

IN THE MATTER OF ARBITRATION BETWEEN

Minnesota Government Engineering Council,
Union or “MGEC” or “Council”,

and

State of Minnesota,
Employer.

OPINION AND AWARD

Interest Arbitration
BMS Case No. 16-PN-0318

ARBITRATOR:

Gerald E. Wallin, Esq.

DATE OF AWARD:

July 22, 2016

HEARING SITE:

MNDot Training and Conference Center
Shoreview, Minnesota

HEARING DATES:

June 2-3, 2016

RECORD CLOSED/BRIEFS RECEIVED:

July 1, 2016

REPRESENTING THE UNION:

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JURISDICTION

The hearing in this matter was held on June 2-3, 2016. The undersigned was selected to serve as arbitrator pursuant to Minnesota law, the procedures of the Minnesota Bureau of Mediation Services (“Bureau”), and the parties’ collective bargaining agreement. The Commissioner of the Bureau certified three issues to be at impasse for interest arbitration. Both parties were afforded a full and fair opportunity to present their evidence on these issues. Witnesses were sworn and their testimony was subject to cross-examination. The parties closed the record by submitting post-hearing briefs by email, duly received on July 1, 2016, which closed the record, and the matter was taken under advisement.

ISSUES

The impasse issues certified to interest arbitration by the Commissioner on January 27, 2016 are as follows:

1. Wages Year 1. What are the rates and effective date of changes for wages payable to each job classification during the first year of the agreement?
2. Wages Year 2. What are the rates and effective date of changes for wages payable to each job classification during the second year of the agreement?
3. Deferred Compensation Match. What is the amount of the Employer matching contribution for each fiscal year of the agreement?

According to Appendix B-1 of the current Agreement, the pay rates for the members of the MGEC bargaining unit are found in Compensation Grid 12. The grid contains sixteen numbered ranges. Each range contains nine, ten, or eleven annual increase steps. The steps are coded alphabetically for pay purposes beginning with the letter A for the first step and ending with either the letters I, J, or K for the final step of each range.

The Employer’s final wage proposal provides for a 2.5% across-the-board (“ATB”) increase for each step of each range for Year 1 and another 2.5% ATB increase for each step for Year 2, which produces a compound increase of slightly more than 5% for the biennium. The Union’s request differs from the Employer’s proposal in two respects: First, while the Union agrees with the

Employer's proposed ATB figure of 2.5% for most steps for both years, the Union says the final step of each range should be increased by 3.5% in each year instead of the 2.5% offered by the Employer. Second, the Union requests to have the job classification of Engineering Specialist Senior ("ESS") moved upward from Range 7 to Range 8 for Year 1 and beyond.

On the third issue, the Employer currently matches each employee's annual contribution to the deferred compensation plan up to \$300 per year. The Employer proposed no change to this limit. The Union requested an increase to \$350 for Year 1 and a further increase to \$400 for Year 2 and thereafter. But because the timing of the post-hearing brief submissions could not produce an Award before the close of the first fiscal year, the Union modified its request to seek only a matching figure of \$400 for Year 2 and continuing.

BACKGROUND SYNOPSIS

The MGEC represents approximately 1,000 employees working in fifteen job classifications and serving in thirteen departments within the State of Minnesota. Of this overall figure, some 487 hold engineering licenses. Included in this licensed group are 17 radio engineers who hold licenses issued by the Federal Communications Commission. Among those without licenses are 88 graduate engineers who have obtained their academic degrees in engineering but have not yet completed the requirements for licensing. Finally, some 371 members of the bargaining unit are unlicensed engineering specialists.

As of January 6, 2016, more than three-quarters of the MGEC members work in the Minnesota Department of Transportation. The next largest contingents of members work in the State's Pollution Control Agency, its Department of Natural Resources, and the Health Department, with 84, 31, and 30 members, respectively. The remaining nine departments employ between 1 and 19 members each.

