

**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**

**August 26, 2013**

IN RE ARBITRATION BETWEEN:

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City of Rochester, MN

and

IUOE, Local #49.

DECISION AND AWARD OF ARBITRATOR

BMS 13-PA-0152

Part time/seasonal employee Grievance - Damages phase

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**APPEARANCES:**

**FOR THE CITY:**

Pam Galanter, 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  
Steve Piper, union Steward  
Eric O'Gary, union Steward  
Gene Grover, Business Agent

**PRELIMINARY STATEMENT**

The parties agreed to bifurcate the hearing on the questions of liability and damages. An award was rendered on the liability issue on April 24, 2013. The second, damages phase, hearing in the above matter was held on June 12, 2013 at the Rochester City Offices. The parties presented oral and documentary evidence at that time. The parties submitted post-hearing briefs dated August 1, 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 parties had differing statements of the issues. The Union asserted that the issue now is, "which temporary/seasonal employees hired between 2010 and the present have been impacted by the city's violation, and in what amount is the city liable to those employees?"

The city set the issue as “what is the effective date of any award of back pay to part time and temporary/seasonal employees who meet the PELRA definition of public employee? And “what wages are due temporary/seasonal employees who meet the PELRA definition of public employee?”

These issues, while similar contain several sub-issues in the context of this case. The issues determined by the arbitrator are as follows:

What is the effective date of any back pay award to temporary/seasonal workers who meet the definition under PELRA of a “public employee”?

What is the effect of Minn. Stat. 179A.03 subd. 14(b)(2) on the determination of back pay pursuant to PELRA’s “67-day rule” in this matter?

Did the city violate the CBA when it designated certain employees as part-time employees under PELRA? If so what shall the remedy be?

Has the City met its burden to show that certain temporary/seasonal workers were appropriately designated as “students” under PELRA and thus subject to the provisions of 179A.03, subd 14 (a)6(ii)? If not what shall the remedy be?

Whether there are employees entitled to fringe benefits pursuant to article 28 of the CBA and if so in what amount?

### **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. Stat. § 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

**RELEVANT STATUTORY LANGUAGE**

**PELRA - 179A.03 DEFINITIONS**

**Subd. 14. Public employee or employee.**

(a) “Public employee” or “employee” means any person appointed or employed by a public employer except: \*\*\*

Subd. (6) employees whose positions are basically temporary or seasonal in character and: (i) are not for more than 67 working days in any calendar year; or (ii) are not for more than 100 working days in any calendar year and the employees are under the age of 22, are full-time students enrolled in a nonprofit or public educational institution prior to being hired by the employer, and have indicated, either in an application for employment or by being enrolled at an educational institution for the next academic year or term, an intention to continue as students during or after their temporary employment;

(b) The following individuals are public employees regardless of the exclusions of paragraph (a), clauses (5) and (6):

(2) an employee hired for a position under paragraph (a), clause (6), item (i), if that same position has already been filled under paragraph (a), clause (6), item (i), in the same calendar year and the cumulative number of days worked in that same position by all employees exceeds 67 calendar days in that year. For the purpose of this paragraph, “same position” includes a substantially equivalent position if it is not the same position solely due to a change in the classification or title of the position;

## **541.07 TWO OR THREE-YEAR LIMITATIONS.**

Except where the Uniform Commercial Code, this section, section 541.05, 541.073, 541.076, or 604.205 otherwise prescribes, the following actions shall be commenced within two years:

(5) for the recovery of wages or overtime or damages, fees, or penalties accruing under any federal or state law respecting the payment of wages or overtime or damages, fees, or penalties except, that if the employer fails to submit payroll records by a specified date upon request of the Department of Labor and Industry or if the nonpayment is willful and not the result of mistake or inadvertence, the limitation is three years. (The term "wages" means all remuneration for services or employment, including commissions and bonuses and the cash value of all remuneration in any medium other than cash, where the relationship of master and servant exists and the term "damages" means single, double, or treble damages, accorded by any statutory cause of action whatsoever and whether or not the relationship of master and servant exists);

### **PARTIES' POSITIONS**

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

The union took the position that the City owes back pay at the union scale rates to various city temporary/seasonal employees pursuant to the initial ruling of the arbitrator in this matter on April 24, 2013. In support of this position, the union made the following contentions:

1. The union asserted that there is no dispute about the classifications at issue in this matter: Custodians, Supervisors, Tree Inspector, Ice Arena Supervisor and Laborer. The union noted however that this case is really about the last three of those, See union Brief at page 7.

2. The union also noted that the data on which their case is based comes from the City and that the City therefore has the burden of proving that the affected employees met the definition of temporary/seasonal workers under PELRA and were thus exempt from the provisions of the CBA until certain statutory thresholds were met.

3. THE APPLICATION OF 179A.03 Subd 14(b)(2): The union asserted most strenuously that the exemption of non-students under Minn. Stat. 179A.03 (a)(6) must be read in conjunction with the provisions of Subd (b)(2) and that the clause that reads "in the same calendar year and the cumulative number of days worked in that same position by all employees exceeds 67 calendar days in that year" means that all non-student temporary/seasonal workers are public employees if they work in a position where the cumulative number of days worked by *all employees* exceeds 67 days.

4. The union asserted that this can only mean that the clause applies to the position, not to the individual employee, and that once the total number of days worked in any given position exceeds 67 days *by all employees working in that position* all such employees are considered public employees entitled to the benefits of the CBA. Thus, the days must be counted in the aggregate by all employees working in that same position. To read the language as the city suggests would render it meaningless and allow the city to hire people for 67 days in the same position in serial fashion, thwarting the obvious intent to include such workers after 67 days of employment in the same position.

5. The union asserted that the “positions” in this case are set forth above and that the employees involved in this matter were assigned and worked in those positions for far more than 67 days in the aggregate. The union pointed to the legislative history and the comments made by various legislators who were directly involved in passage of the amendments that led to this provision and argued that the intent of the law, as well as its stated language, was to require that non-student employees working in the same position be exempted from the provisions of a CBA but that after all such employees had worked 67 days in a calendar year, those employees would thus be considered “public employees” under PELRA. The union also noted that this case is one of first impression and that apparently no one has yet challenged the calculation of how the 67-day rule works when compared to the clear provision of Subd. 14(b)(2).

6. The operative language was enacted in 1991. However the original statutory language provided that temporary/seasonal workers did not attain public employee status until after they had worked 100 days individually. When that original language was changed in 1983 it drew a distinction between student and non-students but significantly did not include the language found in the current version of the law. The union asserted that the 1991 amendments demonstrates a clear legislative intent (despite there being no legislative history addressing directly on this question) to prevent employers from abusing the temporary/seasonal language by hiring workers, calling them seasonal but in fact hiring them in a serial fashion.

7. The union argued that these provisions were specifically intended to prevent a “revolving door” of different workers being hired in the same position for 67 days, thus avoiding the CBA. The union asserted that these amendments show that the “same position” language was intended to apply to the positions held by all employees working in that same job – not just the exact same position, not each individual employee as asserted by the city.

