

IN RE ARBITRATION BETWEEN:

**AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES,
AFSCME, COUNCIL 5**

and

CITY OF DULUTH, MN

DECISION AND AWARD OF ARBITRATOR

BMS CASE #14-PA-0861

JEFFREY W. JACOBS

ARBITRATOR

January 15, 2015

IN RE ARBITRATION BETWEEN:

AFSCME Council 5,

and

City of Duluth, MN

DECISION AND AWARD OF ARBITRATOR
BMS Case #14-PA-0861
Overtime call out grievance

APPEARANCES:

FOR THE UNION:

Amanda Wilson, Union Representative
Nick Economos, Utility Operator
Phil Fournier, CSMW, union steward
Greg Johnson, grievant

FOR THE CITY:

Steven Hanke, Attorney for the City
Greg Guerrero, Utility Ops. Supervisor
Jim Benning, Public Works Utility Director

PRELIMINARY STATEMENT

The hearing in the above matter was held on October 21, 2014 at the City of Duluth City Hall in Duluth, MN. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted briefs dated January 5, 2015.

ISSUES PRESENTED

The union stated the issue as follows: Did the employer violate the Collective Bargaining Agreement when they implemented a new policy as a unilateral change and in violation of past practice in application of Article 20, Section 2?

The City stated the issues as follows: Does the legal doctrine of collateral estoppel bar re-litigation of this issue? If the Arbitrator does not find that collateral estoppel applies, then the second issue is:

Does the Employer's revised Utility Operations policy and practice utilizing employees on Scheduled Standby Duty to respond to after-hours Sewer emergencies violate the overtime seniority provisions of the CBA?

Based on the record as a whole the arbitrator has determined the issue to be as follows:

What impact does the prior award by Arbitrator Boyer in re: *AFSCME Council 5 and City of Duluth* BMS # 14-PA 0862 (2014) have on this proceeding? Further, did the City violate the, collective bargaining agreement, CBA, when it promulgated and applied the revised utility policy of utilizing scheduled stand by duty crews to respond to after hours sewer emergencies?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 5 - MANAGEMENT RIGHTS

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 [including] the right to direct the working force; 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 assign overtime; ... to change or eliminate existing methods of operation, equipment of facilities.

ARTICLE 18 - STANDBY AND SCHEDULING 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.”

18.2 A standby schedule of qualified employees of 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, but not limited to, vacation, 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 Basic Hourly rate for each shift they perform duty Monday through Friday and three (3) hours of pay at their current Basic Hourly for each shift they perform duty Saturdays and Sundays.

18.3 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 Basic Hourly for any time actually worked.

18.5 (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 and Gas Maintenance Apprenticeship program or the Utility Operator Maintenance Apprenticeship Program. This duty will commence at 7:30 AM on Monday of the assigned week and continue until 7:30 AM 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 duty they shall notify the dispatcher to check them in and out. Standby leadworkers shall be the first contact for after hours calls for all four utilities (sewer, stormwater, water and gas). Employees will be scheduled and compensated on holidays the same as Saturdays and Sundays.

18.3 (b) Other than leadworkers, Utility Operations Division Employees who have completed either the Water and Gas Maintenance Journeyperson Apprenticeship Program, or the Utility Operator Apprenticeship Program, are eligible to serve standby duty and must be placed on the annual standby duty schedule based on seniority. ...

ARTICLE 20 - SENIORITY

20.1 Seniority shall be determined by the employee's continuous service 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 vacation may be taken, vacation and overtime selection shall be determined within each department division by seniority.

20.10 No City of Duluth Employee will be forced to Transfer or reclassify into the Utility Operation classification. Employees holding the classification of Collection System maintenance worker, Water and Gas Maintenance Journeyperson, regulator Mechanic, W & G Equipment operation, Lift System Operation, 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 choses. The City will maintain these classifications and agrees not to eliminate them so long as there are employees who wish to remain in those classifications.

PROVISIONS OF THE DISPUTED CITY POLICY – DATED AUGUST 12, 2013

Utility Operation Standby Crew shall respond to all after-hours call of 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 (sic) 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.