These parties have a mature bargaining relationship that began well before the turn of the Millennium. They negotiate every two years for two-year agreements that coincide with the biennial budgeting process of the State of Minnesota. The State's fiscal year begins on July 1st and ends the following June 30th. Thus, Year 1 of this interest arbitration began on July 1, 2015 and ended on June 30, 2016. After the instant interest arbitration award is rendered, the parties will enter the bargaining season for a new two-year agreement in early 2017, less than six months away.

The current dispute is the third time these parties have resorted to interest arbitration to resolve an impasse in bargaining. Their first use of the process was in 1981. Thereafter, they successfully negotiated a succession of new agreements that essentially followed the pattern of ATB increases and benefit settlements set by the bargaining units represented by the American Federation of State, County, and Municipal Employees (“AFSCME”) and the Minnesota Association of Professional Employees (“MAPE”). These two bargaining units represent the large majority of the State’s represented employees.

The undersigned arbitrator was selected by the parties some sixteen years later to arbitrate their second impasse in bargaining.¹ Three of the certified issues then were nearly identical to the issues involved in the present dispute. Although the Council’s approach to pay increases was different then, in that it sought to obtain a new pay step for each applicable range, the net effect of its proposal was to increase the compensation for its members who had reached the top pay step of their respective ranges. As noted previously, the current MGEC proposal does not seek to add a new pay step but, rather, calls for a 1% larger increase for the top step of each range than the Employer’s 2.5% pattern proposal provides. In this way, the MGEC seeks to achieve the same objective of increasing compensation for those at the top of their range. The Council also sought, then as here, to obtain an increase to the limit of the Employer’s deferred compensation match.

Since the second use of interest arbitration in 2000 until now, the parties successfully negotiated another series of new agreements. For the most part, the pay increases followed the same ATB pattern of settlements as described above that was set by the Employer’s agreements with AFSCME and MAPE. But not always. The Council’s evidence pointed out various deviations from strict compliance with the historical patterns when circumstances warranted. The Employer, for its part, contended that such deviations were usually paid for by pay increase delays or other means.

Given the similarity between the current impasse issues and those from sixteen years ago, it is not surprising that the kinds of evidence presented by the parties were virtually the same as the second interest arbitration in 2000. Indeed, the Council’s presentation this time again included the report of the Legislative Auditor on State Employee Compensation issued in February of 2000. Despite being quite dated at this point, it provided an explanation for the composition of the external comparison group advanced by the Council.

¹BMS Case No. 99-PN-1438. Award issued August 6, 2000.

It would serve little purpose to use seven pages of text again, as was done in the prior Award, to describe the kinds of evidence presented. The advocates for the parties in this case are veteran practitioners who left no stone unturned in advancing their respective positions on the certified issues. For example, the Council's presentation consisted of 134 exhibits as well as the testimony of three witnesses and it took a full day to unfold. The Employer's presentation was comparable and fully used the second day of hearing. Interested readers can obtain the 2000 award from the Bureau, or the parties, if they wish to review it. For the sake of economy, therefore, no lengthy description of the evidence will be undertaken here. Instead, this background section will confine itself to some highlights that bear directly on the compensation issues involved.

The Council's evidence included several items of compensation survey data. In 2008, apparently suggested by a Bureau mediator, these parties compiled their own compensation and benefits survey. Data was solicited from both private sector and other public sector employers including employers in other states. There were 29 total responses. A weighted averaging process was used to break down the data. The resulting figures showed pay differences between MGEC members and similar external classifications at entry, average, and maximum pay levels. These parties repeated that process with another survey in 2013 which used the same methods for calculating and compiling results. A third survey was underway for 2016 at the time of the instant arbitration hearing but no results had yet been published and there was no speculation about the results.