8. The union then provided a calculation of how the damages would be calculated given its position with regard to the 67-day rule here. The union reduced the total liability for each position at issue here by a ratio that allows the reduction in damages to be borne equally by all employees in the position, rather than arbitrarily applying the exemption to an individual employees. The calculation is thus to take the total number of days worked and subtract 67 days and divide that by the total number of days worked in that calculation. See union exhibit 9, providing examples of how this calculation works for various categories of employees. See also union exhibit 5, which provides a damage summary of how the calculation works for the entire group of affected employees.

9. The union countered the city’s interpretation of 179A.03 subd. 14 6(b) and asserted that it fails to give effect to the language requiring that the 67 days be counted among all employees “in the same position.” The union asserted that the city simply ignores the clear provisions of this language and would effectively limit the 67-day rule to each individual employee, even though multiple employees may be working in the “same position.” Here, of course, many employees worked in the same position in each of the classifications set forth above and the union asserted that the clear language requires that once there has been an aggregate total of 67 days worked in each of those categories by all the employees working in that same position, the provisions of the CBA apply.

10. The union also asserted that the city has the burden of proof on the question of whether any particular employee is exempt and cited *Kramer v Westonka Schools*, 1994 WL 929547 (Minn. App. 1994) for the proposition that the public employer must show that the employee is not a public employee. While that case arose in the context of a Veteran's Preference discharge matter, the union argued that the analysis applies here equally and requires that the city show that these employees are not public employees. In addition, the union noted prior arbitrations involving the question of seasonal employees but asserted that neither of these cases involved the application of 179A.03 subd 14(b)(2).

11. STUDENT EXEMPTION: The union again asserted that the City has the burden of showing that any seasonal workers who the city claims are exempt under the 100-day rule for students and that it failed to meet that burden in this case. Citing *NLRB v Kentucky River Community Care, Inc.*, 532 US 706, 711 (2001).<sup>1</sup>

12. The union cited the relevant provisions of 179A.03 subd. 14 Subd. (6) as follows: "employees whose positions are basically temporary or seasonal in character and: ... (ii) are not for more than 100 working days in any calendar year and the employees are under the age of 22, are full-time students enrolled in a nonprofit or public educational institution prior to being hired by the employer, and have indicated, either in an application for employment or by being enrolled at an educational institution for the next academic year or term, an intention to continue as students during or after their temporary employment" The union noted that there are several required prongs to the 100 day student exemption. First, the employer must establish that any such students are enrolled in a nonprofit or public educational institution prior to their employment. Second the public employer must establish the employee indicated at the time they are hired an intention to continue as a student either during or after their employment.

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<sup>1</sup> The union cited a federal case but noted the policy that where PELRA is silent, the Minnesota Courts will follow federal precedent regarding PELRA's application. The *Kentucky River* case involved the definition of "supervisor" under the NLRA but the union asserted that the employer bears the burden of proving any exemption from the provisions of an applicable CBA.

13. The union asserted that the use of the words “have indicated” in the context of the language means that the student must have indicated *at the time of hire* their enrollment and the intent to continue as a student. Further, the use of the word “intention” supports the claim that the employee must have already made the decision to enroll in the appropriate educational institution. Here though the city’s applications do not have these required statements and thus do not meet the requirements of the statute to apply the 10-day exemption.

14. There is a question on the employment application that merely asks, “Are you a full time student?” This falls far short of the required information. First there is no statement that the employee is enrolled in a non-profit or public educational institution, as opposed to a for profit educational institute. Second, it does not provide the required intention to continue as a full time student either during or after the employment.

15. Further, the city’s vain attempt to bring in evidence later is not only too little too late but evidences a tacit if not overt acknowledgement by the city that they in fact did not do it correctly the first time and did not meet the statutory requirements for exempting these employees under the 100-day rule.

16. Affidavit evidence is highly suspect not only because it is not subject to cross examination but also because there is little reliability in terms of who took them, what was said to the students when asked for them and whether anything was offered to them for their signatures. The city’s witness was not even the person who spoke to the students in order to get these affidavits. Thus, the only evidence the arbitrator should consider is the applications themselves. Any attempt to bring in evidence after that, especially after the hearing date, must be rejected and not considered at all. Since the city bears the burden on this issue, the evidence simply does not support the student exemptions for any of the employees the city claims were students.

17. **PART TIME EMPLOYEES:** The union asserted that the city has failed to provide adequate evidence that the so-called part-time workers were in fact really that and asserted that these employees should also be categorized as temporary/seasonal workers subject to the same analysis set forth above regarding the 67-day rule. In order to be considered part-time an employee must work at least 14 hours per week or 35% of the regular workweek. See 179A.03 subd. 14 (a)(5). Here though the city's evidence consisted of summaries only of the data and did not contain the required information regarding the number of hours worked in the employee's "appropriate unit."

18. The union asserted that data from prior to 2012 is missing entirely (See discussion below regarding the date on which the damages accrue) and that without such evidence the city cannot sustain its burden of showing that these employees were exempt under the part-time provisions of 179A.03.

19. Second, the data from 2012 and 2013 consists only of summaries of the hours worked and does not contain the best evidence of the actual hours. The city has the original data and should have and could have introduced that, yet it failed to do so. See, city exhibits 9 & 16. Thus the arbitrator should reject these documents and accordingly rule that the city has again failed to provide adequate proof of the claimed exemption.

20. **DATE OF BACK PAY AWARD:** The union asserted that the effective date for calculation of back pay is two years prior to the filing of the grievance in this matter, January 31, 2012. The union asserted that the use of external law is appropriate here for at least two reasons. First, this action is akin to a claim for unpaid wages. Minn. Stat. 541.07 provides for a 2-year limitations period for unpaid wage claims. Moreover, the union placed the city on notice well before the filing of the actual grievance in this matter and the city cannot now claim that it was somehow prejudiced by the delay in filing. The city had the information but it was in a large number of boxes in a storage warehouse, thus requiring the union to spend copious amounts of time and effort to cull through these. It was not until January 2012 that sufficient information had been obtained to support this grievance.

21. The CBA contains a specific reference to PELRA under Article 14, which again supports the view that external law should be a guide to determining the limitations period. Moreover, other arbitrators use external law as an aid to interpreting a CBA. In a case arising out of an FLSA claim, the arbitrator awarded damages retroactively for three years prior to the filing of the grievance due to a 3-year limitations period for filing an FLSA action. See, *AFGE Local 801 and Federal Bureau of Prisons, Waseca, Minnesota*, 127 LA 415, FMCS # 07-53583 (Daly 2010). See also, *AFGE and US Border Patrol*, 131 LA 343, 351 (Thompson 2012).

22. Applying that same logic here, because there is a two-year limitation period and because the original award was for recovery of wages that had been improperly paid by the city, the limitations period should be 2 years.

