

IN THE MATTER OF ARBITRATION BETWEEN

AFSCME Council 5, Local 66	) OPINION AND AWARD
	)
	) Grievance Arbitration -
	) 1) Arbitrability
-and-	) 2) Overtime Callout
	) (P. Fournier)
	)
	) Arbitrator:
	) John W. Boyer, Jr.
	)
City of Duluth, Minnesota	) BMS 14-PA-0862

APPEARANCES

For AFSCME Council 5, Local 6  
Amanda Wilson, Field Representative  
Ken Loeffler-Kemp, Field Representative  
Phil Fournier, Grievant  
David Leonzal, Chief Steward

For City of Duluth  
Steven B. Hanke, Assistant City Attorney  
Jim Benning, Director - Public Works & Utilities  
Audra Flanagan, Human Resource Manager  
Greg Guerrero, Utility Operations Supervisor  
Stina LaPaugh, Paralegal

Date of Hearing  
September 25, 2014

Close of Hearing  
October 22, 2014

STATEMENT OF JURISDICTION

Pursuant to the State of Minnesota Public Employment Labor Relations Act, as amended, and Article 45 - Grievance Procedure of the Agreement, the Issues as determined by the Arbitrator and stated below were submitted to Arbitration.

At the Hearing each of the Parties presented testimony under Oath, was afforded full opportunity for examination and cross-examination of witnesses, and submitted exhibits in support of their

respective positions. The Parties elected to submit post-Hearing briefs, such were duly received, and the Hearing was declared closed. Finally, the Parties mutually waived the requirement of the Agreement for issuance of the Award within thirty (30) days of the close of the Hearing.

### **THE ISSUES**

1) Arbitrability - Did the Union submit the grievance in a timely manner per Article 45 of the Agreement? If not, what shall be the appropriate remedy?

2) Substantive - Does the Employer's revised Utility Operations policy and practice utilizing employees on Scheduled Standby Duty to respond to after-hours sanitary sewer calls violate the overtime seniority provisions of the Agreement? If so, what shall be the appropriate remedy?

### **BACKGROUND**

The dispute involves interpretation of the 2013-2015 Agreement, as the facts giving rise to the matter are essentially not in dispute.

The Employer is a large city in Northern Minnesota, and the Grievant was hired as a Collection Systems Maintenance Worker (CSMW) in 1976. Then in 1999 the Employer began to merge the Water, Sewer and Gas Maintenance Departments and those employees into a single department. The merger created overlapping job duties and work assignments for the job classes that had formerly been separate, including Collection Systems Maintenance Workers.

Further, the Employer created a new job class of Utility Operator, where an employee was to be trained and capable of working on all three (3) utilities. At some point, the employees were allegedly told that Collection Systems Maintenance Workers (CSMW) like the Grievant would have the opportunity to receive training to become Utility Operators or they could choose to remain in the Collection Systems Maintenance Worker classification until separation from employment.

Accordingly, the Parties bargained transitional language and developed practices to address anticipated issues and hasten a smooth transition from the prior three (3) departments to the new single department cited above. The practice at the genesis of the dispute involves annual meetings wherein the Director - Public Works & Utilities and Union Stewards met to develop overtime policies and procedures that included an "order of callout" for the various classifications, and the nature of overtime. A common theme in these "bargained" policies was that "overtime work associated with Water & Gas operations will be offered to the positions that were

traditionally water & gas work", and that practice was allegedly continued until a new policy was made effective in March 2013.

The Record also indicates that pursuant to the prior policy, the Grievant and other CSMW employees were regularly called to work overtime because that classification had traditionally performed such work, and it continued to perform those same duties "during the day".

However, in August 2013 a policy was created that provided in relevant part:

"Utility Operator Standby Crews shall respond to all after-hour calls for all four (4) utilities...the Standby Leadworker on duty...will determine the size of duty crew that will respond to the work site."

Additionally, the Parties completed negotiations for the instant Agreement during the Summer of 2013 and deleted the Article 20.10 provision that provided for purposes of Article 20 - Seniority "the job classifications of Collection System Maintenance Worker, Utility Operator and Water & Gas Maintenance Journey person shall be treated as one job title" that had been effective during the merger process. Further, the Parties also bargained the deletion of their Article 51 - Reopeners Clause that provided:

51.4 During the term of this Agreement, either party may require the other to meet and negotiate concerning any new or modified job specification or title, or any issue of pay, seniority, assignment, scheduling, or other term or condition of employment not otherwise reserved to management as an inherent management right, resulting from the integration of the Department of Water and Gas and the Department of Public Works.

