

BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between

CITY OF MINNEAPOLIS

and

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL NO. 70, AFL-CIO**

**Grievant: Local 70 Employees
Detailed to Water Technician
Position on July 17, 2011
Arbitrator: Sharon K. Imes**

APPEARANCES:

Trina Chernov, Assistant City Attorney, appearing on behalf of the City of Minneapolis and its Public Works Department.

Miller O'Brien Jensen, P.A., by **M. William O'Brien**, appearing on behalf of the International Union of Operating Engineers, Local No. 70, AFL-CIO and the grievants.

JURISDICTION:

The City of Minneapolis, referred to herein as the City or the Employer, and the International Union of Operating Engineers, Local Union No. 70, AFL-CIO, referred to herein as the Union, were parties to a collective bargaining agreement effective October 1, 2007 thru September 30, 2010 which is automatically renewed from year to year thereafter unless either party gives notice as provided for in Article 24 of the agreement. Under this agreement, the undersigned was selected to decide a dispute that has occurred between them. Hearing was held on November 30, 2012 in Minneapolis, Minnesota. The parties, both present, were afforded full opportunity to be heard. The hearing was closed with oral arguments on November 30 and the parties agreed to extend the time to issue the decision. The matter is now ready for determination.

STATEMENT OF THE ISSUE:

Is the dispute arbitrable? If so, did the City violate its pay obligation agreement when it reduced the base pay and eliminated longevity pay and the shift differential of seven Local 70 Water Technicians during their period of temporary assignment to that job classification? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE 1
RECOGNITION AND UNION SECURITY

Section 1.01 - Recognition and Amendments to Unit

Subd. 1. Recognition

The Employer recognizes the Union as the sole and exclusive certified collective bargaining representative of all employees whose job classifications and rates of pay are set forth in Appendix "A" of this Agreement, except those who work less than fourteen (14) hours per week or thirty five percent (35%) of the normal work week in the employees (sic) appropriate unit, or less than sixty-seven (67) working days in any calendar year, except those who are Supervisors or Confidential employees within the meaning of the *Minnesota Public Employment Labor Relations Act*, as amended, those who are otherwise excluded by the Act, and all other employees.

Subd. 2. Amendment to Certified Unit

. . . In the event the Employer has established a new job classification which is added to the bargaining unit by agreement between the Parties or by determination of the Commissioner, Bureau of Mediation Services, State of Minnesota, the Parties agree to negotiate with one another concerning wages and such other terms and conditions of employment as may be applicable to the position and which are not covered by this Agreement. However, it is agreed that all other terms and provisions of the Agreement shall apply to the new job classification.

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Section 1.03 - Exclusive Representation

The Employer shall not enter into any agreements with the employees covered by this Agreement either individually or collectively or with any other employee organization which in any way conflicts with the terms and provisions of this Agreement. Further, the Employer shall meet and negotiate, pursue the resolution of grievances and conduct arbitration proceedings only with the properly designated representative(s) of the Union.

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ARTICLE 4
SETTLEMENT OF DISPUTES

Section 4.01 - Scope

This article shall apply to all members of the bargaining unit.

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Section 4.04 - Definition, Timelines and Form

A grievance is any matter concerning the interpretation, application, or alleged violation of any currently effective agreement between the City and the bargaining unit. Grievances shall be resolved in the manner outlined in this article.

Subd. 1. Time Limits

Time limits, as specified in the grievance procedure, may be extended by written mutual agreement of the parties. The failure of the City to comply with any time limit herein means that the Union may automatically process the grievance to the next step of the grievance procedure. Failure of the union or its employees to comply with any time limit herein renders the alleged violation untimely and no longer subject to the grievance procedure.

Subd. 2. Commencement of Grievance

A grievance must be commenced at step one no later than twenty-one (21) days from the discovery of the grievable event(s) or fourteen (14) days from when the event(s) reasonably should have been discovered, whichever is later. Unless otherwise expressed, days shall mean calendar days.

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Section 4.08 - Step Four (Regular Arbitration)

Within twenty (20) days of the date of the step three decision the Union shall have the right to submit the matter to arbitration by informing the Director of Employee Services that the matter is to be arbitrated. Thereafter, the Parties shall attempt to have the grievance resolved in a timely manner. When a party has the burden of production, any period of inactivity great than thirty (30) days shall result in the mater becoming untimely. The defaulting party shall be solely responsible for the arbitrator's fee, if any.

If the matter is to be arbitrated, a single arbitrator shall be selected from the panel of eight (8) qualified arbitrators. The arbitrator shall be selected on an alphabetical, rotational basis with each Party having the right to exercise one strike. If the arbitrator is stricken, s/he will retain his/her position in the order. Either Party may request an annual review of the panel at which time a new panel will be selected.

Within thirty (3) days following the close of hearing or the submission of briefs by the parties, the arbitrator shall render a written decision based upon the facts presented and provide the reasons for determination. The decision shall resolve the grievance and order any appropriate relief. The decision and award of the arbitrator shall be final and binding upon the Employer, the Union and the employee(s) affected.

The arbitrator shall have no authority to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement.

The arbitrator is also prohibited from making any decision that is contrary to law or to public policy.

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Section 4.10 - Mediation (optional)

The Parties may, by mutual agreement, utilize the grievance mediation process in an attempt to resolve a grievance before going to arbitration.

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ARTICLE 9
WAGES AND PAYROLLS

Section 9.01 - Classifications and Rates of Pay

Subd. 1. General

All positions covered by this Agreement shall be classified by the Employer and the minimum, maximum and intervening salary rates for such classification shall be those shown in Appendix "A" which is attached to this Agreement and made a part hereof.

Subd. 2. Job Classification System

The Minneapolis Civil Service Commission (MCSC) shall administer the Employer's job classification system in accordance with the following criteria:

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Disputes respecting the classification of jobs within any bargaining unit shall be directed to the MCSC for review and final action. No dispute respecting the classification of jobs shall be subject to the grievance/arbitration provisions of this Agreement.