23. Second, as an alternate limitations period, the union offered that even if the two year limitations period is rejected, the arbitrator should allow the back pay to be retroactively applied for 90 days prior to the filing of the grievance. Under PELRA, case law holds that for matters arising under PELRA, such as unfair labor practice, ULP, or DFR matters, the limitations period is 90-days. As noted above, there is specific reference to PELRA in Article 14. See, *Allen v Hennepin County*, 680 N.W.2d Minn. App . 2004). See also, *Oniya v St. Cloud State University*, 655 F. Supp. 948, 967 (D. Minn. 2009).

24. Further, this claim, according to the union, derives from PELRA's definition of public employees and is effectively based on the claim that the employer violated PELRA by failing to recognize the employees who had worked more than 67 days, or 100 days as students as the case may be, in a calendar year.

25. The union asserted too that the grievance was in fact verbally filed on September 30, 2011, even though it was not filed in writing until January 31, 2012. The City has been on notice of the claim since at least that time and the 90 days should run prior to September 30, 2011 (if the arbitrator adopts the 90-day rule and follows both state and federal courts in this regard).

26. BENEFITS ISSUES/800 HOURS WORKED PURSUANT TO ARTICLE 28: The union also asserted that there are a few employees who are entitled to benefits pursuant to Article 28 because they worked the requisite 800 hours as required in that provision for payment of certain fringe benefits. See union exhibits 9 through 12. In 2010 this included employees Leindecker, Redmann, Nienow, Ottman, Yennie and Vatland. In 2011 this included, employees Dunlap, Watson and Yennie. In 2012 this included employees Dunlap and Tator. The union asserted that these employees worked in excess of 800 hours and are thus entitled to benefits pursuant to the Article 28 and the CBA.

27. LOGISTICS OF THE BACK PAY AWARD: Finally, the union raised the issue of how to effectuate the back pay and other payments to the affected employees, some of whom may be difficult or impossible to find. The union asserted that any back pay must be subject to all appropriate deductions for taxes etc. and for union dues where applicable.

The union suggested that the arbitrator determine the exact amounts due each employee and that such amounts be placed in an escrow account accessible by both parties. Further, that the city create a website and a phone number and other contact information for people to inquire regarding this award and that the city share with the union all contact information regarding the affected employees i.e. phone, address and/or e-mail for those intended to receive back pay awards. The union seeks an award requiring that if there are any unpaid funds left that these amounts be sent to the union for dues and that if there is a remainder, the money be directed to a jointly designated charity or other organization designated by the parties.

## **CITY'S POSITION**

The City took the position that the union's calculation of damages is greatly inflated, is based on improper assumptions and interpretation of the applicable law and should be limited to post grievance damages, i.e. after January 31, 2012. The city asserted that its total liability is actually \$57,857.25, see attachment E, which is a revised city exhibit 5 herein. In support of this position the City made the following contentions:

1. DATE OF BACK PAY AWARD: The city argued most strenuously that the date of the award of any back pay must be limited to the date of filing of the grievance. The city took issue with the assertion by the union that this is like a claim for unpaid wages, for which Minn. Stat. 541.07 applies and allows a two-year statute of limitations. The city asserted that this is not a claim for unpaid wages it is a claim that the wages were improperly calculated – which is a very different claim. This claim is based on an alleged violation of the CBA, including the recognition clause and the wage schedule. The city noted that this claim was filed, as it had to be, under the grievance procedure of the CBA and cannot be based on a statutory claim.

2. The city asserted too that the language of Minn. Stat 541.07 applies to actions for the “recovery of wages ... under any federal or state law...” This is not such a case and is brought specifically pursuant to the grievance procedure in the CBA; not pursuant to federal or state law. The city asserted that this crucial distinction distinguishes this case from those cited by the union where arbitrators awarded three years of back pay for violations of the overtime provisions of the FLSA.

3. The city further asserted that the language of Minn. Stat. 541.07 applies to “actions” that must be commenced within two years. An action as defined by the rules are lawsuits commenced in Court for the recovery of unpaid wages. This is not an “action” but is instead a “grievance” filed pursuant to the provisions of a CBA. Thus, the statute by its own terms does not apply to this claim at all. This is subject to and filed pursuant to the grievance procedure of the CBA. It is therefore subject to the rules applicable to the filing of grievances and not subject to language for wage claims brought pursuant to other statutory schemes.<sup>2</sup>

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<sup>2</sup> The city did not address the union’s claim that in the alternative, the back pay should be retroactive 90 days prior to the filing of the grievance since that was apparently raised for the first time in the union’s brief herein. Presumably though the city’s assertion and theory regarding the appropriate date for back pay would apply equally to that theory as well.

4. The city noted that the issue as determined in the liability phase of this proceeding was whether “the city violate[d] the parties’ collective bargaining agreement when it failed to pay the wages rates in the CBA...” Thus the union’s assertion that this is “fundamentally a proceeding under the statute” is entirely misplaced. It is a proceeding under the CBA and thus subject to the grievance procedure in the CBA. Without the provisions of the CBA the affected temporary/seasonal employees would have no claim at all. They were obviously paid wages – the issue was whether they were entitled to the higher wages set forth for bargaining unit members in the CBA.

5. Further, even the union tacitly acknowledged that this is not a statutory proceeding. The union’s statement of the issue in the liability portion was “which of the seasonal/temporary employees were impacted by the city’s *contract* violation and in what amount?” (Emphasis by city in its brief at page 9). Thus even the union acknowledged that this is based on the contract and thus subject to the grievance procedure and to the arbitral principles regarding the calculation of back pay for a contractual violation.

6. The city also noted that while PELRA was used to interpret the provisions of the CBA, - namely the recognition clause and the wage provisions – this case is not based on an alleged violation of PELRA. There is no provision of PELRA that was alleged to have been violated; the question was whether certain employees were entitled to CBA wage rates due to the effect of PELRA on their status as public employees. The city asserted that no provision of PELRA establishes wages for employees.

7. The city cited to commentators and arbitral decisions regarding the effective date of so-called continuing grievances and asserted that the generally accepted, well-established rule is that the effective date for calculation of any back pay in such cases is the date of the filing. See, *IBT #320 and Waseca County*, BMS # 13-PA-0776 (Jacobs 2013) See also *ARA Services*, 97 LA 971 (Donnelly 1991)(arbitrator ruled that an arbitrator cannot change the parties’ method for resolution of a potential or actual grievance before it begins. The arbitrator limited back pay to the date of the filing of the grievance). Here that date is January 31, 2012 and any back pay must be limited to that date.

8. The city also asserted that the fact that there were discussions about this issue going back several years does not change the fact that the grievance was filed on January 31, 2012. Otherwise a simple discussion could lead to unintended consequences in terms of the limitations to be applied to all sorts of grievances. The union's theory on the two-year limitations must thus be rejected.

9. The city also asserted that in any event the arbitrator is without power to award back pay prior to the effective date of the current CBA. Here that date is January 1, 2012. Thus even if the arbitrator determines that there is some retroactive obligation for back pay; that must be limited in any event to January 1, 2012.

