

CASE NOS. A10-1244 and A10-1331

State of Minnesota
In Court of Appeals

CITY OF MINNEAPOLIS, a Municipal Corporation,

Respondent,

vs.

MINNEAPOLIS POLICE RELIEF ASSOCIATION AND
 MINNEAPOLIS FIREFIGHTERS RELIEF ASSOCIATION,

Appellants.

BRIEF OF AMICUS CURIAE
MINNEAPOLIS RETIRED POLICE OFFICERS' ASSOCIATION

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INTRODUCTION

The Minneapolis Retired Police Officers' Association¹ (henceforth, "Retirees") formed in 1928 as a voluntary association of retired Minneapolis police officers and surviving spouses of deceased Minneapolis retirees. Membership is open to Minneapolis police officers with 20 or more years of service, or who suffered a permanent injury in the line of duty. The Retirees' purposes are to promote fellowship among retired Minneapolis officers, to protect the lawful rights of its members, and to preserve and improve the pension benefits provided through the MPRA.

A substantial majority of the Retirees' members receive pension benefits administered by the Minneapolis Police Relief Association ("MPRA"); the Retirees' bylaws still state that dues are paid by withholdings from each member's MPRA checks. For many members, the police pension is the sole source of income, as police officers and their surviving spouses are ineligible to receive Social Security. *See* Minn. Stat. § 355.07(d)(adopted in 1955 excluding police officers and firefighters covered by pensions from participating in State's agreement the same year to make state and local government employees eligible for Social Security program). Throughout the course of this legal dispute with the City of Minneapolis, the retired officers, surviving spouses, and other recipients of MPRA pensions have had a very concrete stake in the outcome of the litigation. Many members were aware of the State Auditor's letters beginning in 2003, and the issues presented in those letters. The 2009 decisions of the District Court in this

¹ The undersigned counsel authored this brief in its entirety, and no person or entity other than the identified *amicus curiae*, its members, and undersigned counsel made a monetary contribution to the preparation and submission of the brief.

matter, and especially the September 21, 2009 order and memorandum granting partial summary judgment to the City of Minneapolis.

The Appellants in this case, whose arguments the Retirees support in this appeal, have presented the basic facts about the police pension. The Retirees agree with the facts presented and the issues identified in the Appellants' brief. To fully appreciate the impact of the District Court's order upon the Retirees' members receiving MPRA pension, however, the Court should be clear about the composition of a "unit" used to determine the amount of an MPRA pension.

Compensation Item	When first included	10/15/2004 unit value² (\$86.02)	12/31/2008 unit value³ (\$96.64)
Base wages	n/a	\$ 60.36	\$ 67.21
Shift Differential	1995 ⁴	\$ 2.32	\$ 2.59
Clothing & Equipment Allowance	1995	\$ 0.80	\$ 0.86
Longevity pay	1995	\$ 7.10	\$ 7.90
Work out program (health club) pay	1995	\$ 0.37	\$ 0.42
60 hours of accumulated comp time	1995	\$ 2.00	\$ 2.23
Maximum sick leave buy back credit	1995	\$ 3.21	\$ 3.57
<i>Overtime pay</i>	1996 ⁵	\$ 7.21	\$ 8.86
<i>Vacation leave credit pay</i>	1996 ⁶	\$ 1.16	\$ 1.30
<i>Holiday pay</i>	2000 ⁷	\$ 0.29	\$ 0.35
<i>Performance premium pay</i>	2001 ⁸	\$ 1.21	\$ 1.34
Value of <i>post-1995</i> items (% of unit value)		\$ 9.87 (11.5%)	\$ 12.04 (12.5%)

² Appellant's Appendix, AA 110 (State Auditor's Letter for year ended 12/31/2004). This brief will refer to the Appellant's Appendix, and use the page numbers therein.

³ AA 236 (Affidavit of Renee Tessier 12/8/2009), overall value. Individual values are from State Auditor's Letter for year ended 12/31/2008.

