

**IN RE ARBITRATION BETWEEN:**

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**CITY OF ROCHESTER, MN**

**and**

**INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 49**

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**DECISION AND AWARD OF ARBITRATOR**

**BMS CASE # 13-PA-0152**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**April 23, 2013**

IN RE ARBITRATION BETWEEN:

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City of Rochester, MN

and

DECISION AND AWARD OF ARBITRATOR

BMS 13-PA-0152

Part time/seasonal employee Grievance

IUOE, Local #49.

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**APPEARANCES:**

**FOR THE CITY:**

Pam Galanter, Attorney for the City  
Frank Madden, Attorney for the City  
Linda Hillenbrand, HR Director  
Ron Bastian, Park and Rec. Director

**FOR THE UNION:**

M. William O'Brien, Attorney for the union  
Tim Louris, Attorney for the union  
Steve Piper, union Steward  
Eric O'Gary, union Steward  
Gene Grover, Business Agent

**PRELIMINARY STATEMENT**

A hearing in the above matter was held on February 12, 2013 at the Rochester City Offices. The parties agreed that the case is to be bifurcated in the event the arbitrator finds that there was a violation of the CBA in this matter and that the issue of any remedy will be heard later. The parties presented oral and documentary evidence at that time. The parties submitted post-hearing briefs dated March 25, 2013 at which point the record was closed.

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement dated July 6, 2010 through July 5, 2012. Article 4 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Bureau of Mediation Services. At the hearing the parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

**ISSUES PRESENTED**

The union stated the issue as follows: Whether the employer violated the parties' collective bargaining agreement by failing to pay the wages and/or benefits to bargaining unit employees that the CBA requires?

The City stated the issues as follows: Is the grievance barred on the basis of the union's acquiescence to the past practice of the parties? Does the City's employment of temporary and seasonal employees violate Article 28, Limited Appointment, or any other provision of the collective bargaining agreement?

The issues determined by the arbitrator are as follows: Did the City violate the parties' collective bargaining agreement, CBA, when it failed to pay the wage rates in the CBA for bargaining unit employees to the seasonal and temporary employees under the facts of this case? If so, what shall the remedy be?

### **RELEVANT CONTRACT LANGUAGE**

#### **ARTICLE 1-PURPOSE**

The purpose of this Agreement is to [...] establish rates of pay, hours of work, and other conditions of employment [.]

#### **ARTICLE 2 - RECOGNITION**

The City, through the Park Board, recognizes the union as the exclusive representative for all employees in Addendum A of the Parks and Recreation Department except supervisory and confidential employees, secretarial-clerical employees, and part-time and seasonal employees defined by Minn. Stats. § 179A.03, Subd. 14.

#### **ARTICLE 14 – WAIVER OF BARGAINING**

B. Both parties fully recognize and acknowledge the terms and conditions of the Public Employment Labor Relations Act and that upon claim of violation thereof, either party may invoke the provision of the grievance procedure herein set forth.

#### **ARTICLE – 27 - COMPENSATION**

A. New hires normally start at ninety percent (90%) of the hourly rate. After six (6) months, ninety-five percent (95%) of the hourly rate is paid and after one (1) year the full hourly rate is paid.

#### **ARTICLE 28 – LIMITED APPOINTMENT**

For the purpose of this Agreement, employees hired on a limited appointment working up to eight hundred (800) hours of any year shall be excluded from benefit provisions of this Agreement. Said employees shall not be eligible for insurance, vacation, sick leave, holidays, and other benefit provisions contained in this Agreement.

## **ADDENDUM A-HOURLY PAY RATES**

<b>Position</b>	<b><u>Hourly Rate</u></b>
Custodian	\$21.07
Head Custodian	\$22.07
Custodian/Operator	\$22.07
Equipment Op I (Park/Forestry/Golf)	\$23.02
Equipment Op II (Park/Forestry/Golf)	\$23.57
Equipment Op II (Back Hoe)	\$23.93
Crew Chief	\$24.35
Building Maintenance Worker	\$24.35
Utility Maintenance Worker	\$24.35
Tree Trimmer	\$24.86
Equipment Op (Tree Trimmer)	\$24.86
Utility Maintenance Worker II	\$24.86
Golf Course Superintendent	\$24.86
Mechanic	\$25.40
Building Maintenance Worker III	\$25.45
Crew Chief II/Tree Trimmer	\$25.72

### **PARTIES' POSITIONS**

#### **UNION'S POSITION**

The union took the position that the City has violated the contract when it failed to pay the wage rates for any such "seasonal" employees who have worked a sufficient number of hours to qualify as public employees within the meaning of PELRA and who are therefore entitled to the wage rates set forth for the positions into which they were hired pursuant to the wage schedule in the CBA.