10. PART TIME EMPLOYEES: The city asserted that there are part time employees who did not meet the definition of public employees applicable to their employment and who are therefore not entitled to the CBA wages. The city cited the BMS' 6-step test for determining whether an employee has worked 14 hours per week or 35% of the normal workweek. See city brief at page 13. The city asserted that it appropriately excluded part time employees who did not work the requisite number of hours under the BMS test.

11. The city also countered the claim by the union that it was not using the "best evidence" for establishing which employees were appropriately excluded. The records, as acknowledged by the union, are voluminous and to have brought all those records would have been unduly burdensome, expensive and unnecessary. Because there are no electronic records (and none are required) it was simply logistically best to provide summaries of these records. The City asserted that Ms. Hillenbrand testified credibly that the summary of those records showed which employees worked the requisite hours and which did not. See city exhibit 9.

12. Further, the city provided access to all these records to the union. See city exhibit 23. The union could easily have verified the accuracy of these records or provided them if it felt they were necessary. Ms. Hillenbrand wrote to the union and outlined the cost of accessing or copying the records but the union never availed itself of that opportunity. The city asserted that for the union now to assert that the city somehow hid this or failed to produce it under these circumstances is disingenuous at best.

13. The city asserted too that these records showed that only 6 employees are entitled to back pay as part time employees who worked the requisite number of hours to be considered public employees pursuant to 179A.03 subd 14 (a)(5). See city brief at pages 16-17. The union's calculation includes far more employees than that and the city asserted that the arbitrator should include only the 6 employees listed on city exhibit 8 and exclude the rest. The city took issue with several of the union's exhibits and noted that they were incomplete and did not include the actual number of hours worked. The city asserted that these should be rejected in favor of the city's evidence and testimony.

14. THE APPLICATION OF 179A.03 Subd 14(b)(2): The city strenuously disagreed with the union's proposed theory of the application of Minn. Stat 179A.03 Subd. 14(b)(2) and argued that the language and the intent of that law is to allow each individual employee to work up to 67 days before being considered as a public employee under PELRA.

15. The city pointed to the history of the legislation and argued that the law was designed to prevent an employer from hiring employees in serial fashion to subvert the effect of PELRA. It was however enacted to allow an employer to hire seasonal/temporary employees for up to 67 days each without having to pay applicable CBA rates. It prevents a public employer from hiring a person for 67 days and then replacing that [person to do the same job the first one did for 67 days and then replacing that person and so on. It allows a public employer to hire multiple workers performing the same type of work for up 67 days without having to pay applicable CBA wage rates or other benefits.

16. The city asserted that the term “same position” as used in subd. 14 (b)(2) means just what it says – the same position – i.e. the same exact *job* and not the same classification, as the union’s argument suggests. The city provided many examples of seasonal work done by various public employers and argued that if carried to its logical conclusion, the union’s argument would lead to absurdity. Subd. 14(b)(2) was never intended to apply in the manner in which the union suggests.

17. The city cited BMS interpretive decisions that define a “position” as a “group of tasks performed by one person.” Thus, the 67 days is applicable to the individual employee, not to an entire group of employees who may perform similar or even identical work.

18. City exhibit 5 sets for the city's calculation of damages when properly applying the 67-day rule here. The city asserted that it has properly applied the 67-day rule and properly excluded any individual employee who did not work 67 days in a calendar year. That calculation should also include the deduction of certain holiday pay paid in error to several of the affected employees.

19. **STUDENT EMPLOYEES:** The city asserted that it appropriately excluded student workers under the 100-day rule in this instance. The city argued that it confirmed all the necessary elements under PELRA to verify that the employee was a student and that they intended to enroll in an appropriate school either during or after their employment with the city.

20. Even if the arbitrator finds that these elements were lacking, there are only 4 such employees who could arguably be included for back pay in this matter. Those are employees Kunkel, Minske, Powers and Whitney. See city exhibit 8.

21. The city relied on its calculations of the total back pay for all affected employees, i.e. non-student who worked more than 67 days, student who worked more than 100 days and part time employees who worked more than 14 hours per week/or than 35% of the normal work week, and asserted that the total claim is \$57,857.25 (plus applicable FICA and other payments as set forth in Attachment E to the city’s brief herein.) Further, that there were several employees who received holiday pay in error and those erroneous payments be deducted from the pay to any such employee.

22. BENEFITS ISSUES: The city acknowledged that employees who worked more than 800 hours per year are entitled to the fringe benefits set forth in Article 28 of the CBA but further asserted that only 2 employees worked more than that number of hours in 2012. These employees, Dunlap and Tator, were not entitled to benefits when one compares their actual days worked to the benefits they might have been entitled to. Neither would have been entitled to vacation pay since they left within 6 months of their employment. See Article 8 sections A and B of the CBA.

23. Neither of these employees was entitled to holiday pay since they left employment on October 12 and 31 2012 respectively. There were no approved contractually mandated holidays between the time they reached 800 hours and the dates they left employment and thus no holiday pay was ever due. See attachment F.

24. Neither was entitled to medical insurance since both reached 800 hours of employment but both left employment in October 2012. Under Article 12, they would not have been eligible for health insurance until November 1, 2012 – but both were no longer employed at that time.

25. BACK PAY ISSUES: The city asserted that no union dues should be deducted from any of the back pay since the union acknowledged that dues are not deducted from employees until they have been employed for at least a year. None of the affected employees in any category were employed for more than one year. It is thus up to the individual employee's discretion whether to have dues deducted and there was no evidence that any of these employees would have elected to have dues deducted from their paychecks.

26. The city further asserted that the union's suggestion that any unpaid moneys should be given to an appropriate charity is contrary to law and simply cannot be ordered. See Article XII of the Minnesota Constitution. Further, there is no basis or jurisdiction for the process suggested by the union for establishing a fund or escrow account for the issuance of back pay ordered pursuant to this award. In addition, there is no reason or basis to require the city to establish a website or to provide the union with the names or contact information for any of these employees.

27. The city asserted that its HR department can take appropriate steps to calculate the exact amount owed, the appropriate deductions for taxes and PERA benefits if any, take steps to contact the individuals and make the payment. There is nothing more the arbitrator need do in this instance.

28. The sole issue before the arbitrator is the amount of back pay due the affected employees. To do otherwise is to exceed the jurisdiction and stated issue in this matter.

The City seeks an award ordering its calculations of back pay and benefits to be ordered herein and rejecting the union's calculation 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 arbitrator's decision with regard to the liability portion of this matter was rendered on April 24, 2013. The award was 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."

The essence of that ruling was that the city was liable for contractual rates of pay for seasonal and temporary employees if and where those workers worked more than 67 days in a calendar year or where they worked more than 100 days in a calendar year if they were "students" as defined by PELRA.