PROVISIONS OF PRIOR CBA'S THAT WERE DELETED FROM THE CURRENT CBA

(The following provisions were shown to have been in prior CBA's between these parties but were deleted through negotiations for the current agreement and no longer appear there. These were relevant to the determination of this grievance).

ARTICLE 20 - SENIORITY

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

ARTICLE 51-REOPENERS

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, to 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.

UNION'S POSITION:

The union's position was that the city violated the contract when it used stand by crews to respond to an emergency instead of calling out the grievant to respond to an after-hours sewer emergency. In support of this position the union made the following contentions:

1. The union filed this grievance along with two other similar grievances claiming that the City violated the terms of the CBA when it failed to call out the grievant for an emergency and instead called out a standby crew pursuant to the new policy dated August 12, 2013, set forth above. The union based its claims on the terms of Article 20.2 and asserted that the provisions of Article 18 are unrelated to and have nothing to do with the provisions of Article 20.2. Likewise, the provisions of former Article 20.10, which was deleted from the CBA during the negotiations for the 2013-2015 CBA between these parties, have nothing to do with this grievance either.

2. The grievant in this particular case was a Collections System Maintenance Worker, CSMW, and has been with the city for many years. As such he was entitled to be called first pursuant to well-established practices between the parties regarding emergency call outs for sewer emergencies. He left employment due to the loss of overtime following the promulgation of the City's new policy.

3. The union pointed to memos dated 2-15-2011 and 3-5-2013 in support of its position here. The union asserted that over time the parties would routinely meet and decide on a policy and practice to determine emergency call out procedure. The parties understood this practice and it worked well until the City unilaterally changed it through the policy in dispute here. The two policies relied upon by the union called for overtime work associated with water and gas operations to be offered to the positions that traditionally did water and gas work. They further called for a hierarchy of who would be called out for overtime so there were no disputes about which employees were entitled to it.

4. The union further noted that Article 20.2's somewhat vague language has traditionally been clarified by the parties' longstanding practice in this regard and that all of the essential elements of a binding past practice have been met – i.e. (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. See, *Ramsey County v AFSCME*, 309 N.W.2d 785, at 788, n. 3 (Minn. 1981) (Citing from Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy* 30 (S. Pollard ed. 1961)).

5. The union acknowledged that commencing in 1999 there has been an effort to consolidate certain positions and that the parties negotiated and met in good faith to resolve any issues pertaining to the merger. The practice of determining overtime was the result of joint meetings between the parties to “work this out” and has been in place since 1999.

6. The August 2013 policy is thus nothing more than a unilateral change in the terms and conditions of employment and to the longstanding past practice between the union and the City regarding emergency call outs and allocation of overtime for those emergencies. There was no repudiation of the practice during negotiations and at no point did the City ever inform the union of its unstated and hidden agenda to try to eliminate such a longstanding practice. The deletion of Article 20.10 and 51.4 were never couched in those terms and the union was never formally placed on notice that this would be the result.

7. Further, the union argued that those provisions did not and were never intended to modify or affect the provisions of Article 20.2 – which it asserted most strenuously is the provisions that requires the allocation of overtime to the CMSW’s for sewer emergencies. As a direct result of the City’s unilateral action, the City is now calling out one job class, that of Utility Operator, for overtime emergency work and denying more senior employees overtime

8. The union countered the claim by the City that the deletion of certain provisions voided the past practice and rendered it moot. The union argued that under prior agreements, Article 20.10 was never used, despite its presence in several agreements, and that the memoranda set forth above, governed the allocation and assignment of overtime. The deletion of the provisions set forth above was simply done to delete a provision that was never applied by the parties anyway and did not have the effect of voiding the practice.

9. The union also disagreed strongly with the ruling in the prior decision of Arbitrator Boyer involving a similar set of facts and provisions. The union cited the finding by Arbitrator Boyer that the management rights article does not allow an employer to unilaterally alter or void a binding past practice. He further found that there was indeed a past practice regarding the assignment of overtime here – a conclusion with which the union agreed.