In support of this position, the union made the following contentions:

1. The union acknowledged that this matter has been bifurcated into a liability portion to determine if the City has violated the CBA by failing to pay certain designated wages to employees whom the union contends worked enough hours to qualify as "public employees" under PELRA and who are, according to the union, thus entitled to the contract wage rates for the positions they hold as set forth above in the wage schedule. The union noted that the only issue to be resolved by the arbitrator at this stage of the proceeding is whether the City violated the contract by failing to pay seasonal bargaining unit employees wages and benefits set forth in the contract.

2. The union focused on five classifications set forth in the CBA. These were Laborers, Tree Trimmers, Custodians, Supervisors and Ice Arena Supervisors. The union further noted that the City admitted at the hearing (after a long period when it did not do so) that the affected employees involved in this matter perform bargaining unit work as Laborers, Tree Trimmers, Custodians, Supervisors, and Ice Arena Supervisors.

3. The union noted that the City also admitted that it has not paid those employees the wages and benefits required by the collective bargaining agreement. The union asserted as well as that the admission that these employee perform bargaining unit work by definition means that they are not supervisors within the meaning of PELRA and as such, the union asserted, if they worked the requisite number of hours to be considered “public employees” under PELRA they are entitled to the contract wage rates set forth in the CBA.

The union asserted most strenuously that it is required to and has negotiated for all employees’ wage rates who perform bargaining unit work. This is set forth in Article I, which requires the parties to establish rates of pay, and in PELRA which defines “terms and conditions of employment,” which are mandatory subjects of bargaining, as “compensation.” The union cited both provisions of PELRA as well as case law in support of this proposition, See, *Lipka v. Minnesota School Employee Ass’n*, 537 N.W.2d 624, 630 (Minn. Ct. App. 1995).

4. The union further asserted that it has never waived that right nor acquiesced to anything and the mere fact that the City got away with it for years does not constitute a past practice to that effect. The union vehemently maintained that it never agreed to allow the City to unilaterally establish wage rates of its members and that for the City to attempt to do so is at odds with several CBA provisions, including the CBA's recognition clause.

5. The union relied both on the provisions set forth above in the CBA as well as PELRA in support of its position in this matter. The union noted that the grievance procedure allows the processing of any dispute over the interpretation or application of the CBA and that here is also the provision of Article 14(B) that allows the union to process violations of PELRA as grievances.

6. The union also countered the claim that Article 28 somehow allows the City's actions to pay the seasonal and temporary workers who have worked enough hours to qualify as public employees a lesser wage rate than that called for in the CBA. The union pointed to the specific provisions of that language and noted that it specifically provides that "employees hired on a limited appointment working up to eight hundred (800) hours of any year shall be excluded from benefit provisions of this Agreement. Said employees shall not be eligible for insurance, vacation, sick leave, holidays, and other benefit provisions contained in this Agreement." Nowhere does that language provide for a lower wage rate and nowhere does it allow the City to pay seasonal workers who work more than the requisite number of days/hours to be paid less than the CBA wage rates.

7. The union argues that this provision clearly allows the City to exempt such limited appointment employees, which it argued appears to be specifically targeted to the seasonal and temporary employees, from *benefits* under the CBA. It does not however allow the City or the Park Board to unilaterally set *wage* rates for employees who fall under the CBA even though it may "consider" them to be merely seasonal and temporary." The union argued further that if the parties had intended for these "limited appointment" employees to have a different wage rate than what is set forth in the CBA, they would have done so. It could also simply have stated that until the limited appointment employees worked 800 hours they would not be entitled to any contractual benefits, instead of spelling out a specific list. They did not. Thus, the union asserted, that the language is clear and unambiguous and must be applied according to its terms.

8. The union argued in the alternative that even if the arbitrator were to somehow find that the provisions of Article 28 were ambiguous and that there is some basis for adding the term “wages” to it, the bargaining history does not pass the “common sense” test. The union pointed to a single notation on one of the employer’s witnesses bargaining notes that “800 hours--do we need to address the issue of wages for seasonal ee’s - they won't be paid union wages until after 800 hours.” The union asserted that this is not only unsubstantiated and that there was no evidence that the union agreed to this but also it bolsters the union’s case. The fact that the parties discussed wages yet did not include it in the language evinces an intent to *exclude* wages from the purview of Article 28, not include it. The union asserted that the City is simply attempting to gain in arbitration what it was not able to gain through negotiation.