⁴ AA 020 (1995 Settlement Agreement) for all 1995 items.

⁵ AA 031 (Police Labor Agreement, 1995-1998).

⁶ AA 033 (Police Labor Agreement, 1995-1998).

⁷ AA 036 (Police Labor Agreement, 1999-2002).

⁸ AA 035-036 (Police Labor Agreement, 1999-2002).

The table emphasizes the “post-1995 items” because those items were eliminated as a direct result of the District Court’s decision ruling those items of compensation invalid. MPRA pensions have been reduced by approximately that amount since January 1, 2010, and the “recoupment” currently sought by the City of Minneapolis accordingly seeks to have retirees pay back up to an eighth of all past pension payments since 2000. By contrast, the unit-value impact of the items identified by the State Auditor which gave rise to the lawsuit is less than \$0.20 per unit. (AA 110). This *amicus* brief focuses exclusively on the two pages of the District Court’s September 21, 2009 summary judgment opinion, which had this outsized impact upon the membership of the Retirees’ association. The District Court committed a cascade of legal errors over the course of those two pages, beginning with its interpretation of a statute to require that, “if MPRA ... want(s) to increase the benefits paid to their beneficiaries, [it] must amend their respective bylaws, and Plaintiff must ratify such change in benefits.” (Appellants’ Addendum, ADD 20). The impact of this single conclusion is to eliminate past calculations of “a first-grade patrol officer’s salary” which included overtime pay, vacation credit pay, holiday pay and performance premium given to those officers as new items of compensation in collective bargaining agreements after 1995. The District Court then layered on additional legal condemnation of the MPRA’s actions with little analysis or explanation, which this brief will also address. This entire section of the Court’s work is simply wrong, and every subsequent Order of the District Court granting relief to the City is affected by this fundamental error. The Retirees urge reversal of the District Court’s conclusions and vacation of the relief.

ARGUMENT

STANDARD OF REVIEW

The *amicus* supports the Appellants' challenge of the District Court's legal conclusions. "An appellate court is not bound by, and need not give deference to, the district court's decision on a question of law." *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001) (citing *Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984)). The Court granted partial summary judgment to the City of Minneapolis on the issues raised on appeal based on undisputed facts. "When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion that we review *de novo*." *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 638 (Minn. 2006) (citing *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998)).

I. THE DISTRICT COURT INCORRECTLY INTERPRETS MINN. STAT. § 69.77, SUBDIVISION 11.

The District Court's interpretation of Minn. Stat. § 69.77, subd. 11 relies entirely upon giving effect to a phrase that is not actually part of the statute and would not even be relevant outside evidence of legislative intent. "Statutory construction is a question of law, which this court reviews *de novo*." *In re Kleven*, 736 N.W.2d 707, 709 (Minn. App. 2007) (citing *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998)). This Court on appeal would need to engage in *de novo* review in any event, because if the District Court did any formal construction of the statute in connection with the summary judgment decision, it did not show its work in the opinion. Instead, immediately following a block quote of § 69.77, subd. 11, the Court concludes,

“[t]herefore, if the MPRA or MFRA want to increase the benefits paid to their beneficiaries, i.e. add new items to be included in the definition of salary, Defendants must amend their respective bylaws or articles of incorporation, and Plaintiff must ratify such change in benefits.” (ADD. 20). This one sentence is the sum total of the District Court’s statutory construction analysis in the opinion. As such, it is deeply flawed.