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Section 9.04 - Payrolls and Paydays

All payrolls shall be calculated on a biweekly basis and employees shall normally be paid every other Friday. The regular amount of pay shall be the hourly rate times the number of hours worked, or the biweekly rate regardless of the number of hours on duty for the period provided that the employee is on duty as scheduled or is on authorized paid leave.

Section 9.05 - Benefits Calculations and Accruals

For purposes of benefit plan administration, all compensated hours (exclusive of overtime hours and workers' compensation, unemployment compensation or similar insured compensation payments, except as modified by Section 20.05) (sic) shall be considered *hours worked* for all benefit accruals provided for by this Agreement. Benefit accruals shall be based upon a proportionate number of straight time compensated hours only.

Section 9.06 - Shift Differential

Effective October 1, 2007, a shift differential of one (1) dollar per hour shall be paid to all employees whose regularly scheduled shift begins between the hours of 11:00 a.m. and 6:00 a.m.

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ARTICLE 10
HOURS OF WORK AND OVERTIME

Section 10.01 - Work day and Work Week Defined

This section is intended only to define the normal hours of work and to provide the basis for the calculation of overtime pay. Nothing herein shall be construed as a guarantee of hours of work per day or per week.

Subd. 1. Normal Work Day and Work Week Configuration

The normal work day shall be eight (8) hours of work and the normal work week, regardless of shift arrangements, shall be an average of forty (40) hours of work. Nothing in this Agreement shall be construed to prohibit the approval of a work week schedule of four (4) ten (10) hours (sic) days provided such work schedules have been approved by the involved Division Director and the involved employee(s).

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ARTICLE 11
VACATIONS

Section 11.01 - Vacations With Pay

Employees in the classified service of the Employer shall be entitled to vacations with pay in accordance with the provisions of this article.

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ARTICLE 12
HOLIDAYS

Section 12.02 - Eligibility and Pay

Employees in the classified service of the Employer shall be entitled to holidays with pay in accordance with the provisions of this article.

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ARTICLE 15
SICK LEAVE

Section 15.01 - Sick Leave

Employees in the classified service of the Employer who regularly work more than twenty (20) hours per week shall be entitled to leaves of absence with pay, for actual, bona fide illness, temporary physical disability, or illness in the immediate family, or quarantine. Such leaves shall be granted in accordance with the provisions of this article.

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ARTICLE 18
WORK RULES

The Employer has reserved the right to establish and modify from time-to-time, reasonable rules and regulations which are not inconsistent with the provisions of this Agreement. The Employer shall meet and confer with the Union on additions or changes to existing rules and regulations prior to their implementation.

ARTICLE 19
DISCRIMINATION PROHIBITED

In the application of this Agreement's terms and provisions, no employee shall be discriminated against in an unlawful manner as defined by applicable city, state and/or federal law or because of an employee's political affiliation. The Parties recognize *sexual harassment* as defined by city, state and/or federal regulations to be unlawful discrimination within the meaning of this article.

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ARTICLE 22
WORK PLACE ENVIRONMENT

The Employer reaffirms its commitment to encourage and maintain a work environment which is hospitable to all employees, managers and supervisors. To that end, the Employer and the Union shall continue to develop and refine a form policy that prohibits harassment and abuse in the work place by an employee, manager, or supervisor. The Employer agrees to investigate all allegations of violations to that policy. Upon a finding that a violation of the policy has occurred, the Employer shall take appropriate remedial and/or corrective action and encourage the resolution of any resulting dispute through an established *alternative dispute resolution* (ADR) system.

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OTHER RELEVANT DOCUMENTS:

- **Memorandum to Director of Human Resources from the Director of Employee Services Regarding New Classification: Water Technician (Grade 5, 295 points; \$26.50-\$27.00/hour) February 28, 2011**

The Management in the Water Department has indentified (sic) a need to establish new classifications which will replace the existing Pumping Station Engineer I and II, Water Treatment Plant Operator, and the Coordinate Water Pumping classifications. This recommendation pertains to the junior level position in two-job series: Water Technician. The Water Technician classification has been evaluated at 265 points. It is allocated to grade 5 of Plant Operation and Maintenance Promotional Line, and is FLSA-non exempt.

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Effective Non-represented salary schedule February 28, 2011

	FLSA	PTS	G	MN "Special" Boiler License (Min Qual)	Second Class Grade "C" Boiler License	First Class Grade "C" Boiler License
				*Step 1	*Step 2	*Step 3
Water Technician	N	265	5	\$26.500	\$26.700	\$27.000

- Step placement and advancement is based solely on level of license held/achieved by employee.

Provided that the following hourly premiums shall be paid to all employees holding current MN Certificates, as follows:

"D" Water Operator	No Premium Paid (Minimum Qualification)
"C" Water Operator	\$0.20 Per hour

"B" Water Operator	\$0.40 Per hour
"A" Water Operator	\$0.80 Per hour

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- **Memorandum to Water Treatment Plant Operators, Pumping Station Engineers, Water Coordinators, Plant Service Workers, Operations Supervisors from Charlie Kocourek Regarding Clarification and Update on Moving to New Operational Structure
June 16, 2011**

Some employees have asked for clarification on the details of how and when we will move to the new operating structure. Some of the questions and concerns I have received are:

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When will the Water Technician jobs be filled on a permanent basis?

We will not fill the Water Technician positions on a permanent basis until after union representative is resolved. The decision on which union will represent these positions will be made by a State mediator, and we do not know when this will happen.

I "opted in" for detailing to a Water Technician, when will this begin?

We plan to begin detailing into the Water Technician position by July, 2011.

What union will represent me while I am detailed into the Water Technician position?

You will continue to be represented by your current union while detailing to Water Technician.

Will I receive shift differential or longevity pay while detailed to Water Technician?

You would have to be detailed to a qualifying shift in the detail in order to receive the shift differential. The shift differential rules and amounts would be those on the non-represented salary schedule.

If you are receiving longevity pay now you will continue to receive it while detailed.

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- **Two E-mails from Charlie Kocourek, Assistant Superintendent, Water Plant Operations to several employees including grievants in this dispute regarding update
July 14, 2011 and July 15, 2011**

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In the memo I sent on July 7th I said that we planned to detail existing employees who opted into the Water Technician position sometime in July. These details will be effective on July 17th. This includes all Water Coordinators, Water Treatment Plant Operators, and Plant Service Workers who opted in.

