

WITNESSES TESTIFYING

Called by the Union

Mark Mandich,
Staff Representative
AFSCME Council 65

Len Belobaba,
Former President Local 484

John Ravzi,
President Local 484

Called by the City

Louis J. Russo,
Labor Relation Consultant
Chief Labor Negotiator

Calvin Cossalter,
Mayor, City of Eveleth

Jim Pollack,
Councilor, City of Eveleth

Larry Hall,
Assistant Public Works Director
City of Eveleth

Michael Wiskow,
Director of Public Works
City of Eveleth

ALSO PRESENT

For the Union

Steve Anderson,
Vice President Local 484

Steve Preble,
Director, AFSCME Council 65

Kathy Sedgeman,
Secretary/Treasurer Local 484

For the City

Jackie Monahan-Junek,
City Administrator
City of Eveleth

JURISDICTION

The issue in grievance was submitted to the Arbitrator for a final and binding resolution under the terms set forth in Article VIII of the Collective Bargaining Agreement between the parties (Joint Exhibit 3). The Arbitrator was mutually selected by the parties from a

list of names of arbitrators submitted to them by the Minnesota Bureau of Mediation Services.

The Employer contends that the grievance is not arbitrable on substantive and procedural grounds. The Union contends that the grievance is arbitrable. The parties agreed at the hearing to defer the matter of arbitrability and a final framing of the issue to the Arbitrator. The parties stipulated that the Arbitrator had been properly called.

At the hearing the parties were given full and complete opportunity to examine and cross-examine witnesses and present their proofs. Final argument was provided through post hearing briefs filed by both parties, and received by the Arbitrator by the agreed upon deadline. With the receipt of the post hearing briefs, the record in this matter was closed. The issue is now ready for determination.

STATEMENT OF THE ISSUE

After review of the entire record of the hearing the Arbitrator has determined the issued presented for resolution is:

Is the issue procedurally and substantively arbitrable? If it is, did the City violate the Collective Bargaining Agreement, a related letter of understanding, or a binding past practice by its use of casual employees? If so what is the appropriate remedy?

The grievance (Joint Exhibit 6) is dated June 23, 2004 and reads in relevant part as follows:

STATEMENT OF GRIEVANCE:

List applicable violation: That 6 dollar an hour casual help are placed in Union Positions and operating drivable equipment.

Adjustment required: Put Union employees back in their position.

In its post hearing brief the Union stated the remedy sought as:

“This case should be decided on its merits and the Arbitrator should rule that the City violated the agreement between the parties, and they should be required henceforth to hire union employees to operate drivable equipment of all types including mowers in the summer, absent union consent. The City should have to pay union wage rates for any hours the casual mowers worked in the summer of 2004, 2005 and 2006, said payment to be made to AFSCME Council 65 for proper distribution amongst Local #484 union members or to a charity of the Union’s choice.”

The City rejected the grievance at the third step in the course of a regular City Council meeting held on July 20, 2004

The sections of the Collective Bargaining Agreement that bear on this issue are contained in ARTICLE VIII – GRIEVANCE PROCEDURE , ARTICLE XIII – GENERAL PROVISIONS, and ARTICLE XIV – EMPLOYER AUTHORITY. In relevant part this language reads as follows:

ARTICLE VII – GRIEVANCE PROCEDURE

The Council shall attempt to adjust all grievances with its employees which may arise by virtue of these regulations or otherwise in the following manner:

* * * *

Section C.

Step 1. An employee or group of employees claiming a violation concerning the interpretation or application of this contract shall, within twenty (20) working days after such alleged violation has occurred, present such grievance to the employee's immediate supervisor. The supervisor will discuss and give an answer to such Step 1 grievance within five (5) working days from the date of the grievance meeting between the parties. In the event the grievance is unresolved, the grievant or the Union shall have seven (7) working days after the supervisor's final answer to submit the grievance to Step 2. Any grievance not appealed in writing to Step 2 by the Union within seven (7) working days shall be considered waived.

Step 2. If appealed, the written grievance shall be presented by the Union and discussed with the City Clerk. The City Clerk shall give the Employer's Step 2 answer in writing within ten (10) working days after receipt of such grievance. A grievance not resolved in Step 2 may be appealed to Step 3 within ten (10) working days following the City Clerk's final answer. Any grievant not appealed in writing to Step 3 by the Union within ten (10) working days shall be considered waived.