This is the damages phase of the proceeding to determine which employees are entitled to damages and in what amounts, what is the effective date of the award of back pay, whether any employees are entitled to fringe benefits pursuant to Article 28 of the CBA and how to properly effectuate the payment of any back pay awarded. As noted below, due to the various ruling as – some were in the city’s favor and others were in the union’s it was logistically difficult for the arbitrator to calculate the exact back pay for each individual employee in this case.

The record in this case is extensive but 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 workers 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>3</sup> It was also clear that there are some seasonal/temporary workers hired by the Park and Recreation Department who do not perform bargaining unit work and are not the subject of this arbitration.

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>3</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.

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, subd. 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 whom 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. 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.

## EFFECTIVE DATE OF THE BACK PAY AWARD

It is appropriate to address this question first since the effective date of any such award will greatly impact the analysis of which employees are entitled to back pay and in what amounts. As noted above, the date this grievance was formally filed was January 31, 2012. The union asserted that it was “verbally” filed on September 30, 2011 and further asserted that the issue has been known to the parties since the 2007 letter referenced above. The union further contended that this matter is essentially a statutory case for unpaid wages and that the 2-year statute of limitations applying to such actions should be applied here to allow for back pay damages for two years prior to the date of the filing of the grievance.

This analysis was unpersuasive. While this case involves wages it is not a statutory wage claim. It is a grievance filed under the specific terms of the CBA. Further, Minn. Stat. 54.07 Subd 5 makes specific reference to a claim for “wages or overtime or damages, fees, or penalties accruing under any federal or state law...” The obvious flaw in the union’s argument is that this matter does not arise under federal or state law but rather arises under the CBA. As noted in the liability decision, the essence of the union’s claim is that there was a violation of the recognition clause of the CBA in that some seasonal and temporary workers were working the requisite number of hours to be considered “public employees” under PELRA and as such were entitled to representation by the union and to the wages set forth in the CBA. This was not a claim that arose under a claimed violation of state law.

Moreover, this claim is not one that arises for “unpaid wages” as the union suggests. Wages were clearly paid to these employees. The question was whether they were paid the incorrect amount *based on the application of the CBA* to their work. There was some merit to the city’s claim that without the CBA these employees would have no claim for additional wages at all. Indeed, the question in this matter is whether the affected employees worked the requisite number of hours to be considered public employees. There is though another step to this case that underlies the analysis – are they then to be treated as bargaining unit members pursuant to the CBA.

On balance, the analysis provided by the city was persuasive. The determination of the effective date for any award of back pay or other damages must therefore be considered under the grievance procedure and arbitral precedent interpreting such matters. It is well established and longstanding arbitral precedent that continuing grievances, which typically involve wage claims, may be allowed and decided on the merits even though they are not filed with a certain time following the initial occurrence. Any back pay is limited to the time when the grievance was filed.

Elkouri notes as follows:

“Many arbitrators have held that ‘continuing’ violations of the agreement (as opposed to a single isolated and completed transaction) give rise to ‘continuing’ grievances in the sense that the act complained of may be said to be repeated from day to day, with each day treated as a new ‘occurrence.’” These arbitrators permit the filing of such grievances at any time, *although any back pay would ordinarily accrue only from the date of filing*. For example, where the agreement provided for filing ‘within ten working days of the occurrence.’ It held that where employees were erroneously denied work, each day lost was to be considered an occurrence and that a grievance presented within 100 working days of any such day lost would be timely.” Elkouri and Elkouri, *How Arbitration Works*, 6<sup>th</sup> Ed at page 218-219. (Emphasis added)

The above rule has long been adopted by arbitrators and commentators alike. The union cited no authority for altering this time honored rule with respect to such grievances other than that this should be treated as a statutory claim rather than a contractual one. To adopt the union’s position would undermine that longstanding arbitral rule in the interpretation of CBA and the time limits in grievance procedures.

The union asserted that it took a long time to determine if indeed there were violations of the CBA and if there were in fact seasonal/temporary employees who were working the required hours or days to be considered public employees and that the arbitrator should allow for that here. To be sure, there was a large quantity of evidence for the union to plow through to determine this. However, the union was concerned about this as early as 2007 and could have filed the grievance subject to further investigation much earlier than it did.

Further, there was insufficient evidence to prove that there was a “verbal” grievance filed in September 2011. At best the evidence showed that these conversation were nothing more than the same sorts of concerns that had been raised for years in the past and which had been discussed in contract negotiations. Thus the clear date of filing of the grievance was January 31, 2012. Using the analysis provided by Elkouri and others, the great weight of arbitral precedent and of the evidence in this matter supports the result that the date of filing is the effective date for any award of back pay.<sup>4</sup>

Finally, the union posited the alternate theory that at the very least, the back pay should extend 90 days prior to January 31, 2012, here that would be approximately November 1, 2011. The union's argument was that the CBA specifically references PELRA and allows for violations to be processed through the grievance procedure. By analogy, cases involving violations of PELRA itself or action for the failure of representation, the so-called Duty of Fair Representation, DFR, cases, are subject to a 90-day limitation period.

Considerable thought was given to this. Article 14 B of the CBA provides as follows:

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.

The union asserted that because there is a reference to PELRA in this language there is a basis to award back pay based on the analogy that claims made for violations of PELRA have been interpreted as having a 90-day limitations period. . See, *Allen v Hennepin County*, 680 N.W.2d Minn. App . 2004). See also, *Oniya v St. Cloud State University*, 655 F. Supp. 948, 967 (D. Minn. 2009).

The union asserted that both state and federal courts have imposed a 90-day period for DFR actions and that this should apply here. DFR actions are not based on the CBA however and are a very different category of claim.

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<sup>4</sup> There was also some merit to the city’s assertion that if the Union's argument is correct, every grievance matter involving wages or the allegation of improper payment of wages would go back 2 or even 3 years if the provisions of 541.07 are somehow incorporated by reference into the CBA. This would have a clearly adverse impact on labor relations not only in this city and under this CBA but would set a dangerous precedent throughout the State of Minnesota.

Two clauses are important in this language. First, there is the language that references a “claim of violation” of PELRA. It was not entirely clear whether this clause has been used before but the import is that there must be a claim of a violation of the terms of PELRA. As noted, this case is not about a violation of PELRA but rather a claim of a violation of the CBA in that the city was using seasonal/temporary workers for more than 67/100 days per year as applicable, and not paying them contract wage rates. As the city notes, there is nothing in PELRA that compels a given wage rate.

Second there is specific reference to the “grievance procedure.” The clear import of this language is that the union may assert that there has been a violation of PELRA and may bring that claim pursuant to the grievance procedure in the CBA. However is using that specific reference to the “grievance procedure” strongly implies that the rules applicable to continuing grievances as they apply to the use of a contractual grievance procedure applies and not a statutory based limitation period for other sorts of claims.

PELRA may be used to aid in the interpretation of the CBA and here did indeed provide that very guidance. The union asserted too that this language requires the use of external law and that the use of external law compels the use of the external limitations periods. This argument is misplaced.

