

**IN THE MATTER OF THE ARBITRATION BETWEEN:**

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**STATE OF MINNESOTA**

**AND**

**MINNESOTA GOVERNMENT ENGINEERING COUNCIL**

**BMS Case No. 13 PA 0957**

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**OPINION AND AWARD OF ARBITRATOR**

**Richard A. Beens  
Arbitrator  
1314 Westwood Hills Rd.  
St. Louis Park, MN 55426**

**APPEARANCES:**

**For the Union:**

**Bob Haag  
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5874 Blackshire Path  
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**For the State:**

**Carolyn J. Trevis, Esq.  
Assistant State Negotiator  
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**Date of Award:  
March 18, 2014**

## **JURISDICTION**

This arbitration arises pursuant to a collective bargaining agreement (“CBA”) between the State of Minnesota (“State” or “Employer”) and the Minnesota Government Engineering Council (“MGEC” or “Union”). This is a class action grievance.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. The hearing was held on February 5, 2014 in St. Paul, Minnesota. The parties stipulated that the matter was properly before the arbitrator. Both parties were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Written closing arguments were submitted by March 14, 2014. The record was then closed and the matter deemed submitted.

## **ISSUES**

The parties stipulated that the issues to be decided are:

1. *Does the Employer’s policy on reimbursement for safety footwear violate Article 16, Section 2.B of the Agreement between the parties?*
2. *Does the Employer’s policy on reimbursement for safety footwear violate Article 24 of the Agreement between the parties?*
3. *If the policy violates either Article, what is the appropriate remedy?*

## **FACTUAL BACKGROUND**

MGEC represents approximately 950 engineers, surveyors, engineering assistants, etc. who are employed in various Minnesota State Agencies.<sup>1</sup> While over 700 of them work for the Minnesota Department of Transportation (“MNDOT”), significant numbers are also employed by the Pollution Control Agency, Natural Resources and Public Safety

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<sup>1</sup> State Exhibit 11.

departments. The vast majority work in environments necessitating the use of safety equipment and, in particular, safety boots. These state employees may supervise road construction, investigate hazardous waste spills, or inspect pipelines. Each of these activities exposes the employees to environments rife with safety concerns. Agency rules, OSHA regulations, or Federal Mine Safety and Health Administration protocols all mandate the use of safety boots in settings where foot injuries are possible. Safety boots provide ankle support and usually have steel toes and/or metal shanks for puncture protection.

In response to regulatory directives, the parties' CBA addresses safety equipment requirements.:

*B. Any protective equipment or clothing shall be provided and maintained by the Agency whenever such equipment is required as a condition of employment either by the Agency, by OSHA, or by the Federal Safety and Health Administration.<sup>2</sup>*

This provision has been in all CBA's between the State and MGEC without substantive change since 1981.<sup>3</sup> Also beginning in at least 1989, the State has adopted a policy, PERSL #1410, setting the amount that an employee can be reimbursed for the purchase of safety footwear.<sup>4</sup> Initially set at a maximum of \$75 every 24 months, the amount has gradually risen to a present-day sum of \$125 every 24 months.<sup>5</sup> The fiscal magnitude of this issue is demonstrated by the fact that over a four year period, from October, 2007 through September, 2011, the State paid MNDOT employees alone safety boot

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<sup>2</sup> State Exhibit 4. CBA Article 16, Sec. 2.B.

<sup>3</sup> State Exhibit 3.

<sup>4</sup> State Exhibit 5.

<sup>5</sup> State Exhibit 5, Subd. A through E.

reimbursements totaling \$497, 629.74.<sup>6</sup>

Nevertheless, the Union asserts the reimbursement levels are inadequate in many cases. Individual employees may have different sized left and right feet, unusually high insteps, or narrow heels. Any one of these problems may require custom footwear fitting that will often exceed the reimbursement allowed. Further, the Union stresses that CBA Article 16, Sec. 2 B contains no limitations on the Employer's duty to provide safety equipment.