10. The union however disagreed with the conclusion that the amendment of the CBA allowed this unilateral change. The changes in the 2013-2015 CBA were proposals made by the union – not the City – and the union questioned how or why it would propose amendments that would effectively negate a longstanding past practice to the benefit of its members. These changes were made merely to address the obvious inconsistencies between the actual practice and provisions of the agreement discussed above and were never intended to have the sweeping changes to the methodology of allocation of overtime Arbitrator Boyer assigned to them.

11. Despite the similarities in the cases – including the other grievance heard by yet another arbitrator over these same basic facts and CBA provisions - the union asks that this arbitrator render a different award. The union noted that there are material differences in the facts and that this grievant has different seniority. Thus the “exact” facts needed for collateral estoppel are not present.

12. The essence of the union’s argument is that there is, just as Arbitrator Boyer found, a longstanding and binding past practice in place that modified the provisions of Article 20.2 and require the City to follow the negotiated agreements regarding that practice as well as the clear and consistent practice its of how overtime for sewer emergencies are assigned. Further that the changes in the CBA were never intended to alter this practice and the City never expressed its understanding that the changes in the CBA would have this effect. In order to repudiate or modify a practice, the party seeking that change must clearly express that desire during negotiations and negotiate a change in the language affected by the practice. Neither of these necessary elements occurred here and thus, the union argued, the practice continued unabated and unchanged.

The union seeks an award of the arbitrator ordering the city to return to the way it has been traditionally done since the four utilities, sewer, storm water, gas and water, were merged in 1999 and that collection system maintenance workers, CSMW's, will be called out first for service calls involving sewer emergencies. In addition, the union seeks an award for 4 hours of overtime the grievant should have been paid and to otherwise make him whole.

CITY'S POSITION

The city's position was that there was no contract violation and that the new policy was within its managerial rights to promulgate. Further, that the union's claim of past practice is defeated by recent changes in the CBA that undermined the practice itself. In support of this position the city made the following contentions:

1. The City asserted that the essential facts of this case are undisputed. The City pointed out that it has been attempting to merge several classifications in order to maximize efficiency within the various departments and to provide better and faster service to City residents. The city further noted that CSMWs are trained and legally authorized to perform work on only two of the City's four utilities – Sewer and Stormwater. There are currently three CSMW's working for the City. See, City Exhibits 5 and 6.

2. The City merged its Water and Gas Departments in approximately 2001 that consolidated all four utilities into one department. CSMW's were invited to complete the Utility Operator Apprenticeship Program and become Utility Operators but were not required to and the parties negotiated specific provisions into the CBA regarding CSMW's that provided that no Collection System Maintenance Worker would be forced to transfer or reclassify into the Utility Operator classification, and that Collection System Maintenance Workers could remain working in that classification through retirement. That provision did not, according to the City, negate its managerial right to determine overtime nor did it disallow the promulgation of a new policy regarding calling out standby crew to respond to after-hours sewer emergencies.

3. The City noted that language caused operation problems since the City was contractually required to call CSMW's for emergency overtime work even if the work involved Water or Natural Gas utilities. The CSMW's were not always qualified to do this work nor are they legally able to work on water and gas equipment so the parties agreed not to call the CSMW's for water and gas emergencies. They are not all allowed to drive some of the trucks needed for that type of work due to not having a Class A driver' license. As such the CSMW's are called to perform stormwater and sewer work.

4. There were also problems noted with people "gaming" the system by getting the call late in the afternoon but not going out until just after their shift ended in order to get overtime pay. See testimony of Mr. Guerrero. To deal with this, the City's new policy calls for a Standby Crew to deal with any of the four utility emergencies. These individuals are trained and qualified to deal with any of these emergencies and are called out only in emergencies after hours. Doing so saves considerable time and cost and results in better and more efficient service to the taxpayers.

5. The City emphasized that it is a leadworker who determines the need for emergency call out and the crew size for sewer and stormwater emergencies. The leadworkers are also union members. The leadworker may call in CSMW's to deal with emergencies even under the new policy if he/she determines a need for that given the nature of the emergency and the Standby Crew at hand.