A. The District Court Improperly Gives Effect to the Statute Heading.

Appellants’ brief in this case is absolutely correct: the District Court re-wrote Minn. Stat. § 69.77, subd. 11. Our Supreme Court recently has put special emphasis on reminding lower courts and other branches of government not to “rewrite” statutes. *See Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 732 (Minn. 2010)(overturning “longstanding interpretation” of variance statute in Court of Appeals decisions, Court states “had the Minnesota Legislature not defined “undue hardship” in [the statute] we might consider the approach” advocated by supporters of the interpretation); *see also In re Hubbard*, 778 N.W.2d 313, 323 (Minn. 2010)(declining to construe statutes to give DNR authority to “certify” certain land-use variances, stating such “variation” should come from the Legislature). We believe the impetus for this particular “re-write” is easy to spot: the Court includes the subdivision heading, “Municipal approval of benefit changes required,” in block-quoting the statute. While not much explained within the opinion, the Court’s interpretation and application of the statute over the page and a half that follows is a perfectly reasonable attempt to give effect to the language in that subdivision heading. The result reached by the Court, at least on the five items at issue in

this section, applies a rule holding that any benefit changes must come through bylaw amendment, and the City must ratify the changes,

Unfortunately for this interpretation, the subdivision heading is not part of the statute. Minn. Stat. § 645.49 (words in boldface type before sections and subdivisions “are mere catchwords” to summarize statute, and are not themselves part of the statute). Accordingly, the “plain language” phase of interpreting the statute must ignore the statute’s caption and only examine the operative text. *See Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (citation and quotations omitted)(interpretation of a statute begins with its text; if the text is unambiguous, no other material needed to interpret the statute). Here is a corrected block-quote with only the legally effective text:

Any amendment to the bylaws or articles of incorporation of a relief association which increases or otherwise affects the retirement coverage provided by or the service pensions or retirement benefits payable from any police or firefighters’ relief association enumerated in subdivision 1a is not effective until it is ratified by the municipality in which the relief association is located.

Minn. Stat. § 69.77, subd. 11. Diagramming this sentence, the subject is “Any amendment to the bylaws or articles of incorporation of a relief association.” The predicate is the phrase, “is not effective until it is ratified by the municipality.” All other words in this one-sentence subdivision describe either the subject (the type of amendment of interest) or the predicate (the municipality that ratified said amendment). There is no additional provision which governs actions that are not amendments, or that addresses benefit increases in general. Thus, if no amendment is proposed to the association’s bylaws or articles, subdivision 11 is simply not applicable. If an amendment is proposed

to the bylaws, but it not one that “affects the retirement coverage,” the statute is also inapplicable. Only when an amendment is proposed and adopted by the association, which *does* affect retirement coverage, does the subdivision hold the amendment ineffective until ratified by the municipality. This is the entire purpose and effect of subdivision 11.

Nothing in the text of the subdivision requires an amendment to association bylaws, or suggests circumstances in which the bylaws should be amended. The subdivision is unambiguous and easily read and applied, requiring no analysis of outside factors to give it meaning. *See Schroedl*, 616 N.W.2d at 277. The District Court’s finding that the MPRA “must” amend its bylaws to “increase the benefits” is not based on a plain reading of the statutory text, but includes material outside of the statute and thus reads provisions into the statute that the Legislature omitted. Adding provisions to a statute which were not included by the Legislature is clear error. *See Hubbard* at 321; *Krummenacher* at 732; *see also Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006). This Court must reverse the statutory misinterpretation, and vacate the relief awarded that arises out of the District Court’s flawed reading of the statute.

B. Even if the Statute is Considered Ambiguous, This Subdivision Heading is Not Relevant to the Interpretation of Legislative Intent.

The District Court did not expressly find § 69.77, subd. 11 to be ambiguous in declaring its meaning at summary judgment, but even if it had intended to find ambiguity the subdivision heading would remain irrelevant to the analysis. Statutory headings are only relevant to the interpretation of the statute if “they were present in the bill during the legislative process.” *Minn. Express, Inc. v. Travelers Ins. Co.*, 333 N.W.2d 871, 873

(Minn. 1983) *quoted in Russell's AmericInn, LLC v. Eagle Gen. Contrs., LLC*, 772 N.W.2d 81, 84 (Minn. App. 2009). The statute is in no way ambiguous, and should be applied according to its plain language as just described. Should a party assert ambiguity on appeal, however, it would still be inappropriate to use the subdivision heading in construing the statute. The current heading of Subdivision 11 was not a part of the “process” that led to the substantive text of the statute.