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Some people have asked for clarification on the pay rate while detailed to the Water Technician position. Detail pay corresponds to the pay schedule for that position. The pay schedule for the Water Technician position is listed in the attached document.¹

¹ The attachment is the same document as the memo to the Director of Human Resources dated February 28, 2011 which is provided above.

All employees detailed to Water Technician remain members of their respective unions (Local 70 or Local 363) and continue to be represented by those unions, but the Water Technician position currently falls under the non-represented pay schedule. Therefore, all employees detailed to Water Technician will also receive shift differential per the following language:

Employees who are scheduled to work a full shift which begins between 12:00 noon and 1:29 p.m. shall be paid an additional \$0.423 cents per hour for all hours worked on that shift. In addition, should that same employee be authorized to "come in early" or "stay over", working overtime immediately

Employees who are scheduled to work a full shift which begins between 1:30 p.m. and 1:59 a.m. shall be paid an additional \$1.001 per hour for all hours worked on that shift. In addition, should that same employee be authorized to "come in early" or "stay over", working overtime immediately adjacent to such a shift, the \$1.001 differential shall also be applied to those overtime hours.

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- **E-mail from Charlie W. Kocourek to number of employees, including grievants in this dispute regarding Pay Premium for Water Operator Certificate
July 21, 2011**

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As you know, the Water Technician position has premium pay of \$.20 for a grade "C", \$.40 for a grade "B", and \$.80 for a grade "A" water certificate. I want to make sure that you receive the correct premium pay.

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- **E-mail from Chris Catlin to number of employees, including grievants in this dispute regarding overtime; comp time and vacation
August 10, 2011**

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Please see the attached memo that clarifies . . .

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We want to clarify some issues regarding overtime, comp (compensatory) time and related payroll issues. Some of these changes are due to many of our staff members "opting in" to Water Technician details. Some changes are a result of the recent implementation of the City's New Payroll system, Time and Labor.

We ask for your understanding in the timing of these clarifications. We have been working with HR and Payroll to make sure our statements are accurate. Unfortunately this has resulted in a less than timely delivery.

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3. Detailed Water Technicians continue to be represented by their previous union representatives - Locals 363 and 70. Detailed Water Technicians are **paid** according to the **non-represented** pay schedule. You can see the pay schedule on City Talk at this address:
 - <http://www.ci.msp.mn.us/labor-agreements/non-rep/CNR-Salary-Schedule-current.xls>
 - The pay schedule has some important differences as compared to the previously represented pay schedules - for instance, the 363 and 70 contracts allow for overtime pay for work in excess of 8 hours per day, where the non-represented schedule does not.

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- **Stipulation - Certification of Exclusive Representation**
August 11, 2011

. . . This serves as a Public Sector joint request for certification of Local 363 as exclusive representative for the Water Technician 1 positions at the Minneapolis Wage Department. We wish to have this title accreted into our current Local 363 Minneapolis Public Works unit.

Further, this letter serves as a Public Sector joint request for certification of Local 70 as exclusive representative for the Senior Water Technician position at the Minneapolis Water Department. We wish to have this title accreted into our current Local 70, International Union of Operating Engineers. . . .

- **Unit Clarification Order**
August 19, 2011

. . . **AGREEMENT OF THE PARTIES**

As evidenced by the signing of a signed stipulated agreement, received by the Bureau on August 16, 2011, the parties agree on the following:

1. The position of Water Technician 1 should be represented by Local 363.
2. The position of Senior Water Technician should be represented by Local 70.

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FINDING AND ORDERS

1. The agreement of the parties is appropriate.
2. The position of water Technician 1 is **included** in the appropriate unit represented by Local 363.
3. The position of Senior Water Technician is **included** in the appropriate unit represented by Local 70.

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- **Letter of Agreement - Senior Water Technician**
September 23, 2011

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LETTER OF AGREEMENT

WHEREAS, the City of Minneapolis (hereinafter "Employer") and the International Union of Operating Engineers, Local Union No. 70, AFL-CIO, Stationary Engineers Unit (hereinafter "Union") are Parties to a Collective Bargaining Agreement that is currently in force, and

Whereas, a classification study has been conducted that resulted in the creation of a new classification, Senior Water Technician; and

Whereas, the classification of Senior Water Technician is recognized by the parties as work for which the Union is the sole and exclusive certified collective bargaining representative, and

Whereas, Senior Water Technician has been evaluated at 318 points and allocated to grade 7 of Plant Operation and Maintenance Promotional Line, and is FLSA-non exempt;

Now, therefore, be it resolved that:

1. The classification of Senior Water Technician be recognized by the parties for which the Union is the sole and exclusive certified collective bargaining representative; and
2. The following hourly wage rates have been negotiated for Senior Water Technician:

Effective August 15, 2011

	FLSA	PTS	G	MN "Special" Boiler License (Min Qual)	Second Class Grade "C" Boiler License	First Class Grade "C" Boiler License
				*Step 1	*Step 2	*Step 3
Senior Water Technician	N-2	318	7	\$28.500	\$28.700	\$29.000

- Step placement and advancement is based solely on level of license held/achieved by employee.