6. The City acknowledged that the prior practices called for the City to offer all Sewer and/or Stormwater utility call back overtime work first to CSMW's but asserted that there is no provision in the past or current CBA's that required CSMW's to always get that work. The City further argued that there is no provision requiring this grievant to have some form of super seniority that guarantees that he get all after hours sewer overtime emergency work. The City thus continued its objection to the union's claim that there is a binding past practice and persisted in its claim that the practice was one of convenience and an application of management discretion not binding on the City.

7. The City also asserted that this case is governed by the concept of collateral estoppel. The City cited the recent decision of arbitrator Boyer, *supra*, which it asserted involved the same issue, same contractual provisions and the same essential facts. He ruled in the City's favor and denied the grievance in the matter before him. The City argued that nothing has changed to dictate a different decision and that under well-established legal and arbitral principles of collateral estoppel barring the unnecessary relitigation of the same claim, this case should be denied without even reaching the merits – largely because the merits have already been decided by another arbitrator.

8. The City cited several Minnesota Supreme Court decisions for the proposition that collateral estoppel exists to bar a subsequent claim where the following elements are present:

- a. the issue was identical to one in a prior adjudication;
- b. there was a final judgment on the merits;
- c. the estopped party was a party or in privity with a party to the prior adjudication; and
- d. the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

9. The City argued that all of these elements are present here and both this and the other case involving the same facts and CBA clauses should be denied. See Elkouri and Elkouri, *How Arbitration Works*, 7th Ed, BNA Books at Section 8.5, pages 8-56 & 57, & Sections 11.2 A, 11.2 B and 11.2 C, at pages 11-7 to 11-20. See also, Elkouri 6th Ed at pages 386-388. The issues are the same (the City pointed out that the issue statements in the respective cases are virtually identical), there was a final and binding decision made on the merits, the union was of course a party to the prior arbitration and was given a full and fair opportunity to present all arguments before Arbitrator Boyer. The City noted Arbitrator Boyer's admonition as contained in his decision at page 18 wherein he expressed "surprise" that the union chose to arbitrate three identical cases before three separate arbitrators in what he deemed "award shopping."

10. On the merits, the City reiterated the argument it apparently made before Arbitrator Boyer that past practice may not work to infringe on inherent managerial rights. Citing several cases and Elkouri, the City asserted that the practice relied upon by the union was nothing more than the exercise of managerial discretion and thus not a matter for binding past practice.

11. Further, the City noted that even if there was a past practice, the underlying contract clauses were changed thus negating the effect of that practice. The City argued that it is well known that a practice may change if the underlying circumstances or contractual provisions change that gave rise to the practice. Here the parties expressly amended the contract by deleting Article 20.10 and 51.4 set forth above. Thus, just as Arbitrator Boyer ruled, the practice no longer exists and the City is free to exercise its inherent management right to use Standby Crews of qualified and trained individuals to respond to any of the four utility emergencies when needed after hours.

12. The City noted that the union was unable to point to any specific contractual clause that requires the City to use the CSMW's to respond to sewer emergencies and instead must rely upon a past practice argument herein as noted, Arbitrator Boyer has already ruled that the practice, if any, was negated by the amendment to the contract during negotiations. He also ruled that these amendments to the contract were a recognition that the merger process was complete. Further, as he noted, there was little evidence of specific discussions regarding the impact of the amendment to the CBA during those negotiations even though the parties added Article 20.10. See, Boyer award at slip op pages 16-18.

13. Further, in prior years there were no stand by crews available but now the City has union employees scheduled to perform emergency work. The City pays these employees to be immediately available for emergency work and pays them additionally when it becomes actually necessary to perform emergency work. This too, the City argued supports the claim that the underlying rationale for the practice no longer exists.

14. The essence of the City's claim is that the identical issue has already been arbitrated and decided on the same fact, the same CBA clauses and with the same issue. The union is simply seeking to shop for a better award, which arbitral precedent does not support. Further, the management rights clauses coupled with the provisions of the current CBA reveals no provision limiting the inherent right to decide to use Standby Crews who are trained to respond to whatever emergency exists – even though the lead worker, who is a union member – can decide to call in additional CSMW's if need be. Finally even if there is a past practice, the underlying contractual provision and underlying circumstances have changed sufficiently to negate that practice.

