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In Re the Arbitration Between

**BMS File No. 11-PA-0539**

City of St. Cloud, Minnesota,

Employer,

and

**GRIEVANCE ARBITRATION  
OPINION AND AWARD**

AFSCME Council 65,

Union.

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- Pursuant to **Article IX** of the collective bargaining agreement effective January 1, 2009 through December 31, 2010, the parties have brought the above captioned matter to arbitration.
- The parties selected James A. Lundberg as the neutral arbitrator from a Minnesota Bureau of Mediation Services list of arbitrators.
- The parties stipulated that the matter is properly before the arbitrator and there are no procedural issues.
- Grievances were filed on June 1, 2010 and August 11, 2010.
- The hearing in the above matter was conducted October 20, 2011 at the St. Cloud, MN City Hall.
- Briefs were submitted on November 29, 2011 and the record was closed.

**APPEARANCES:**

**FOR THE EMPLOYER:**

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**FOR THE UNION:**

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**ISSUES:**

**Union’s issue statement:**

*Did the Employer, the City of St. Cloud, violate the collective bargaining agreement when it failed to pay shift differential (Article 15.12) and holiday pay (Article 17.4) to “all employees”, in particular when it failed to pay shift differential and pay for work on a holiday to those city employees who work less than fulltime? If so, what should be the remedy?*

**Employer’s issue statement:**

*Does the 2009-2010 collective bargaining agreement extend a shift-differential benefit to those part-time employees who work less than an average of 30 hours per week?*

*Does the 2009-2010 collective bargaining agreement extend a holiday benefit to those part-time employees who work less than an average of 30 hours per week?*

**RELEVANT CONTRACT LANGUAGE:**

**ARTICLE III – Definitions**

3.8 Employee is a member of the exclusively recognized bargaining unit.

3.11 Full-Time Employee. An employee scheduled to work forty (40) regular hours per week.

3.12 Part-Time Employee. An employee scheduled to work less than forty (40) regular hours per week, but more than 14 hours per week.

3.13 Benefit-Eligible Employee. An employee scheduled to work thirty (30) or more regular hours per week, 12 months a year.

3.14 Casual Employee: An employee who is employed nine (9) months or less within a twelve (12) month period but more than sixty – seven (67) days and fourteen (14) hours per week.

A. Nine Months Defined: Nine (9) months shall be defined to be the following period of time:

1. Public Works and Water Distribution Crew. For an employee employed in the Public Works Department or in the Water Distribution crew within the Public Utilities Department nine months shall be the period of time commencing March 15 of each year and ending December 14 of each year without limitation on the total number of hours worked during that period of time.
2. All Other Positions. For all positions, other than those subject to subparagraph “A” above, nine months shall be 1300 work hours within a twelve (12) month calendar year.

3.15 Permanent Employee means an employee in the classified service who has successfully completed a probationary period.

15.12 Shift Differential. All employees performing work between the hours of 6:00 P.M. and 6:00 A.M will receive a shift differential of sixty (.60) cents per hour for all hours worked during that time period. Shift differential shall be paid in addition to overtime.

#### **Article XVI – Part-Time and Casual Employees**

16.1 Pro-Rata Benefits. Part-time employees who work 30 or more hours per week, 12 months a year, are considered benefit-eligible and will receive pro-rata benefits, including health insurance and longevity benefits, as established in this agreement based upon the ration of the hours in their normal work week to 40.

16.2 Partial Health Insurance Benefit. Those part-time employees who work 12 months a year and who work 20-29 hours per week may elect the health insurance benefit. The City will contribute half of the normal City contribution. Employees are ineligible for other benefits established in this agreement.

16.3 No Benefits. Casual employees are non-benefit eligible employees and shall be compensated at the hourly rate of their assigned job classification for all hours worked, but shall not earn or be eligible for any benefits established by this agreement. Further, Casual employees shall not be covered by the provisions relating to:...

**Article 15: Salaries**

Casual Employees shall be compensated according to the schedule attached in Exhibit B.

**Article XVII – Holidays**

17.4 Work on Holidays. If an employee works on any of the holidays listed above, he/she shall be compensated at the rate of time and one-half (1 1/2) for all hours worked in addition to his/her regular holiday pay.

**FACTUAL BACKGROUND:**

In negotiations over the 2009-2010 collective bargaining agreement the Employer, the City of St. Cloud, Minnesota, proposed a new shift differential provision at **Article XV, Section 15.12**, which says:

All employees performing work between the hours of 6:00 P.M. and 6:00 A.M will receive a shift differential of sixty (.60) cents per hour for all hours worked during that time period. Shift differential shall be paid in addition to overtime.

The shift differential provision contained in earlier collective bargaining agreements was far more restrictive than the language adopted for 2009-2010 in that only specifically identified employee groups were eligible for shift differential payments. The new provision provided that “all employees” who work the designated hours will be paid the sixty cent shift differential.