External law can be and frequently is used as an interpretive tool to determine contractual intent where there is dispute over the terms of a CBA. However, external law is not typically the basis for a grievance, and was not here. While external law may be used to aid the arbitrator in determining the intent of the parties the grievance remains one that derives from the provisions of the CBA.

As the arbitrator noted in the original decision on liability, “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.” (Emphasis added). Moreover, even though the CBA incorporates potential violations of PELRA, this entire matter is at its very heart, a contractual grievance subject to the grievance procedure in the CBA.

The union cited several cases awarding back pay for violations of the FLSA where the employer had required employees to work overtime without payment at applicable time and one half rates. See, *AFGE Local 801 and Federal Bureau of Prisons, Waseca, Minnesota*, 127 LA 415, FMCS # 07-53583 (Daly 2010). See also, *AFGE and US Border Patrol*, 131 LA 343, 351 (Thompson 2012).

In *AFGE Local 810 and Federal Bureau of Prisons*, the arbitrator was faced with a statutory claim for overtime – the CBA was used only to calculate the amount. Here the claim is based on the grievance procedure and the wage rates paid to employees. Without the CBA these employees would have no claim whereas in *AFGE* the employees would have had the same claim but perhaps could have brought it in court rather than in arbitration. Arbitrator Daly specifically found that there had been a violation of federal law stating as follows: “The Union has fulfilled its burden of proof and shown by a preponderance of the evidence that the Master Agreement, Agency policy and Federal law have been violated.” Slip op at p. 20. Here there was no violation of PELRA, even though PELRA was used to determine which employees were covered by the recognition clause as “public employees.”<sup>5</sup> PELRA was used to support that claim and to aid in the interpretation and application of the CBA.

As noted in the 2007 letter from the union to the city, as well as the contentions made at the original hearing, this case is not based on a violation of PELRA but rather on a violation of the recognition clause of the CBA that “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

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<sup>5</sup> As noted in the original decision, the parties stipulated that these employees were performing bargaining unit work. Thus if they were working the requisite number of hours/days under PELRA they would be considered “public employees” and as such, covered by the terms of the CBA once they reached “public employee “ status.

defined by Minn. Stat. 179A.03, Subd. 14.” Thus this claim derives from the CBA, not from a statutory claim, as in *US Border Patrol* and *US Department of Prisons* cited above.<sup>6</sup>

Thus the 90-day limitations period is not applicable to this case. The *US Border Patrol* case is similarly inapplicable to this matter as well for similar reasons. Accordingly, the union’s contention that the limitation period should run for a period of 90 days prior to the filing of the grievance must be similarly rejected. The back pay awarded pursuant to this award thus runs from the date of the filing of the grievance, January 31, 2012.

#### THE APPLICATION OF 179A.03 Subd 14(b)(2):

This question was the source of two diametrically different readings of the applicable statutory language. The relevant language is cited above but it bears repeating at this juncture for reference purposes and because of the importance of this issue not only to this case but also to all public employers in Minnesota who hire seasonal/temporary workers. The language provides as follows:

(b) The following individuals are public employees regardless of the exclusions of paragraph (a), clauses (5) and (6):

(2) an employee hired for a position under paragraph (a), clause (6), item (i), if that same position has already been filled under paragraph (a), clause (6), item (i), in the same calendar year and the cumulative number of days worked in that same position by all employees exceeds 67 calendar days in that year. For the purpose of this paragraph, “same position” includes a substantially equivalent position if it is not the same position solely due to a change in the classification or title of the position;

The union asserted that the clause in Subd 14(b)(2) must be read, and can only be read, as requiring that once 67 days has been worked by all employees in the “same position,” all such employees working in that position are considered public employees under PELRA. The essence of the union’s claim is that all days worked by all employees working in the same job, in the aggregate, must be counted toward the 67 days and that once the aggregate number of days worked by all such employees equals 67, all such employees are then “public employees” within the meaning of PELRA and entitled to any applicable contractual benefits under a CBA.

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<sup>6</sup> It was noted that in the *Department of Prisons* matter Arbitrator Daly awarded statutory interest and attorneys fees as well as the overtime of 15 minutes per day for three years. This was clearly based on the statute and not the CBA. Thus, these cases are distinguishable.

This issue rests on the interpretation of the term “same position.” Clearly the union has equated “same position” as meaning the same type of work across multiple jobs done by different employees. The term is somewhat ambiguous but on balance the union’s assertion is without adequate support in the language, the legislative history and other interpretive pronouncements both in statute and caselaw. Those interpretive tools show that the term “same position” means the same job held by one employee – not all jobs cumulatively.

The city provided other legislative support for the proposition that a “position” is a job held by “an individual,” not by a group of individuals doing similar work. Further, the interpretation of these terms by the Bureau of Mediation Services is entitled to some deference here. As the BMS ruled in *AFSCME #65 and City of Hibbing*, BMS # 92-PCL-423 (1991) a “position” is one person performing a job. It is only after that one person works 67 days in a calendar year that they become a “public employee” under PELRA. See also, *IBT #320 and City of Coon rapids*, 2013 WL 1500975 (Minn. App 2013), Court held that “although the statute [179A.03 subd 14] addresses seasonal position, it does not require the measuring of time spent in a particular job classification of union employees. And the naming of individuals by BMS coincides with the statutory language addressing personal characteristics, such as student status.” It is also clear that the statute applies irrespective of how many employees are hired into a position.

Moreover, the city’s view is consistent with the remainder of the 179A.03 Subd. 14 which allows public employers to hire temporary/seasonal employees for up to 67 days (or 100 as the case may be) without paying them CBA rates and does not require payment of CBA rates where multiple people are hired for the same type of work, even identical work, but who fill different positions.

Finally, there was considerable merit to the city’s position that if carried to its logical absurdity, the Union’s argument could result in employees who work only a few days in a calendar year being entitled to CBA wage rates when that is clearly not contemplated by the statute. For example, if the city hired 67 lifeguards for its various pools all of whom performed the same work even though they

would work different hours at different locations, and those 67 employees worked one single day each, using the union's argument, they would all be considered public employees and entitled to CBA wage rates as of their second day. This is patently contrary to the intent and the language of the statute.<sup>7</sup>

The statute was, as the city asserted, designed to prevent "serial hirings;" i.e. those where a public employer attempts to circumvent a CBA by hiring a person in the same job for 67 days, and then another doing the same job for another 67 days, and so forth. A review of the legislative history shows that this was exactly the sort of abuse the legislation was designed to prevent. There was no evidence of that here. A review of the records shows that indeed the seasonal/temporary workers who worked the positions involved in this case were indeed working different positions. There was no evidence that the city attempted to undermine the integrity of the union by hiring permanent workers but only hiring them for 67 days apiece in some sort of subterfuge to end run the CBA.