Accordingly the city seeks an award of the arbitrator denying the grievance in its entirety.

DISCUSSION

FACTUAL BACKGROUND

The essential facts of this matter were straightforward and for the most part undisputed. The City currently operates four utilities, i.e. sewer, stormwater, water and gas. The grievant works in the job classification of Collection Systems Maintenance Worker (CSMW).¹ CSMWs are trained and legally authorized to perform work on only two of the utilities, sewer and stormwater.

The City merged its Water and Gas Departments in approximately 2001. This merged all four utilities into one City Department. Collection System Maintenance Workers were invited to complete the Utility Operator Apprenticeship Program and become Utility Operators. However, the parties negotiated specific provisions into the CBA regarding CSMW's whereby those employees would not be forced to transfer or reclassify into the Utility Operator classification, and that the CSMW's could remain working in that classification through retirement. See, CBA Article 20.10 (previously 20.11) in City Exhibits 8 & 9.

¹ The grievant has now left employment with the City but held the CSMW position until he left employment

The parties also negotiated language protecting CSMW's date-of-hire seniority for purposes of overtime that indicated, "for purposes of overtime seniority, Collection System Maintenance Worker, Utility Operator, and Water and Gas Maintenance Journeyman shall be treated as one job title." See, 2011 CBA Article 20.10 in City Exhibits 8 & 9. There was evidence to support the claim that this language was intended to prevent the City from choosing one job classification over another for overtime work.

There was evidence that the above language caused operation problems; the City was contractually obligated to call Collection Systems Maintenance Workers for emergency overtime work even if the work involved Water or Natural Gas utilities. There was also some evidence that some employees would wait until very near the end of their respective shifts to respond to emergency requests in order to get the overtime work.

The City addressed this operational problem by implementing a Utility Operations Policy that did not require the City to call in CSMW's for water and gas emergencies. The union approved that Policy. See, Union Exhibits 6 & 9. Since the merger approximately ten employees have opted to train and transfer into the Utility Operator classification.

As noted above, the parties changed the 2013-2015 CBA to delete Article 20.10 and 51.4 from the contract. There was an unfortunate paucity of evidence as to the discussions, if any at the bargaining table regarding the intent of these provisions. It was clear that the union proposed them and that the City understood that the practices that had existed under the previously negotiated language would change with the modification of the new language.

Further, Arbitrator Boyer determined that "the transitional process to the merged department was complete" and that "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." Boyer opinion at page 17. There was no contravening evidence that compelled a different conclusion on this record.

On August 12, 2013, the City adopted a new Standby Duty Policy that requires the scheduled Standby Duty to respond to all after-hours utility emergency calls. See, Union Exhibit 6. The standby crew is to respond to emergencies involving any of the four utilities and only call in additional employees when the Standby Duty Leadworker deems it necessary. The Leadworker is a union member and can call in CSMW's in appropriate situations. The City asserted that this new policy and practice saves costs and leads to faster and safer responses to emergencies and thus better, cheaper and faster service to the taxpayers.²

The union argued that the new policy conflicted with and changed the previous City "Utility Operations Division Overtime Policies and Procedures Policy" created by a former Utility Operations Manager and the union stewards. There was no question that prior practices were different from the new policy dated August 12, 2013. It was also clear that in the past the managers and stewards met and agreed to a policy and practice regarding emergency call outs and overtime that was also somewhat different from what the old language in the CBA called for. See, Union Exhibits 4 & 5. Those policies indicated that sewer and/or stormwater utility overtime would first be offered to CSMW's by seniority within that job classification, then to Utility Operators & Apprentices within that job classification.

The union filed three separate grievances in this matter. For reasons that were not fully explained at the hearing, even though those cases were apparently based on the same alleged violation and virtually identical facts, they were not consolidated for hearing. The first was heard by Arbitrator Boyer, whose decision was issued on December 19, 2014. The second was heard by Arbitrator Carol O'Toole and the third presented to the undersigned. Arbitrator Boyer ruled that the matter was timely and arbitrable (an issue that was not presented on this record) and ruled against the union on the merits. It is against that factual background that the matter proceeds.