9. The union also pointed to negotiation notes, also from the City’s negotiators that directly conflicts with the argument put forth by the City that Article 28 was intended to apply to something other than benefits. Those notes in a handwritten entry made directly by the wording of Article 28 provides as follows: "Negotiating for unit benefits *only*- not exclusion in the K-not changing the recognition." See Page 5 of City Exhibit 2.

10. The union further noted that it was only after an exhaustive amount of research plowing through many boxes of paper records that it discovered that there were in fact many seasonal and temporary workers who were working more than the required number of days and/or hours under PELRA to be considered public employees within the meaning of the statute. The union noted that the City’s records were not indexed or referenced that way which thus required a tedious manual review of all the records to determine that this was the case. The union further noted that despite the City’s electronic records, nowhere is there an entry indicating the number of days worked, for purposes of determining the 67-day rule under PELRA.

11. The union also maintained that there are may even be seasonal and temporary workers who have worked more than 800 hours yet who were not paid the contractually mandated benefits either. There was no actual evidence of that on this record (given the bifurcated nature of this case) and the union seeks a declaratory ruling that the City violated the CBA in the event there are employees who performed bargaining unit work and who worked more than 800 hours.

12. The union thus argued that it never even knew of the potential or actual violation of the CBA until recently. It further asserted that several of the essential elements of a past practice (as the City asserts here) are mutuality and acceptability. These require knowledge by the other party that practice is happening and that there must also be informed consent or acquiescence by that party for such a practice to be binding. The union of course argued that no such knowledge, consent, mutual agreement or acceptance ever occurred here and that once the union discovered the violation it acted immediately to file this grievance.

13. The union also asserted that a past practice should not be allowed to change or amend clear contractual language, especially where there is such strong evidence of a contractual intent only to exempt the seasonal and temporary workers from benefits but not from contractual wages. The union cited a litany of prior cases of this proposition and asserted that the intent of the parties should not be undermined or altered by arbitral fiat in this situation.

14. Finally, the union noted that it is clear that while it was agreed that the affected employees listed above do perform bargaining unit work, the City hires other seasonal and temporary workers who do not. This fact, according to the union, makes it even clearer that the parties intended something different for workers who do perform bargaining unit work and who do work sufficient numbers of hours or days to meet the definitional requirements of “public employees” under PELRA.

15. The essence of the union's case is that through exhaustive research and due diligence it discovered that there are dozens or more employees who met the definition of public employee and who perform bargaining unit work and must thus be entitled to the CBA wage rates. The language of Article 28 excludes them from benefits until they have worked 800 hours but nowhere does that language exclude them from wages. Finally, there is no binding past practice that helps the City here and no mutual agreement of any kind to waive the contractual rights of the employees.

The union seeks an award sustaining the grievance and for the issuance of a declaratory ruling that the City has violated the agreement by failing to pay the contractual wage rates to the bargaining unit employees in the five positions including Laborer, Tree Trimmer, Custodian, Supervisor, and Ice Arena Supervisor and by failing to apply the benefit provisions of the collective bargaining agreement to employees in these positions who have worked in excess of 800 hours in a calendar year. The union seeks a further order for the parties to reconvene for a hearing on damages and appropriate back pay. In the damages phase, the union will address the appropriate remedy for the violations in this case.

### **CITY'S POSITION**

The City took the position that there was no contractual violation here and that the intent of the language was to exclude seasonal and temporary workers from both benefits and wages. Further that the City has a long standing, well-established and well-known practice of establishing wage rates for these types of employees that results in a binding past practice in its favor. In support of this position the City made the following contentions:

1. The City asserted that for nearly 40 years, if not more, the City has unilaterally established wage rates for seasonal and temporary workers. The City asserted that this fact is so well known that it scarcely needs proof. It has been the longstanding practice to establish these wages rates outside of the collective bargaining process or CBA for these types of workers.

2. The City noted that it operates some 3500 acres of parks and other recreational facilities, 85 miles of paved trails, 100 individual park areas with 81 playgrounds, 15 picnic shelters, one indoor and two outdoor pools, a beach, 36 tennis courts, 34 horseshoe courts, 54 softball/baseball diamonds, 37 football/soccer fields, 15 basketball courts, 2 dog parks, 19 sand volleyball courts, 2 archery ranges, 2 Frisbee golf courses, 2 garden plot sites, 3 groomed cross country ski trails, 9 outdoor hockey rinks and 6 indoor hockey rinks. It also maintains a large number of “major” facilities in and around Rochester. See, union Exhibit 12. Taking care of all of these facilities requires more seasonal workers in the summer and the City has long hired these types of temporary workers to maintain and staff them.