3. Provided that the following hourly premiums shall be paid to all employees holding current MN Certificates, as follows:

"D" Water Operator	Not Applicable (more required for Minimum Qualification)
"C" Water Operator	Not Applicable (more required for Minimum Qualification)
"B" Water Operator	No Premium Paid (Minimum Qualification)
"A" Water Operator	\$0.80 Per hour

4. This letter represents the full and complete agreement in regards to this matter.

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- **Letter of Agreement between City of Minneapolis and City Employee's Union, Local Union #363, a/w Laborers International Union of North America, AFL-CIO - Regarding pay for Water Technicians October 6, 2011**

LETTER OF AGREEMENT

WHEREAS, the City of Minneapolis (hereinafter "City") and the Laborers Local Union No. 363, a/w Laborers' International Union of North America, AFL-CIO, (hereinafter "Union") are Parties to a collective bargaining agreement; and

Whereas, a classification study has been conducted that resulted in the creation of a new classification, Water Technician; and

Whereas, the classification of Water Technician is recognized by the parties as work for which the Union is the sole and exclusive certified collective bargaining representative, and

Whereas, Water Technician has been evaluated at 265 points and allocated to grade 5 of Plant Operation and Maintenance Promotional Line, and is FLSA-non exempt;

Now, therefore, be it resolved that:

1. The classification of Water Technician be recognized by the parties for which the Union is the sole and exclusive representative; and
2. The following hourly wage rates have been negotiated for Water Technician:

Effective August 15, 2011

	FLSA	PTS	G	MN "Special" Boiler License (Min Qual)	Second Class Grade "C" Boiler License	First Class Grade "C" Boiler License
				*Step 1	*Step 2	*Step 3
*Water Technician	N-2	265	7	\$26.500	\$26.700	\$27.000

(Step placement and advancement is based solely on level of license held/achieved by employee.)

3. In accordance with the Agreement pertaining to the Laborers' International Union of North America National (LIUNA) Industrial Pension Fund, a supplemental pension fund authorized by Minnesota Statutes, Section 356.24, Subdivision 1(8) (2001), the above stated wage will be reduced by the amount forwarded by the City of Minneapolis to the LIUNA Fund.
4. Provided that the following hourly premiums shall be paid to all employees holding current MN Certificates, as follows:

"D" Water Operator	No Premium Paid (Minimum Qualification)
"C" Water Operator	\$0.20 Per hour
"B" Water Operator	\$0.40 Per hour
"A" Water Operator	\$0.80 Per hour

4. This letter represents the full and complete agreement in regards to this matter.

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- **E-Mail from Perry Palin to the Union regarding "Pension monies begin withheld from Local 70 Members" November 30, 2011**

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No money was withheld illegally. The City applied the negotiated wage rate for Water Technician effective August 15, 2011, after both you and Audie said that you wanted the terms of the collective bargaining agreements applied retroactively to August 15, 2011.

In applying the wage rates retroactively, the City planned to take the difference between the non-represented pay and the negotiated pay from the paycheck that is due tomorrow, November 4, 2011. When the City changed the

implementation date of the negotiated rate to November 6, it was too late to rerun the November 4 payroll. I have been told that the difference was issued in paper checks and mailed today to the affected employees.

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- **Letter of Agreement - Premium Pay - Senior Water Technician
March 20, 2012**

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LETTER OF AGREEMENT

7th Day Premium Pay - Senior Water Technician

WHEREAS, the City of Minneapolis (hereinafter "Employer") and the International Union of Operating Engineers, Local No. 70, AFL-CIO (hereinafter "Union"), (the Employer and Union are hereinafter referred to as the "Parties") are Parties to a collective bargaining agreement effective October 1, 2007 through September 30, 2010 (hereinafter "Agreement"); and

WHEREAS, a new job classification of Senior Water Technician at the Water Department of Public Works has been recognized as appropriately in the Union's bargaining unit; and

WHEREAS, Article 10, Section 10.03, Subd. 1 of the Agreement provides that employees will be paid "at the rate of two (2) times the employee's regular hourly rate of pay for all times worked on the seventy (7th) consecutive day of a work week"; and

WHEREAS, the assigned work schedule of Senior Water Technicians requires them to work seven or more consecutive days over parts of two consecutive work weeks on some occasions;

WHEREAS, the Employer has designated the work week for Senior Water Technicians in the Water Department of Public Works as Sunday through Saturday;

NOW, THEREFORE, IT IS HEREBY AGREED, that Senior Water Technicians at the Water Department of Public Works will only receive the seventh (7th) day premium if the seventh (7th) consecutive day is within the same work week.

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BACKGROUND AND FACTS:

In 2010, the City expressed an interest in reorganizing its water department by consolidating a number of job classifications which existed there into two new job classifications, that of Water Technician and Senior Water Technician. Under its collective bargaining agreement with Local 70, it was obligated to negotiate over the changes with the Local since some of the positions affected were represented by it. During the reorganization and until permanent assignments could be made, the City opted to temporarily assign (detail) seven Local 70 members and the Local 363 members as Water Technicians. The employees were detailed on July 17, 2011. During this period of reorganization, addressing questions

raised by Local 70, the City stated several times that those Local 70 members detailed to the Water Technician job would receive the non-represented Water Technician rate together with certain premium pay items and that these members would continue to be represented by Local 70. Local 70 agreed with the City's representation and did not propose any changes. The parties also agreed, and the Bureau of Mediation Services on August 19, 2011, certified, that Local 363 should represent the Water Technicians and Local 70 should represent the Senior Water Technicians.

Following this certification, the City and Local 363 and Local 70 engaged in negotiations over the rates of pay each classification would receive. An agreement over Local 70 Senior Water Technician rates of pay was reached on September 30, 2011 and over Local 363 Water Technician rates of pay was reached on October 6, 2011. In November, both Locals were advised that the City, in accord with the unions' requests, applied the bargaining agreements reached in September and October retroactively to August 15, 2011. Shortly thereafter, the paychecks for the Local 70 members detailed to the Water Technician positions reflected a reduction of 80 cents per hour in the base rate of pay and a discontinuance of longevity and shift differential pay. When Local 70 objected, the City justified its action by stating it had reached an agreement with Local 363 and had applied the terms of that agreement to all detailed Water Technicians.² Rejecting the City's justification for the change, Local 70 grieved the reduction in the base pay rate on November 30, 2011.