Finally, in addition to the Substantive Issue cited, the Employer contends the Union's grievance was filed in an untimely manner, and ought not be subject to review upon its substantive merit(s). However, the Record indicates there was no such contention by the Employer up to and including the meeting/"hearing" with the Employers Chief Administrative Officer (CAO). Rather, the Record indicates the CAO gave the Union a verbal denial to which the Union allegedly responded with a verbal notice of its intent to submit the matter to Arbitration, and approximately six (6) months after filing of the grievance the Union submitted a written request for Arbitration in February, 2014.

Nevertheless, in October 2013 the Union had submitted a grievance on behalf of the Grievant that provided in relevant part:

Statement of Grievance

At approximately 5:30pm on 10/15/13 one of the Utility Operators

on Standby Duty was called back along with one crew member from the afternoon shift to respond to a service call regarding a customer's sanitary sewer problems. This resulted in unscheduled overtime work for the Utility Operator. Sewer calls have traditionally been offered to Collection Workers first.

Contract Violations

Article 20.2 - Overtime selection rights shall be determined within each department by seniority. Our seniority is being honored in all the aspects including carry over after storm, sanitary construction and emergency storm or sanitary construction.

Remedy Sought

Allow Grievant to make up overtime denied, rescind current sewer call policy, return to previous policies in place since merger of utilities in 2000.

However, the Employer consistently denied the position and request of the Union on the basis that overtime had been properly assigned in accordance with the provisions of the Agreement, applicable policy and management rights.

Therefore, given the Parties were unable to resolve the dispute and stipulate to an absence of any other procedural deficiency, the matter was reduced to writing in accordance with Article 45 - Grievance Procedure and appealed to Arbitration.

PERTINENT PROVISIONS OF:

A) THE AGREEMENT (Excerpts Only)

ARTICLE 5 - MANAGEMENT RIGHTS

5.1 The Employer and Union recognize and agree that except as expressly modified in this Agreement, the Employer has and retains all rights and authority necessary for it to direct and administer the affairs of the Employer and to meet its obligations under federal, state and local law, such rights to include, but not be limited to, the rights specified in Minnesota Statutes, Section 179A. 07, Subd. 1; the right to direct the working forces; to plan, direct and control all the operations of the Employer; to determine methods, means, organization and number of personnel by which such operation and services are to be conducted; to contract for services; to assign and Transfer Employees; to schedule working hours and to assign overtime; to make and enforce reasonable rules and regulations; to change or eliminate existing methods of operation, equipment or facilities.

ARTICLE 17 - OVERTIME

17.3 The working of overtime by an Employee shall be voluntary except in cases where the Supervisor determines that work is necessary to protect property or human life. For purposes of distribution of overtime, overtime refused is to be considered overtime worked.

17.4 Except for Employees assigned to standby duty under Article 18 of this Agreement, Employees shall not be required to work more than sixteen (16) consecutive hours, to be followed by a minimum of eight (8) hours off before being required to return to work.

17.5 In Fleet Services, callout will occur as follows:

(a) When the Employer determines that the work to be done is heavy equipment work, a callout will be in this order: a leadworker, heavy equipment mechanic(s), equipment maintenance specialist(s) with a CDL, other leadworker(s).

(b) When the Employer determines that the work to be done is light equipment work, callout will be in this order: a leadworker, equipment maintenance specialist(s), heavy equipment mechanic(s), other leadworker(s).

(Emphasis Added)

ARTICLE 18 - STANDBY SCHEDULING AND PAY

The term "standby" is limited to a status in which an Employee, though off duty, is required by the Employer, to be available for duty. The Employee should receive clear advance notice that he/she will be on "standby".

18.1 Standby may or may not be scheduled at the discretion of the Department Director.

18.2 A standby schedule of qualified employees for standby duty shall be established annually, and posted no later than the first of December of the preceding year. Qualified Employees shall be scheduled on a continuous rotation. The Employees will be ranked on the list, by division seniority (first date of employment in division) and voids in the scheduling, including, but not limited to, vacation or sick leave, shall be filled from the same seniority list.