The Legislature first adopted the subdivision (as subdivision 2a to § 69.77) in the 1971 session; its heading as reported in the 1971 Session Laws was, “Police and Firemen’s Relief Associations: Ratification of Bylaws and Articles.” Laws 1971, Ch. 11, Sec. 1. The only substantive revision to this provision occurred in 1981; the heading for the revised subdivision in Session Laws, 1981 reads, “Requirement for Municipal Ratification.” Laws 1981, Ch. 224, Sec 26. The Legislature rewrote much of § 69.77 in 1986, but made no textual change to the subdivision followed here; the subdivision is re-numbered to “2i,” and has no heading at all. Laws 1986, Ch. 359, Sec. 10. This heading-free version, we should emphasize, is the way the statute appeared at the time the MPRA and City adopted and ratified this key Bylaw amendment in 1995, and also in 1996, 2000 and 2001 when the MPRA incorporated new pay items into the calculation of “unit” values through routine Board action in accordance with the amended Bylaw. The current heading only makes its entry in 2002, when the Legislature again overhauled § 69.77. As part of the overall change to the entire statute, the Legislature: a) re-numbered this subdivision from “2i” to “11;” b) changed a use of “shall” to “is;” and c) changed a use of “prior to” to “before.” Laws 2002, Ch. 392, Art. 1, Sec. 1.

Any attempt to advocate using the current heading as a relevant part of the legislative history of this subdivision in the context of this case must first explain how someone acting in 1995, 1996 or 2001 could have complied with statutory language which did not appear until 2002. Even construing the statute generally, for its present application, there can be no serious argument that adoption of the 2002 bill is the “legislative process” that forged the statutory language, investing the heading with interpretive meaning, when the 1981 incarnation had all but three active words in common with the 2002 version but a different heading, and even the 1986 legislation also shares 95% of the effective words and has no heading at all.

It’s clear that there was no substantial change in meaning within the 2002 textual amendments. In that session, a heading was attached to the subdivision in the course of re-numbering and replacing three words in the statute with two simpler words of identical meaning and effect. If we’re asking that headings accurately summarize the statute, that heading just happens to be flat wrong. It is not the case, then or now, that the plain text of the subdivision requires “municipal approval of benefit changes.” The subdivision was, and remains, about the municipal approval of amendments to relief association bylaws or articles of incorporation. If the Legislature’s intent were otherwise, it clearly had the opportunity to make substantive changes to the statute’s text.

Even if the subdivision’s active text were somehow ambiguous, there would be no grounds for using this particular subdivision heading in the interpretive process. This Court must decline any invitation to give meaning to the current heading of § 69.77, subd. 11.

C. The District Court's Results are Internally Inconsistent.

Finally, the District Court's application of § 69.77, subd. 11 to five compensation items is wildly inconsistent with the lower Court's tacit approval of every other portion of the 1995 bylaw amendment, and the statutory scheme for Minneapolis police pensions overall. Comparing the logical consistency of competing interpretations is a means by which the Court can assure itself of a valid interpretation. *See* Minn. Stat. § 654.16(6); *City of Crystal Police Relief Assn. v. City of Crystal*, 477 N.W.2d 728, 731 (Minn. App. 1991). To summarize, both pension systems before the Court are predicated on the routine increase of pension benefits without the amendment of relief association bylaws. As the record shows, patrol officer base pay is 70% of the salary upon which a "unit" is calculated; base pay increases more or less on an annual basis. (see table on p. 2). The other salary components enumerated in the Bylaw – and not attacked by the District Court – together with salary make up over 85% of the "salary" driving the benefit amount; again, these also almost always increase on an annual basis. The City does not insist on bylaw amendments to put these annual increases into effect, in Court or in practice. However, in ruling the "salary additions" as grievous violations of State law, the District Court declared, "if the MPRA or MFRA want to increase the benefits paid to their beneficiaries ... Defendants must amend their respective bylaws or articles of incorporation, and Plaintiff must ratify such change in benefits." (ADD 20).