The Council also provided wage data about its proffered external comparison group. The five-member group consisted of the Metropolitan Council, the cities of Saint Paul and Minneapolis, and the counties of Hennepin and Ramsey. This contingent was selected because it was one of the significant contingents used by the Legislative Auditor's Office for its 2000 report. Three of the members of this comparison group had some unionized classifications similar to MGEC classifications. Council Exhibits 86 through 108 showed the resulting data in both numerical and graphical terms. The exhibits also provided historical data from 2000 to 2015 to show what percentage State pay was relative to the average pay of the group.

The MGEC is the Employer's only bargaining unit that did not accept the two-year 2.5% ATB increase pattern. Thus, approximately 97% of the State's employees followed the pattern that was offered to the MGEC-represented employees. The Employer also introduced a survey provided by the League of Minnesota Cities that reflected the percentage ATB increases paid by other public

sector employers in both the metro and out-state areas.

The Employer's evidence included explanations about how classified positions are evaluated and how their compensation levels are determined. In the case of the Engineer Specialist Senior, the position is already compensated one pay range higher than the ideal range predicted by the rating system used.

The Employer's evidence showed that MGEC-represented employees already have one of the higher deferred compensation match limits among all bargaining units.

Both parties expended a considerable amount of presentation energy jousting over whether the State has suffered from retention and/or recruiting problems currently and in the recent past. The Council contended that such problems have been seen. The Employer maintained that such problems do not and have not existed in the relevant time frame.

Both parties cited Minnesota Statutes 43A.18 Subd. 8 in support of their respective positions. In practical effect, this law requires the Employer's position in collective bargaining to meet four compensation relationship criteria. They are:

- 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.

Subdivision 8 also contains a subparagraph "e" that defines what is meant by a reasonable relationship. Such a relationship exists 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.

OPINION AND AWARDS

The 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 resolution themselves. With that theoretical objective in mind, interest arbitration generally presents three primary issues for analysis. First, is the employer financially able to meet the economic demands of the bargaining unit? Second, have the parties historically used a formally or informally agreed upon standard or approach in reaching earlier settlements that may be used to resolve the issues? Finally, if the answer to the second question is “no,” then can a comparability model be developed to guide the arbitral decision-making process?

Accordingly, when analyzing the evidence and the competing proposals, little weight is ordinarily given to the subjective wants and desires of either party. Instead, interest arbitration seeks to identify objective criteria to use as the basis for decisions. This approach recognizes the realities of bargaining in that, regardless of whatever aspirations the parties may have had as they entered bargaining, the agreements reached are predominantly the product of objective considerations. A corollary of this objective is that neither party should achieve through interest arbitration that which they would likely not have achieved via traditional bargaining.

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. Those kinds of considerations are present here as well. Such situations should be approached with caution. Accepting such proposals 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. As noted, 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.

When, as here, an interest arbitration involves the State of Minnesota, the foregoing

principles surrounding interest arbitration are essentially overshadowed by statutory law. Minnesota Statutes 43A.18 Subd. 8 requires that the Employer's proposal satisfy four tests. As the statute is written, it is not sufficient to satisfy only the three that deal with internal compensation relationships. Because the statute does not identify any of the four tests to be of a higher priority than the others, the undersigned concludes that all are of equal priority and must each be satisfied independent of the others.

The traditional ability to pay question is not in dispute. The added cost of the Council's proposal can well be absorbed by the projected budget surplus the State expects to realize for the relevant biennium.

The answer to the second traditional historical question is also clear. The parties have used pattern bargaining for many years. Thus, if adherence to the Employer's 2.5% ATB pattern proposal will satisfy all four of the tests required by Minnesota Statutes 43A.18 Subd. 8, it should prevail.

ISSUE NO. 1

Part 1 - Wages for July 1, 2015 to June 30, 2016

MGEC Position. The Council's proposal differs from the Employer's 2.5% ATB proposal in only one respect: The top pay step of each range should be increased by 3.5% instead of the 2.5% provided by the Employer's proposal.