Step 3. If appealed, the written grievance shall be presented by the Union and discussed with the City Council within thirty (30) days. The City Council shall give the Union the Employer's Step 3 answer in writing within ten (10) working days after hearing such grievance. A grievance not resolved in Step 3 may be appealed to Step 4 within ten (10) working days of the City Council's final Step 3 answer.

Step 3A. Prior to going to arbitration, either party to the Agreement may request mediation of the grievance by the Minnesota Bureau of Mediation Services. Such request must be made within ten (10) working days following the decision in Step 2 (sic). The time limit for requesting arbitration is tolled during mediation and if mediation does not resolve the grievance, arbitration may commence as hereafter provided.

Step 4. A grievance unresolved in Step 3 or Step 3A an appealed to Step 4 shall be submitted to arbitration subject to the provisions of the Public Employment Labor Relations Act, Minnesota Statutes 179A, as amended. A request to submit a grievance to arbitration must be made in writing, and such request must be submitted to the City Clerk. No grievance shall be considered by the arbitrator which has not been first duly processed in accordance with the grievance procedure and appeal procedures.

* * * *

Subd. 4. Arbitrator's Authority. The arbitrator shall have no right to amend, modify, nullify, ignore, add to or subtract from the terms and conditions of

this Agreement. The arbitrator shall have no authority to make a decision on any other not so submitted. The arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying or varying in any way the application of laws, rules and regulations having the force and effect of law. The arbitrator's decision shall be submitted in writing within thirty (30) days following the close of the hearing or submission of briefs by the parties, whichever is later, unless the parties agree to an extension. The decision shall be binding on both the Employer and the Union and shall be based solely on the arbitrator's interpretation of application of express terms of this Agreement and to the facts of the grievance presented.

ARTICLE XIII – GENERAL PROVISIONS

* * * *

Section B.

All matters not covered by this Agreement shall be settled by negotiations between the Mayor and the City Council and the employees and their representative.

ARTICLE XIV – EMPLOYER AUTHORITY

Section A. Employer Authority

The Employer retains the full and unrestricted right to operate and manage all manpower, facilities and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct and determine the number of personnel; to establish work schedules; and to perform any inherent managerial function not specifically limited by this Agreement.

In addition to the above cited contract language the parties have previously entered into a Letter of Understanding between AFSCME Local #484 and the City of Eveleth (Joint Exhibit 4). That Letter of Understanding reads as follows:

The parties, by their signature below, hereby agree that casual employees will not be placed in Union positions, nor shall they operate drivable equipment without the express consent of the Union.

It is further agreed that the above paragraph will not apply to casual employees hired at the golf course. Casual employees at the golf course

will be allowed to operated equipment under the direction of the Parks and Recreation workers.

The Letter of Understanding was signed by representatives of the Union and the City, but was not dated. Joint Exhibit 4 carried a fax transmission date of July 17, 1997 from the City of Eveleth, however. The authenticity of the Letter of Understanding was not disputed by the parties, and its existence since at least July of 1997 was not disputed. There was no evidence entered at the hearing that the Letter of Understanding was ever appended or otherwise incorporated into the Collective Bargaining Agreement.

FACTUAL BACKGROUND

Involved herein is a grievance that arose as a result of the Employer's use of casual employees who were hired on a temporary basis to perform grounds keeping duties, principally grass cutting. In the performance of those duties the casual employees operated a motorized lawn mowing tractor and a small utility vehicle referred to by the parties as a "gator". The Employer is a municipal corporation incorporated under the laws of the State of Minnesota. The Union is the exclusive bargaining representative for all employees of the City who are members of the Union. The Collective Bargaining Agreement was made effective on January 1, 2003 and continued in full force and effect through December 31, 2005. For all relevant times the employees involved in the instant grievance have been covered by its provisions. The parties have had a collective bargaining relationship for many years.