18.3 (a) Employees who are on standby duty shall receive two (2) hours of pay at their current Basic Hourly Rate for each Shift they perform duty Monday through Friday and three (3) hours of pay at their current Basic Hourly Rate for each Shift they perform duty on Saturdays, Sundays, and holidays.

(b) Employees who are on standby duty and are required to report back to work shall also receive pay at time and one-half their current Basic Hourly Rate for any time actually worked.

\* \* \* \* \*

18.5 Public Works and Utilities - Utility Operations  
Division:

(a) Crew staffing levels shall be determined by the Appointing Authority. Crews shall consist of only Utility Operations Leadworker and/or Utility Operations Employees who have completed the Water & Gas Maintenance Apprenticeship Program or the Utility Operator Apprenticeship Program. This duty will commence at 7:30am on Monday of the assigned week and continue until 7:30am of the following Monday. During this period, the crew shall work their regular day Shift hours from Monday through Friday and, in addition, they shall remain on call and be immediately available for any emergency work during all non-work hours of their standby duty Assignment. When Employees are called out on standby, they shall notify the dispatcher to clock them in and out. Standby leadworkers shall be the first contact for afterhours calls for all four utilities (sewer, stormwater, water, and gas). Employees will be scheduled and compensated on holidays the same as Saturdays and Sundays.

(b) Other than Leadworkers, Utility Operations Division Employees who have completed either the Water & Gas Maintenance Journeyman Apprenticeship Program, or the Utility Operator Apprenticeship Program, are eligible to serve standby duty and may be placed on the annual standby duty scheduled based on seniority. If less than 24 Employees sign up for standby duty for the coming year's rotation, the city may assign, according to reverse seniority, Employees to serve standby in order to assure no less than 24 Employees will be on the rotation list.

ARTICLE 19 - CALL BACK

19.1 An Employee who is released by his or her Supervisor and is called back for emergency work shall receive a minimum of four (4) hours pay at one and one-half (1 ½) times the Employee's current Basic Hourly Rate commencing when the Employee returns to the assigned work site, except that such four (4) hour minimum pay requirement shall not apply in instances where the call back time extends from or into the Employee's regularly scheduled Shift. In the event an Employee is called back more than once during an eight (8) hour period, such Employee shall not receive more

than eight (8) hours pay at the overtime rate for such period.

19.2 Employees who are called back and are required to work remotely shall receive pay at time and one-half their current Basic Hourly Rate for a minimum of one (1) hour or actual time worked, whichever is greater.

#### ARTICLE 20 SENIORITY

20.1 Seniority shall be determined by the Employee's continuous length of service within this bargaining unit in his or her present job classification in the department in which he or she is currently working..

\* \* \* \* \*

20.2 Except as provided in Section 20.3 of this article and subject to the Employer's right to schedule overtime and determine the times at which vacations may be taken, vacation and overtime selection rights shall be determined within each department division by seniority.

#### ARTICLE 45 - GRIEVANCE PROCEDURE

45.1 An Employee or group of Employees with a Grievance shall, within twenty-one (21) calendar days after the first occurrence of the event giving rise to the Grievance, present such Grievance through the Union in writing to the appropriate first line or division manager or, in the absence of such manager, to his or her authorized representative with a copy of the Grievance being sent to the Department Director.

(a) Within ten (10) working days of receipt of the Grievance, the manager shall meet with the grieving Employee(s) and the steward to try to fairly and equitably resolve the Grievance.

(b) The manager, in consultation with the department head shall present the Employer's position in writing to the Employee or Employees and the Union within ten (10) working days after receipt of the Grievance.

(c) Grievances not resolved within the department must be presented by the Employee or Employees through the Union in writing to the Chief Administrative Officer or designee within twelve (12) working days after the Employer has given its reply to such Grievance.

(d) The Chief Administrative Officer or designee shall reply in writing to the aggrieved Employee or Employees and the Union within twelve (12) working days after receipt of such grievances.