A grievance was filed on June 1, 2010 by the Union, because only full time employees who worked the hours between 6:00 P.M. and 6:00 A.M. were receiving premium shift

differential pay for work between 6:00 P.M and 6:00 A.M. The grievance was based upon the plain language of **Section 15.12**. The grievance was denied at all early steps and was brought to arbitration for a final and binding determination.

A second grievance was filed on August 11, 2010, which challenged the Employer's interpretation of **Article XVII, Section 17.4**. The grievance contends that all employees are eligible to receive payment of time and one half the normal wage, when they work on a holiday. The Employer also denied the August 11, 2010 grievance and the grievance was brought to arbitration.

The June 1, 2010 grievance and the August 11, 2010 grievance are both before the arbitrator for final and binding determination.

**SUMMARY OF UNION'S POSITION:**

The Union argues that the plain meaning of **Section 15.12** is clear and unambiguous and should be enforced by the arbitrator. The language change in **Article 15.12** from the 2006-2008 contract to the 2009-2010 contract extends the right to receive a shift differential of sixty cents for work performed between 6:00 P.M. and 6:00 A.M. from selected groups of employees to "all employees." There is nothing ambiguous about the phrase "all employees." Using the agreed upon meaning of "employee" found at **Section 3.8** of the collective bargaining agreement, "a member of the exclusively recognized bargaining unit," all bargaining unit members should be paid the sixty cent per hour shift differential for all work performed between 6:00 P.M. and 6:00 A.M. When the plain meaning of a term is clear and unambiguous, the arbitrator should require that the agreement be followed. There is no need to look to external evidence to determine what the parties intended.

The language of **Section 15.12** was proposed by the Employer's lead negotiator. When the meaning of a term is in dispute, it should be construed against the drafting party. While the Union contends **Section 15.12** is clear and unambiguous, the rule that disputed language should be construed against the drafting party also supports the Union's position. **Section 15.12** should be applied to all members of the bargaining unit not just "full time employees".

The Employer claims that it could not afford pay increases at the time that the proposal was made. Hence, it argues that it would not have proposed contractual language that would have required increased payments to employees. The argument should be rejected because the plain language of **Section 15.12** extends differential pay to "all employees" not to "full time employees." The contract should be enforced as it was written.

The grievance over holiday pay is based upon the plain meaning of **Section 17.4** of the collective bargaining agreement. **Section 17.4** of the agreement says "If an employee works on any of the holidays listed above, he/she shall be compensated at the rate of time and one-half (1½) for all hours worked in addition to his/her regular holiday pay." **Section 17.4** makes no mention of an employee's status as full time, part-time, benefit eligible, or casual. The section simply says that "if an employee works" on a holiday, the employee shall be paid time and one half plus regular holiday pay. Working on a holiday is not a benefit but it is a circumstance which the parties agreed entitles employees to premium pay. The collective bargaining agreement clearly defines an employee as a bargaining unit member. No additional qualifying language such as "full time" or "benefit eligible" is used in **Section 17.4**. The plain meaning of the section is that if a bargaining unit member works on a holiday, the bargaining unit member is entitled to premium pay for his or her labor on the holiday. Some employees are not entitled to the benefit of a paid holiday or holiday benefit pay plus the time and one half premium pay

provided for in **Section 17.4**. However, bargaining unit employees are entitled to be paid time and one half premium pay for work on a holiday together with any holiday benefit. In the absence of any modification of the term “employee” in **Section 17.4**, time and one half should be paid to bargaining unit members who work on designated holidays.

**SUMMARY OF EMPLOYER’S POSITION:**

The City argues that **Section 16.2** and **Section 16.3** of the collective bargaining agreement completely undercut the Union’s plain language position. **Section 16.2** says in the second sentence that “Employees are ineligible for other benefits established in this agreement.” **Section 16.2** makes it clear that some part-time employees may elect the health insurance benefit and receive half of the City contribution. Other benefits established in the collective bargaining agreement are not available to the employees identified in **Section 16.2**. **Section 16.3** says that casual employees are not eligible for benefits under the collective bargaining agreement and specifically references **Article XV** of the agreement. The plain language of **Section 16.3** excludes casual employees from the group of employees eligible for benefits available under the collective bargaining agreement.

It has been the custom and practice of the parties not to extend the holiday pay benefit to part-time and casual employees. The current holiday pay language has been in the collective bargaining agreement for a long time. Casual and part-time employees have never received holiday pay under the collective bargaining agreement. The language was unchanged in the 2009-2010 contract. There is simply no basis for changing the long standing interpretation of **Section 17.4** of the collective bargaining agreement. There is no evidence that the parties intended to change the meaning of **Section 17.4** in negotiations over the 2009-2010 agreement.