Perhaps unaware of the breadth of this declaration, the Court never even attempts to reconcile this bright-line rule with the fact that the central structure of the MPRA pension *routinely provides benefit increases without bylaw amendments or City*

ratification. Far from being the aggressive agency interpretation of law, the enabling statute requires the MPRA to administer a routinely increasing pension benefit. See Minn. Stat. § 423B.01, subd. 20 (unit value of pension defined as 1/80 of “current monthly salary of a first-grade patrol officer”). Absolutely nobody is suggesting that the MPRA needs to propose an amendment to bylaws each time the top patrol officers receive a raise, yet this would seem mandatory under the District Court’s interpretation of § 69.77. Similarly, the City and the lower Court appear untroubled by the use of six enumerated compensation items in addition to “base wages” used to calculate unit values though these also have served to “increase the benefits paid” to members in years following 1995. In combination, the items about which the City does not complain and the District Court does not apply its rule led to an 8% increase in unit values between 2004 and the end of 2008⁹ – and none of those increases even arguably required a bylaw amendment to accomplish.

Perhaps the argument is that including additional *categories* of patrol officer pay is substantively different than including additional *amounts* of said pay. That distinction is not at all expressed in the Court’s declared rule, and there is no support for it as a logical or equitable application of the rule. The parties established a clear and easily understood process for adding new items to keep pace with future collective bargaining agreements into their settlement agreement. The process was copied, *verbatim*, into the 1995 bylaw amendment adopted by the MPRA and ratified by the City. As this brief will discuss in

⁹ The 2004 unit value without the items ruled invalid by the District Court is \$78.57; the 2008 value without those items is \$84.79, an 8% increase over the 2004 figure. The “base wages” component of that figure, which is least likely to fluctuate with overtime requirements, emergencies or special events, increased over 11% in that time period.

detail in the next two sections, none of the complained-of items were ineligible for inclusion by the terms of the bylaw, and none conflicted with the terms of the bylaw in any other respect which might require an amendment. Institutionally, the Minneapolis City Council that examined and ratified the MPRA bylaw amendment on November 22, 1995 is the same Minneapolis City Council that approved the labor contract with police on March 29, 1996 – the contract that first included cash payment for overtime hours worked and for unused vacation hours. (AA 024; AA 030). It's not as though the ratification process is, or ever has been, the City's only way to hold the line on police and fire pension expenses. The pension amount is statutorily tied to current personnel expenditures, which the City Council approves, if not controls, through labor negotiations.¹⁰ It doesn't appear that the lower Court considered any facts on this matter at all, but simply concluded that the mere act of adding items from the 1996 and 1999 CBAs did great violence to the statute, as it (erroneously) understood it. All of the MPRA's actions – including eligible items of compensation granted in labor contracts and annually updating salary figures from those same contracts – are necessary for the MPRA to keep pace with the “salary of a first-grade patrol officer” and thus fulfill its statutory mandate. It carries out all actions in accordance with the express terms of a bylaw it adopted and the City ratified. There is no logical reason to distinguish between these actions. Of course, the rule declared by the lower Court doesn't actually make such a distinction; it's only in trying to give the Court the absolute benefit of the doubt that we

¹⁰ The CBA last approved by the Minneapolis City Council, and currently in effect, provided a 2% pay raise to top-grade patrol officers in August, 2010, and will provide an additional 1.5% raise for these officers on July 1, 2011. (AA 237, ¶ 12(a)).

try to read between the lines and find any logical consistency in the Court's decision. It does not appear that the District Court spent much time or effort working out the logical effects of its interpretation.