45.2 If the Grievance is not settled in accordance with the foregoing procedure, the Union may, within twelve (12) working days after receipt of the reply of the Chief Administrative Officer or designee submit the Grievance to Arbitration by serving notice in writing of such submittal upon Chief Administrative Officer or designee.

45.3 The Arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. He or she shall consider and decide only the specific issue(s) submitted to him or her in writing by the parties, and shall have no authority to make a decision on any other issue not so submitted to him or her.

\* \* \* \* \*

45.6 If a Grievance is not presented within the time limits set forth above, it shall be considered waived.

B) EMPLOYER POLICY (Excerpts Only)

MEMO

To: Utility Operations Staff

From: Howard Jacobson, Manager of Utility Operations

Date: 8/12/2013

Re: Responsibility of Standby Crews

Utility Operation Standby crews shall respond to all after-hour calls for all four utilities (Sanitary, Stormwater, Water, and Gas). Crew size and makeup shall be in accordance with the Collective Bargaining Agreement. When the standby Leadworker on duty determines that after-hours work must be completed immediately, they will decide the size of duty crew that will respond to the work site. Unless a standby employee is unqualified to do a specific task or a larger construction crew is required, this work will be accomplished by the employees currently on standby duty.

When responding to a call that will require the use of sewer cleaning equipment the standby Leadworker on duty will dispatch both standby employees (east and west) to respond to work site. When responding to a sewer service call that will require sewer cleaning equipment the duty crew must consist of at least one current Utility Operator (UO).

If only one standby employee is currently a UO, the Leadworker may **Call Back** a Utility Maintenance Worker (UMW) unless the standby employee who is not a Utility Operator feels competent to assist the UO on the sewer call by opening manholes, setting up traffic control, and assisting in other tasks.

If both standby employees on duty have not completed the Utility Operator Apprenticeship Program then the standby Leadworker will fill the crew by **Call Back** with 1 Collection System Worker (CSMW) and 1 UMW, if no CSMW is available then a UO will be called. Seniority will be used for Call Back.

If one of the standby employees who has not completed the Utility Operator Apprenticeship Program feels competent to assist the called back CSMW or UO on sewer service call, they may do so.

A construction crew will be called out at the discretion of the standby Leadworker when that work cannot be safely deferred until normal working hours.

(Emphasis Added)

### POSITION OF THE PARTIES

The position and requests of the Parties on each of the Issues were outlined by their representatives and supported by a variety of documents and testimony as follows:

#### THE UNION

##### Issue 1 - ARBITRABILITY - Timeliness

1) The Union processed the grievance in a timely manner given Article 45 provides a notice of its intent to submit a grievance to Arbitration should be provided within twelve (12) working days after receiving the reply of the CAO.

2) The CAO provided only a verbal reply rather than a written reply.

3) The Employer is attempting to "pick and choose" applicability of sections of the Agreement and has elected to ignore its responsibility for a written response to a grievance.

4) The Employer was unable to provide any evidence the disputed language has always been utilized to the letter to determine

timeliness, and that a verbal notification of the Union's intent to proceed to Arbitration has never been acceptable.

5) Requested the Arbitrator to deny the position of the Employer, and to find the matter is properly subject to arbitration upon its substantive merit(s).

#### Issue 2 - SUBSTANTIVE - Violation of Agreement

1) The Employer violated Article 20 of the Agreement by denying the Grievant(s) the right to work overtime to complete work performed by his job classification during normal business hours.

2) That Article 20 governs Seniority, and Section 20.2 states "Except as provided in 20.3 and subject to the City's right to schedule overtime and determine the times at which vacation may be taken, vacation and overtime selection rights shall be determined within each department division ... by seniority".

3) That application of this vague provision has been the subject of a long standing practice as interpreted and implemented pursuant to Article 20. Further, both the language and practice have remained unchanged since the 1999 merger of the departments.

4) The merger that combined Water, Sewer, and Gas department workers into one (1) department during 1999-2003 created overlapping job duties and work assignments that had formerly been separate, including Collection Systems Maintenance Workers (CSMW).

5) The merger also created the new Utility Operator classification where employees were to be trained and capable of working on all three (3) utilities.

6) The Parties formalized a process for determining which job classes would respond to after-hour calls and address seniority issues that could arise out of the overlap that included the understanding that members in each job class must retain their job duties for the duration of their employment.