On December 20, 2011, the City issued a Step 1 response to the Union's grievance which denied the grievance. In its response the City stated that while a Step 1 grievance would normally be filed with an immediate supervisor, the decision being grieved was made by Human Resources - Employee Services and, therefore, the response was being issued by the Labor Relations Coordinator in this department. The response also stated that Local 70 did not have standing to grieve the hourly pay for work performed in job classifications not

² The Letter of Agreement the City reached with Local 363 states the negotiated wage rate and states that "In accordance with the Agreement pertaining to the Laborers' International Union of North America National (LIUNA) Industrial Pension Fund, a supplemental pension fund authorized by Minnesota Statutes, Section 356.24, Subdivision 1(8) 2001, the above stated wage will be reduced by the amount forwarded by the City of Minneapolis to the LIUNA Fund. It is undisputed that the negotiated wage rate reflects a rate 80 cents less than the previous rate paid the Water Technicians and that the amount forwarded to the LIUNA Fund is 80 cents.

represented by it; that all Water Technicians are being paid an hourly rate bargained between the City and Local 363, and that when employees are detailed between bargaining units, the City's established practice is to pay the negotiated wage rate of the job classification to which the detail occurs. On December 22, 2011, the Union rejected the Step 1 response and asked that the grievance be moved to the next step. On January 3, 2012, the Union asked the Labor Relations Coordinator, by e-mail, when they would be meeting again on the grievance. An e-mail sent by the Union on February 17, 2012 indicates the parties met that day and that the grievance was again denied. On March 5, 2012, the Labor Relations Coordinator sent the Union a letter stating they had met on February 17 and that the grievance was being denied at Step 3. It also stated again that the Local does not have standing to grieve the hourly pay for work performed in job classifications not represented by it. Following this denial, the Union sent the Labor Relations Coordinator a letter on March 15 stating that the Coordinator had not addressed all of the issues raised in the grievance and requesting an audit of all employees assigned at the water department to ensure employees had been properly paid. In response, the Coordinator sent the Union a letter dated March 22, 2012 in which he stated he had answered the issue raised in the grievance as filed; that the other issues the Union raised were an attempt to orally add them to the grievance; that the audit request would require the City to sort through months of records to look "for what is not there"; that "any errors on the timesheets would be between the employee and his or her supervisor", and that if the Union is alleging such errors it is obligated to bring detailed cases forward. In this letter the Coordinator also indicated that while Local 70 had opted not to meet with the City regarding time and labor issues, three other unions representing public works have met with the City on their time and labor grievances and they are working to resolve these issues.

Following this response, the parties agreed to meet with the Bureau of Mediation Services in an attempt to mediate their differences and the meeting was held on July 24, 2012. After the mediation session, the Union filed an amended grievance which it stated was consistent with the issues discussed in mediation. The amended grievance states the grievance concerns "the City's failure to pay members 'detailed' into the Water Technician position in the Water Department the wage rate as agreed by the parties, failure to pay certain premium pay

and benefits including, but not limited to, shift differential and Longevity Pay" and "improper 'detailing' of Local 70 members." It is this grievance that is before the Arbitrator. As remedy, the Union seeks that each of the Local 70 members detailed to the Water Technician position receive the proper base rate of pay for each hour worked during the period of the detail; that they also receive the proper longevity pay for each hour worked during the period of the detail, and that they receive the proper shift differential for each hour worked that is subject to the shift differential premium.

ARGUMENTS OF THE PARTIES:

The City argues the grievance is not properly before the arbitrator and that if the arbitrator finds otherwise Local 70 is seeking a better bargain than it negotiated in several signed contracts. In its arbitrability challenge, the City raises three objections. The first is that Local 70 is seeking to apply the provisions of Local 363's labor agreement to its members and that there is nothing in Local 70's agreement or signed memoranda of understanding which requires or allows that. Its second objection is that Local 70 is asking the Arbitrator to pay its detailed members the 80 cents per hour which the City contributes, as part of Local 363's agreement, to Local 363's supplemental pension fund and in essence is asking the Arbitrator to allow its members to participate in the pension fund, authority which the Arbitrator does not have since ERISA governs pensions and participation in a pension fund must be bargained. In addition, with respect to this objection, the City maintains that even if Local 70 is not seeking to have its members receive a pension contribution, it is arguing for its members to receive more compensation now while those receiving the contribution to the pension fund will not receive a benefit until after retirement. The City's third objection is that that the grievance is not timely filed. According to the City, Section 4.04, subd. 2 of Local 70's collective bargaining agreement, requires a grievance be "commenced within 21 calendar days from the discovery of the grievable event or 14 days from when the event reasonably should have been discovered, whichever is later." Based upon this provision, the City argues that Local 70 signed memoranda of understanding (MOUs) with the City in August and September 2011 and did not file the grievance until November 30, 2011, well beyond the 21 calendar days provided for in the

grievance procedure, and under subd. 1 of this same provision failure to file a grievance in a timely manner makes the issue no longer subject to the grievance procedure.

On the merits, the City argues that the Union's case "constitutes buyer's remorse" since the Union is asking the Arbitrator to apply the best parts of Local 363's written agreement to its Local 70 members. In support of its position it states that the parties agreed in Article 23, Section 23.01 of the collective bargaining agreement that the master contract could be amended during the term of the agreement; that the parties did amend their master contracts; that Local 70 and the City agreed Local 70 would represent the Senior Water Technicians, and that in its Letter of Agreement the parties stated their "agreement constitutes the entire agreement of the parties." It continues that by asked the Arbitrator to award the "best parts of a different . . . agreement" to its members the Local is seeking an award that is unprecedented for an arbitrator to issue.

The City also maintains that the Union may raise an issue over job classifications and declares that no dispute concerning job classifications is subject to the grievance/arbitration procedure. Instead, it charges that its agreement with Local 70 specifically states that the Minneapolis Civil Service Commission is the proper venue for resolving job classification disputes. Further, it asserts that if Local 70 believes it should be the exclusive representative for the Water Technician classification that issue properly belongs before the Bureau of Mediation Services as the parties have agreed upon in Article 1, Section 1.01, subd. 2 of the parties' contract.