The Eveleth City Council, at a regular meeting held on November 18, 2003 directed City management personnel to utilize casual employees "to operate the City's riding mowers,

in accordance with Article XIV, Section A of the AFSCME Base Unit Agreement, effective November 18, 2003; the City recognizes and accepts that this policy will not affect the employment of any of the full time City employees that are covered under the base unit contract; this policy will not change any rights the City has to assign employees to work tasks as needed and in accordance with the labor agreement.”

On May 18, 2004 the City actually started utilizing a casual employee (Shawn Laukka) to operate a riding lawn mower in areas of the City other than the golf course. Another employee (Lowell Thomas) was utilized in a similar capacity starting on May 19, 2004. Local Union President Belobaba became aware of the utilization of casual employees Laukka and Thomas, and contacted Union Staff Representative Mark Mandich some time in May 2004 about that use. Mr. Mandich testified without challenge that he contacted then City Clerk Ray Eck about the matter, and a meeting was arranged for a date in June 2004 with Mr. Mandich, Mr. Eck, Mayor Cossalter, and Councilor Pollack in an attempt to resolve the dispute. That meeting was held, but the parties were not able to reach a settlement. The instant grievance was then filed on June 23, 2004.

Mr. Mandich testified at the hearing without challenge that he usually tried to informally resolve disputes with the City’s management before filing formal grievances. He went on to testify, again without challenge, that the parties did not rigidly enforce the timelines of the grievance procedure so that they could attempt to resolve disputes through informal discussions.

The grievance proceeded to Step 3 of the grievance procedure without resolution. It was heard at Step 3 by the City Council in session on July 20, 2004. The Council denied the grievance and Mr. Mandich advised that the Union at that meeting that it would move the grievance to arbitration. Mr. Mandich also requested that the City formally notify the Union that they were denying the grievance. Formal notice of the City denying the grievance was issued in the form of a letter dated July 22, 2004 to Mr. Mandich (Joint Exhibit 8).

On August 13, 2004 Mr. Mandich advised City Clerk Eck that the Union was proceeding to take the grievance to arbitration (Joint Exhibit 9). On January 5, 2005 the first arbitration hearing in this matter was convened. The parties requested, at that hearing, time to negotiate a settlement before the hearing began. Negotiations were held between the parties. The Arbitrator was not present in those negotiations and did not participate in them. Negotiations appeared at first to be successful, and the parties requested that the hearing be cancelled in favor of City Attorney Brunfelt reducing the tentative agreement to writing. Subsequently, however, the parties were not able to achieve final agreement.

The City subsequently took the position that the grievance was not arbitrable, and that a Court with jurisdiction would have to order arbitration in order for the grievance to proceed. The parties presented their cases in Court, and a ruling was handed down on February 6, 2006 by the Honorable Gary J. Pagliaccetti, Judge for the Sixth Judicial District in the State of Minnesota. Judge Pagliaccetti ruled that in this case “the scope of the arbitration agreement is broad and that it is at least debatable whether the grievances

are within the scope of the arbitration clause.” Accordingly, he ordered that “the arbitrability of the grievances is determined in the first instance by an arbitrator.” As to the issue of the timeliness and related past practices by the parties Judge Pagliaccetti ruled that such issues are more properly addressed to the arbitrator. The motion of Union to compel arbitration was granted. An arbitration hearing was then held on July 25, 2006.

POSITION OF THE PARTIES

Position of the Union

It is the position of the Union that the grievance is arbitrable both procedurally and substantively, and that the City violated the Letter of Understanding (Joint Exhibit 4) in this case. It seeks as remedy that the City “should be required henceforth to hire union employees to operate drivable equipment of all types including mowers in the summer, absent Union consent. The City should have to pay Union wage rates for any hours the casual mowers worked in the summer of 2004, 2005, and 2006, said payment to be made to AFSCME Council 65 for proper distribution amongst Local #484 Union members or to a charity of the Union’s choice.” In support of this position the Union offers the following arguments:

1. There is not a timeliness concern that should keep the Arbitrator from reaching the merits of the case. The Employer never claimed timeliness as an issue in this case until the settlement agreement, arising from the first scheduled arbitration of this grievance fell apart.
2. The City of Eveleth cannot claim that it did not have adequate and timely notice of the Union’s objection to the use of casual employees on City lawn mowers in the Spring of 2004; as such notice was given orally.
3. No grievance was appropriate in November 2003 when the City Council expressed its intent to hire casual employees as mowers the following Spring

because no action to effectuate its intent was taken until Spring. The Union believed, until the casual employees were actually hired, that the City was going to seek the Union's consent as they had in the past. When the casual employees were actually hired the Union notified the City of its objections, and thus began the usual informal grievance procedure that had been followed by the parties in the past.