7) That stewards from each job class met annually with Employer representatives to discuss how overtime would be distributed and bargained an agreement based upon their mutual consent that was applicable from 2003 to 2013.

8) Then in July-August 2013, the Employer unilaterally eliminated that agreement and implemented it's new policy that is in dispute. The Employer changed the prior agreement and practice of calling out workers for overtime based upon the employee's work assignment during business hours, by calling out only the Utility Operator classification and denying any more senior employee the overtime work opportunity.

9) That in addition to its management right, the Employer argues removal of Article 20, Section 10 as proposed during the 2013

negotiations constituted its justification for the change by contending such voided the past practice relative to Article 20.2 of the Agreement.

10) That both Union negotiators testified this Article was never utilized and was in fact contradictory to the application of Article 20.2, and the Employer was not able to respond with other than unsubstantiated claims and hearsay.

11) The Union proved there had been no bargained changes to the interpretation or practice relative to application of Article 20.2.

12) The Employer's unilateral change of denying CSMW employees the opportunity to perform the work of their job class is a violation of the Agreement.

13) The Employer unilaterally implemented a new policy that eliminated over a decade of practice and mutual agreements relative to the order of callout for overtime work.

14) Requested the Arbitrator to sustain the grievance and to direct the Employer to return to its previously bargained agreement relative to Article 20.2, and the Grievant be made whole for any lost overtime opportunities and wages.

#### **THE EMPLOYER**

##### 1) Issue 1 - ARBITRABILITY - Timeliness

1) The grievance was not timely filed because the Union failed to give notice of its intent to arbitrate within twelve (12) days of the CAO's denial of the grievance. Rather, such was provided nearly six (6) months later.

2) That Article 45.6 of the Agreement provides in relevant part that if "a grievance is not presented within the time limits ... it shall be considered waived. (and) ... if not appealed to the next step within the specified time limit or agreed extension thereof, it shall be considered settled on the basis of the Employer's last answer".

3) Requested the Arbitrator to sustain the position of the Employer to find the grievance was not timely processed to Arbitration, and such renders it not subject to adjudication upon its substantive merit(s).

##### 2) Issue 2 - SUBSTANTIVE - Violation of Agreement

1) The Employer's issuance and administration of its new policy on scheduling of the Standby Crew to perform emergency sewer and storm water work shall not be construed as a violation of the Agreement.

2) The Employer has the inherent management right pursuant to both the Agreement and the Public Employment Labor Relations Act (PELRA) to implement such a policy.

3) That Article 5 and PELRA expressly provide the Union recognizes and agrees the Employer has and retains all rights and authority necessary to direct and control all operations.

4) That direction of emergency operations is a fundamental management right.

5) In the instant matter, the Employer already has Union employees scheduled to perform emergency work. Those employees are paid to be immediately available for emergency work and are paid additionally when it becomes necessary to actually perform such work.

6) The Employer demonstrated multiple "good faith" reasons for the operational change, the most important being that Standby Duty crews are not staffed by a majority of employees who are legally trained and authorized to perform sewer and storm water utility work.

7) That CSMW employees can be called in by the Standby Duty crew when a Leadworker, who is a Union employee, determines the additional help is required and such call-back is offered by seniority.

8) The Union is not able to find any support in the Agreement for its contention that CSMW employees have the absolute right to perform sewer and storm water work.

9) The Agreement only guarantees that CSMW employees can remain in that classification. However, neither the Agreement or any policy guarantees the Employer's customer service demands and/or operations will remain unchanged.

10) The Union's contention that Article 19 - Call Back must be utilized is contradictory, given the Grievant is not the most senior employee on the Call Back list, and he is the least senior CSMW employee.

11) The Union's argument relative to an alleged binding past practice fails to recognize the CSMW's who transferred to the Utility Operator class also lose all seniority for the Sewer and Storm Water overtime work opportunities.

12) That elimination of Article 20.10 supports the Employer position that even if Call Back is required, the Employer can choose which job class shall perform the Call Back work when there are multiple qualified job classes. The Agreement then only requires the Call Back be by seniority within that job class.

13) The grievance is actually only a disagreement relative to an operational decision veiled as a past practice agreement.

14) The Employer has the inherent managerial right to utilize scheduled Standby crew members rather than to call out additional employees on overtime.

