BMS Case No. 16-PN-O318
IN THE MATTER OF ARBITRATION BETWEEN

Minnesota Government Engineering Counsel

and

State of Minnesota

POST-ARBITRATION BRIEF OF THE EMPLOYER STATE OF MINNESOTA

I. INTRODUCTION

The Minnesota Government Engineering Counsel ("MGEC" or "Union"), an essential bargaining unit, is the exclusive representative of approximately 1000 State of Minnesota ("Employer" or "State") engineering and land surveyor employees. In the fall of 2015, the Employer and the MGEC (collectively "the parties") engaged in the collective bargaining process to replace their expired 2013-2015 collective bargaining agreement, but were unable to reach agreement. Pursuant to state law, the Bureau of Mediation Services certified issues for resolution through an interest arbitration. *See* Minn. Stat. §179A.16, Subd. 2.

On June 2 and 3, 2016, before Arbitrator Gerald Wallin, the parties presented evidence and testimony at an interest arbitration and subsequently agreed to electronically submit post-hearing briefs to the Arbitrator by 12:00 a.m. on July 1, 2016.

I. CERTIFIED ISSUES

The Bureau of Mediation Services found the following issues to be at impasse and thus certified for arbitration:

1. What are the rates and effective date of changes for wages payable to each job classification during the first year of the agreement? Art. 17, Sec.3

2. What are the rates and effective date of changes for wages payable to each job classification during the second year of the agreement? Art.17, Sec.4

3. What is the amount of the Employer matching contribution for each fiscal year of the agreement? Art. 17, Sec.14

Joint Exhibit 2.

II. PARTIES' FINAL POSITIONS

The Employer's final position is a general wage adjustment for all MGEC job classifications of 2.5% on July 1, 2015, and another 2.5% on July 1, 2016, in addition to wage progression in both years, with no change to its current $300 deferred compensation contribution. *Joint Exhibit 3.*

The MGEC similarly proposes a general wage adjustment for all MGEC job classifications of 2.5% on July 1, 2015, and another 2.5% on July 1, 2016, in addition to wage progression in both years, but only to those employees who are below the top of their respective salary ranges. For those at the top of all salary ranges of all bargaining unit classifications (*i.e*. no longer in steps), it proposes a 3.5% general adjustment on July 1, 2015, and another 3.5% on July 1, 2016.[1] *Joint Exhibit 4.*

The Union also proposes to move the job classification of Engineering Specialist Senior from Range 7 to Range 8; and, finally, it proposes to increase the employer's contribution to participating MGEC employees' deferred compensation plans by $50 in the first year of the contract on July 1, 2015 and another $50 in the second year of the contract[2] on July 1, 2016. *Id.*

[1] This is a simplified, yet accurate, restatement description of the union's position. Most MGEC salary ranges have 11 steps (A through K); others have 9 or 10 steps (A through I or A through J). *See Joint Exhibit 1 at pages 54 and 56*. Accordingly, the MGEC described its position as: In ranges 1 and 9, increase steps A through I by 2.5% and increase step J by 3.5%; In range 4, increase steps A through H by 2.5% and increase step I by 3.5%; All other ranges (2, 3, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15 and 16), increase steps A through J by 2.5% and increase step K by 3.5%.

[2] The union's position concerning the deferred compensation match also includes this caveat, "Because a change in the Employer match cannot be implemented retroactively if the arbitration award is not issued prior to the end of the first fiscal year of the Agreement, if the arbitration hearing is scheduled such that it is unlikely for the award to be issued prior to the end of the first fiscal year, then in that event the Union 's position is that the amount of the Employer matching contribution is $300 for the first fiscal year of the agreement and $400 for the second year of the agreement and thereafter."

III. STATEMENT OF FACTS

A. Background Facts.

This arbitration does not present a factual dispute and most of the evidence presented at the hearing was uncontroverted. Rather, in issue here is the application of those undisputed facts to the parties' respective positions.