None of these continuity problems exist if the plain meaning of § 69.77, subd. 11 is, as advanced by Appellants and *amicus*, that the statute only requires ratification of any amendment to bylaws or articles of incorporation affecting benefits, and nothing more. Once bylaws are put in place by the relief association and the City which spell out how future benefits are to be calculated, no subsequent amendment is necessary in order to carry out those bylaws. This interpretation is eminently more reasonable than the hasty rule fashioned by the District Court. This Court must adopt this interpretation of the statute and reverse the District Court orders based on erroneous interpretation.

D. Reversing the Lower Court's Interpretation and Resulting Orders Will Correct the Injustice to Retirees' Members.

Minn. Stat. § 69.77, subd. 11 only applies when an amendment to the bylaws or articles of the relief association will affect the benefits paid by the association. It has no other effect: it does not purport to regulate benefit increases, nor does it mandate any procedure for approving a benefit increase without a bylaw amendment. The District Court simply misinterprets the statute. This misinterpretation is the core of the case, from the perspective of the Retirees' members: it leads directly to eliminating over 12% of retiree benefits and the creation, on paper, of a \$39.6 million "overpayment" that gives rise to the recoupment order also at issue in this appeal.¹¹ (ADD 42, at ¶ 38). The reality

¹¹ The recalculations to comply with the District Court orders reduced the MPRA's "unit value" by \$9.93 a unit. (AA 236, ¶ 7). Even if all other issues before the Court were

is that the pension's unit value is exactly what it is supposed to be under state law: 1/80th of a first-grade patrol officer's salary. The Retirees urge that the Court reverse this portion of the District Court's summary judgment ruling, which is clearly erroneous, and restore the retirement benefits previously found void as a direct result of the holding.

II. THE MPRA ADDED THESE ITEMS IN ACCORDANCE WITH BYLAWS.

Intertwined with its declaration that the MPRA's bylaw amendment is contrary to statute, the District Court also declared that by applying the bylaw the MPRA Board violated Minn. Stat. § 423B.05, subd. 2. (ADD. 22). This statute says nothing more than the MPRA must govern itself in accordance with its Articles of Incorporation and Bylaws. The District Court does not identify any particular act of the MPRA Board which allegedly violated the terms of the bylaw adopted by the MPRA and ratified by the City. The record is similarly devoid of any suggestion that any of the items added to the compensation formula after 1995 were ineligible for inclusion, in any year, under the criteria set within the Bylaw. There appears to be no dispute that the Board followed the process in the Bylaw. In order for the District Court's statement, "the addition of new items to the definition of salary is contrary to Defendants' bylaws, is a violation of Minn. Stat. § 69.77, and is a violation of ... § 423B.05, Subd. 2" to make any sense, the Court must believe that if the bylaw (or portion of the bylaw, it's never made clear) violates state law, the Court should treat it as though it never existed. (ADD. 22). There is no other way to conclude that these acts were "contrary to bylaws" under these facts.

resolved against the Associations, the individual Retirees at this point would have no overpayment liability, and their benefits would at most be reduced by less than 20 cents per unit.

As with the statutory interpretation that brought us here, the District Court is simply wrong about the legal effect of an invalid bylaw. A bylaw, once adopted, is permanent in nature and must be observed until it is legally changed. *See Diedrick v. Helm*, 217 Minn. 483, 497, 14 N.W.2d 913, 921 (1944)(citations omitted). While action in accordance with an invalid bylaw may be declared void, it does not follow that a corporate board has failed to follow its bylaws, and thus breached its duties to the corporation, simply because a bylaw was subsequently determined to be invalid. *See Bosch v. Meeker Coop. Light & Power Assn.*, 253 Minn. 77, 83, 91 N.W.2d 148, 152 (1958). There is no “default” set of bylaws which a Board should follow if a bylaw is questioned, and there’s certainly no issue with following a bylaw in the absence of questions. Even if the bylaw were somehow invalid, the Court’s follow-on conclusion that the MPRA Board violated its fiduciary duties in following it is not remotely correct.