Employer Position. The 2.5% ATB increases proposed should apply to all steps of all ranges.

AWARD

Both parties' proposals are partially awarded as follows:

The top pay step in Ranges 9, 11, and 14 shall be increased by 3.5%.

All other pay steps in all ranges of Grid 12 shall be increased by 2.5%.

Rationale

The Council's proposal here seeks to change the structure of the existing ranges from what the parties have voluntarily negotiated in the recent past. As previously noted, the proponent of such change bears a heavy burden of proof to establish the justification for such change. The Council's evidence satisfies this burden in part.

Five of the fifteen employee classifications represented by MGEC require educational degrees in engineering. Three of the five require licensing as a professional engineer. The applicable compensation ranges in Grid 12 are as follows:

Range 1 - Engineer Graduate I

Range 4 - Engineer Graduate II

Range 9 - Engineer Senior (licensed)

Range 11 - Engineer Principal (licensed)

Range 14 - Engineer Administrative (licensed)

The compensation surveys these parties did in 2008 and 2013 are illuminating for the listed classifications. The summary for the 2008 survey showed a significant disparity between what the State paid in compensation at the top pay level and what the weighted average maximum pay was for all respondents with comparable classifications. The Engineer Graduate II was paid \$8,938 less than the weighted average. The 2013 survey showed this disparity had widened to \$20,574.

For the Engineer Senior, the 2008 survey produced a \$14,851 pay disparity from the weighted average for all respondents. This disparity widened to \$15,415 in the 2013 survey.

The disparities for the Engineer Principal were \$18,272 and \$18,583 respectively.

The disparity in 2008 for the Engineer Administrative was \$42,526. It had improved somewhat by 2013, but the disparity was still \$38,693.

Similar disparities are seen when the MGEC engineer classification comparisons are contrasted with other public sector positions. For example, for the Engineer Senior, a 2008 disparity of \$7,056 more than doubled to \$15,392 by 2013 when compared with similar external public sector classifications.

The two surveys showed that the MGEC engineer classifications also experience significant disparities when contrasted with comparable classifications in the private sector.

The foregoing disparities shown by the 2008 and 2013 surveys were corroborated by the Council's data pertaining to the five public sector employers in its proffered comparison group. For the Engineer Senior, Council Exhibit No. 93 shows a top pay disparity of more than \$10,000 when compared with the Metro average. That disparity remains at more than \$9,000 even with the MGEC's proposal for a 3.5% increase to the top step of Range 9. Historically, the exhibit shows that during the 15-year period from 2000 to 2014 the annual pay of the Engineer Senior has shrunk, as

a percentage of the Metro average, from 93.5% in 2000 to 89% in 2014. Council Exhibit No. 99 shows a more than \$13,000 annual disparity for the Engineer Principal as well as a decreasing percentage of pay compared with the Metro area average over the 15-year historical period.

In the undersigned's opinion, the previously described pay disparities and the shrinking percentage trend produced by adherence to pattern bargaining over the past sixteen years establishes that the Employer has not satisfied its statutory obligation to maintain "... a reasonable relationship to compensation for similar positions outside state service; ..." as required by Minnesota law. Therefore, the undersigned finds it to be necessary to award the 3.5% increase to three of the sixteen pay ranges for the purpose of alleviating the compensation disparities established by the evidence and to call attention to the failure of past pattern bargaining to comply with the mandate of Minnesota Statutes 43A.18 Subd. 8(b).

The 2008 survey showed the other ten classifications represented by the Council fared much more favorably than the engineering classifications. The All Respondents and Public Sector comparisons do not show any disparities at all. That remained the case in the 2013 survey except for the Land Surveyor Senior. However, that classification is also located in Range 9 and will benefit from the 3.5% increase awarded to the top step of that range.