4. There was a practice between the parties to be flexible with grievance procedure timelines. By being flexible the parties could usually settle grievances without a lot of formality. Traditional behavior of the parties was to not put the grievance into writing before a meeting with City management so that discussions were kept low-key.
5. After the issue remained unresolved following a meeting with the City Clerk, Mayor and a Council Member the Union filed the grievance. When the Council subsequently denied the grievance the Union and the City both said that they would have the matter resolved in arbitration. No strict adherence of the timelines for moving a written grievance to arbitration was necessary since the parties told each other of their intentions at the Council Meeting. Both sides had the requisite notice to begin preparations for arbitration. In any event the parties had been flexible about timelines for filing grievances and moving them to arbitration in the past. If the City was then insisting on strict adherence to the timelines, it had a burden to say so to the Union.
6. There is an enforceable agreement between the parties signed sometime in the late 1990s which requires the City of Eveleth to obtain the Union's consent prior to hiring any casual employees to operate drivable equipment.
7. A 2002 grievance on the use of casual employees to fill-in on a Union job due to the crew being short handed was settled by the City agreeing to communicate with the Union and open lines of communication about work assignments. This settlement is in keeping with the mandates of the Letter of Understanding. Testimony at the hearing indicates that it was likely that the City and the Union reviewed the Letter of Understanding in reaching that settlement.
8. The City Council must have known of the Letter of Understanding in November of 2004 because they directed the Public Works Director at that time to advise the Union of their decision and suggest that the decision be grieved if the Union objected.
9. A side letter of agreement or understanding is a binding and valid contract. The Letter of Understanding (Joint Exhibit 4) should be treated as either a separate contract binding the parties or as an amendment to their existing collective bargaining agreement. Because the Letter of Understanding affects

the working relationship between the Union and City, and because it concerns the terms and conditions of employment of bargaining unit members, it is appropriate to arbitrate its enforceability under the grievance procedure in the collective bargaining agreement.

10. The collective bargaining agreement between the parties broadly defines a grievance. It is the Union's belief that definition would encompass a grievance arising from an alleged violation of the Letter of Understanding. Further, it would be appropriate to require the parties to negotiate any future change to, or the elimination of the Letter of Understanding. There is no clause in the collective bargaining agreement that provides for all prior agreements between the parties being superseded.

Position of the City

It is the position of the City that the grievance is neither procedurally or substantively arbitrable, and if found to be arbitrable it should be denied. In support of that position the City offers the following arguments:

1. Article VIII, Section C, Step 4 provides that no grievance shall be considered by the arbitrator which has not been first duly processed in accordance with the grievance procedure and appeal provisions. There are four separate instances where the employees or the Union did not comply with the procedural requirements of the grievance procedure. The Arbitrator has no authority to modify those procedural requirements. Accordingly, the grievance is not properly before the Arbitrator and cannot be decided by him.
2. Acting under the Management Rights provision contained in Article XIV of the collective bargaining agreement the City decided on November 18, 2003 to utilize casual employees for grass cutting duties. The Union was promptly informed of that decision, but declined to grieve it until June 23, 2004. The date of the grievance is well outside of the 20 working days provided for in the labor contract for filing a grievance.
3. Casual employees were actually utilized for grass cutting duties starting on May 18, 2004. They operated drivable equipment in the performance of those duties, and the Union was aware of that. The Union did not file a grievance until June 23, 2004, again well outside of the 20 working days provided for in the labor contract for filing a grievance.
4. The Step 3 grievance meeting was held with the Union and the City Council on July 20, 2004, when the City denied the grievance. The Union did not

advise the City that it was moving the grievance to arbitration until August 13, 2004, well outside of the 10 working days mandated by the labor contract for doing so.