² It was clear that the new policy may well save money and time but the question here does not depend on reduced cost but rather whether there was a violation of the CBA in doing what the City did here. Thus reduced cost was not a factor that was given much weight here.

COLLATERAL ESTOPPEL

The City raised an argument that the determination of this matter is now effectively governed by the decision on the merits in the Boyer ruling. Frankly there was some merit to the City's arguments in this regard. Elkouri discusses the collateral estoppel doctrine in some detail. Some arbitrators hold to the view that they are retained to exercise independent judgment irrespective of any prior award. See Elkouri, 6th Ed at page 576-77. However others adopt the view that final and binding arbitration decisions are just that and that unless there is an evidence mistake or the underlying facts or language have changed, a prior award between the same parties on the same facts and issue is a very compelling piece of evidence. *Id.*

Elkouri notes that the collateral estoppel doctrine is an affirmative defense barring future litigation or arbitration that has been determined against a party in a prior proceeding. Elkouri notes as follows: To be applicable the doctrine requires that the following four elements be present: The issue at stake is identical to the one involved in the prior litigation; the issue has been actually determined in the prior suit; the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the action and the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding.” Elkouri 6th Ed at page 387. See also, Elkouri 6th Ed at page 577, n. 46. *GAF Materials Corp.* 11 LA 871 (Marcus 1999), where the arbitrator held that once an arbitrator decides an issue within the realm of reason, the disappointed party's remedy is not to present the same issue to a different arbitrator, but to seek resolution by changing the policy under authority set forth in the management rights clause, or when negotiating renewal of the labor agreement.”

Elkouri also cited several commentators and arbitral decisions as follows: “Were the parties free to repeatedly submit the same issue to arbitral resolution, ‘shopping’ for a different result the ‘common rule’ of the work place would be destroyed. Contract terms are expected to be applied uniformly to all similarly situated employees. A provision cannot be allowed to mean one thing for one employee and something else for another employee.... Accordingly, regardless of the decision an arbitrator might be inclined to render, were a dispute brought to him as a matter of first impression, he is bound to defer to the opinion of a prior arbitrator upon the same issue.” Id at 578.

It was clear that the factors cited above were all present here. The issue was on its face identical and involved the same claim of a contractual violation by the union. The prior decision rested on the same newly promulgated policy by the City and the apparent assertions were the same. Certainly the determination of the issue was a “critical and necessary part” of the prior award – indeed it was the award. Finally, there was no question that these same two parties – and indeed some of the same witnesses – were part of the prior award. If one were to take a rigid approach to the notion of collateral estoppel and even *res judicata* principles,³ the analysis would end there. There was also some cogency in Arbitrator Boyer’s comments regarding the notion of “award shopping.” It was clear that he was puzzled by the tactic of trying the same case to three different arbitrators.

Elkouri further notes that “the refusal to apply an award to cases of the same nature is justified where it is shown that any of the following conditions obtains: (1) the previous decision clearly was an instance of bad judgment, (2) the decision was made without the benefit of some important and relevant facts or considerations or (3) new conditions have arisen questioning the reasonableness of the continued application of the decision.

³ Elkouri notes that there are four elements necessary to assert a *res judicata* claim: identity of the thing sued for; identity of the cause of action in both actions; identity of the parties and identity of the quality or capacity of the person against whom the claim is made. Elkouri, 6th Ed at page 387. Here these elements were present as well.

A review of the prior decision reveals none of these conditions. While it is not known the exact testimony or documentary evidence that was presented to Arbitrator Boyer, it certainly cannot be said that his decision was based on “bad judgment.” Indeed, as discussed below, his decision rested on sound factual findings and well-reasoned determinations as to the effect of the negotiated change in the language of the CBA and its impact on the practices that had been in place between these parties.

Further, there was no evidence that the parties in this case presented new or previously undiscovered evidence of any kind that would have potentially altered the prior decision. Finally there were of course no new conditions that have arisen at any time material to this discussion.

Having said that, it was also apparent that Elkouri’s analysis revealed some sense that these concepts are not written in stone and that each case should to some degree rise and fall on its own facts. Here, the cases were heard before three separate arbitrators before the first decision was rendered. That in and of itself does not change the underlying analysis but at least provides some explanation for why the cases were trifurcated instead of consolidated.