Nearly 1000 State of Minnesota employees are covered by the MGEC labor agreement in 15 different job classes. *See Employer Exhibit 8*. MGEC represents both professional licensed engineers and land surveyors and other employees performing engineering and land surveying–related duties. Of those, about 85% work for the Department of Transportation ("MnDOT"), 9% work for the Pollution Control Agency ("PCA") and 30 or fewer are spread out among 9 other state agencies. *Id.*

Labor contracts between the State and the bargaining units representing its employees are for two years, coinciding with the state's fiscal biennium which is from July 1st of each odd-numbered year to June 30th of the next odd-numbered year. Each fiscal year is identified by the year in which it ends, so for instance, fiscal year 2015 is the 12-month period that runs from July 1, 2014 through June 30, 2015. *Testimony of Marcy Cordes ("Cordes").*

Minnesota Management & Budget ("MMB") negotiates nine separate two-year labor contracts for State of Minnesota employees in odd-numbered years including: AFSCME Council 5 (five units), Minnesota Association of Professional Employees ("MAPE"), Middle Management Association ("MMA"), Government Engineering Council, Nurses Association, Law Enforcement Association, Public Safety Radio Control Operators, Correctional Officers, and Residential Teachers. *Employer's Exhibit 5; Cordes testimony*.

The State and the MGEC have bargained collectively for many years and have reached agreement for every two-year contract since their last interest arbitration in 2000. The parties past

wage and benefit settlements in the biennial labor agreements have generally followed the pattern set first by the AFSCME and MAPE bargaining units. *See Employer Exhibit 7; Union Exhibit 17*.

In late June, 2015, AFSCME and MAPE agreed to a general wage adjustment of 2.5% effective on July 1, 2015 and a second general adjustment of 2.5% effective on July 1, 2016, with step progression in both years of the contracts. That agreement was followed closely by the MMA, with the same general increase. *Cordes testimony*.

By the end of October 2015, all bargaining units (other than the MGEC) followed suit and accepted the same internal pattern wage increase of 2.5% in the first year of the contract and 2.5% in the second year of the contract, with progression in both years. Those bargaining units also reached agreement on health and dental insurance, resulting in increased costs to the employer of approximately $100 per month per employee (family coverage). *Employer's Exhibit 16.* Together, these unions represent 97.1% of the state's organized work force. *Employer's Exhibit 5*.

Around the same time, the unrepresented employees covered by the Commissioner's Plan and the Managerial Plan received identical general increases and eligible employees received performance increases. They received the same group health insurance plan as the union employees. Cordes testimony.

According to Marcy Cordes, former State Negotiator and Chief Spokesperson in MGEC negotiations, pattern bargaining is important to the State and creates stability. Providing one unit, such as the MGEC, a larger general increase than over 97% of the State's other bargaining units, after those contracts were settled, would harm the State's relationship with the other units. It could harm the trust unions place in the State, and impact the State's ability to reach voluntary agreements in the future. In negotiations, Cordes repeatedly told the MGEC of the 2.5% parameters and that it was important to maintain that pattern.

In the fall of 2015, after several days of negotiations and mediation between the State and MGEC, the union would not accept the pattern general increase accepted by 97.1% of the State's organized workforce. However, and notwithstanding the failure to reach a complete agreement, the State and the MGEC executed a Memorandum of Understanding so MGEC members would be eligible for the same group insurance coverage as other state employees described above. The increased insurance cost for this bargaining unit in calendar year 2016 is approximately $800,000.[3] *Employer's Exhibit 15.*

In May, 2016, the legislature passed a bill authorizing those wage increases and shortly after, the Governor signed that bill. *Cordes testimony.*

B. Job Classification and the Hay Rating System.

The State uses the well-established Hay rating system to rate most State jobs. Hay raters look at three key factors when rating a job – know-how, problem solving and accountability – and assign points that represent their weight in the job. *Employer's Exhibit 31*. New positions are Hay rated upon creation and in certain other instances, when a rating might be warranted. *See id.* at 2. The Hay rating does not determine the class in which a position belongs, rather it allows the employer to evaluate very different jobs against the same factors. *Id*. at 3.

Once points are assigned to a position, the MMB Compensation division places the position where it fits within the States' classification structure. It determines the appropriate compensation range based upon the Hay points, the pre-existing organizational structure and the market for the job. The Hay points of all jobs are plotted on a trend line. *Testimony of Jill Pettis ("Pettis").* And, the ideal maximum rate of pay for a position is within two ranges above, or two ranges below that trend line. *Id.*

[3] The employee's portion of total insurance costs shared with the Employer has decreased by 2% between 2005 (employee 9.2%) and 2015 (employee 7.2%).