5. The Union has never grieved or challenged numerous, past instances where City management, without having obtained prior approval or consent from AFSCME, has utilized casual employees on drivable equipment, including riding lawn mowers, in areas of the City other than the golf course.
6. The Letter of Understanding on which the Union bases its case was in effect since 1997. Since then the Union has been aware that the City has utilized casual employees to operate riding lawn mowers and a “gator” utility vehicle in areas other than the golf course. They have not grieved those situations until the instant grievance in 2004. Similarly, the City has utilized for many years a casual employee to serve as a crew leader of other seasonal employees. The crew leader drove a pickup truck in the performance of his duties, the Union was aware of that and did not grieve that practice.
7. The instant grievance is not substantively arbitrable because no provision of the collective bargaining agreement was violated. The grievance procedure clearly limits the Arbitrator to consideration of violations of the labor contract. The Letter of Understanding is not a part of the labor contract, and the Arbitrator lacks contractual authority to consider it.
8. The Letter of Understanding on which the Union bases its case was never discussed in contract negotiations in 1999, 2002, or 2003. Unlike other side agreements, it is not appended or otherwise incorporated into the labor contract. Accordingly, it is not a part of the labor contract and cannot be enforced through the contractually mandated grievance and arbitration procedure.
9. While the Letter of Understanding came into effect sometime in the late 1990s, it has been substantially ignored by City management and the Union. A June 2002 grievance (Joint Exhibit 10) shows that the parties ignored the Letter of Agreement. In settling that grievance the City simply agreed to communicate with the Union. It did not seek the consent of the Union as is sought in this case.
10. The Letter of Understanding was superseded by a strong management rights provision that was agreed to by the parties in the 1999 labor contract. The only limitations on the City’s authority that is contained in that provision relate to limitations found in the collective bargaining agreement. The City is not limited by the Letter of Understanding that is not a part of collective bargaining agreement.

11. The Union prepared the final written draft of the collective bargaining agreements. In performing this work they never proposed to have the Letter of Understanding included in the labor contract.
12. The use of casual employees on riding mowers has not in any way caused a reduction in the number of hours of work for the City's regular Union workforce, or had any other adverse impact on them.

ANALYSIS OF THE EVIDENCE

The first issue to be decided here is whether or not the grievance is arbitrable. The City argues that it is not on both procedural and substantive grounds. The Union on the other hand argues that it is arbitrable.

Substantive Arbitrability

Addressing first the question of substantive arbitrability it is noted that this grievance was found by the 6th Judicial District of the State of Minnesota to be arbitrable. The Court ruled that "It is at least reasonably debatable that the issues/grievances are covered under the arbitration agreement, and therefore the arbitrability of the grievances is determined in the first instance by an arbitrator." It is clear from this order that the Court has directed the parties to submit the question of arbitrability to an arbitrator.

In analyzing the substantive arbitrability question this Arbitrator notes that there is an undated Letter of Understanding (Joint Exhibit 4) addressing the use of casual employees. While it is not dated, it is signed by representatives of both sides, and the copy introduced at the hearing bears a fax transmission date from the City on July 17, 1997. The

authenticity of the document was not challenged. Clearly the parties were both aware in 1997 of the understanding reached in regard to the use of casual employees.

The subject matter of the Letter of Understanding clearly deals with work assignments. Such a matter clearly involves working conditions, and as such is a traditional matter for collective bargaining. It is, however, undisputed that the Letter of Understanding was not amended to the Collective Bargaining Agreement. The parties have previously recognized that work assignments are a matter of bargaining by including in their labor contract certain job classifications that describe in general the duties performed.

It is also noted that the Letter of Understanding contains no dispute resolution procedure. Inasmuch as the subject matter of the Letter of Understanding deals with a traditional area of collective bargaining, it is reasonable to conclude that the parties intended it as an adjunct to the Collective Bargaining Agreement that would have access to the grievance and arbitration procedure should a dispute arise. It is further noted that the grievance definition found in Article VII is very broad. That language provides as follows:

The Council shall attempt to adjust all grievances with its employees which may arise by virtue of these regulations or **otherwise** in the following manner: (Emphasis Supplied).

It is clear by including the phrase “or otherwise” in this definition that the parties intended the grievance procedure to address more than disputes over the application of the terms contained within the four corners of the Collective Bargaining Agreement.