15) That pursuant to the Union contention, the Employer is allegedly required to operate forever in the same way it did prior to the merger.

16) The Agreement has no provision(s) that would support the Union contention relative to absolute CSMW seniority in such situations.

17) That it is fundamentally unfair for the Union to arbitrate three (3) different grievances on the same issue with three (3) different Arbitrators.

18) Requested the Arbitrator to deny the grievance of the Union for a lack of any Substantive merit(s).

### OPINION AND AWARD

On the basis of the considered evaluation of all documents, testimony and arguments presented by the Parties, the decision of the Arbitrator on each of the Issues follows:

1) Initially, the Arbitrator can readily empathize with the mutual concerns and apparent frustration inherent in the disparate position of the Parties when confronted with the emotion-laden matters of the Procedural issue relative to Timeliness and the complex Substantive issue relative to overtime work distribution for various job classes subsequent to a significant and protracted merger of major public utility departments, that necessitated adjudication through these proceedings.

Therefore, the Award shall not be interpreted as reflecting upon the integrity of the principals given the behavior of each exhibited at the Hearing could be characterized as an open, reserved, and sincere attempt to provide convincing argumentation supportive of their positions. Nevertheless, the Award was predicated upon well documented standards of contract interpretation recognized by both the principals in a dispute and neutrals alike.

#### 1) Issue 1 - ARBITRABILITY - Timeliness

On the basis of the considered evaluation cited above, the decision of the Arbitrator is to deny the position of the Employer and to find the grievance timely processed and subject to review upon its Substantive merit(s). The basic reasons for the Award are the following:

1) Simply stated, there is no question that if the decision was predicated singularly upon the literal expression and readily discernable interpretation of Article 45 that the Employer's position would have been sustained. Specifically, the Article cited in detail above provides in a relevant and totally applicable part that:

"the Union may within twelve (12) working days after receipt of the reply of the Chief Administrative Officer ... submit the grievance to Arbitration by serving notice in writing ... (to) the Chief Administrative Officer ..."

Clearly, the Record indicates that written notice of the Union was submitted months later. Similarly, the Article continues "If a grievance is not presented within its time limits set forth above, it shall be considered waived".

However, the Record also indicates that both Parties have apparently become lax and taken liberties with these explicit provisions of the bargained Grievance Procedure. More importantly, in the instant matter the Record also clearly indicates the Chief Administrative Officer failed to provide the required written reply/denial of the grievance as specified in Section 45.1(d) of the Article, and offered only a verbal response. Further, such "informal" procedures are not atypical of a labor-employer relationship in such settings.

The Record also indicates the Union ultimately provided the designated Chief Administrative Officer with verbal notification of its intent to proceed to Arbitration after receipt of the Employer representative's verbal denial. Further, the extent to which the matter was complicated by the fact there were multiple grievances being processed relative to essentially the same issue the Arbitrator prefers remain for conjecture, but such is a readily acceptable explanation.

Therefore, on the basis of the totality of the Record on the Issue, the Arbitrator is compelled to sustain the position of the Union, and find the matter was timely submitted to Arbitration for adjudication upon its Substantive merit(s).

## 2) Issue 2 - SUBSTANTIVE - Violation of Agreement

On the basis of the considered evaluation cited above, the Arbitrator is compelled to deny the grievance of the Union. The basic reasons for the Award are the following:

1) The compelling and critical backdrop for the matter is the protracted process of merging three (3) very different and traditionally separate departments into a single department that was initiated in 1999. The Record indicates such was initiated and completed with the openly communicated objective of achieving increased efficiency and optimal customer service for the City's residents. Further, typical of any such merger in either the public or private sectors, one (1) of many inevitable results was the combination of various and/or multiple similar job classifications that could/would potentially, and perhaps inevitably, result in

changes in historical work assignments and overtime distribution practice as inherent in the instant matter.

Further, the Parties routinely bargained contractual provisions and developed additional staffing practices that were intended to facilitate a "smooth transition" from the "old" to the "new" structures relative to such real and/or potentially highly emotional job-related matters. They also apparently perceived that process to be a "work in progress", and the instant aspect of overtime distribution was apparently a significant issue throughout that transitional period.