3. The City acknowledged and agreed that seasonal employees are included in the bargaining unit if they meet the PELRA definition of a “public employee.” The City was clear at the hearing that if seasonal employees meet the PELRA definition of a public employee, they are included in the bargaining unit. It further stipulated at the hearing, and again in its brief herein, that that temporary and seasonal employees hired by the City of Rochester Park and Recreation Department into the seasonal classifications at issue in this case, namely, custodian, ice arena supervisor, laborer, supervisor and tree inspector, are included in the Local 49 bargaining unit upon hire, provided that said employees meet the statutory definition of a “public employee” set forth in PELRA, Minn. Stat. 179A.03 (2012).

4. The City reiterated that for more than 40 years the Park Board has established wage rates for these types of workers and that the union and the general public are well aware of the practice of doing so and of the wage rates paid for these seasonal and temporary employees. The City asserted that for the union to assert now that it was unaware of this practice is disingenuous at best.

5. The City also asserted that it is contrary to the negotiated agreement and the bargaining history giving rise to it. The City turned to the negotiations for the latest CBA and asserted that the parties agreed that the wages for seasonal and temporary employees would be specifically excluded from the provisions of the CBA. The City relied on the testimony of the negotiator for this assertion and she testified that it was her understanding that the union knew of the City's desire to exclude these workers from the provisions of the CBA – just as they have been for decades.

6. The City asserted that not only was the union aware of this practice they were also aware that none of the seasonal and temporary workers were paid the contract wage rates. The City asserted that this was a mutual decision to exclude them from the wage rates and that the union is now seeking to gain something as something of a “gift” that it was not able to gain in negotiations.

7. The City acknowledged that seasonal employees are bargaining unit members but that they clearly know what their rates of pay are when they hire on – just as the union does. They are told by their hiring supervisor and their rate of pay is on the pay advice when they receive their paychecks. The rates of pay are also included on the postings for recruitment of seasonal employees; they know what the rates of pay are and make a conscious choice to accept the job under those terms. See, union Exhibit 28. These postings are public and accessible to everyone, including the union.

8. The City also cited case law and arbitral precedent for the proposition that knowledge by employees constitutes constructive, if not actual, knowledge by the union. The City argued that both the employees and the union officials were well aware of the practice by which the Park Board set these wage rates and acquiesced to that for decades. The City cited numerous cases for the proposition that such knowledge is binding on the union and constitutes a past practice.

9. Here the union knew or should have known of the wage rates paid to its own members and to argue now that these employees should be paid the contract wage rates is far too late. The City pointed to correspondence between a former union official and the City that it claimed showed that the union was aware of this issue as far back as 2007 yet nothing was done until January 2012.

10. The City cited the seminal case of *Ramsey County v AFSCME Council 91*, 309 N.W.2d 785, 788 n.3 (Minn. 1981) (citing Mittenthal's article on past practice), for the proposition that if the elements of a past practice are present that practice binds the parties to that conduct. The City asserted that all of the elements, i.e. longevity, clarity/consistency, mutuality and acceptability and a consideration of all the underlying circumstances are present here.

11. The City asserted that such a practice has been held to take precedence even over clear CBA language, see *Ramsey County*, and that such a long standing well accepted and understood practice as here meets all the requisites of that principle. This practice is 40+ years old, everybody knew of it, it never changed, and even the employees were aware of it. The City asserted that on these facts such practice must take precedence over the claim that the union was unaware of it.

12. Further, the City asserted that the parties negotiated over this very issue and that the City even prepared specific language that acknowledged that the seasonal and temporary employees were part of the bargaining unit but would not be entitled to contractual benefits until they worked 800 hours. The City made concessions in exchange for the provision that eventually became Article 28. The City asserted most strenuously that their negotiator had a conversation with the union negotiator and told him that there was a longstanding practice whereby the Park Board set the rates for the seasonal and temporary employees so there was no need to include wages in the terms of Article 28. The City asserted that all parties clearly understood this and that the union negotiator was not at the hearing to refute this clear testimony.

13. The City countered the claim that such evidence should be excluded under the “parol evidence rule” and noted that this rule of construction in general contracts has little application here. Moreover, bargaining history can be crucial in determining contractual intent. Here the intent of the parties was clearly discussed and the union both knew of the City’s interpretation and acquiesced to it. There as certainly no counter proposal made by the union at the negotiations.