The Collective Bargaining Agreement in this case has no “zipper clause” that specifically states that it constitutes the complete agreement of the parties. To the contrary, Article XIII, Section B of the Collective Bargaining Agreement (Joint Exhibit 3) provides that “All matters not covered by this Agreement shall be settled by negotiations between the Mayor and City Council and the employees and their representatives.” It is reasonable to conclude that the Letter of Understanding is an agreement that followed such negotiations back in 1997. As such, it is reasonable to find that the parties intended it to carry the same weight as provisions of the labor contract even though it was not specifically incorporated into the Collective Bargaining Agreement.

It is also important to recognize that interpreting a labor contract requires more than a review of its specific provisions. Past practices observed by the parties are frequently used by arbitrators to ascertain the intent of the parties with regard to contract terms. As such those past practices can be found to carry the weight of contract language. The Letter of Understanding at issue in this case deserves at least the consideration given to past practices between the parties.

In 1999 the parties agreed to an employer authority clause. The City argued that the language of that clause permitting the City to “perform any inherent managerial function not specifically limited by this Agreement” supersedes the Letter of Agreement because it was not specifically incorporated into the labor contract. The City’s argument is misplaced.

The analysis contained in the above paragraphs compels a finding that the Letter of Understanding carries the weight of contract language, and is not voided by the employer authority clause. Accordingly, for all the above cited reasons the grievance in this case is found to be substantively arbitrable.

Procedural Arbitrability

Turning now to the issue of whether the grievance is procedurally arbitrable. The City contends that the grievance is not arbitrable because it was not processed in accordance with the timelines contained in the grievance procedure. The Union, on the other hand argues that the grievance is procedurally arbitrable because the parties have not rigidly followed the timelines in the past.

The dates involved in the processing of the grievance in this case are not seriously disputed. The City points to the fact that the City Council directed the use of casual employees for lawn mowing on November 18, 2003, and the grievance was not filed until June 23, 2004 to file the grievance. The Union argues that the Council's action on November 18, 2003 was merely a statement of intent, and the Union could not grieve the "intent" of the City to use casual employees on riding lawn mowers; it had to await the actual use of those casual employees. The Union is correct in its assertion. The mere announcement of intent or giving direction to management to carry out an act is not in and by itself grievable. History shows that many intended acts are not carried out. The Union had to await the actual use of the casual employees.

The record of this case shows the first use of casual employees on riding lawn mowers was on May 18, 2004. The City contends that the grievance is not timely because it was not filed until June 23rd. The contract provides at Article VIII, Section C, Step 1 that the Union had 20 working days “after such alleged violation has occurred” to present a grievance “to the employee’s immediate supervisor”. The record does not show when the Union’s concerns were first presented to the “immediate supervisor”. While the record appears to show that the grievance was not filed within 20 days from the first use of casual employees on riding lawnmowers in May of 2004, the schedule delinquency was not so apparent that the City immediately claimed that it was not timely. What is shown is that it was discussed with City Clerk Eck, Mayor Cossalter and Councilor Pollack sometime in June 2004 and written up on June 23, 2004.

The City also contends that the grievance is not timely because the Union did not move it to arbitration within the 10 days allowed by Article VIII Section C, Step 3. The City gave its Step 3 answer denying the grievance verbally on July 21, 2004 and in writing on July 22, 2004. At the July 21, 2004 Council meeting the Union and the City both stated that the case would have to be resolved in arbitration. It is reasonable to conclude from the record that both sides were aware that the case was moving to arbitration. The record shows that the Union did not reply in writing to move it to arbitration until August 13, 2004. Clearly that delay was more than the ten days allowed by the contract to move the grievance from Step 3 to Step 4-arbitration.

The recognized arbitration authority: How Arbitration Works, 6th Ed. BNA, 2003, by Elkouri and Elkouri provides some useful insight into this area of the case. At page 217 that reference reads as follows:

“In the vast majority of cases, arbitrators strictly enforce contractual limitations on the time periods with which grievances must be filed, responded to, and carried through the steps of the grievance procedure where the parties have consistently enforced such requirements. Untimely grievances will be refused a hearing. ... [C]ertain situations, however, are not subject to contractual time limits.”