2) The Record also compels a finding the Parties have created and nurtured a unique practice of scheduled annual meetings between Union stewards and Employer representatives with the clear objective and practice of "negotiating" such issues as the "order of callout" for overtime work for the various job classifications that remain in the new merged department. Indeed, the documented agreements that resulted from this mutual practice became operational policy(s) with the most recent being March 2013.

Accordingly, the Arbitrator is cognizant and appreciative of a basic axiom of labor relations as recognized by Neutrals and Advocates alike, and initially articulated by the often-quoted Richard Mitterthal with a rationale totally applicable to the instant matter:

Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For \* \* \* if a practice is not discussed during negotiations, most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.

That inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment..<sup>1</sup>

Therefore, given the unequivocal presence of a past practice, the Arbitrator is compelled to deny the position of the Employer that it could terminate such predicated simply upon its inherent and/or bargained managerial rights. Rather, it is an accepted Arbitral principle that such rights are and/or can be expressly limited and/or

---

<sup>1</sup> See "Past Practice and the Administration of Collective Bargaining Agreements", Arbitration and Public Policy, 30, 56 Bureau of National Affairs, Inc., 1961

modified only by either collectively bargained provisions or by a clearly established and mutually accepted practice as addressed above.

Further, as stated by Arbitrator Mittenthal in his acknowledged treatise cited above, any such binding practice has "life and effect" until "broken" in direct collective bargaining. In that regard, the Record also indicates that while the practice was not explicitly addressed during the 2013-2015 negotiations, the Parties did delete two (2) directly relevant contractual provisions that were critical for the mergers transition from three (3) to one (1) operational department.

Specifically, note the following, the Parties bargained the deletion of the original Article 20.10 that provided:

20.10 For the purposes of this article, the Civil Service job classifications of Collection System Maintenance Worker, Utility Operator and Water and Gas Maintenance Journeyperson shall be treated as one job title.

Similarly, the Parties bargained the deletion of an explicit Article 51 - Reopeners provision relative to the "integration" of the merged departments, that provided:

51.4 During the term of this Agreement, either party may require the other to meet and negotiate concerning any new or modified job specification or title, or any issue of pay, seniority, Assignment, scheduling, or other term or condition of employment not otherwise reserved to management as an inherent management right, resulting from the integration of the Department of Water and Gas and the Department of Public Works.

Finally, and more importantly, the Parties bargained the addition of the "new" and disputed Article 20.10 that expressly provided:

20.10 (a) No City of Duluth Employee will be forced to transfer or reclassify into the Utility Operator classification. Employees holding the classification of Collection System Maintenance Worker, Water and Gas Maintenance Journeyperson, Regulator Mechanic, W & G Equipment Operator, Lift Station Operator, W & G Pipeline Welder, Water Quality Specialist, or Warehouse Assistant will be allowed to hold such classification for the remainder of their employment with the City; all the way to and including their retirement if the Employee so chooses. The City will maintain these classifications and agrees not to eliminate them so long as there are Employees who wish to remain in these classifications.

However, the Record is surprisingly void of any specific aspects of the Parties discussion relative to their individual or mutual intent

and/or perceived impact of the significant differences in the resulting finalized Agreement.

Accordingly, the Arbitrator is compelled to adjudge such change as the Parties mutual recognition the nearly fifteen (15) year transitional process to the merged department was complete. Indeed, employees in the various departments such as CSMW's can train to become qualified as Utility Operators, or can voluntarily elect to remain in that prior classification until separation of their employment, including the option to continue such until retirement, and such was the decision of the Grievant. Further, it is well-documented that such natural evolutions of organizational structure and/or job classifications do not continue forever, but typically "run their course" and are explicitly ended when the Parties recognize the need for such transitional and/or interim "firefighting" contractual provisions and/or practices are neither necessary and/or justified. Simply stated, the Parties in this matter have acted to eliminate and/or modify the transitional provision(s) and operational policies/understandings that were the basis for their practice.

In addition, the Employer's readily discernable motivation to terminate the traditional practice of overtime distribution and to create a new policy relative to such was clearly predicated upon sound business rationale, customer service, and accountability for the management of public funds. Simply stated, the Arbitrator cannot accept the explicit and/or implicit contention of the Union that would require the redundant payment of "callout" wages for employees when scheduled Standby Crews are available, trained and already being paid for that service.

