vacant DPW positions referenced above (Benjamin to the relief assistant operator position at the Wastewater Treatment Plant and Mohr, Lambert and Nelson into laborer positions in the Street Division). Thus, the four employes never lost any work time. After they moved the Employer paid them the pay rate for their new position - not the pay rate for their old position. When the four employes had worked as maintenance employes at the Wastewater Treatment Plant they were paid $13.49 per hour. After November 1, 1995, Mohr, Lambert and Nelson were paid at the Laborer I rate of $12.14 per hour. Since their old rate had been $13.49 per hour, they had their hourly pay cut by $1.35 after they bumped into the laborer position. Benjamin did not have his pay cut like the others. The reason his pay was not cut was because the pay rate for his new position (relief assistant operator) is the same as his old (maintenance) position.

The Union subsequently filed a grievance contending that the rate of pay for the three employes who bumped into laborer positions in the Street Division should not have been reduced but instead should have stayed the same as it had been before their move. The grievance was later appealed to arbitration.

Insofar as the record shows, there has only been one previous instance where a full-time bargaining unit position was eliminated. It occurred in 1985 when the position of assistant poundmaster was eliminated. After that position was eliminated, the incumbent (Robert Rich) used his seniority to bump into a laborer position in the Street Division. After Rich bumped into the laborer position, he was paid at the laborer rate of $7.57 an hour. Since Rich had been making $8.02 an hour when he was in the assistant poundmaster position, he had his hourly pay cut by $.45 after he bumped into the laborer position. No grievance was filed by the Union concerning this matter.

POSITIONS OF THE PARTIES

Union

The Union's position is that the City is not paying the three employes who bumped into the laborer position the correct pay rate. According to the Union, the three employes are to be paid at the same rate they were paid when they were maintenance employes at the Wastewater Treatment Plant. It makes the following arguments to support this contention.

The Union asserts at the outset that the employes involved here were not laid off as alleged by the City. In its view, no layoff occurred. To support this premise, the City cites the fact that the employment of the three employes was never interrupted - on one day they all worked at the Wastewater Treatment Plant and on the next day they all worked in the Street Division. The Union also cites the fact that none of the three employes ever applied for or received unemployment compensation benefits. Given the foregoing, the Union characterizes what happened here as simply a "paper layoff". The Union also asserts that just because the parties had a meeting to discuss the impact of elimination of positions does not establish that a layoff occurred. It therefore argues that the contractual layoff clause has no applicability here.

With regard to the alleged past practice relied upon by the Employer (i.e., the elimination of the assistant poundmaster position in 1985 and the incumbent's bumping to a laborer position and getting paid the laborer rate), the Union asserts it does not know why this matter was not grieved at the time. In any event, the Union contends that just because "the Union did not grieve this matter in 1985 does not give the City license to violate these employes' rights in 1995 and 1996."

The Union relies exclusively on Article 5.04 to support its contention here that the three affected employes should be paid their old maintenance rate - not the (lower) laborer rate. According to the Union, that provision is clear and unambiguous in providing that employes are to be paid the rate of pay based on where they spent the majority of their hours during the previous calendar year. Applying that language to the instant facts, the Union reads this clause to mean that the majority of time worked in 1994 determines the 1995 wage rate and the majority of time worked in 1995 determines the 1996 wage rate. The Union asserts that since the three affected employes spent the majority of 1995 at the Wastewater Treatment Plant, they are entitled to be paid at their old maintenance rate for all of 1996. Since the Employer has not been paying the employes at that rate since November 1, 1995, the Union argues that the Employer has violated this section. The Union acknowledges that in 1997 though, the employes will be paid at the laborer rate.

In order to remedy this alleged contractual breach, the Union requests that the three affected employes be made whole for all losses suffered as a result of the Employer's improper wage payment.

City

The City's position is that it is paying the three employes who bumped into the laborer position the correct pay rate. According to the City, the three employes are to be paid at the laborer rate since that is their current classification. It makes the following arguments to support this contention.

For purposes of background, the City notes that after the City decided to eliminate four maintenance positions at the Wastewater Treatment Plant, the parties met pursuant to Sec. 9.01 to

discuss the anticipated layoffs. The City further notes that at that meeting, the parties agreed that four then-vacant DPW positions would be kept open for these four employes to bump into to avoid a layoff. The City further notes that is what happened, namely that the four employes later bumped into the four vacant DPW positions which had been kept open for them. Finally, the City notes that the employes were advised prior to bumping that their pay would be the rate for their new position - not their old maintenance position at the Wastewater Treatment Plant.