Among the situations that are not subject to contractual time limits is a “continuing violation”. A continuing violation is one where “the act complained of may be said to be repeated from day to day, with each day treated as a new ‘occurrence’.” For such cases arbitrators will usually permit the filing of such grievances at any time. Such is the case here. It is not disputed that the use of casual employees on riding lawn mowers continued through the Spring and Summer of 2004. Each day of such use is reasonably considered a “continuing violation”. Accordingly, the initial filing of the grievance is deemed to have been timely.

How Arbitration Works points out another situation that is not subject to contractual time limits in processing grievances. That situation is where the parties have not regularly followed contractual time limits in the past. Importantly, in this case Mr. Mandich and Mr. Belobaba both testified without contradiction that the parties had not rigidly enforced grievance processing timelines in the past. Notwithstanding the contractual timelines for processing a grievance, if those timelines had not been followed in the past then the City would have to provide prior notice that it was beginning to strictly enforce them. There is

nothing in the record to suggest that such prior notice of strict enforcement of grievance processing timelines was being invoked.

It is also troubling to find that the City did not raise the timeliness issue until after the parties were unable to finalize a settlement agreement reached at the January 5, 2005 scheduled arbitration. Had the City believed all along that the processing of the grievance by the Union was untimely, it is reasonable to expect that they would have raised that concern before then.

While the Arbitrator has no authority to alter the terms of the Collective Bargaining Agreement pertaining to timelines for processing grievances, the parties do. It is apparent from uncontradicted testimony in the record that they have not been strict in complying with grievance processing timelines in the past. Such compliance must have been what the parties intended, because they followed that approach. Indeed, it may be that such an approach provided opportunities to settle disputes before they hardened into formal grievances. Absent notice that strict grievance processing guidelines would be invoked, the less than strict approach used by the parties traditionally must apply in this case. Accordingly, and for all the above cited reasons the grievance is deemed to have been timely and procedurally arbitrable.

Merits of the Grievance

As to the merits of the grievance, the Union complains that casual employees are placed in union positions and are operating drivable equipment. Their concern is that such a

practice will lead to the loss of union jobs in the bargaining unit. The controlling basis for their concern is the Letter of Understanding (Joint Exhibit 4). The language of that Letter of Understanding is clear. It clearly states that the parties agree that casual employees will not be placed in Union positions, nor shall they operate drivable equipment without the express consent of the Union. The authenticity of the Letter of Agreement is not challenged.

What is troubling about the Union's position on the merits of this grievance, however, is that undisputed testimony from City witnesses showed that the terms of the Letter of Agreement have not been consistently observed over the years. The evidence showed that the City utilized casual employees on riding lawn mowers at Veterans' Park, the "gator" utility vehicle at the City Cemetery, and a pickup truck operated by a casual employee crew leader. That evidence was largely not disputed. There is nothing in the record of this hearing to suggest that the parties observed the Letter of Understanding with any regularity whatsoever. To the contrary, it appears more likely that the Letter of Understanding was largely ignored.

The record also shows with undisputed testimony that no regular union employee suffered any loss of wages as a result of the City using casual employees in the work complained of in this case. Since there has been no harm it is at least arguable that there has been no foul.

Union testimony at the hearing indicated that the City had sought Union permission in the past, and that it was regularly given. There is no evidence in the record to suggest that such permission would not have been given in this case. The Union has failed to show that any of its members were harmed, or that it would have had valid reasons for withholding permission if it had been asked by the City to approve the use of the casual employees involved in this grievance.

This analysis compels a finding that the Letter of Understanding remains in effect, and it is an extension of the Collective Bargaining Agreement. However, just as the lack of strict enforcement of the grievance processing guidelines results in no violation of the grievance procedure, the inconsistent enforcement of the Letter of Understanding compels a finding that the City did not violate it in this case.

AWARD

Based on the evidence and testimony taken into the record in this case, the grievance is found to be procedurally and substantively arbitrable. Due to lack of any consistent observance of the Letter of Understanding, and the fact that no harm was done to the Union employees involved, the grievance is denied. The Letter of Understanding remains in effect. The parties shall observe its terms until such time as they are modified or terminated through the collective bargaining process.

Dated: August 11, 2006

/s/ James L. Reynolds,

James L. Reynolds, Arbitrator