14. The City also asserted that the provisions of Article 28 have remained in the CBA since 2008-2010 and were unchanged in the 2011 negotiations. This despite the fact that the union knew that contractual wage rates were not being paid to the seasonal and temporary employees. Had the union desired to change that language it could have attempted to do so in bargaining but did not.

15. The City also raised the concept of laches which bars a party from asserting a claim that it has known about but done nothing about for too long a time. The City asserted that 40 years of consistent practice is well past the time that this union, which was first certified in 1966, should have had to file a grievance. Yet no grievance was filed or other action was taken on this claim until January 2012.

16. The City also relied on the terms of Article 28 set forth above and argued that despite the fact that it does not specifically use the term “wages” it was clearly understood at the bargaining table that no employee would be entitled to either wages rates or the benefits set forth in the contract until they worked 800 hours in a year.

17. The essence of the City’s case is thus that the union knew of this practice for 40 years and should not be allowed to claim it should be changed now. Both bargaining history as well as the parties’ clear practice and understanding should be taken into account here to deny this grievance and obviate the need for further proceedings.

The City seeks an award denying the grievance in its entirety.

## MEMORANDUM AND DISCUSSION

### BACKGROUND:

As noted above, this matter was bifurcated by agreement of the parties; first to determine if there is any liability under the CBA for the use of the seasonal and temporary workers under these facts and in the second phase to determine the actual “damages” or remedy in the event there is a finding that any of the seasonal and temporary employees are entitled to the contract rate of pay.

The underlying facts are straightforward. The City of Rochester maintains an extensive park and recreation department with a number of trails, parks, buildings and other facilities, as listed above. The City has for many years hired seasonal and temporary works to assist in the operation and maintenance of these various facilities, depending on the time of year and season.

These five positions include Laborer, Tree Trimmer, Custodian, Supervisor, and Ice Arena Supervisor. The City stipulated at the hearing that these employees perform bargaining unit work.<sup>1</sup> It was also clear that there are some seasonal and temporary workers hired by the Park and Recreation Department who do not perform bargaining unit work and that they are not the subject of this arbitration. As noted above, since this matter was bifurcated it cannot be determined at this stage of the proceeding which exact employees those are. The parties agreed that the discussion and determination of which employees, if any, may be entitled to the CBA wage rate and which are not will be part of the second phase of this process.

The City contended and the evidence showed that the Park and Recreation Board has hired seasonal and temporary workers for many years and has set the wage rates for them apart from the CBA. The City contended that the union and quite literally everybody in the general public were well aware that the City set these wage rates and that these positions were seasonal and temporary.

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<sup>1</sup> The record reflects that the City had not agreed to this prior to the hearing. The evidence thus showed with this stipulation that the affected seasonal and temporary workers involved in this matter would otherwise be included in the bargaining unit if they meet the definition of “public employees” within the meaning of the CBA and PELRA. The City’s argument however, as discussed further herein is that there is a longstanding and binding practice that exempts these workers from the provisions of the CBA.

The essence of this case however is whether the union knew that the affected employees were in fact working more than the requisite number of days/hours to meet the statutory definition of public employees. The union showed through convincing testimony and evidence that they indeed did *not* know this until it investigated the voluminous records of the seasonal and temporary employees which ultimately gave rise to the instant grievance. Until then it was a mere suspicion.

The evidence showed that there were concerns about this as early as August 2007 and that the former business agent for the IUOE sent a letter to the City that read is relevant part as follows:

This is a follow up letter to our meeting held August 6, 2007. I would like to meet with you in regards to the “part-time seasonal” employee issue. The problem, as Local 49 sees it, pertains to the employees that are working or who are scheduled to work beyond the PELRA exemptions listed in 179A.03, sub. 14, sections e and f. Article 2 – recognition, the current labor Agreement makes reference to this MN statute. The unions position on this issue is; any employee that is doing bargaining unit work and works beyond the 67 working days; or 100 working days and is under the age of 22 and a full time student is, in the union’s opinion, entitled to every provision listed in the current labor agreement. This does include representation of the employee and the employee becoming a member of the Local 49 bargaining unit.” Employer Exhibit 1.

Significantly, this letter, while acknowledging the potential for the issue, did not identify any particular employees whom the union alleged should be included in the unit as asserted in the letter. The evidence also showed that the union did not do its exhaustive investigation until well after this letter was written in order to verify which employees worked more than the 67 days or 100 days as the case may be and who the union alleged should be included in the bargaining unit.