Three of 15 MGEC classes - the Engineering Specialist Senior, the Senior Engineer and the Land Surveyor Senior - all have 393 total Hay points. *Employer's Exhibit 33.* In fact, there are dozens of job classes with 393 Hay points that are in three different bargaining units and one is in the Managerial Plan. *Employer's Exhibit 36.* Hay points do not directly correlate to employees' salaries and the State does not require that all classes with the same Hay points have the same compensation. *Pettis testimony.* For instance, the maximum hourly salary among those classes with 393 Hay points ranges from $33.59 to $43.22. *Id.* The three MGEC classes are among the more highly compensated.[4] The Senior Engineer ($39.25) is two salary ranges above the trend line and the Engineering Specialist Senior ($37.34) is one range above the trend line. *Pettis testimony.*

C. Recruitment And Retention Of Employees In MGEC Classes

The two agencies with the largest number of MGEC employees representing approximately 90%, the MnDOT and the PCA have identified no difficulty recruiting for, and filling positions in MGEC job classes. *See e.g. Employer's Exhibit 37*; *testimony of Bonnie Wohlberg; testimony of Colleen Naughton.* There is no evidence that any of the other agencies that employ a smaller number, have any difficulty filling those positions either.

Similarly, as agency representatives testified and as the uncontroverted documents reveal, there are no retention problems at either MnDOT or the PCA. *See Employer's Exhibits 39 and 43*. In fact, with a voluntary turnover rate of 2.47% in FY15, the MGEC has among the lowest turnover rate of all the State bargaining units. *Employer's Exhibit 28*. That rate was just 1.91% in the first 10.5 months of FY16. *Employer's Exhibit 45.* At MnDOT, the total FY15 turnover rate was 4.7%.

[4] In fact, the maximum salaries of nearly all the MGEC classes are within the top half of positions with the same number of Hay points. *See Union's Exhibits 39 - 47.*

Employer's Exhibit 39. At MnDOT, in the Engineering Specialist Senior class in particular, there was not one voluntary resignation in FY15. *Employer's Exhibit 39*.[5]

D. The Distinction Between Licensed Senior Engineers and the Engineering Specialist Senior Classifications.

Former union president and current manager of the St. Croix River Crossing project, Terry Zoller ("Zoller"), described the vast difference between the training, education, licensure and responsibility possessed by Senior Engineers, yet not required of Engineering Specialist Seniors.

The licensing requirements for Senior Engineers are set forth in State law: (1) a bachelor's degree in engineering is required; (2) a professional license must be obtained by paying the fees and taking two separate exams; (3) the professional license must be maintained which requires that every two years, the Senior Engineer take 24 continuing education classes, report on that continuing education and pay a license renewal fee. *See* Minnesota Rule 1800.2500; Minn. Stat. §326.107. State Administrative Rules describe the requirements courses must meet in order to qualify for continuing education credits, and set forth the manner in which licensed engineers must maintain their own course records.

Perhaps the most important distinction between the Senior Engineers and the Engineering Specialist Seniors, as it applies to the laws governing compensation of state employees, is the level of responsibility possessed by those with a professional engineers' license. Licensed engineers must sign all design plans, construction plans and final plans. For instance, a construction plan signed by a licensed engineers says, "I hereby certify that this plan was prepared by me or under my direct supervision and that I am a duly licensed Professional Engineer under that laws of the State of Minnesota." *Employer's Exhibit 18*. In addition, several other licensed engineers sign a

[5] Of the 11 Engineering Specialist Senior employees who separated in FY15, eight retired, one died, one was let go while still on probation, and one had his/her temporary appointment ended.

construction plan indicating that they recommend it for approval. *See id.* By signing such a plans, each licensed engineer takes the responsibility for building the project in accordance with legal standards, thereby warranting that he/she knows all state and federal codes, including safety standards, and that the project will be constructed in accordance with the same. *Zoller testimony*.

Furthermore, the Rules of Professional Conduct govern licensed engineers, but do not apply to the engineering specialists, or other non-licensed classes. Minnesota Rules, part 1805. Those rules contain standards of personal conduct and personal integrity to maintain the engineer's reputation for professional integrity. Licensed engineers shall not:

1. Circumvent a rule of professional conduct through actions of another;

2. Engage in illegal conduct involving moral turpitude;

3. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

4. Engage in conduct that adversely reflects on the licensee's fitness to practice the profession; or,

5. Permit the licensee's name or seal to be affixed to plans, specifications, or other documents which were not prepared by or under the direct supervision of the licensee.

Minnesota Rules, part 1805.0200, Subp.4. None of these restrictions apply to MGEC members who are not professional engineers.

E. MGEC's Proposal to Change the Engineering Specialist Senior Classification.

In negotiations and in its final position, the Union proposed to change the salary range for the Engineering Specialist Senior classification from 7k to 8k. Ordinarily such a request in bargaining is framed as an "inequity," rather than as a proposal. *Cordes testimony; Pettis testimony.* Nevertheless instead of simply rejecting the union's proposal, the Employer assessed the proposal as if it were requested as an inequity. *Id.*

Inequity requests are assessed by the State's Compensation Manager who listens to a union's rationale for the request, discusses the request with affected State agencies and obtains and reviews research by staffing and compensation personnel. *Pettis testimony.* The State applies the standards set forth in Minnesota Statute §43A.18, Total Compensation. It surveys agencies to identify if they are having recruitment and retention problems and looks at turnover rates in the classifications for which the inequities are requested. The State also assesses the effect a new salary assignment could have on the current compensation structure, particularly as it relates to compression among related classes performing similar work and the reporting relationships between employees and supervisors. The State also considers the relationships between positions of comparable skill, effort and responsibility.

The State considered those factors and notified the union the request would not be granted and that the current range was proper. In addition to discussing the request with the Union at the bargaining table, State Negotiator Cordes sent an email message to MGEC Executive Director and Chief Spokesperson, Dana Wheeler ("Wheeler"), on October 28, 2015, articulating the factors the State reviewed in assessing that request, indicating that when reviewing recruitment and retention, primary considerations in granting a request of that nature, no problems were identified. *Employer's Exhibit 9.* Then, on November 9, 2015, Cordes sent another more message to Wheeler, sharing an analysis prepared by State Compensation Analyst, Liz Koncker, setting forth the factors to consider when assessing the Union's request and responding to each of the factors. *Employer's Exhibit 11 at 2.*

IV. BURDEN OF PROOF

It is well-settled that the bargaining unit bears the burden of proof in an interest arbitration to demonstrate through clear and convincing evidence the need for the additional changes to the contract beyond what the parties have already agreed to:

> It is a commonly accepted axiom of the interest arbitration process that the party proposing the change to the existing provision or provisions of the collective bargaining agreement, or otherwise add new language to the contract, sustains the burden of proof to demonstrate through *clear and convincing evidence*, first the need for such change and then the reasonableness of their proposal.

AFSCME Council 65 and Carver County, BMS Case No. 10-PN-0423 at 17 (Fogelberg, 2011) (Emphasis added).

The goal in an interest arbitration is to determine what the parties would have agreed to if they were to continue bargaining and enter into a voluntary agreement. The Arbitrator should be committed to producing a contract which the parties themselves might well have negotiated in the absence of circumstances which lead to the exhaustion of their traditional remedies. *Id.*

It has long been recognized that "[t]he central goal of interest arbitration is to ascertain the agreement that the parties themselves would have reached if they had continued bargaining and concluded a voluntarily negotiated settlement. *See Dakota County and Law Enforcement Labor Services. Inc.* BMS Case No. 96-PN-2 190 (Flagler 1997). In fact, this Arbitrator recently wrote, "[t]he fundamental objective of interest arbitration is to formulate awards from the evidence that, in theory, represent what agreements the parties would have ultimately reached, mindful of whatever influence a work stoppage might theoretically have provided, had they continued negotiating to a conclusion themselves." *Law Enforcement Labor Services, Inc.*, Local No. 44, and City of Crystal, Minnesota, BMS Case No. 12-PN-0693 (Wallin 2012).

As this Arbitrator wrote in 2000 in an Interest Arbitration Award with the same parties:

> Interest arbitration also often confronts arbitrators with resolving demands that represent innovative and/or significant structural changes to an agreement

> previously negotiated by the parties. Such situations should be approached with caution. Accepting such demands too readily may well result in establishing a new or substantially modified agreement provision that the proponent would not have been able to achieve in face-to-face negotiations. Such a result is contrary to the fundamental objective of interest arbitration. Accordingly, the proponent of such change bears a *heavy burden of persuasion*. The evidence and arguments in support of the change should be compelling. In addition, since such change usually comes about in negotiations as a quid pro quo for some other concession, the evidence in support of the change should also provide a clear indication of what the negotiating parties would have deemed to be an appropriate trade-off. Absent such strong evidence in support of innovative or structural change, demands of this nature should ordinarily be rejected by arbitrators and left to the parties to resolve in future rounds of collective bargaining negotiations.

Minnesota Government Engineers Council and State of Minnesota, BMS Case No. 99-PN-1438 at 13 (Wallin 2000) (emphasis added).

V. ARGUMENT

A. Introduction: The Criteria For Interest Arbitrations Are Well Established in Minnesota.

The standards for interest arbitration in Minnesota are well established and generally followed by the arbitrators in prior interest arbitrations between the parties. Those factors are: (1) internal pay equity; (2) external market comparisons; (3) the employer's ability to pay; (4) statutory standards the parties are obliged to observe in reaching agreements; and (5) the bargaining history of the parties. CITATION

Arbitrators also examine other economic factors, such as difficulty in hiring, turnover and retention rates. *Hennepin County and Minnesota Public Employees Association,* BMS Case No. 12-PN-0697 (Schiavoni 2012). "The cardinal role of an interest arbitrator is to replicate the bargain that the parties likely would have struck if the voluntary negotiation process had reached its logical conclusion." *AFSCME Council 6, AFL-CIO and State of Minnesota, Unit 8*, BMS Case No. 04-PN-141 at 9 (Befort 2004).

In preparing management negotiating positions for compensation, Minnesota Statute §43A.18, Subd. 8 requires the Employer to assure that four factors are met:

(a) Compensation for positions in the classified and the unclassified service compare reasonably to one another;

(b) Compensation for state positions bears reasonable relationship to compensation for similar positions outside state service;

(c) Compensation for management positions bears reasonable relationship to compensation of represented employees managed;

(d) Compensation for positions within the classified service bears reasonable relationships among related job classes and among various levels within the same occupation; and

The statute defines "reasonable relationship" as follows:

> Compensations bear reasonable relationships to one another within the meaning of this subdivision if compensation for positions which require comparable skill, effort, responsibility, and working conditions is *comparable* and if compensation for positions which require differing skill, effort, responsibility, and working conditions is proportional to the skill, effort, responsibility, and working conditions required.

Three of the four identified factors address internal relationships and just one of four looks to external comparisons.

In setting wages for the bargaining units, State law does not require, and in fact the employer does not consider other factors such as the consumer price index, the cost of living or the purchasing power of bargaining unit members.

B. The Employer's Position for the General Wage Adjustment Should Be Awarded.

The Employer's final position is consistent with the internal pattern and the MGEC failed to present meaningful external comparable positions. Furthermore, the MGEC has tacitly acknowledged the significance of internal consistency of the general increase by negotiating virtually the same wage increases at the other bargaining units nearly every year.

Awarding the union's position could result in a "whipsaw" effect on other units and result in a far higher cost than the union suggests. The State must look at the overall impact of such an increase, and not merely the cost of one small unit, and urges this Arbitrator to do so as well.

In *Sibley County and the Minnesota Public Employees Association*, BMS Case No. 13-PN-0299 (Befort 2013), the Arbitrator noted, "[w]hile not an exclusive factor, internal consistency of settlements with respect to other bargaining units is a principal factor relied upon by most Minnesota arbitrators in deciding issues of wages."

A recent indication of the deference Minnesota arbitrators pay to the internal pattern is the July, 2014 award of Arbitrator Jay C. Fogelberg in the interest arbitration with the Employer's nursing unit. In discussing his reasons for denying the union's request for an inequity adjustment above the internal wage pattern, he recognized two factors that were of particular importance: 1) the vast majority of the bargaining units involved in negotiations with the State settled on a 3% general increase in each year; 2) the external factors, like retention and the suggested comparables, did not support any adjustment. In upholding that internal pattern for the nurses, he wrote:

> [I]f there is a consistent internal pattern of settlements present, it cannot be ignored. In this instance, the MNA has acknowledged the importance of internal consistencies with regard to wages by agreeing to the same wage percentage adjustments in each of the two years, just as the vast majority of other bargaining unit employees working for the state have. . . The evidence reveals that over the past decade, the general wage adjustments offered by the Employer to all of its units have been consistent.

Minnesota Nurses Association and State of Minnesota, B.M.S. Case No. 14-PN-399 (Fogelberg 2014).

In rejecting the external factors, he noted that the alleged comparable group (hospital nurses) was inappropriate, and that the retention data did not support an inequity adjustment, despite a turnover of approximately 10%, a rate far higher than the engineers in this case.

Arbitrator and University of Minnesota Law School Professor, Stephen Befort has written that, " . . . many arbitrators now believe that internal comparisons are more significant in setting wage rates than external comparisons." *Minnesota Nurses Association and State of Minnesota*, BMS 98-PN-0443, p. 16 (Befort 1998) *citing Law Enforcement Labor Services, Inc. and Chisago County*, BMS Case No, 95-PN-54 (Berquist 1995). Most Minnesota arbitrators now rely primarily upon internal consistency when determining and awarding wage settlements among bargaining units in the same jurisdiction as well as those established for the jurisdiction's unrepresented employees. *See AFSCME Council 6, AFL-CIO and State of Minnesota, Unit 8*, BMS Case No. 04-PN-141 (Befort 2004).

While not an exclusive factor, internal consistency of settlements with respect to other bargaining units is a principal factor relied upon by most Minnesota arbitrators in deciding the issues of wages. *Sibley County and the Minnesota Public Employees Association,* BMS Case No. 13-PN-0299, p. 2, (Befort 2014). "The use of external market data will be the basis for the award when the employees are substantially underpaid when compared to the appropriate external comparisons in order to justify wages." *Hennepin County Medical Center, Minneapolis Minnesota and Minnesota Nurses Association,* BMS Case No. 06-HIF-1026, p. 7 (Miller 2007).

As discussed, nearly 98% of the State's organized workforce has settled for the consistent pattern. This consistency would be undermined in the future if the Union's request were to be granted here:

> As many arbitrators dealing with interest arbitrations have noted, there must be a *compelling reason* for such a request to be granted – either due to some anomalous underpayment, problems of attraction or retention, a significant change in the underling job duties of a particular position or group of positions or some showing that the market has somehow left these employees behind.

Teamsters Local 320 and Benton County, BMS Case # 14-PN-0551 (Jacobs 2014) (emphasis added). There, as here, the Union presented no evidence of any of these factors.

A review of the State's bargaining history with the MGEC, as well as with other bargaining units, reveal that the State does not traditionally provide one bargaining unit with a general increase larger than the pattern increase of the others, absent some tradeoff. For instance, in 2007, the 3.25% general increase awarded to both the MGEC and MMA was delayed by seven days in order to pay for those employees' increases to the state's contribution to deferred compensation. Marcy *Cordes testimony; Employer's Exhibit 7.* Here there has been no showing of a quid pro quo or negotiated exchange of benefits for an award in excess of the pattern. Generally, the party seeking to alter that longstanding pattern must provide a quid pro quo for it or provide evidence of a compelling need for such a change. There is no such showing of either here.

The Union argued that an award of its position of a 3.5% general increase to those at the top of their salary ranges, rather than an award of the State's position of 2.5%, would not impact the relative relationship among employees in other bargaining units and upset the "internal comparison among State positions with similar Hay points." *See Union Exhibits 39-47.* However, the statute governing compensation does not address the relative relationships between and among unrelated jobs that happen to have the same Hay points. The statute requires reasonable relationships among *related* job classes and among various levels within the *same occupation*." *Minn.Stat. §43A.18 Subd. 8(d).*

Relationships between unrelated job classes, not within the same occupation, are irrelevant. For instance, the Union's Exhibit 39 illustrates that awarding the State's position would leave the Engineer 1 Graduate earning less than the Industrial Hygienist 1, although the Union's position would have that engineer earning only slightly more than the hygienist. However, nothing in the

statute suggests that the relationship between an Engineer 1 Graduate and an Industrial Hygienist 1 is relevant. This argument has no persuasive value.

C. The Engineering Specialist Senior Class is Assigned to the Proper Salary Range.

The relationship between the ESS and ES job classes currently bear reasonable relationship to one another because that compensation is proportional to the skill, effort, responsibility, and working conditions required. The percentage difference between the wage of the Engineering Specialist Senior and the Senior Engineer is just 8%, which the employer asserts accurately reflects the relative differences in those positions.

The Union's primary reasons for asserting that the ESS class should be in a higher salary range appear to be two-fold: First, the work they do is the same as that of the Senior (licensed) Engineers except for signing plans; and second, the two positions have the same number of Hay points.

1. The Salary Range of the Engineering Specialist Senior Class Complies with State Law and is Reasonably Proportionate to that of the Senior Engineer Class.

The Union asserts that the work of the Engineering Specialist Senior and Senior Engineer classes are virtually the same, which the State denies. The only evidence presented by the Union in support of that position are 1985 class specification documents obtained from the MMB website which describes them as, "a general description of the kind of work performed by employees in that classification." The State law which requires written class specifications says:

> Definitions used in class specifications are descriptive and not restrictive, indicating the kinds of positions allocated to classes, and are *not to be construed as limiting in any way or modifying the power of the appointing authority to appoint, direct, and control the work of employees*. Using a particular expression or illustration of duties does not exclude other duties not mentioned that are of a similar kind or quality.

Minnesota Rule 3900.1200 (emphasis added). Clearly, since the specifications present a broad general overview of a particular job class, they do not contain specific descriptions of the day-to-day work performed by all State employees in those classes at all State agencies where they may work. In fact, the actual duties of employees in the same class could differ greatly depending upon the agency in which they work.

The statute requires that, "compensation for positions within the classified service bears reasonable relationships among related job classes and among various levels within the same occupation. As discussed, compensations bear reasonable relationships to one another if "compensation for positions which require comparable skill, effort, responsibility, and working conditions is comparable and if compensation for positions which require *differing* skill, effort, responsibility, and working conditions is *proportional* to the skill, effort, responsibility, and working conditions required." Minn. Stat §43A.18 Subd. 8(e) (emphasis added). Certainly the requirements to obtain and maintain an engineering license, in addition to the great responsibility that accompanies that licensure, indicates the 8% difference in the classes' salary ranges is appropriate.

Finally, it is important to note that the Union's advocate stated at the hearing that "not many organizations have a job similar to the Engineering Specialists." If there are no similar jobs outside of state service, then there are no external comparables within the meaning of the statute.

2. Hay Points Alone Do Not Dictate the Salary Ranges of Job Classes.

The Union asserted that the Engineering Specialist Senior class should be moved to a different salary range because it has the same number of Hay points as the Senior Engineer. This argument is without merit. As discussed, Hay points alone do not dictate salary and the Engineering Specialist Senior classification is already one range above the trend line. And, when

compared to other job classifications with the same Hay points, the compensation is at the high end.

D. The State's Contribution to Participating MGEC Members' Deferred Compensation Plans Should Not Be Increased.

As indicated, of all the MMB-bargained labor contracts, the MGEC has one of the highest deferred compensation contribution rates, which is the equivalent of that received by the Middle Management supervisors unit. *See Employer's Exhibit 12.* In fact, only the Law Enforcement Association has a higher contribution. *Id.* The state's other professional employee unit, MAPE, receives a $100 contribution, one-third of the MGEC contribution. Here, the Association provided no rationale for the requested increase, and moreover, the parties' bargaining history reveals the state does not increase a deferred compensation match absent a quid pro quo.

The Union calculated the state's contribution as a percentage of employee's annual salaries for all bargaining units in an attempt to show that the state's contribution to MGEC should be increased. *See Union Exhibit 30.* There is no evidence that the state has ever tied contributions to deferred compensation or other benefits to the average salary of bargaining unit members in determining the amount of that contribution. For instance, all State employees have the same health insurance and dental insurance plan options: Finance Directors have the same health and dental insurance plans as those of a maintenance worker.