The City argues that given the factual background just noted, the Union's contention that no layoff occurred here is simply contrary to logic. The City asserts that the four maintenance employes were in fact laid off, but were able to avoid becoming unemployed by exercising their seniority rights and bumping into other positions. The City therefore believes that the contract provision applicable here is the layoff clause (Article 9). In the City's view, it has complied with that provision to the letter. The City avers that the provision is silent though with regard to what rate the employe is to be paid after he bumps into a new position. Given this contractual silence, the City contends that its past practice is applicable. According to the City, the City's past practice is that when an employe bumps from one position into another to avoid a layoff, the employe is paid at the rate of the new position - not the old position. To support this contention, the City cites the only previous instance where a full-time bargaining unit position was eliminated. In that instance, the position of assistant poundmaster was eliminated and the incumbent (Robert Rich) used his seniority to bump into a laborer position. Rich was subsequently paid at the laborer rate - not the (higher) assistant poundmaster rate. According to the City, this instance is factually identical to what occurred herein. Consequently, the City asserts it supports the City's position.

Finally, with regard to the Union's reliance on Sections 5.03, 5.04 and 5.05, the City simply argues that those provisions are inapplicable to the instant factual situation. It therefore requests that the grievance be denied.

DISCUSSION

My discussion begins with some comments concerning the issue to be decided herein. As previously noted, the parties stipulated to the following issue:

> Did the Employer violate the terms of the collective bargaining agreement when the Employer eliminated four Wastewater Treatment Plant positions, thus forcing the affected employes to bump to lower-paying positions in the Public Works Department, and paying them at the lower rate of pay for new positions than what the rate of pay was for the Wastewater Treatment Plant positions?

Two separate matters are subsumed into this issue. The first concerns the elimination of the four positions and the subsequent bumping while the second matter deals with the employe's rate of pay after bumping. Normally, the undersigned would be obliged to address both matters in detail in

the analysis which follows. Here, though, it is not necessary to address the first matter since, in the course of making their respective cases, it became clear that the first matter was not disputed. The Union acknowledged in this regard that the Employer is empowered under the contract to eliminate positions. Consequently, the Employer could eliminate four Wastewater Treatment Plant positions as it did. The employes whose positions were eliminated then faced the choice of either being laid off or bumping into lower-paid positions. Faced with this choice, which can be characterized as choosing between the lesser of two evils, they chose the latter (i.e., bumping). That was their call to make. However it is not accurate to say as the stipulated issue does that they were "forced" to bump. In point of fact they could have elected the other choice (i.e., layoff). Given the foregoing, it follows that the only issue to be decided herein is the second matter referenced in the stipulated issue (i.e., the employes' rate of pay after bumping).

The applicable facts are undisputed. After employes Mohr, Lambert and Nelson bumped into laborer positions in the Street Division they were paid at the laborer rate - not at the rate they were paid when they worked as maintenance employes at the Wastewater Treatment Plant. The issue here is whether the City is paying the three employes correctly. The City contends that it is while the Union disputes that assertion.

In deciding this contractual dispute, the undersigned will look at the two provisions relied upon by the parties, namely Sections 5.04 and 9.01. The Union contends Section 5.04 controls this matter while the City relies on Section 9.01. Inasmuch as the parties dispute which section is applicable here, it is apparent that this is the critical question. In the following discussion I will review both contractual provisions and decide which one is most applicable here.

As just noted, the Union relies on Section 5.04 to support its case. That section is part of an article entitled "Classification". Although the word "classification" is not defined anywhere in the article, it is implicit from its usage that it refers to those positions listed on the salary schedule. This can be seen by referring to Appendix "A" of the contract wherein the word "classification" is used at the top of a column with various positions listed underneath it. An overview of Article 5 follows. Section 5.01 sets forth the procedure for reallocating the placement of a position. Section 5.02 establishes a pay range for the various classifications listed in Appendix "A". Section 5.03 deals with working out of class. The first sentence of that section provides that employes who work in a lower class will not be paid at the lower rate. The second sentence provides that employes who work in a higher class will be paid at the higher rate. The third sentence provides that the exceptions to the rules just established are listed in Section 5.06. Section 5.04 provides that "The permanent classification is based upon the one in which the employee spent the majority of his/her total hours during the preceding calendar year." Section 5.05 then goes on to say that the "permanent rate in 5.04" does not apply to certain named employes (i.e., "all employes hired after July 1, 1986, and all employes at the Wastewater Treatment Plant"); instead, those employes are "covered by the yearly rate in 5.03." Finally, Section 5.06 deals with the pay for seasonal employes. It has no bearing on this case and need not be summarized further.

The Union argues that since employes Mohr, Lambert and Nelson spent the majority of 1995 working at the Wastewater Treatment Plant, Section 5.04 mandates that they are entitled to be paid at their (old) maintenance rate for all of 1996. At first glance this interpretation does seem plausible, since Section 5.04 does say that employes are to be paid the rate of pay based on where they spent the majority of their hours during the previous calendar year. Thus, if Section 5.04 were looked at standing alone, it would seem to require that the three displaced Wastewater Treatment Plant employes be paid in 1996 at their (old) maintenance rate.