Nevertheless, the State has imposed certain safety boot reimbursement limits. First, they have contracted with and compiled a list of approved boot vendors.<sup>7</sup> Each of these vendors offers discounts, ranging from 20% to 25% to state employees. There is no question that numerous styles of safety boot are available within the reimbursement sum allowed.<sup>8</sup> However, employees are free to purchase boots for any one they wish and are given total freedom to wear them for personal use.

The evidence indicates that during repeated rounds of CBA negotiations running from 1989 to the present, neither party has proposed any substantive changes to CBA Article 16, Sec. 2.B set out above.<sup>9</sup> Further, until now, neither MGEC nor any other union has challenged the State safety footwear reimbursement policy.

In the present grievance, the Union points out that CBA Article 16, Sec. 2.B contains no explicit dollar limitation on the State's duty to provide protective equipment. Additionally, the Union asserts a violation of Article 24 of the CBA which states:

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<sup>6</sup> State Exhibit 13.

<sup>7</sup> State Exhibits 8 and 9.

<sup>8</sup> State Exhibit 14.

<sup>9</sup> State Exhibit 10.

*The Agency may establish and enforce reasonable work rules that are not in conflict with the provisions of this Agreement. Such rules shall be applied and enforced without discrimination. The Agency shall discuss the changes in new or amended work rules with the Council, explaining the needs therefore (sic), and shall allow the Council reasonable opportunity to express its views prior to placing them in effect.<sup>10</sup>*

The State counters by asserting CBA Article 3, Employer Rights, justifies their position. It states:

*It is recognized that, except as expressly stated herein, the Employer shall retain whatever rights and authority are necessary for it to operate and direct the affairs of the Employer in all of their various aspects, including but not limited to, the right to direct and assign employees: to evaluate job performance of employees, to plan, direct and control all the operations and services of the Employer: to schedule working hours appropriate for employees in this bargaining unit; to determine whether goods and services should be made or purchased; to make and enforce reasonable rules and regulations affecting terms and conditions of employment that are uniformly applied and then enforced in accordance with the rules and regulations. Any term or condition of employment not specifically established by this Agreement shall remain solely within the discretion of the Employer to modify, establish or eliminate.*

The State also notes that employees are not limited to using the safety boots at work.

They may take the shoes home and wear them for any personal use, be it hunting, hiking, mowing the lawn, etc. Further, they may keep the boots upon leaving State employment or retirement. As such, the employees also receive a personal benefit at State expense.

### **APPLICABLE CONTRACT PROVISIONS**

See CBA Articles 3, 16, Section 2.B, and Article 24 set out above.

### **OPINION AND AWARD**

The instant case involves a contract interpretation in which the arbitrator is, in part, called upon to determine the meaning of some portion of the collective bargaining

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<sup>10</sup> Union Exhibit 2.

agreement between the parties. The arbitrator may refer to sources other than the CBA for enlightenment as to the meaning of various provisions of the contract. The essential role of the arbitrator, however, is to interpret the language of the CBA with a view to determining what the parties intended when they bargained for the disputed provisions of the agreement. Indeed, the validity of the award is dependent upon the arbitrator drawing the essence of the award from the plain language of the agreement. It is not for the arbitrator to fashion his or her own brand of workplace justice nor to add to or delete language from the agreement.

In undertaking this analysis, an arbitrator will first exam the language used by the parties. This objective approach "...holds that the "meaning" of the language is that meaning that would be attached to the integration by a reasonably intelligent person acquainted with all the operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration."<sup>11</sup> If the language is clear and unambiguous, that is the end of the inquiry. A writing is ambiguous if, judged by its language alone and without resort to parol evidence, it is reasonably susceptible of more than one meaning.<sup>12</sup> Parol evidence cannot be used to create an ambiguity.<sup>13</sup>

On it's face Article 16, Section 2.B is clear and unambiguous. "*Any protective equipment or clothing shall be provided and maintained by the Agency...*" (Emphasis added.) Base on the clear language, the Employer's duty would appear to be mandatory and without dollar limits. That begs the question, "Is the State's obligation unlimited in terms of dollars?" Probably not. It is axiomatic that:

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<sup>11</sup> Elkouri & Elkouri, *How Arbitration Works*, Sixth Edition, (2003), Chapter 9.1.B.i.