The Union argues, however, that the grievance is timely filed and that the City reneged in its obligation to pay Local 70 members detailed to the Water Technician positions the agreed-upon base pay, longevity and shift differential during their period of temporary assignment. Maintaining that the City repeatedly assured the seven Local 70 members detailed to the Water Technician positions during the period of reorganization that they would be paid the wage rate paid Local 363 Water Technicians at the time they were detailed together with longevity pay for employees with 20 and 25 years of service and shift differential pay for hours worked outside of regular day hours, the Union declares that the City violated its agreement with these members by unilaterally reducing the base rate of pay and discontinuing

the longevity and shift differentials during the midst of the detail period. In support of its position, it declares the City knew that the Water Technicians represented by Local 70 were to remain in the Local 70 bargaining unit for the period of the detail and that they were not represented by Local 363; that the City also knew Local 70 Water Technicians did not and could not participate in the Laborer's pension fund, and that there was no agreement with Local 70 to reduce the pay for its members detailed to the Water Technician positions. It also argues that when the City decided to reduce the wage rate paid these employees based upon its agreement with Local 363 it caused these employees to receive nearly a dollar an hour less in base pay than that received by the Local 363 Water Technicians. As a remedy, the Union seeks that each of the Local 70 members detailed to the Water Technician position receive the base rate confirmed by the City in its February 28, 2011 memo to the Director of Human Resources; that each also receive the longevity pay confirmed by the City in its June 16, 2011 memorandum from the Assistant Superintendent of the Water Plant Operations, and that each receive the shift differential confirmed by the City in e-mail from the Assistant Superintendent of the Water Plant Operations on July 15, 2011.

In its closing statement, the Union argued that the grievance is arbitrable not only because Article 4, Section 4.04 defines a grievance as any matter concerning the interpretation, application, or alleged violation of any current effective agreement between the City and the bargaining unit even if the agreement is not written but because the City entered into an agreement with Local 363 that conflicts with its agreement with Local 70 and because the agreement undermines Local 70 employees. It also maintains that the grievance was filed well within the 21 days of when Local 70 members learned that a violation had occurred. As support for its position it posits that while the problem with pay dates back to sometime earlier, the actual cut in pay was not reflected until sometime after November 6 so the actual violation occurred well within the 21 day reference in the collective bargaining agreement.

DISCUSSION:

Jurisdictional Issues: The City raised several issues with respect to whether the Arbitrator had jurisdictional authority to hear this dispute. Among them is that the Union is seeking to apply provisions bargained in Local 363's agreement to its members when its

agreement does not allow that; that the Union is seeking an award which requires the City to contribute the Local 363's pension fund on behalf of Local 70 members, authority which the Arbitrator does not have since ERISA governs pensions and the parties must bargain participation, and that since the grievance was not timely filed, the dispute is no longer subject to the grievance procedures in accord with the collective bargaining agreement negotiated between the parties. After reviewing the arguments advanced by the parties, it is concluded that the only challenge relevant to whether this Arbitrator has authority to hear this dispute is that of timeliness. While the City maintains that Local 70 is attempting to require the City to apply the benefits of its bargain with Local 363 to those Local 70 members detailed to the Water Technician positions, this Arbitrator understands Local 70 to be arguing solely over whether its detailed members are entitled to the wage rates negotiated by Local 363; whether the basic wage rate negotiated by Local 363 is the amount reflected in the wage rate schedule contained in Local 363's Letter of Agreement and whether its detailed members are entitled to longevity and shift differential premiums. Consequently, the primary argument is whether the rate negotiated by Local 363 is the rate reflected in the Letter of Agreement's wage rate schedule or the an amount less than that since Local 363 members have agreed to receive less than the negotiated amount in order to contribute to a supplemental pension fund. Further, given this interpretation of the dispute, the City's argument that Local 70 is seeking to include its members detailed to the Water Technician positions in Local 363's pension fund is not persuasive. While it is true that Local 70 is seeking the return of the 80 cents per hour which the City is forwarding to Local 363's pension fund on behalf of its members, it is seeking the return of that money to the wage rate paid its members and not as a contribution to Local 363's pension fund.

There is merit, however, in considering the City's argument regarding whether the grievance was timely filed since Local 70 employees were detailed on July 17, 2011; since questions regarding the rates of pay arose shortly thereafter, and since the grievance was not filed until November 30, 2011. In the vast majority of cases, contractual limitations on time periods within which a grievance must be filed are upheld by arbitrators, including this Arbitrator, where the parties have consistently enforced such requirements. However,

arbitrators also recognize a presumption of arbitrability and, consequently, are less likely to enforce these limitations when the date giving rise to the grievance is difficult to determine; when the record establishes the parties do not strictly enforce the timeliness limits, or when unusual circumstances occur.³

After reviewing the evidence in the record pertaining to whether the grievance was timely filed it is concluded that City's argument is not persuasive. While the record establishes that from the time the detail was first proposed questions arose regarding how employees would be compensated and that the parties held several discussions regarding the rate of pay those detailed to the Water Technician positions would be paid and who would represent those employees, it also establishes that the Local 70 members detailed as Water Technicians did not receive a paycheck raising the issue before the Arbitrator until at least a week or more after November 6, 2011 which makes the grievance filed on November 29 or 30, 2011 well within the agreement's required twenty-one day limit.

In February, 2011, the Director of Employee Services sent the Director of Human Resources a memorandum setting forth a non-represented salary schedule which established the rates that would be paid those detailed to the Water Technician position.⁴ It appears this was the rate discussed with those employees who opted for the detail but that employees remained concerned not only about the rate they would be paid but about who would represent them and whether they would receive other benefits that had been agreed to in their respective collective bargaining agreements.

On June 16, 2011, the Assistant Superintendent for the Water Plant Operations sent a memo to employees affected by the reorganization addressing their request for additional information regarding the reorganization including when the detail would begin; how long they would be detailed, and whether those detailed would receive shift differential or longevity pay

³ Among those circumstances are where a grievant or union has made a substantial, good faith attempt to file a formal grievance in a timely manner; has given the employer notice of the grievance and the employer is not prejudiced by the delay; where the date of discovery of the event giving rise to the grievance is debatable, or where "continuing" violations of the agreement occur (i.e. repeated daily). See *Elkouri & Elkouri, How Arbitration Works, Seventh Edition*, Bloomberg BNA, 2012, page 5-27, 28.