Finally, although the Engineer Graduate I and II classifications experienced similar top pay step disparities as the other engineer classifications, the employees in those ranges normally do not reach the top pay level before they become licensed and move into the higher pay ranges for engineers. Accordingly, the evidence does not provide a compelling reason to award an increase of 3.5% to the top steps of Ranges 1 and 4.

The magnitude of the disparities shown by the evidence on this issue suggests that further remedial adjustment might be needed. That discussion, however, is left for the parties to undertake in their next round of bargaining after the results of their 2016 pay survey become known.

ISSUE NO. 1

Part 2 - Pay range change for the Engineering Specialist Senior (ESS) classification

MGEC Position. The Council proposes to move the ESS classification upward from Range 7 to Range 8.

Employer Position. The Employer proposes no change.

AWARD

The Employer's position is awarded.

Rationale

The ESS classification is currently located in Range 7. The Engineer Senior is located in Range 9, two ranges higher. The Summary of the Classification, Council Exhibit No. 3, says this about the ESS:

Requirements:

Does not require a Bachelor's degree or registration but may have the education. Years of experience may substitute for a degree or certifications.

Nature of Work:

Generally assigned all of the work of a Senior Engineer but cannot sign the plan, specification, reports which must be directed, reviewed and signed by a licensed Professional Engineer.

(Underscoring supplied)

Examples of Work:

An employee in this classification leads a design squad for multiple projects simultaneously. Oversee multiple construction projects simultaneously. Subject matter expert. Conducts investigation and technical reviews for pipeline safety, water systems, and water treatment systems. Responsibilities may include supervision of technicians, non-registered engineers or other para-professionals. Their work may be periodically reviewed by a higher level engineer.

Both parties provided extensive testimony about the ESS classification. The importance and value of the work performed by the incumbents of the classification was never in dispute. But this has apparently been the case for many years. Indeed, according to Council Exhibit No. 57, the class specification for the ESS was established in April of 1985 and has not been revised since then. It appears, therefore, that the ESS classification has always performed almost all of the work of an

Engineer Senior, which is compensated two pay ranges above that of the ESS.

The Council is effectively proposing a structural change to a compensation relationship that has existed for many years. Thus, the Council's evidence must satisfy, for want of a better descriptor, the "Why Now? Test." To satisfy that test, one would expect to see very persuasive evidence that the duties and responsibilities of the classification have experienced significant increases since the most recent round of bargaining. The record does not contain such evidence. Moreover, the evidence does not establish that the Employer is experiencing attrition losses to greener pastures elsewhere. The only attrition losses shown by the evidence are normal retirements. Nor does the evidence establish that the Employer is having difficulty filling vacancies when they occur. Finally, the 2008 and 2013 surveys do not reflect any compensation disparities of the magnitude experienced by the five engineer classification previously discussed. Simply put, the evidence does not provide the kind of compelling reasons to call for awarding the Council's position.

ISSUE NO. 2

Wages for July 1, 2016 to June 30, 2017

MGEC Position. The Council's proposal differs from the Employer's 2.5% ATB proposal in only one respect: The top pay step of each range should be increased by 3.5% instead of the 2.5% provided by the Employer's proposal.

Employer Position. The 2.5% ATB increases proposed should apply to all steps of all ranges.

AWARD

Both parties' proposals are partially awarded as follows:

The top pay step in Ranges 9, 11, and 14 shall be increased by 3.5%.

All other pay steps in all ranges of Grid 12 shall be increased by 2.5%.

Rationale

The rationale for the second year step increases is the same as for the first year.

ISSUE NO. 3

Deferred Compensation Match

MGEC Position. The Council's proposal requests the matching contribution limit be raised to \$400.

Employer Position. The Employer proposes no change.

AWARD

The Employer's position is awarded.

Rationale

The evidence establishes that the existing limitation is already higher than most other employees receive. No persuasive rationale has been shown to warrant the requested increase at this time.



Gerald E. Wallin, Esq.,
Arbitrator

July 22, 2016