Finally, a review of the records and evidence here shows that the city properly applied the 67-day rule to the non-student employees. This meant examining each such employee's records to determine if that employee worked more than 67 days in a calendar year. Those that did are entitled to CBA wage rates for the time after the 67 days.<sup>8</sup>

Accordingly, the city's position in the application of the 67-day rule set forth in 179A.03 subd. 14 (b)(2) is adopted. The city's calculation of damages for these employees is likewise adopted as well.

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<sup>7</sup> The city also posited the equally astonishingly absurd result if one adopts the union's claim on this question that the city would effectively be limited to hiring only one seasonal and temporary employee per year due to the fact that once that employee worked 67 days every other seasonal/temporary employee would automatically be entitled to CBA wages rates irrespective of the number of days those other employees worked. This simply cannot be the result the statute intends. In the alternate, if the city hired 20 workers, as soon as even one such worker got to 67 days, the rest of the crew would be entitled to CBA wages. In either event, these sorts of results are contrary to the statutory language and are rejected.

<sup>8</sup> It should be noted that any such employee is not entitled to CBA wages until after they reach the threshold set forth in PELRA to be considered a "public employee." The statute does not require that there be a retroactive payment from day one of their employment in the event any particular employee worked more than 67 days.

## PART TIME EMPLOYEES:

The union asserted that there was insufficient evidence to support the city's claim that certain employees met the exemption for part time employees under PELRA. That statutory language provides as follows:

Subd. (5) part-time employees whose service does not exceed the lesser of 14 hours per week or 35 percent of the normal workweek in the employee's appropriate unit;

The union asserted that the city bears the burden of proof on the question of exemptions. See *NLRB and Kentucky Community Care*, 532 U.S. 706 (2001) and *FTC v Morton Salt*, 334 U.S. 37 (1948). This exact question has not apparently been squarely dealt with by the Minnesota Courts interpreting PELRA but on these facts, even assuming that to be the case, the city introduced sufficient evidence to establish that the employees it contended did not meet the threshold under Subd 14(5) to be considered "public employees." The question of whether there was adequate evidence to establish the exemption is discussed immediately below and there was adequate evidence to establish it such that the question of burden of proof did not greatly impact the outcome of this case.

The union further asserted that the city failed to provide sufficient evidence to establish that the employees it asserted were part time employees whose service did not exceed the requisite 14 hours or 35% of the normal workweek. The union asserted that the city should have introduced the actual time records for these employees rather than the summaries it provided at the hearing.

The evidence here showed however that the summaries were adequate to establish the exemption on this record. It was clear that there were literally boxes full of such paper records and that the time and effort necessary to copy them and introduce them at the hearing would have been unduly burdensome. Further, there was no evidence that the summaries were inaccurate or that any of the information on those was fabricated or inaccurate. Finally, the union was given the opportunity to review these records for accuracy and could have introduced counterveiling evidence if indeed there was a valid claim that the city's figures and/or data were incorrect.

The city showed that it appropriately applied the BMS 6-part test for determining whether an employee meets the threshold under Subd 14(5) as a part time employee. That test requires that the employee first determine the number of hours in the normal workweek of the bargaining unit in which he employee would be included.

Second one must calculate the exclusion – i.e. 14 hours per week or 35% of the normal workweek, whichever is less. Third, the employer must identify the previous “calendar year – as required by the statute. Fourth, calculate the number of weeks during which the employee worked during the previous calendar year. Fifth, determine the number of weeks worked in which the employee’s hours exceeded the number set forth above in the second step. Finally, determine if the majority of those weeks worked exceeded the lesser of 14 hours or 35%. If the employee worked a majority of the weeks in the previous calendar year then the employee is a “public employee” under PELRA. If they did not, then the opposite is true and the employee is not covered by a CBA and is not a “public employee for purposes of PELRA.

Here the city showed that the employees listed on its exhibits 8, 9 and 23 did not meet the statutory definition/threshold under Subd 14 (5). Ms. Hillenbrand testified credibly that she prepared the summaries based on the voluminous wage records involved in this case and that they are accurate. Little if any countervailing evidence was produced to refute this.

Thus the evidence on this record showed that the employees the city claimed were exempt because they did not meet the statutory thresholds under Subd 14 (5). Accordingly, the city’s position in this regard is awarded.<sup>9</sup>

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<sup>9</sup> It should be noted that in a case were the number of records might be less onerous, the “best evidence” would indeed be the actual wage records. Here due to the sheer number of these records the summaries coupled with the testimony of city witnesses and the fact that the union was given ample opportunity to review the records governed this particular result. A different case with different facts might well lead to a different result.

## STUDENT EXEMPTION:

The operative statutory language is as follows:

(a) “Public employee” or “employee” means any person appointed or employed by a public employer except: \*\*\*

Subd. (6) employees whose positions are basically temporary or seasonal in character and: ... (ii) are not for more than 100 working days in any calendar year and the employees are under the age of 22, are full-time students enrolled in a nonprofit or public educational institution prior to being hired by the employer, and have indicated, either in an application for employment or by being enrolled at an educational institution for the next academic year or term, an intention to continue as students during or after their temporary employment;

There are a number of required indications to meet the student exemption. The student employees must work for less than 100 days in a calendar year; must be under the age of 22; must be full time students enrolled in a nonprofit or public educational institution prior to being hired by the employer and must indicate either on the application or by being actually enrolled at an educational institution an intention to continue as a student during or after the temporary employment.

The evidence fell short of these requirements here. The union noted that while the age requirement is met and acknowledged that while the employees worked less than 100 days and were all under the age of 22, several of the required indications were not. The applications simply asked, “Are you a full time student?” See city exhibits 13 and 19. The form does not indicate whether these students are enrolled in a public or non-profit educational institution, as opposed to a for profit institution. Neither does it indicate whether the students were enrolled in school or intended to continue after the temporary employment as required. Some certainly could have been but the evidence did not establish which if any of the claimed student employees were. The city bears the burden of establishing the exemption and must fully comply with the statute in order to claim it.

Moreover, there is no indication of an intention to continue as a student either during or after the employment. The attempt by the city to introduce post hoc affidavits by employees it claimed were in fact students was insufficient to meet the burden here. The sole testimony regarding these affidavits was from Ms. Hillenbrand, who acknowledged that she did not meet with the students nor did she even meet with the supervisors who met with the students to verify the accuracy of the affidavits. More to the point, this information must be obtained at the time of the application; not months or even years afterward in order to hastily rectify an inadequate form.

On this record the union's claims have merit. The city failed to establish that any of the seasonal/temporary workers met the statutory exemption for "students" under the 100-day. Thus any employee who was alleged to be exempted as a "student" but who worked more than 67 days in a calendar year is entitled to CBA wages – just as the non-student employees are.<sup>10</sup>

#### BENEFITS ISSUES/800 HOURS WORKED PURSUANT TO ARTICLE 28:

The union noted that there are some employees who worked the requisite number of hours under Article 28 of the CBA to warrant payment of fringe benefits. It was noted were that many of these employees worked in years prior to 2012. Given the award above regarding the effective date of this award, most of that evidence is now moot. There were however two employees, Dunlap and Tator who worked more than 800 hours in 2012. The question was whether they were entitled to any actual benefits as the result of working 800 hours.