Finally, the evidence showed that the union undertook a very intensive research project to go through the files to determine if indeed there were any employees who in fact, met the statutory definitions of “public employee” under PELRA by working more than the requisite number of days per year, depending on the category, and determined that there were “many dozens” of such employees, to use the words of the union.

While those were not discussed in any detail in this phase of the case, the union contended quite strenuously that there are many such employees who should be entitled to the wages set forth in the CBA. It is against that factual backdrop that the case proceeds. Other salient facts will be discussed as the various assertions and arguments of the parties are analyzed.

### **NEGOTIATION HISTORY**

The City further asserted that the parties had an agreement that the seasonal and temporary employees would not be paid contract wages despite the lack of any specific language in the CBA about that. The argument is that there was a conversation during bargaining and that the assumption made by everyone was that since the Park and Recreation Board had always set those wages they would continue to do so in the future.

As noted above, the union had raised the issue regarding the seasonal and temporary workers in the August 2007 letter. Significantly, the City responded to this letter in negotiations for the next CBA. At the first such meeting, Ms. Hillenbrand proposed a new article entitled “Limited Appointment,” which would have prescribed a time period for the limited appointment of seasonal employees. She also acknowledged at this meeting that seasonal and temporary employees would not be excluded from the bargaining unit, but they would be excluded from the benefit provisions of the CBA. See, employer Exhibit 2. Notes on that same exhibit indicated that “not exclusions in the K” (which the arbitrator took to mean the CBA as the letter “K” is many times used to delineate a contract) and “not changing the recognition.” That proposal also listed several forms of benefits, such as insurance, vacation, sick leave holidays and other benefits provisions” but did not mention wages or salary in any way.

The remainder of the employer's notes were reviewed but revealed nothing that would solidly indicate that there was an agreement in writing to exclude the seasonal and temporary workers from the wage provisions of the CBA. As discussed more below, there was clearly an agreement as reflected in Article 28 to exclude them from certain benefits of the CBA as set forth in that language but there was no such agreement regarding wages.

The noted in employer exhibit 3 showed that there was a discussion about wages and Ms. Hillenbrand's note indicates "800 hours – do we need to address the issue of wages for seasonal ee's – they won't be paid union wages until after 800 hours." The City relies on this note and asserted that this reflects an agreement of some sort that the seasonal and temporary workers would not be paid union contract wages until after 800 hours worked. The difficulty with this argument is twofold.

First, and perhaps most importantly, the language of Article 28 does not say that. In fact, as noted many times herein, it excludes wages from the list of benefits that are specifically excluded until workers reach 800 hours. While notes may reflect one thing, such notes do not carry the weight of actual contract language. While negotiation history can be and is important in the interpretation of ambiguous language it may not be used to add something to a CBA that is frankly just not there.

Second, whether the City understood the provisions of the CBA to exclude wages is not as important as whether the union understood that too from the context of the negotiations. Parties' mental processes are not relevant here. What somebody privately intended is not at all germane. What is relevant, where it exists, is the outward manifestation by that party of the meaning of the language. Or, as Elkouri notes, "where the parties have attached different meanings to an agreement ... it is interpreted in accordance with the meaning attached by one party if at the time the agreement was made that party did not know or had no reason to know of any different meaning attached by the other, and the other knew, or had reason to know that the meaning attached by the first party." Elkouri and Elkouri, *How Arbitration Works*, BNA 6<sup>th</sup> Ed. at page 432.

Here the evidence did not establish that the union was made to understand this even though the City's negotiator might have. There was insufficient evidence that the union agreed that the seasonal and temporary workers would not be paid union wages until 800 hours. Indeed, if one reads this in the context of the August 6, 2007 letter from Mr. Clayton, employer Exhibit 1, a cogent claim can be made that the union specifically did not agree to this. Even though there may well have been a discussion about wages, since the parties raised the issue, the language of Article 28 does not mention "wages" at all. The union claimed that despite the City's desire to exclude wages; those were not excluded as part of the negotiation process and the language that was negotiated into the CBA supports that claim. Obviously, the most persuasive evidence of contractual intent is the language the parties chose to include – or exclude as the case may be – from the contract they themselves negotiated and signed.

Third, it has long been held as a matter of contract interpretation that expressing a specific list of matters excluded from the CBA's protections excludes anything not on that list. This is of course the "expressio unius est exclusio" rule. Elkouri references this as well and notes that "... contracts that specify certain exceptions imply that there are no other exceptions, and those that expressly include some guarantees in an agreement are thought to exclude other guarantees." See Elkouri, 6<sup>th</sup> Ed at 468.