Further, many commentators do not strictly adhere to either school of thought. Elkouri cited comments from a discussion of this topic at the 1994 NAA meeting: “I doubt if any of us is a member of the absolute loyalty to either the incorporation camp or the independent judgment camp. ... Rather we will be found in the one camp or the other and interchangeably, depending on the totality of the particular record before us and what we think needs to be done about it.” Elkouri 6th Ed at page 577, n. 43, citing Valtin, *Other People's Messes, The Arbitrator As Clean Up Hitter*, Proceedings of the 47th Meeting of the NAA, (1994). Arbitrators are retained to exercise some independent judgment based on the record adduced before them and may not make unwarranted assumptions about what the “other” record contained.

Thus, while the City's claims that this matter was collaterally estopped from being re-heard had considerable merit, some discussion of the underlying merits of the claim, the impact of the amended language on these facts is appropriate. The parties presented this case in good faith and deserve a decision on the record presented in good faith.

PAST PRACTICE AND THE IMPACT OF THE CONTRACTUAL CHANGES

Arbitrator Boyer found and this record also supported the claim that there was a binding past practice between these parties regarding the call outs for overtime with regard to the CSWM's pursuant to the memoranda set forth in Union exhibits 4 & 5. All of the well-established conditions for such practice were present. Without going into excruciating detail here, it was clear that this practice was longstanding – having been in place for more than 10 years, clear and consistent – there was no evidence that the parties deviated from this practice and there was in fact evidence that at times when there was an attempt to deviate from it, the union would raise these agreements and the City would accede to those demands. It was mutual and accepted – clearly these memoranda were the result of negotiated agreements between the managers with authority to strike such deals and the union stewards. It was followed for years and the parties understood it.

However, as Arbitrator Boyer found, there was evidence to support the claim that the language changes, even though proposed by the union, were regarded by the city as an agreement that the merger was completed, even though not all CSWM's were retired or no longer employed by the City.⁴ At best the union asserted that it disagreed with Arbitrator Boyer's analysis but presented no new evidence that compelled a different result.

⁴ The union decried Arbitrator Boyer's decision in this regard but on the record before me, there was insufficient evidence to warrant overturning his determinations either factually or contractually.

Here too the facts supported the City's claim that after the change in language there is a new understanding with respect to emergency call outs and there was nothing in the CBA that prevented the City from promulgating and applying its new policy. It should be noted that here, as before Arbitrator Boyer, the City's claim that its management rights clause trumped the effect of a binding past practice was without merit. A binding past practice is one that meets all of the elements set forth by Mittenthal and the Minnesota Supreme Court in *Ramsey County v AFSCME*, supra, and is a binding part of the contract and may not be unilaterally negated by a management rights clause.⁵

What may change the practice though is a change in the underlying language or a change in the underlying conditions of employment that gave rise to it. Here there was a significant change in the language of the collective bargaining agreement. The union asserted that these changes had nothing to do with the call out agreements for overtime but the record supported the City's claims in that regard.

This record also supports Arbitrator Boyer's determination that "the 'old' practice was predicated upon clearly understood transitional provisions and understandings that were deleted from the parties' 2013-2015 Agreement and the 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." There was nothing on this record that called for a different conclusion. There was evidence to support the City's claims here. Thus, the record did not support the union's assertion.

Finally, the question now is whether there is some provision in the current CBA that limits the City's ability to promulgate its new overtime call out policy. There is no provision that limits the city from using standby crews who are trained and available to respond to these emergencies. Neither is there a current provision that requires that the CSMW's be called out after hours and thus be entitled to overtime pay, when a standby crew is available. Accordingly, the city's arguments prevailed and the grievance must therefore be denied.

⁵ See, *Ramsey County v AFSCME*, 309 N.W.2d 785, at 788, n. 3 (Minn. 1981) (Citing from Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy* 30 (S. Pollard ed. 1961).

AWARD

The grievance is DENIED as set forth above.

Dated: January 15, 2015

City of Duluth and AFSCME 14-PA-0861 award.doc

Jeffrey W. Jacobs, arbitrator