⁴ While the Arbitrator was not provided with a document which also reflected longevity and shift differential pay employees placed on the non-represented schedule might receive, evidence in the record indicates these premiums are available to those eligible for them.

while detailed. At that time the Assistant Superintendent stated that permanent placement would not begin until after union representation had been determined; that the detail would begin in July; that those detailed to a qualifying shift would receive the shift differentials on the non-represented salary schedule, and that those receiving longevity pay would continue to receive it while detailed.

A month later, on July 14 and July 15, the Assistant Superintendent sent e-mails to those employees affected by the detail which stated that the detail would become effective July 17 and, in response to questions still being asked about pay rates while detailed, that the pay rate would be that reflected in the non-represented schedule posted in the February 28, 2011 memo to the Human Resources Director and that all employees detailed would remain members of their respective unions and continue to be represented by them. He also identified the schedules which would result in employees receiving shift differential.

On July 21, a week later, the Assistant Superintendent sent another e-mail to those employees affected by the detail. In that e-mail he restated that Water Technicians would receive premium pay for certification and explained that he wanted to make sure those employees detailed were receiving the correct premium pay.⁵

On August 10, an e-mail from the Water Treatment and Distribution Services Division of the Department of Public Works was sent to several supervisors and employees indicating a need to clarify issues regarding overtime, compensatory time and other payroll issues.⁶ In that e-mail it was stated that some of the changes had resulted from some employees opting into the Water Technician detail and that some were the result of a new payroll system being implemented. In that e-mail, the following statement was made: "We have been working with HR and Payroll to make sure our statements are accurate. Unfortunately this has resulted in a less than timely delivery." The e-mail also stated that Water Technicians continue to be represented by their previous union representative; are paid according to the non-represented pay schedule, and that there are "some important differences" between the non-represented

⁵ The City argued that the Assistant Superintendent had no authority to determine how those detailed would be paid but that argument is rejected since the Assistant Superintendent is a member of the management team and the information he was conveying was the same information that had been shared with these employees before.

⁶ See Union Exhibit 16.

pay schedule and the Local 363 and Local 70 schedules such as whether these employees would be paid for overtime.

On August 19, 2011, the BMS issued a unit clarification order which indicated that Local 363 would represent the Water Technicians and Local 70 would represent the Senior Water Technicians. Following the issuance of this unit clarification order, on September 23, 2011, the City reached an agreement with Local 70 regarding the wage rate to be paid the Senior Water Technicians and the premium that would be paid for Minnesota certification and on October 6, 2011, the City reached an agreement with Local 363 setting the wage rate to be paid the Water Technicians and the premium that would be paid for certification. In the Local 363 agreement, the parties also agreed to reduce the wage paid the Water Technicians by the amount the City would forward to the Local's supplemental pension fund. It is undisputed that the amount forward to the pension fund was 80 cents per hour per member.

While there is no written confirmation that talks regarding the wage rates continued, nor testimony to that effect, it appears the parties continued to discuss the wage rates pertaining to those detailed as Water Technicians and that part of the discussion concerned whether the agreements reached in September and October should be made retroactive to August 15, 2011 shortly before the Bureau of Mediation Services issued a Unit Clarification Order declaring Local 363 to be the exclusive representative for the Water Technician position and Local 70 to be the exclusive representative for the Senior Water Technician position. During this period of time there was no challenge to the rates being paid since the detailed employees were receiving the wage rates and premium pay set forth in the non-represented salary schedule.

Consistent with the discussions that arose after the Unit Clarification Order was issued, the City Labor Relations Coordinator advised the Locals in e-mails dated November 1, 2, and 3, 2011 that the City had complied with the Locals' request that the "terms of the collective bargaining agreements" be made retroactive to August 15, 2011; that it had applied the negotiated wage rate for Water Technicians effective on that date, and that it intended to take the difference between the non-represented pay and the negotiated pay from the November

4th paycheck but it was too late to do so and, therefore, the implementation date had been changed to November 6.

While all of the discussions between June 16, 2011 and November 6, 2011 indicate a concern over wage rates being paid employees detailed to the Water Technician positions the actual dispute over the wage rates being paid Local 70 members detailed to this position did not occur until the agreement bargained between the City and Local 363 in October 2011 was made retroactive to August 15, 2011 and these employees received paychecks reflecting a wage rate that was less than they had previously been paid shortly after November 6, 2011. In the November 2 and 3 e-mails, Local 70 was advised that the Local 363 negotiated Water Technician wage rates were less than non-represented hourly pay for the position and that the City planned to take the difference between the non-represented pay and the negotiated rate from the November 4 paycheck but that the City had changed the implementation date to November 5 since it had been too late to rerun the November 4 payroll. The difference between the wage rate reflected in the non-represented schedule and the amount the City withheld from the paychecks issued Local 70 detailed members was 80 cents per hour.⁷ Since the dispute is over whether the Local 70 members detailed to the Water Technician positions and not eligible to participate in the LIUNA pension fund are entitled to the 80 cents per hour the City withheld from the Water Technician negotiated wage rate and that action was not taken until after November 6, the grievance challenging the City's actions filed on November 29, 2011 is within the time limits set forth in Local 70's collective bargaining agreement.

Merits: On the merits, it is determined that the City was obligated to pay the Local 70 members detailed to the Water Technician positions the full Local 363 rate negotiated in its October 6, 2011 Letter of Agreement between August 15, 2011 and September 2011.⁸ Further, it is concluded that the City should have continued to pay longevity provided for in the Local

⁷ The Letter of Agreement between the City and Local 373 indicated that the negotiated wage rate was that reflected in the non-represented schedule and which had been previously paid those employees detailed to the Water Technician position. The agreement also stated, however, that the negotiated wage rate would be reduced for by the amount forwarded to LIUNA in accord with Local 363's agreement pertaining to LIUNA.

⁸ The September date is not a date certain since the parties differ over when the detail ended with the City asserting that the detail ended September 9, 2011 and the Union declaring the detail ended on September 23, 2011.