Here the application of this time honored interpretive rule is apparent. The language of Article 28 specifically sets forth the benefits excluded until one works 800 hours. Despite a specific list of matters to which employees working less than 800 hours are not entitled, the language excludes wages. The implication from the clear language is that wages were not intended to be subject to this Article.

The union's claim is that the clear language of the recognition clause coupled with the provisions of PELRA, govern this result and that any employee who performed bargaining unit work and who met the definition of PELRA is entitled to the protections of the CBA, including the wage provisions. While the parties excluded certain benefits from those "limited appointment" workers, as set forth in Article 28, they did not exclude them from wages. Thus, the clear implication from the recognition clause and the other provisions of the CBA support the union's claims.

Conversely, the contract negotiation history did not support the City's assertions here despite Ms. Hillenbrand's testimony, what governs the bargaining history is frankly the bargain – i.e. the language itself. The question next is whether there was a binding past practice that subverted the contractual language and mandated that the seasonal and temporary workers be excluded from the provision of the CBA even though some of them may have met the statutory requirements for inclusion in the bargaining unit under PELRA. On this record, it did not.

### **PAST PRACTICE**

The other prong of the City's claims here is that there has been a longstanding and now binding past practice which allows the Park Board to set the wages of the temporary and seasonal workers without regard to the wage structure set forth in the CBA. The City asserted that this practice has been in place for literally decades,; perhaps as many as 40 or 50 years, and that the union and the general public, including those accepting the seasonal jobs, know this and accept it as part of the "deal" in taking such employment. Some discussion of how past practice works and how it applies is necessary.

There is always considerable argument in a case involving past practice as to whether a practice can be used at all to redefine clear contractual terms. There is no definitive answer to this question. Some arbitrators disallow past practice in the face of clear and unambiguous contract language while others will find that strong evidence of a binding past practice, if it meets the tests discussed below, can be used to determine intent even in the face of clear contract language.

Perhaps the best-known case in Minnesota was *Ramsey County v AFSCME*, 309 N.W.2d 785 (Minn. 1981). There the arbitrator found that the parties' practice with respect to vacation accrual rates differed from the clear language of the contract. The matter arose when it was discovered that employees had for years been receiving vacation accruals and payments upon their departure from the County that were very different from what the clear language of the contract indicated.

The Supreme Court held in *Ramsey County* as follows:

“past practice has been defined as a ‘prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.’ Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. 709 N.W.2d at 788, n. 3 (Citing from Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy* 30 (S. Pollard ed. 1961).

Thus, the essential feature of any award, whether it is derived from reliance on past practice or not, is whether it “draws its essence from the labor agreement.” See, 709 N.W.2d at 790-91. It appears thus pretty clear that in Minnesota at least, it is well settled that custom and practice of the parties may be used to provide interpretation of existing language or it may be used to establish that the practice is binding even in the face of contrary and clear contract language, as in *Ramsey County*.

It should be noted however, that there is a reluctance of many arbitrators to overturn or alter what appears to be clear contract language. Not all arbitrators are so quick to allow evidence of past practice much less to use it to overturn clear contract language to the contrary. Elkouri, cites to Arbitrator Whitley McCoy as follows:

“ ... caution must be exercised in reading into contracts implied terms lest the arbitrators start remaking the contracts which the parties have themselves made. The mere failure of a Company over a long period of time, to exercise a legitimate function of management, is not a surrender of the right to start exercising such right. ... Mere non-use of a right does not entail the loss of it. See Elkouri at 635, citing to *Esso Standard Oil*, 16 LA 73 (McCoy 1951).

The eminent arbitrator Harry Shulman has also observed the need for caution as well in using past practice for more than it was intended as follows:

“There are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment to the future. Such practices are merely present ways, not prescribed ways, of doing things. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion.” Elkouri at p. 636 citing to *Ford Motor Co.*, 19 LA 237, 241 (1952).

At the end of the day all of the elements must be present in order for there to be a past practice.<sup>2</sup> As Professor Mittenthal posited, mutuality is an essential element of a past practice. Mutuality implies that there must be a mutual agreement as to the practice. That entails knowledge of the underlying practice and of the underlying circumstances giving rise to the practice itself.

Here that requires that the union knew of all of the essential facts of the practice in order to make it binding. The evidence showed that while the union knew that the Park Board set the wages and while it may have suspected there were seasonal and temporary employees who worked more than the requisite number of hours to be considered public employees under PELRA they did not know that and had no clear evidence that was the case. Even the August 2007 letter referenced above did not indicate any specific employees whom the union alleged should be entitled to contract wages. Thus, the essential element of mutuality is missing here.