The Employer's position is further reinforced by referencing the economic context wherein the 2009 -2010 contract was negotiated. The City's goal during negotiations was to avoid laying off employees by implementing a general wage freeze for 2009-2010 and a step freeze in 2010. The City was asking for Union concessions and was not attempting to expand the benefit package for any employee group. The changes that were made to the contract were "housekeeping" in nature. The definitions of various employee groups were consolidated in **Article III** and contractual rights and limitations were consolidated in **Article XVI. Section 15.12** was changed to say "all employees" but the Employer meant all benefit eligible employees, when it made the proposal. There is no evidence that either the Employer or the Union specifically discussed extension of the shift differential benefit to employees who are specifically ineligible for benefits pursuant to **Sections 16.2** and **Section 16.3**.

**OPINION:**

Reading the specific language of **Section 15.12** and **Section 17.4** of the collective bargaining agreement in isolation leads to the conclusion that all bargaining unit members are to be paid shift differential and at a minimum should receive time and one half for work performed on holidays. However, the entire agreement must be considered in addressing the issues raised in the Union's grievances. As the Employer vigorously argues, **Sections 16.2** and **Sections 16.3** undercut the Union's position by restricting the rights of part-time and casual employees under the contract.

**Section 16.3** significantly limits employee benefits available to "casual employees" under the collective bargaining agreement and contains specific language that denies "casual employees" from being paid the **Section 15.12** shift differential. **Section 16.3** denies "casual employees" benefits under the collective bargaining agreement and says:

*Further, Casual employees shall not be covered by the provisions relating to:...*

**Article 15: Salaries**

*Casual Employees shall be compensated according to the schedule attached in Exhibit B.*

**Article XV, Salaries** clearly and unequivocally does not apply to “casual employees”. **Section 15.12** does not have applicability to “casual employees”, because “casual employees” are not covered by **Article XV**. The only compensatory language that applies to “casual employees” is the “schedule attached at Exhibit B.”

**Section 16.2** denies benefits under the collective bargaining agreement to part-time employees. However, **Article XV** governs compensation not benefits. **Section 15.12** provides that “all employees” shall be paid a shift differential for all hours worked between 6:00 P.M. and 6:00 A.M. The only employees specifically excluded from **Article XV** by another section of the collective bargaining agreement are “casual employees.” If the Employer intended that any group of employees other than “casual employees” would not be eligible for shift differential, it would either have specifically excluded the group of employees from the scope of **Section 15.12**, in the same manner as it did with “casual employees” or **Section 15.12** would have been self limiting, as it was in the 2006-2008 collective bargaining agreement.

Based upon the plain language of the collective bargaining agreement, all bargaining unit employees, except “casual employees”, must be paid the **Section 15.12** shift differential, if they work between 6:00 P.M. and 6:00 A.M. If any employees other than “casual employees have not been paid the sixty cent per hour shift differential established in **Section 15.12** of the collective bargaining agreement, while the 2009-2010 collective bargaining agreement has been in effect, the Employer is required to pay those employees the shift differential earned.

The parties have set holiday provisions apart in a separate **Article** of the collective bargaining agreement. While the language of **Section 17.4** read in isolation strongly suggests that all bargaining unit members who work on a holiday must be paid at time and one half their regular wage, **Article XVII** establishes the benefit of holidays and holiday pay. Because **Section 16.2** and **Section 16.3** deny benefits to “casual employees” and “part-time employees”, both groups of employees are excluded from **Article XVII** benefits, including payment of time and one half for work on holidays. The Employer’s argument that the parties have customarily interpreted **Section 16.2** and **Section 16.3** to exclude both part-time and casual employees from the scope of **Section 17.4** is well taken. Unlike **Section 15.12** which was changed in negotiations over the 2009-2010 contract, **Section 17.4** was the same as in prior contracts. The meaning given to **Section 17.4** by the parties over an extended period of time must be followed in this instance.

The June 1, 2010 grievance should be upheld to the extent that any bargaining unit members, who are not “casual employees” have not been paid the **Section 15.12** shift differential, during the term of the contract.

The August 11, 2010 grievance should be denied based upon the exclusionary language found at **Section 16.2** and **Section 16.3** of the collective bargaining agreement and the custom and practice of the parties.

**AWARD:**

- *The June 1, 2010 grievance is hereby upheld to the extent that any bargaining unit members, who are not “casual employees” have not been paid the Section 15.12 shift differential, during the term of the contract.*

- *The August 11, 2010 grievance is hereby denied based upon the exclusionary language found at Section 16.2 and Section 16.3 of the collective bargaining agreement and the Custom and Practice of the parties.*

**Dated: December 16, 2011**

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**James A. Lundberg, Arbitrator**