The evidence showed that these individuals left employment in October 2012. Mr. Dunlap reached 800 hours on October 9, 2012 but terminated his employment on October 12, 2012. Mr. Tator reached 800 hours on October 8, 2012 and left employment on October 31, 2012. Because there were no approved holidays in that time span, neither is entitled to any holiday pay.

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<sup>10</sup> Obviously this award is subject to the same analysis regarding the application of the 67-day rule set forth above. The arbitrator did not calculate the exact amount due as the result of the failure to introduce adequate evidence to establish the student exemption on these facts. As noted herein the arbitrator will retain jurisdiction in the event there are disputes about the amount to be paid or which employees are entitled to back pay given this ruling.

Further, because both left employment in October 2012<sup>11</sup> and would not have been eligible for health insurance benefits until November 1, 2012, neither are entitled to health benefits. Article 12 of the CBA, health insurance is effective the first of the month following 20 calendar days of the employee's eligibility. Here Mr. Dunlap would not have been entitled to health insurance because he left only 3 days after reaching eligibility and Mr. Tator would likewise not have been entitled to health insurance because he left on October 31<sup>st</sup>. His eligibility did not accrue until November 1, 2012.

Finally due to the provisions of Article 8, Sections A and B neither would have been entitled to vacation pay since they left within 6 months of their employment. Accordingly, the city's calculation of benefits pursuant to Article 28, is awarded.

#### LOGISTICS OF BACK PAY AWARD – INCLUDING HOLIDAY PAY DEDUCTIONS:

Initially the city claimed that there were various errors and that some employees received an overpayment of holiday pay when they were not entitled to it. The city seeks to have the award reduced by the amount of those overpayments to the affected employees. See City exhibit 5, setting forth its calculations of the appropriate back pay award. Simply stated, such a deduction is disallowed by Minnesota law and cannot be awarded. See, Minn. Stat. 181.79 subd 1. There was no evidence that any of the affected employees in this matter have executed the required documents to allow this sort of deduction from their pay. Thus the city will have to deal with these employees separately.

The union sought something of an extraordinary remedy in asking for an escrow account to be set up along with a website. The union also seeks to have the city share with the union the contact information for any of the affected seasonal and temporary employees for verification purposes. Finally, acknowledged that some of these individuals may be hard to locate and that any unpaid money left be paid either to the union for dues or that the arbitrator direct the parties to designate a charity or some other deserving organization and give the left over funds to that entity.

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<sup>11</sup> As noted above, Dunlap left employment with the city on October 12, 2012 and Tator left employment on October 31, 2012. Neither worked past those dates in 2012.

The City correctly pointed out with respect to the latter point that such a remedy likely would violate the public purposes doctrine applicable to the expenditure of public funds. Accordingly, that later point simply is outside of the arbitrator's power to order.

With regard to the remaining points, there is something of a mixed bag. This is a somewhat unusual case in that in the "typical" back pay case, if such a thing exists, the back pay is awarded to a known entity, i.e. back pay to an individual reinstated after discharge or to a group of bargaining unit members whose identity and contact information is usually well known to both the union and public employer. Here these employees were not known to the union because they were never considered part of the bargaining unit until this case arose. While the city certainly knew who they were these employees were obviously seasonal and temporary and likely did not expect to stay with the city in most cases for long periods of time.

However, the standard sorts of logistics considerations for payment of back pay can still apply. Setting up a separate website is unnecessary in this matter. While there are multiple employees who will be entitled to back pay, that number is not in this case so vast that they need a website for it. Thus the city is to simply include a link on its current website that should be more than sufficient to advise any affected employee about this. The substance of that is within the purview of the city.

The city is directed to provide the relevant contact information for the employees affected by this Award and to allow the union access to it to verify payment of any back pay ordered under this Award. This is something of an unusual remedy but this is something of an unusual case. Further such a requirement does not appear to be unduly burdensome nor will it violate any applicable state law or rule by allowing the union access to employees who have now been ordered to have been part of the applicable bargaining unit.

Finally, there remains the question of what to do with any left over funds that are not paid due to employee unavailability or inability to locate them. The union's request is too speculative at this juncture to warrant a specific order since it is unknown at this time exactly how many employees will be affected by this Award or whether the city will be unable to find them.<sup>12</sup> If after diligent efforts the affected employees are simply unavailable or cannot be located any "leftover" funds are subject to state law with respect to the disposition of monies that may be due to back pay but cannot be paid due to the inability to locate the employee is question.

### **AWARD**

The award is as follows:

**DATE OF BACK PAY AWARD:** The back pay awarded pursuant to this award thus runs from the date of the filing of the grievance, January 31, 2012.

**THE APPLICATION OF 179A.03 Subd 14(b)(2):** The city's position on the application of the 67-day rule set forth in 179A.03 Subd. 14 (b)(2) is adopted. The city's calculation of damages for these employees is likewise adopted as well.

**PART TIME EMPLOYEES:** The city's position on this issue is awarded as set forth above.

**STUDENT EMPLOYEES:** The union's position is awarded with regard to the claimed student employees. Thus any employee who was alleged to be exempted as a "student" but who worked more than 67 days in a calendar year is entitled to CBA wages for the period after the 67<sup>th</sup> day – just as the non-student employees are.

**FRINGE BENEFITS PURSUANT TO ARTICLE 28:** The city's position regarding health insurance benefits for employees Dunlap and Tator is awarded.

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<sup>12</sup> The arbitrator was unable to give specific dollar figures in this award since the parties' respective calculations were based on certain assumptions as to what this eventual award might be; some of which were awarded and some were not. For example, the union's claims were based on the assumption that the back pay would be calculated for years prior to the filing of the grievance. On the other hand, the city's calculations appeared to have been based on the deduction of the overpayment of holiday pay to some of the employees. As noted in the final award, the arbitrator will retain jurisdiction for up to 90 days to resolve any disputes about the actual dollar figures due individual employees. It is hoped however that the parties will be able to resolve the actual dollar figures given the award in this matter.

LOGISTICS OF BACK PAY AWARD – INCLUDING DEDUCTIONS FOR HOLIDAY

PAY: The City is directed to include a link on its website regarding this matter and to provide appropriate contact information for members of the public who are interested in this or who may have a potential back pay claim herein. The city is also directed to provide the appropriate contact information for the affected employees under this Award to the union in order to verify payments. Any funds “left over” or which cannot be paid to any affected employees under this Award due to their unavailability or to the fact that they cannot be found is subject to state law with respect to such funds as set forth above.

The arbitrator will retain jurisdiction for up 90 days, subject to extensions by the parties if they so request, to resolve any issues with respect to the actual dollar figure payable to any affected employee under this Award.

Dated: August 26, 2013

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

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Jeffrey W. Jacobs, arbitrator