That said, it is a well-established arbitral principle that the meaning of each contract provision must be determined in relation to the contract as a whole. Thus, Section 5.04 cannot be isolated from the rest of the agreement. Instead, it must be read in its overall context. To read Section 5.04 in isolation from the remainder of the contract, as the Union implicitly proposes to do, would not be in accordance with accepted principles of contract interpretation.

Attention is now turned to an overview of Section 9.01, the provision which the City relies on to support its case. That section is part of an article entitled "Layoffs and Rehiring" which, as the name implies, deals with layoffs, bumping and recalls. The first sentence of Section 9.01 establishes that before any layoff occurs, the parties will meet to discuss same. The second sentence of Section 9.01 then provides that "unit-wide seniority will prevail, providing that the remaining are qualified to perform the available work or unless exceptional circumstances occur which would prohibit the parties from following the unit-wide list." The third sentence goes on to establish a procedure for laying off employes and bumping. The remainder of Article 9 (namely 9.02 through 9.06) has no bearing on this case and need not be summarized here.

The Union argues that Section 9.01 is inapplicable to this situation because no layoff actually occurred. The Employer disputes this assertion. Given this disagreement, it is necessary for the undersigned to decide whether a layoff occurred.

Based on the following rationale, the undersigned finds that a layoff occurred here. First, after the City decided to eliminate four maintenance positions at the Wastewater Treatment Plant, the parties met to discuss the matter. What they discussed at this meeting was the effect that the elimination would have on the employes whose positions were going to be eliminated. That effect, of course, was that the four employes were going to be laid off. That being the case, the meeting which was held gives every appearance of being the meeting referenced in the first sentence of Section 9.01 which mandates that before the City schedules a layoff, the parties will "agree on an orderly, acceptable process." Next, at that meeting the parties found a way to avoid the anticipated layoffs. Specifically, they agreed that four then-vacant DPW positions would remain open and unfilled for these four employes to bump into. The record indicates that is ultimately what happened since after their positions at the Wastewater Treatment Plant were eliminated, the four employes bumped into the four DPW positions which had been kept open for them. In the opinion of the undersigned, the Union's argument that no layoff occurred here ignores the causal relationship between the elimination of the positions and what happened later. Had the employes

whose positions were eliminated November 1, 1995 not bumped into other positions, they would have been laid off as of that date. As was their contractual right though, the four employes decided to bump into the positions which had been kept open for them. This way they avoided a layoff. Having avoided a layoff by bumping though, it is disingenuous for the Union to now argue that no layoff occurred under the circumstances. The reality is that a layoff occurred. The fact that the four employes never had their City employment interrupted and never received unemployment compensation benefits does not change this result.

Given this finding that a layoff occurred, it follows that the contractual provision most applicable here is the layoff provision (specifically, Section 9.01). Consequently, it governs this matter - not Section 5.04.

A review of Section 9.01 reveals it is silent with regard to the rate that is to be paid to an employe who uses their seniority following a layoff to bump into a different position. Thus, it (i.e., that particular provision) does not indicate what rate is to be paid under those circumstances. Given the silence of Section 9.01 on this specific matter, the undersigned has looked elsewhere in the contract for guidance in deciding what pay rate is applicable. The undersigned concludes that Appendix "A" answers this question. Appendix "A" contains the wage rates for the classifications listed therein. For example, it provides that the 1995 wage rate for a Laborer I is $12.14 per hour. It is implicit from listing classifications and pay rates in this fashion that the employes who work in those classifications will be paid at those rates unless the parties specify otherwise. A review of Appendix "A" indicates that the parties know how to make exceptions if they want. To illustrate this point, it is noted that Appendix "A" provides that employe Jim Severson is red circled, that two employes at old rate 7 are red-circled, and that the present 9H employes are grandfathered. Had the parties wanted to, they could have taken similar steps to ensure that the employes involved here did not have their pay reduced as a result of bumping into a lower-paid classification. They did not. That being the case, it is held that the employes involved here are to be paid at the rate of their current classification - not their old classification. The record indicates that since the three employes have been working as Laborer Is (i.e. since November 1, 1995), they have been paid at that rate. Consequently, the Employer is paying them correctly.

The conclusion reached above is buttressed by the fact that in the only previous instance where the City eliminated a position and the laid off employe then used his seniority to bump into a lower-paid position, the employe was subsequently paid at the new (lower) rate - not his old (higher) rate. While this single instance is certainly not sufficient to constitute a past practice, it is nonetheless noteworthy because it is factually identical to the situation herein, and because no grievance was filed by the Union over the matter.

In summary then, it is held that the City did not violate the contract by paying employes Mohr, Lambert and Nelson at the Laborer I rate effective November 1, 1995. Thus, the City is paying them correctly.

In light of the above, it is my

AWARD

That the Employer did not violate the terms of the collective bargaining agreement when the Employer eliminated four Wastewater Treatment Plant positions, thus forcing the affected

employes to bump to lower-paying positions in the Public Works Department, and paying them at the lower rate of pay for new positions than what the rate of pay was for the Wastewater Treatment Plant positions. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 5th day of September, 1996.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator