

**IN THE MATTER OF ARBITRATION  
BETWEEN**

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**AMERICAN FEDERATION OF STATE,  
COUNTY AND MUNICIPAL EMPLOYEES,  
GREATER MINNESOTA COUNCIL 65,**

**Union,**

**and**

**CITY OF ST. CLOUD,**

**Employer**

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**ARBITRATION DECISION AND  
AWARD**

**BMS Case No. 12-PN-0434**

**Arbitrator:**

Andrea Mitau Kircher

**Date and Place of Hearing:**

September 14 and  
October 18, 2012  
St. Cloud City Hall  
St. Cloud, Minnesota

**Date Record Closed:**

November 10, 2012

**Date of Award:**

December 3, 2012

**APPEARANCES**

For the Union:

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For the Employer:

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**INTRODUCTION**

Greater Minnesota AFSCME Council 65 (“Union”) is the certified bargaining representative for the assistant city attorneys employed by the City of St. Cloud (“City” or

“Employer”). These essential employees currently constitute a bargaining unit of three. The City and the Union are signatories to an expired collection bargaining agreement (“CBA”) covering the period from January 1, 2010 through December 31, 2010. Negotiation of a successor contract has not been completely successful. Pursuant to the Public Employment Labor Relations Act, Minn. Stat. ch. 179A (hereafter “PELRA”), the parties engaged in mediation, and then petitioned the Bureau of Mediation Services for interest arbitration on the issues where they were at impasse.

The Bureau certified 6 issues for arbitration, and the parties submitted their final positions. In accordance with Article IX of the CBA, the parties selected me as the arbitrator, and I conducted a hearing at the City Hall, City of St. Cloud, Minnesota on September 14, and it continued on October 18, 2012. At the hearing, I accepted exhibits and other evidence into the record; witnesses were sworn and testimony was presented subject to cross-examination. Post-hearing briefs were submitted and exchanged and the hearing record closed upon receipt of the final brief on November 10, 2012.

## **ISSUES**

The Minnesota Bureau of Mediation Services certified the following issues for arbitration:

1. Termination – Duration of Agreement – Art. 25
2. Salaries 2011 – Cost of Living Adjustment, if any – Art. 14.1
3. Salaries 2012 – Cost of Living Adjustment, if any – Article 14.1
4. Salaries – Steps – Creating an additional step – Art. 14.1
5. Work Schedule – On Call – Establishing a number of weekends and Holidays on Call – NEW (Article 22.3 On-Call)

6. Work Schedule – On Call – Compensation for On Call – NEW (Article 22.3 On-Call)

**Issue 1. Duration of the Agreement.**

Prior to the hearing, the parties agreed that the term of the agreement should be two years, 2011-2012.

**Issues 2 and 3 and 4. Salaries, Cost of Living Adjustment and Additional Steps on the Salary Schedule. Article 14.1.**

The final positions of the parties in February 2012 were that the Union proposed a 4.5% cost of living adjustment effective January first of both 2011 and 2012. The City responded with a 0.0% general salary increase for each year. The Union also proposed two additional steps on the salary schedule, one for each year, and the City opposed any change. On September 13, 2012, the day before the hearing, the City modified its final position to offer a 1.0% general increase effective July 1, 2012, but no additional steps. This is the same increase agreed to by six of its eight other bargaining units.

Currently, the three assistant city prosecutors have a salary schedule with eight annual steps, so that when attorneys have been employed for seven years, they have reached the maximum of the salary range. One of them reached the top of the range and received no increase in 2010 or 2011, but the other two received step increases in 2011. In addition to the three bargaining unit members, the City Attorneys' Office includes four other attorneys who are not in the bargaining unit: the City Attorney, who was until 2010, a prosecuting attorney in the Office himself, one attorney who is about to retire and who handles condemnations and real estate matters, and two attorneys recently promoted from the bargaining unit who work in supervisory roles, support the City Attorney, and handle some criminal and civil work themselves. The City Attorney's Office also handles misdemeanor work for two smaller, nearby cities producing

approximately \$36,000.00 income for the City. (Testimony, (hereafter “T.”) of City Attorney Matthew Staehling.)

#### UNION POSITION

The Union argues that both external and internal comparisons favor increases in salary for its members. It seeks a 4.5% pay increase for each year, 2011 and 2012, because other similar cities in Greater Minnesota who employ assistant city prosecutors pay them substantially more than St. Cloud. The Union points out that the average annual top salary for assistant city prosecutors working for cities that serve as regional centers (Mankato, Duluth, and Rochester) in 2012 was \$88,688.00<sup>1</sup>, while the highest paid city prosecutor in St. Cloud received \$70,356.00, or \$18,332.00 below the average. The Union claims that internal comparables also support its position in that the job classification system gives assistant city attorneys more points than police sergeant, City Clerk and civil engineer, yet their maximum monthly pay is less. Additionally, the Union notes that in 2012, the City increased the pay of its City Administrator by \$12,948.00 and hired a new Police Chief for \$8,100.00 more than the one retiring after 27 years of service. Trying to hold the assistant city attorneys to a 0.0% in 2011 and a 1.0% increase effective July 2012 creates internal inequity, according to the Union.

The Union argues that the financial status of the City, a regional hub for commerce and education, is better than average and it can well afford the increase sought. It has become one of the fastest growing metropolitan areas in Minnesota over the past 20 years, and its unemployment rate is below the state and national averages. The Union contends that considerable new construction in St. Cloud and its environs is strong evidence of the relative financial well-being of the City.

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<sup>1</sup> Union post hearing brief at 3.

## EMPLOYER POSITION

The Employer argues that the Great Recession and its consequences have impacted the overall financial health of the City, and fiscal prudence requires that the City's positions on the items at impasse should be awarded. The City points out that its property tax base and its Local Government Aid ("LGA") has been steadily declining, and it has lost substantial revenue because of low interest rates and the fact that the State Legislature eliminated the Market Value Homestead Credit. The City believes that internal salary consistency among its eight bargaining units is the most important factor to be considered, and six of its eight bargaining units have accepted the City's offer of 1.0% effective July 2012. None of the City's unions successfully negotiated a wage increase for 2011. The City points out that it has a total work force of 674 employees, and argues it is not reasonable to grant a higher salary increase to a bargaining unit comprising 0.04% of the workforce just because it has access to arbitration upon impasse. The City contends that the step increases for two of the three members of the bargaining unit who have not reached the top of their range are significant and should not be ignored.

The City argues that it has had no trouble attracting or retaining attorneys at the pay rate it offers, and that the external market comparisons offered by the Union should not affect the arbitrator's award. The cities which have in-house misdemeanor prosecutors are not comparable because they are either larger than St. Cloud or are healthier economically. The City also argues that there is little similarity between the work of county attorneys and city attorneys, so a comparison of their salaries is inapposite.

The City also contends that the new 20-year salary step it negotiated with the police sergeants' LELS Unit is not comparable to the Union's proposed two new annual 4.0% steps because 1) those bargaining units had significant compression and retention issues, which the

attorneys do not; in fact the City is concerned that increases in the attorneys bargaining unit would create compression with their supervisors which it wishes to avoid, and 2) one 20-year step is significantly less expensive than the annual steps sought by the Union for its employees.

### DISCUSSION AND DECISION - SALARY ISSUES

The general rule followed by arbitrators in impasse disputes is that interest arbitration is not designed to discourage or supplant collective bargaining, but to encourage it. It is often said that an arbitrator's decision should be compatible with the contract the parties themselves might have reached had they been able to agree to one. Specific factors commonly considered by arbitrators in interest arbitration are these: internal comparables, external market conditions, bargaining history, ability to pay, and statutory considerations. The question is whether, based on consideration of these criteria, the facts demonstrate sufficient reason to grant the higher pay that the Union requests.

#### 1. Ability to Pay and Other Economic Factors.

The City presents a strong defense of its position that the parties are faced with sluggish economic growth at best, and that the City should continue its fiscal restraint to conserve its resources. The City has tightened its belt and that of its employees in an effort to ride out the economic downturn, which has been part of the landscape for a number of years. Evidence established that declining income from key revenue sources produced a significant impact on the budget. From 2008 through 2011, State Aids to the City of St. Cloud were reduced by \$3,728,500. The loss of the Market Value Homestead Credit alone has resulted in a reduction in the total tax capacity of the City by approximately 6% in 2011. (Er. Ex. 24.) The largest revenue source for the City from local revenues is property taxes, and declining property values has reduced the tax base. In 2012, the City's budget estimates a tax base decrease of 4.0% (Er. Ex.

39), and the City has had a decline in revenue from other taxes, licenses and permits. *Id.* The City's interest income has fallen by approximately 89% from 2008 to 2012, from \$2,184,485 to \$242,600. *Id.* at 38. To cope with the loss of revenue, the City has given employees no general salary increases for 2009, 2010 (plus no step increases), and 2011. Other actions taken by the City to reduce expenditures included a hiring freeze implemented in 2008, which resulted in a savings of approximately \$3.3 million on an annualized basis, closing of the Nature Center, and minimal capital outlay for 2010 and 2011. (Er. Ex. 39) The City appears to have suffered significant negative effects from the financial downturn.

The Union focuses on positive aspects of growth, commerce and education in the City. It notes that the U.S. Census reported that St. Cloud's population grew 19.1% from 2000 to 2010 and the Counties of Stearns, Benton, and Sherburne (which all include part of the City) are among the largest and fastest growing in the state. (Union Ex. "St. Cloud Area Demographic and Economic Profile: 2011.") The unemployment rate in June 2012 was 5.7% for the greater St. Cloud area workforce, less than the State as a whole. The St. Cloud Metropolitan Statistical Area is Minnesota's third largest metropolitan area with 189,093 residents, and the city itself is among the top 10 largest cities in the state. (Union Ex. at 37, "Greater St. Cloud Development Corporation") The city has maintained a total general fund balance of 52.22%, slightly better than the State Auditor's recommendation of 35-50% for local governments. The unassigned general fund balance is 48% of the general fund expenditures (Un. Ex. 96 and 106), well within the State Auditors recommendation. This is a good indicator of ability to pay its employees a wage increase.

Other evidence indicates good financial administration of the assets of the City. Assets of the City exceeded liabilities at the close of the most recent fiscal year by \$472,546,385 as

compared with \$455,059,910 for the previous year. Of this amount, \$99,749,417 may be used to meet the government's ongoing obligations to citizens and creditors. (Union Ex. at 106, City of St. Cloud financial statement narrative overview for fiscal year ending December 31, 2011.) Although the ending fund balances for 2011 were somewhat decreased in comparison with the prior year, approximately \$6,774,540 constitutes the unassigned fund balance which is available for spending at the government's discretion. (Union Ex. at 96). Another measure of financial stability is the City's bond rating. In 2009, the City's Standard and Poor's bond rating went up from AA to AA+, a rating that was confirmed on the 2011 bond issue.<sup>2</sup> Compared to other Minnesota cities, St. Cloud's financial condition is neither at the top nor the bottom, but its fiscal prudence has served it well.

## 2. External Market Conditions.

The parties have used a group of cities for external wage comparisons in the past. Of these cities, only three employ comparable assistant city attorneys. The others either hire private attorneys to handle criminal misdemeanor prosecutions or have agreements with county attorneys to cover this work. The City argues that the three cities, Duluth, Mankato and Rochester, are not reasonable market comparisons for demographic reasons and that the higher paid county attorneys cited by the Union, who prosecute felonies, are not comparable because their work is different. But on the whole, the Union's assistant prosecutors do not compare favorably with the external market for this job.

For purposes of looking at the external market, Duluth, Mankato, and Rochester employ a group most like St. Cloud's assistant city prosecutors. Arbitrators have used these cities as reasonable comparitors in interest arbitration involving the City of St. Cloud before, albeit as part of a larger group; and on average, they are the most demographically similar. The evidence is

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<sup>2</sup> Union Ex. 37.

that in Rochester, the 2012 starting salary is \$67,841 and the top salary is \$99,766.<sup>3</sup> In Duluth, the starting salary is \$53,160 and the maximum is \$102,072. For similar attorneys in Mankato, the starting salary is \$62,005 and the maximum is \$73,632.<sup>4</sup> None of these salary plans is the same as St. Cloud's, but the average top salary for the assistant city prosecutors in these three cities was \$91,823 compared to the current highest pay for this work in St. Cloud, which is \$70,356, a difference of \$21,467. Because per capita income, number of households and tax capacity of these three cities are not matched with St. Cloud, and it is a small sample, this comparison has limited bearing on the amount that should be awarded, but the differential is instructive. It establishes that the City is substantially below the market value for similar jobs in Greater Minnesota cities.

### 3. Statutory Considerations.

The Minnesota Pay Equity Act ("MPEA") provides:

In interest arbitration for a balanced class, the arbitrator may consider the standards established under this section and the results of, and any employee objections to, a job evaluation study, but shall also consider similar or like classifications in other political subdivisions.

Minn. Stat. Sec. 471.992, Subd. 2.

The job class of assistant city attorneys is considered a balanced class under the MPEA, and the City is in compliance with that statute. In addition to considering jobs in other cities as set out above, I have reviewed portions of the City's job evaluation study. The Union points out a lack of fairness based on that study. It argues that if the 790 job points for the assistant city prosecutor job accurately reflect its comparable skill, effort, responsibility, working conditions and "other relevant work-related criteria"; the pay of several other job classes with fewer total

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<sup>3</sup> There are 6 annual steps to the midpoint of \$79,812, and although the maximum is about \$20,000 higher, the method of reaching the maximum is not clear.

<sup>4</sup> The steps from minimum to maximum for Duluth and Mankato are not specified, although the City's Ex. 80 lists Duluth years to max as 13 and Mankato as 4.

job points should not be paid more than the attorneys. For example, the maximum pay per month of the assistant city attorney job, rated at 790 points, is \$5618 as compared to the police sergeant job, rated at 767 points and paid \$5877. (The sergeants and the City attorneys work closely together.) This type of comparison does not mean that the City is not in compliance with the law or that its comparable pay status would be adversely affected by the outcome of this case. Compliance is based on an overall statistical formula measuring the comparable female dominated job classes as compared to male dominated classes. Neither party claims the other's proposals will cause the City to lose its status as a city in compliance with the MPEA, and I see no statutory impediment arising from either party's position.

#### 4. Internal Comparables

Several internal inequities may have motivated the Union's determination not to settle with the City. First, three of its bargaining unit members were promoted in the last two years, one to City Attorney and two others to supervisory level jobs, and the three have enjoyed dramatic pay increases. The one long-term employee left behind in the bargaining unit is at the top of his pay range and has had neither a step increase nor a general pay increase for two years. Yet, the other two remaining bargaining unit members received step increases ranging from 3.3% to 4.6% because they had not yet reached the top of their pay ranges. Second, the City has reviewed and increased the pay levels of some other recent top jobs, a newly hired Police Chief earns \$108,800 as compared to the former Police Chief who earned \$99,900, and the City Administrator who was given a \$12,948 pay increase in 2012. (Union Ex. at 215.) The Union also notes that the City Clerk was paid \$9,348 more per year than an attorney at top pay. It is apparent that the City does not consistently reward experienced prosecuting attorneys in the same way.

The City argues that internal equity means that it is important that pay increases should be the same across the board. This contributes to stable collective bargaining and better morale among its employees. The City has held a large majority of its employees to the same increase, and it has succeeded in doing so not only this year, but for several years. (Er. Ex. 48.) The City employs a total of 674 full and part-time personnel, of whom 260 are non-union. Of the eight other bargaining units, representing more than 300 additional employees, six accepted the same offer the City has made here for 2011 and 2012. The Union represents a tiny minority comprising 0.04% of the City's total work force, and the only power it has is the power of persuasion. It has been unable to persuade the City to view their situation as substantially different than that of other employees.

#### CONCLUSION

PELRA has replaced the right to strike with a right to arbitration for essential employees like the assistant city prosecutors. Yet, an arbitrator's decision should be compatible with the contract the parties themselves might have reached had they been able to agree to one. If these parties had been able to reach an agreement on a negotiated wage increase, it is more likely than not that the Union would have agreed to accept the City's general wage offer of 0.0% in 2011 and 1% effective July, 2012. Arbitration is not intended to circumvent the collective bargaining process, and the most likely outcome of collective bargaining is the same wage increase accepted by the other six bargaining units, including three that reached voluntary settlements with the City even though they are also essential units that have a right to interest arbitration: Firefighters, represented by IAFF, Sergeants represented by LELS, and Lieutenants/Captains represented by LELS. (Er. Ex. 47.)

Taking into account the City's economic conditions, its bargaining history, and internal comparisons, I award the City's offer of a 0.0% increase for 2011 and a 1.0% increase effective July 1, 2012 rather than the two annual 4.5% raises the Union seeks. I also award a 4% additional step at the top of the assistant city attorney wage grid effective in the year 2012. Awarding an additional step is to help alleviate the pay discrepancy between St. Cloud and the other regional hub cities in Greater Minnesota. Adding another annual step is a relatively inexpensive change for the City, and it acknowledges that especially at the top of the range, the City is paying less than the market value for experienced attorneys.

**3. Issue Five and Six: Work Schedule – On Call – Establishing a number of weekends and holidays on-call – NEW (Article 22.3 On-Call)  
Work Schedule – On Call – Compensation for On-Call – NEW (Article 22.3 On-Call)**

The Union proposes that its attorneys be paid a flat \$75 rate for each day they are on-call, and if they must return to work or meet with law enforcement employees while on call, they should be paid their hourly rate for all hours spent called out. The City offers no change from the current language that provides one day off per year in exchange for being on call.

The facts are these: Assistant city attorneys routinely are on-call to the police department. They take calls on a rotating basis outside their normal work hours from police officers who need information and advice about traffic stops, arrests, and warrants, among other things. These calls sometimes happen at night, in the early morning hours, and on weekends. The attorneys serve a week of on-call once a month. One of the supervisors is currently part of the rotation. Nearly all the calls can be handled by phone rather than requiring office time. The usual situation is that a police officer drafts the warrant and reads it to the attorney over the phone. There are few restrictions of the attorney's usual activities when they are on-call. (T. Hanson) The attorneys are exempt employees under the Fair Labor Standards Act.

The City provides cell phones and logs the actual time spent by the assistant attorneys on these calls during the month. In 2012, the total monthly minutes the attorneys spent on these phones varied from 70 minutes in May to 14 minutes in June. This total time for all the attorneys combined during 2012 was 4.9 hours, a fairly average year. The average call time ranged from 3 minutes to nearly 9 minutes over the year, and the longest call was 17 minutes. The total number of calls on a monthly basis averaged 4.5. (Data from Er. Ex. 83.) It is possible that some additional calls were made to an attorney's personal phone. (T. Hanson.) On-call responsibilities require only a relatively small amount of each attorney's time.

The Union argues that the attorneys have less favorable on-call provisions than other City employees who are required to work on call. Other employees who work on call are law enforcement employees, however, and are eligible for the overtime provisions of the FLSA, which the attorneys are not. The Union also seeks a limit of one week per month for each attorney assigned to this duty.

The changes the Union seeks are changes in pay structure, rather than additions to an existing one, and changes in pay structure are not often awarded in interest arbitration. It is likely that prosecuting attorneys work extra hours without extra pay in many circumstances, and although being on call is inconvenient, the parties previously negotiated an extra day of vacation to offset that inconvenience. (Article 22.3) The evidence does not establish a substantial change in the work since then. Interest arbitration is too blunt a tool for resolving the underlying issues between the parties, and the parties would be better served by further discussion and negotiation on these issues.

## AWARD SUMMARY

### Issues Certified:

1. Duration of the Agreement – Settled before the hearing.
2. Salaries: 2011: 0.0%
3. Salaries: 2012: 1.0% effective July 1, 2012
4. Salaries: - Steps – One additional step 4% above the top of the range in 2012.
5. Work Schedule – On-Call - establishing number of on-call days: no change.
6. Work Schedule – On-Call – Compensation for on-call work: no change.

Dated: December 3, 2012

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Andrea Mitau Kircher  
Arbitrator