And to be clear, the bylaw as amended in 1995 is, in all respects, a valid bylaw for the MPRA to adopt. Generally, a bylaw is an instrument of internal corporate governance and may contain any provision related to corporate business “that is not inconsistent with state law.” *Isaacs v. American Iron & Steel Co.*, 690 N.W.2d 373, 376 (Minn. App. 2004). Consistency with state law is the subject of the first section of this brief. Remaining matters affecting validity are whether the bylaw is germane to the MPRA’s business purposes and whether the bylaw is unenforceable, unfair or unreasonable under the rules of contractual interpretation. *See Bosch*, 91 N.W.2d at 152 (bylaws “must be fair and reasonable.”); *see also Isaacs*, at 376 (bylaws construed “according to rules governing the construction of contracts and statutes”).

The bylaw clearly relates to the association's business, as it establishes the key formula for determining "salary," which drives the value of pension benefits. The MPRA adopted the bylaw using governing procedures, to include compliance with the additional ratification requirement of § 69.77, subd. 11. The bylaw is clear, easily applied, and reasonable. The bylaw sets forth, in clear language, the intent of both the MPRA and the City of Minneapolis to have "salary" determined by future labor contracts. The agreement includes several enumerated pay items, but also expressly identifies conditions under which new compensation items granted to police officers by the City can be identified by the MPRA as a component of "salary" equivalent to the enumerated items. This procedure in the bylaw is not an "agreement to agree," as a separate action (future adoption of the police CBA) completely determines the scope of the MPRA's powers under the bylaw. No further negotiation is required to implement the facts from the labor agreement into the calculation process. Agreement to a term such as this is typical in an "escalator" contract arrangement. *See* Minn. Stat. § 336.2-305 (defining "open price term" under the UCC); *see also Arbitron, Inc. v. Tralyn Broadcasting, Inc.*, 400 F.3d 130, 137 (2nd Cir. 2005)(approving escalation clause in licensing contract as manifesting "shared intent" to future adjustments to contract without further negotiation). If a new or adjusted item qualifies for inclusion under the criteria set in the bylaw, the MPRA has a right to add the item, but the choice is simply a binary decision to either include it or not include it. No further negotiations between the City and the MPRA are required to carry out the bylaw, especially since the City is directly involved in negotiating the instrument

directly driving any possible benefit changes, the police CBA. The 1995 bylaw is not impermissibly vague as a contractual provision.

There is no apparent reason for the District Court to conclude that following the terms of the 1995 bylaw amendment “is contrary to Defendants’ bylaws ... and is a violation of Minnesota Statutes §§ 423B.05, subd. 2.” (ADD. 22) The MPRA Board followed the terms of a reasonable, extensively negotiated, and properly adopted bylaw. Even if it were not, it would not be relevant to determining the Board’s fiduciary duties. No facts or laws exist that suggest it would have been proper for the MPRA Board to disregard the 1995 amendment to the bylaws in the time from its adoption up to the Court’s ruling in late 2009. The opposite is true; the Board would clearly have breached fiduciary duties to its members, and likely state law, by refusing to apply the procedures to keep up with “the salary of a first-grade patrol officer.” The District Court found, erroneously, that the bylaw amendment conflicted with state law. Even if that were not a glaring error, it does not follow that the Board’s application of that bylaw prior to such a finding is a breach of duty. The Court must reverse this conclusion and any related relief granted by the District Court.

III. IMPLEMENTATION DOES NOT REQUIRE FURTHER AMENDMENT.

Finally, contrary to the assertion of the District Court, the 1995 bylaw amendment is not a “circumvention” of state statutes governing the calculation of police and fire pensions. The District Court’s primary charge seems to be that the adjustment of benefits without a bylaw amendment circumvents the procedural dictates of § 69.77. It does not do so, as covered in detail above; that statute is silent about actions that are not

amendments. However, the Court appears to latch onto an idea, whether from the heading or elsewhere, that the City should have a direct veto over any and all benefit increases; perhaps the Court felt that the bylaw “contractually amended” the spirit of the pension statutes. Does adjusting benefits without an amendment offend the “statutory scheme” underlying the governance of Minneapolis police pensions?