However, in such matter, the Union raises the legitimate scenario of the ability of that Standby Crew to timely and adequately respond to emergency work calls from various distant locations such as Lakeside and FonduLac. However, both the Agreement and the "new" policy provide that Unionized Leadworkers will assess such potential challenges and have the authority to "call out" additional employees if adjudged necessary.

Finally, although the policy is allegedly well designed to address anticipated operational staffing needs, such could readily be modified in the future to address unanticipated issues relative to the well-documented unpredictable levels of government funding, staffing patterns, technological changes, etc. that characterize and dominate the contemporary public sector labor-management environment.

Therefore, the Arbitrator is compelled by the totality of the Record to conclude the previous "old" practice was predicated upon clearly understood transitional provisions and understandings that were deleted from the Parties 2013-2015 Agreement, and the Employer's

elimination of that "old" practice and issuance of its "new" policy must be characterized as both justified and appropriate, and not inconsistent with the Agreement.

3) The Arbitrator is also compelled to comment on his expressed "surprise" and skeptical caution relative to the Union's decision and the Employer's concurrence to immediately proceed to Arbitration on two (2) additional grievances on essentially the same issue prior to receipt of this Award. Simply stated, while the Record is void of the specifics/details of those other matters, the Arbitrator is compelled to note the process is traditionally and explicitly intended to summarily resolve labor relations issues/disputes to the mutual benefit of the Parties. Further, it is well-documented that many Neutrals will adjudge the first Award as precedent-setting and dispositive of the issue.

Further, while the multiple grievances may have different "fact sets", the extent to which any specific fact may impact a particular Neutral is both significant and not totally predictable, given numerous variables such as his/her background, perception of the significance of specific facts, interpretation of the applicable Agreement, etc., may differ. For example, in the instant matter the Grievant is the least senior in the job class, and whether such relative seniority status could/would be significant to another Neutral must remain for conjecture.

Nevertheless, if the Arbitrators should potentially render a "split decision", the question becomes what have the Parties gained in terms of achieving final resolution of the issue, especially when considering the time and expense involved in such "Award shopping"? However, again the Arbitrator prefers the ultimate result(s) and effect of the multiple submissions remain for conjecture.

4) Accordingly, given the analysis and conclusions above, should the Union continue to perceive inequity in the interpretation of the contractual provisions at Issue, the appropriate and readily available forum is the process of compromise and concession characteristic of collective bargaining. However, the extent to which such may be instructive, the Arbitrator also prefers remain for conjecture.

Finally, the Record indicates the Grievant reacted in the affirmative to the Arbitrator's question of the extent to which the Union had afforded full, fair and/or adequate representation throughout the proceeding.

Therefore, on the basis of the analysis and conclusions above, the Arbitrator is compelled to render the Award.

AWARD

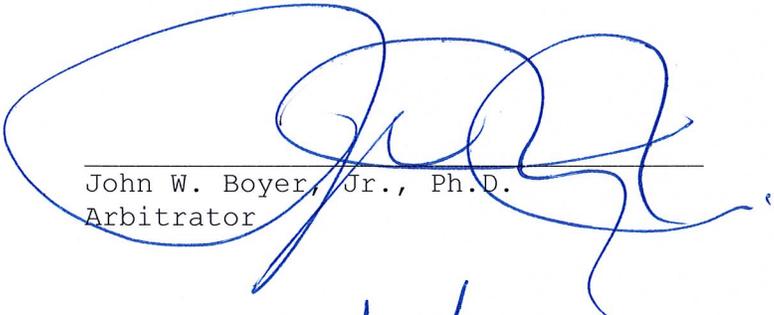
The decision of the Arbitrator on each of the Issues follows:

1) Issue - ARBITRABILITY - Timeliness

The decision of the Arbitrator is to deny the position of the Employer, and to find the matter properly submitted and subject to Arbitration upon its Substantive merit(s).

2) Issue 2 - SUBSTANTIVE - Violation of Agreement

The decision of the Arbitrator is to deny the grievance of the Union in its entirety.



\_\_\_\_\_  
John W. Boyer, Jr., Ph.D.  
Arbitrator

Dated: \_\_\_\_\_

12/19/14