373 agreement to those eligible Local 70 detailed members. These conclusions are based upon a finding that there is no dispute over whether employees detailed from one bargaining unit to another are to be paid the wage rate of the bargaining unit to which they are detailed; a finding that the October 6, 2011 Local 363 Agreement states that the negotiated wage rate ranges between \$26.50 and \$27.00; a finding that although Local 363 agreed to reduce the wage rate by the amount the City would forward to its pension fund on behalf of its employees, it did not negotiate a reduced wage rate; a finding that there is a longevity premium in the Local 363 agreement with the City that affects the wage rate paid those detailed to Local 363 positions, and a finding that detailed Local 70 members are not eligible for shift differential while detailed since the Local 363 agreement does not provide shift differential for water department employees.

Although it is undisputed that it is the City's practice to pay employees detailed from one bargaining unit to another the rate of pay negotiated for the job classification in the other bargaining unit, this was not the case in this dispute. Instead, the record establishes that because the City was attempting to reorganize the department, employees were detailed to a non-represented schedule during the reorganization. The record also establishes that prior to being detailed, employees considering the detail were told they would receive the non-represented Water Technician rate and in clarifications were told they would be paid shift differential and longevity if they were eligible for these premiums.⁹ There is also evidence that although there were questions about compensation for those detailed even before the detail began, the issue in this dispute did not occur until the Local 363 became the exclusive representative for Water Technicians, following a unit clarification order by the Bureau of Mediation Services, and the City, based upon requests by both unions representing water technicians, that agreements negotiated with the City following the unit clarification be applied retroactively to August 15, 2011. At that time, the Local 70 employees detailed to Water Technician positions became employees detailed from one bargaining unit to another and subject to the pay provisions negotiated by the other bargaining unit. Based upon this accepted practice, it is concluded that Local 70 employee detailed to this position are entitled

⁹ See Union exhibits 8, 9, 13 and 14.

to the wage rate and any longevity and shift differential that affect the rate of pay received by them. While neither party provided the Arbitrator with the full agreement between the City and Local 363, evidence in the record establishes that this agreement provides longevity pay for those eligible but no shift differential.¹⁰ Given this fact, it is concluded that detailed Local 70 employees who are eligible should receive longevity pay in accord with the provision in Local 363's collective bargaining agreement.

A finding that the detailed Local 70 members are entitled to longevity if eligible does not resolve the primary issue, however, which is whether detailed Local 70 employees are entitled to the basic wage rate negotiated by Local 363 or the lesser wage rate Local 363 Water Technicians receive as a result of their agreement to participate in a pension fund. Because the City and Local 363 agreed to reduce the negotiated wage rate to be paid Local 363 employees by the amount the City forwards to the Local's pension fund, the City maintains that the negotiated wage rate is 80 cents less than that reflected in the schedule set forth as Item 2 in the its Letter of Agreement with Local 363. Local 70, on the other hand, maintains that if its members do not participate in the pension fund subscribed to by Local 363, it is entitled to the full negotiated rate and not the rate being paid Local 363 members who are also receiving a pension fund contribution. While this Arbitrator does not generally follow the theory espoused in "the plain meaning rule"¹¹ since language on its own usually does not convey an unambiguous meaning without the content in which the language arose she is tempted to follow that theory since a review of the October 6, 2011 Letter of Agreement between the City and Local 363 clearly states that the negotiated wage rates for Water Technicians shall range between \$26.50 to \$27.00 per hour. Since the agreement also states, however, that the parties have agreed to reduce the wage paid its employees by the amount forwarded to the LIUNA fund, there is need for some interpretation.

While there are many standards arbitrators apply in an attempt to ascertain the parties' intent when they agreed upon the language in question, a review of Section 1.09 in Local 363's collective bargaining agreement provides insight. In that Section which refers to the pension

¹⁰See City Exhibit 8.

¹¹ **Elkouri & Elkouri, How Arbitration Works, Seventh Edition**, Kenneth May, Editor-in-Chief, ABA Section of Labor and Employment Law, Bloomberg BNA, 2012, p. 9-8.

fund, the parties state that "the amount, which would otherwise be paid in salary or wages will be contributed . . . (to) the Laborers' International Union of North America National (Industrial) Pension Fund *as pre-tax employer contributions*" and that "for purposes of determining future wage rates, the Employer shall first restore the amount of the wage reduction . . . then apply the applicable wage multiplier, and then reduce the revised wage by the pension contribution amount."¹² This language clearly indicates that while the amount paid Local 363 employees is based upon a lower wage rate since a portion of that taxable income will be converted to a non-taxable contribution to the employees' pension fund, the wage rate is a separately negotiated figure which reflects the amount which would be paid Local 363 employees if they had not opted for a pension fund. Based upon this language the only reasonable conclusion is that when the parties negotiated the October 6 Letter of Agreement the negotiated wage rate is the rate that detailed employees who are not eligible to participate in Local 363's pension fund should receive and that only Local 363 will receive less than that rate since they participate in the pension fund. Given this agreement, the City is obligated to pay Local 70 members detailed to the Water Technician positions the negotiated rate and not a rate reduced for the purposes of participating in Local 363's pension fund.

Accordingly, based upon the record; the arguments advanced by the parties, and the discussion above, it is concluded that the City did not have the right to pay Local 70 employees detailed to the Water Technician positions a rate that the rate set forth in Item 2 of the Letter of Agreement between the City and Local 373 when these detailed employees became detailed to Local 363 in August 2011. Further, the City did not have the right to deny longevity as provided for in the Local 363 collective bargaining agreement to those Local 70 employees detailed to these positions. Based upon these findings, the following award is issued:

AWARD

The grievance is sustained. The City is hereby ordered to reimburse employees for the wages deducted from the wage rate set forth in the Local 363 October 6, 2011 Letter of Agreement and any longevity payments to which they might be entitled for the Water

¹² See City Exhibit 9.

Technician detail between August 15, 2011 and September 23, 2011.¹³ Further, the Arbitrator retains jurisdiction for the sole purpose of determining the amount which each of the Local 70 detailed members is entitled to receive should the parties be unable to agree upon the amount owed each employee.

By: 
Sharon K. Imes, Arbitrator

SKI
January 16, 2013

¹³ The September date is subject to change based upon the parties agreeing when the detail ended. During the hearing, the City said it would stipulate that the detailed ended on September 9 while the Union took the position that the detailed ended either September 16 or 23.