Finally, and perhaps quite crucially, a past practice, even if it does exist, may well be useful to amend contract language – even potentially clear contract language under *Ramsey County*, it cannot amend state statute. It is axiomatic that the provisions of a labor agreement cannot be in conflict with state law.<sup>3</sup> PELRA makes it clear that if an employee meets the requirements under 179A.03 they are public employees. Here because of the stipulation that the affected classifications set forth above, are in the bargaining unit, that by definition means that they are entitled to contract wages if they met that statutory definition. The Recognition Clause also makes it clear that all “employees” in Addendum A of the CBA are represented by the union and therefore entitled to the protections and benefits of the CBA unless there is a specific exclusion in the CBA itself.

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<sup>2</sup> It should also be mentioned that the question of whether there has been a “practice” is not the determinative factor in this analysis. The question is whether there is a *binding* past practice that compels a finding that there is a required response to a recurring set of circumstances that binds the parties to a certain course of action. For this to be the case the elements set forth in the Mittenthal article and judicially accepted in the *Ramsey County* decision must be present. If they are not then the essential elements of a binding past practice may not be present and the party asserting it may well not have sufficient evidentiary support for its claim to such a past practice.

<sup>3</sup> It is also clear that the terms of the parties’ agreement allow alleged violations of PELRA to be subject to the grievance procedure. See Article 14(B) set forth above. While that alone does not govern this result it is clear that the provisions of the CBA are subject to State law. See, e.g. Article 23, Savings Clause.

Here, as discussed above, the provisions of Article 28 do not exclude these employees from the wage provisions of the CBA.

The last argument raised here is that the union's claim should be barred by the doctrine of laches. Essentially the argument is that the union has sat on its hands for decades and should not be allowed to raise this claim now. Even if one assumes that the letter of 2007 is the first such notice of the possibility of this claim, the union still waited until 2012 to file a grievance.

First, it is somewhat questionable if an equitable doctrine such as laches has any application in labor relations, which is based on the terms of a contract. Elkouri makes passing reference to laches but cites but one example and states that "laches may apply to overturn specific contract language where procedural timelines are not followed." Elkouri, 6<sup>th</sup> Ed at P. 564.

The notion of laches, even if it does apply here, must be based on knowledge of a right that is not asserted for an unreasonable period of time. Here the facts showed that the union was not aware of which employees, if any, who were potentially working more than the requisite number of days under PELRA to be considered public employees until it conducted the investigation that gave rise to this grievance. Under these circumstances, laches would not apply to bar the union's action. Laches – has little application in labor relations.<sup>4</sup>

Accordingly, the grievance is sustained as follows: any employee(s) in the affected classifications set forth above and who meet the definition of "public employee" under PELRA are covered by the terms of the CBA, including the wage provisions, once they have met that statutory definition and are then entitled to the appropriate wages set forth in the CBA for the time worked beyond the point at which they met the statutory definition, as the case may be.

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<sup>4</sup> Elkouri further notes as follows: "Mere non-use of a right does not entail a loss of it." Elkouri and Elkouri, *How Arbitration Works*, 5<sup>th</sup> Ed. at P. 635. Thus while the union may have had anecdotal evidence of a possible violation they had no actual knowledge of it and could not have asserted this claim until the investigation had been completed. It was also shown that the City did not have this information readily available and required the union to go through the records in order to determine if a violation occurred. While there was no evidence that the City attempted to hide this or acted in bad faith, the evidence showed that they did not keep track of which such employees were working past the requisite periods to be considered public employees under PELRA. Here the facts are clear that those who did are entitled to the wage rates set forth in the CBA after they met that definition.

At this point, since this is the initial phase of this matter, it cannot be determined which employees may be entitled to the wage provisions of the CBA or in what amounts. That evidence will need to be developed at the next stage of this case.

As a final matter, it appeared that the affected employees would not have been entitled to the CBA wage parties until they reached the PELRA thresholds and then for those days/hours in excess of the statutory minimums. The union also raised the claim that there may be employees covered by the provisions of 179A.03, subd. 14 (b)(2). At this point there was no evidence on this but each party can certainly provide evidence on the question or whether there are employees who may be entitled to the protections of the CBA under that provision of law at the second phase of this matter.

The matter will thus proceed to a hearing on the “damages” phase of this to determine the actual employees who may be impacted by this award and then by how much/in what amount.

### **AWARD**

The grievance is **SUSTAINED** as set forth above.

Dated: April 23, 2013

City of Rochester and IUOE #49 award – Part time grievance .doc

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Jeffrey W. Jacobs, arbitrator