No. The amended bylaw is in harmony with the overall “scheme” of the state statutes behind this pension. As noted elsewhere in this brief, the Legislature dictated that the Minneapolis Police Relief Association would administer a pension with benefits designed to escalate over the course of time. *See* Minn. Stat. § 423B.01, subd. 20 (“unit” is fraction of “current monthly salary of a first grade patrol officer”); Minn. Stat. § 423B.09, subd. 1 (pension payment due to eligible members is based on “units”). It follows, then, that a practice aimed at implementing the “escalator” model built into the statute is presumptively consistent with the “statutory scheme” of Minneapolis police pensions. If the implementation is done through Board action, the relevant question is when a practice aimed at implementing the “escalator” model requires an amendment, or must be considered an “amendment” even if not so labeled?

When new legislation “is inescapably inconsistent with an earlier one dealing with the same subject, the new repeals the old, or amends it in proportion as it introduces change.” *Doyle v. City of Saint Paul*, 206 Minn. 542, 547, 289 N.W. 785, 788 (1939)(city ordinance temporarily reducing public salaries in late 1932 held to be amendment of prior annual salary ordinance, even though the new ordinance did not expressly amend or repeal any prior legislation). The flip side of this coin is that acts or

decisions which are consistent with existing regulations on the same subject do not operate to amend or repeal. An amendment was necessary in 1995 to define "current salary of a first grade patrol officer" because the MPRA's existing bylaws had no such restrictions upon the Board's ability to determine "salary." The 1995 agreement with the City was thus inconsistent with the existing bylaws. In drafting the bylaw amendment, both parties recognized that, along with percentage increases in the hourly rate of pay, the "salary" of Minneapolis Police officers tends to increase from time to time by the decision to pay additional compensation by new methods. The agreement expressly includes six such items which existed at the time of the bylaw's drafting. Since both parties knew that this phenomenon was likely to recur, the Agreement established criteria for including "new" items without further negotiation if a future police labor contract again increased first-grade patrol officer salary through a new item of compensation.

It's clear that following adoption of the bylaw, the MPRA Board's actions to incorporate "new" pay items are perfectly consistent with that bylaw. It is difficult to conceive of how correctly following a procedure set forth in a bylaw will produce a result that is "inescapably inconsistent" with that bylaw, requiring an amendment. There appears to be no claim made that the MPRA incorrectly applied the bylaw. Neither the City nor the District Court identifies any item added in accordance with this provision that was not eligible for inclusion under the bylaw. MPRA's action to add overtime and other items to salary calculations after 1995 is entirely consistent with the Bylaws, and the general model behind the Minneapolis police pensions. No further amendment is necessary to include those items in the unit value calculation. As a result, § 69.77, subd.

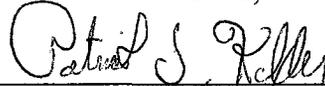
11 is not implicated by the MPRA's actions, nor is any other provision of § 69.77 or other pension statutes violated by these actions. Neither the Bylaw, the decisions to include nor the MPRA's subsequent calculations "circumvent" any existing statute.

CONCLUSION

At summary judgment, the District Court erroneously determined, based on an indefensible interpretation of a statute, that the MPRA bylaw defining "salary" violated state law. Not stopping there, the Court determined that the MPRA Boards that, by all accounts, faithfully applied the terms of the bylaw violated their fiduciary duties and state law by doing so. The District Court offered little explanation for these conclusions, but ultimately issued orders based on this two-page parade of error that are solely responsible for taking away an eighth of the retirement income relied upon by retired Minneapolis cops and their widows. The facts here are undisputed, and this Court owes no deference to the District Court's conclusions on this central issue. The Retirees urge the Court of Appeals to reverse the District Court's ruling that the dynamic definition of "salary" added to MPRA bylaws in 1995 is contrary to state law, and vacate the relief awarded to the City of Minneapolis on the basis of that erroneous holding.

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