E. Whether the State Has the Ability to Pay is Not Germane to this Case.

The Union spent much of its case addressing the state's financial condition ostensibly to show that given its current financial condition, the state has the ability to pay the increases requested by the MGEC, without regard to whether, in fact, those increases are warranted. While it is clear that in his ruling the Arbitrator must consider the employer's inability to pay, that does not compel the conclusion that merely if an employer does have the ability to pay, (or as in this

case, where the employer did not make the "inability to pay" argument) means that the arbitrator should award the union's position.

Once an arbitrator concludes the bargaining unit has not met its burden to prove its position should be awarded, the arbitrator never considers the question whether the employer is able to pay. In other words, an employer's demonstrated inability to pay is a factor in determining whether a union's position should be awarded. But the opposite is not the case; merely because the employer may have the ability to pay does not compel the conclusion that the union's position should be awarded.

In other words, the State's ability or inability to pay for the Union's position, is not the first issue to address, but rather it is the last. Absent a cogent rationale, (at least one arbitrator has required "a compelling reason") for breaking the pattern bargained by over 97% of the State's bargaining unit employees, the arbitrator never considers the employer's financial circumstances. There is an important distinction between the State's willingness to meet bargaining unit economic demands and its ability to do so. One never assesses whether the State has the ability to meet the association's demand, until after one determines the pattern general increase is insufficient.

F. The MGEC Failed To Meet Its Burden In All Respects.

The Union provided no rational bases for its overreaching demands. Evidence presented at the hearing certainly revealed the parties would not have reached a tentative agreement on any aspect of the Association's proposals. The evidence clearly supports the Employer's position. The Union attempted to show that an award of its position would address the alleged recruiting and retention issues that the Employer faces, and will continue to face in the future. The MGEC President cited an alleged turnover rate of 9.7% with no documentation in support of his assertion.

Furthermore, the MGEC presented no evidence to show that any specific external positions are similar to those of the MGEC members. It presented no position descriptions, or

testimony, concerning the actual duties performed by the various engineer classes, for instance, at the City of St. Paul. The Union would have this Arbitrator consider solely the external wages of employees at other public sector entities, merely based upon similar job titles without evidence that the positions are similar, as required by State law, and without regard to the three internal factors.

Although not entirely clear, it appears the MGEC suggests the Employer's biennial general wage adjustment is not *really* a pattern, as the Employer asserts, because of the manner in which MMB reports the State's increased costs to the Legislative Coordinating Commission.

In those reports, for all bargaining units and plans, MMB includes the percentage of the general adjustment, the amount of the biennial base, the amount of biennial new money, the percentage increase represented by that new money, the percent increase biennium to biennium and the dollar impact on the next biennium. *See e.g. Union Exhibit 50.* The numbers are furnished to the Legislative Coordinating Commission merely to assist the members in understanding the magnitude of cost increases flowing from contract settlements. The employer does not use those numbers as targets in collective bargaining

This argument is also without merit. Clearly, State employees' salaries are based on their specific positions and their relative lengths of service. In fact, this Arbitrator has recognized that:

> [B]argaining units whose salary base is a higher percentage of the overall cost base of their agreement, will have lower Hubinger and Merriam numbers. Accordingly, the Council's members, who are the Employer's most highly paid employees, have the lowest Hubinger and Merriam numbers. They will continue to have the lowest Hubinger and Merriam numbers as long as they remain the bargaining unit with the highest percentage salary base.

Minnesota Government Engineers Council and State of Minnesota, BMS Case No. 99-PN-1438 at 9 (Wallin 2000).

VI. CONCLUSION

The Employer settled eight of its 2015-2017 labor contracts with over 97% of its unionized workforce with general wage adjustments of 2.5% effective July 1, 2015, and 2.5% effective July 1, 2016. The Union failed to provide compelling reasons not to follow that internal pattern. In addition, the union failed to establish that the salary range for Engineering Specialist Senior classification should be altered or that the Employer's contribution to members' deferred compensation plans should be increased.

For all the reasons set forth herein, the witness testimony and exhibits presented at the hearing, the State of Minnesota respectfully requests you award the State's position in its entirety.

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