<sup>12</sup> See *Metro Office Parks Co. v. Control Data Corp.*, 205 N.W.2d 121 (1973).

<sup>13</sup> See *Instrumentation Servs., Inc. v. Ben. Res. Corp.*, 283 N.W.2d 902 (Minn. 1979).

*An interpretation giving a reasonable meaning to contractual terms is preferred to an interpretation that produces an unreasonable, harsh, absurd, or nonsensical result. Good faith is an element of reasonableness.<sup>14</sup>*

It would be absurd and nonsensical to allow employees to purchase “Cadillac” versions of safety boots far exceeding minimum safety requirements at any time and always at State expense. Conscientious use of taxpayer money is an ongoing duty of all State departments. Some limitation on the frequency and amount of reimbursement is reasonable. Taken to its logical extreme, an unfettered interpretation of Article 16, Sec. 2B would open the door for abuse. On the other hand, the State contention that they are only obligated to pay for the “safety portion” of the boots is equally obtuse. It is a strained and self-serving interpretation of Article 16, Sec. 2.B. The fact that the State has contracted with and obtained discounts for “whole” safety boots belies the argument. There is no evidence the State has ever tailored its reimbursement policy to fit this contention. Had they done so, presumably the sums allowed would have been much smaller.

In fairness, the Union is not asking for the right to purchase “Cadillac” boots in this grievance. Based on the facts before me, it appears they only contend the State has a duty to pay for safety boots for those employees who present special fitting needs.<sup>15</sup> Additionally, some employees are required to be in the field year around with winter work necessitating insulated boots and non-slip boot covers. Importantly, there is no evidence that Union employees have attempted to abuse the right to safety boot reimbursement.

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<sup>14</sup> *The Common Law of the Workplace*, National Academy of Arbitrators, Antoine, Editor (2005), §2.13.

<sup>15</sup> Union witness John Jaekels testified needing two different sized boots and accommodation for unusually high arches.

It should also be noted that PERSL #1410 does not address situations where employees are required to have safety footwear as a condition of their employment.<sup>16</sup> In those instances, some agencies have the authority to directly provide footwear. This would appear to be the situation with the Minnesota Office of Pipeline Safety, among others, which budgets for direct purchase.<sup>17</sup>

Were our analysis to end here, I would be inclined to agree with the Union position. There is no explicit dollar limitations in the plain language of Article 16, Sec. 2B and it would not be unreasonable to accommodate those few employees who have special fitting needs or a broader exposure to safety hazards. However, this is not the end of our enquiry. The fact that the State and Union have operated under the State reimbursement policy for well over 20 years raises the issue of “past practices.”

The National Academy of Arbitrators defines past practice:

*A past practice is a pattern of prior conduct consistently undertaken in recurring situations so as to evolve into an understanding of the parties that the conduct is the appropriate course of action.*<sup>18</sup>

The now universally regarded factors upon which to base a finding of past practice are: 1) Clarity and consistency of the pattern of conduct; 2) Longevity and repetition of the activity; 3) Acceptability of the pattern, and 4) Mutual acknowledgement of the pattern by the parties.<sup>19</sup>

The state policy for safety footwear reimbursement has been in place since at least

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<sup>16</sup> State Exhibits 5 A through E.

<sup>17</sup> Union Exhibit 5.

<sup>18</sup> *The Common Law of the Workplace*, National Academy of Arbitrators, Antoine, Editor (2005). §2.20

<sup>19</sup> See Mittenthal, Richard, *Past Practice and the Administration of Collective Bargaining Agreements*. 59 Mich. L. Rev. 1017 (1961)

1989 and probably existed much earlier.<sup>20</sup> Several Union witnesses purported to be unaware of the policy. This is difficult to believe when over 700 members of MGEC work for MNDOT, a department that reimbursed employees over \$497,000 for safety footwear between October, 2007 and September, 2011 alone.<sup>21</sup> While ignorance of the policy may be true in individual cases, it has clearly been used, without complaint, by the rank and file for over two decades.

The above facts alone satisfy the first three elements of past practice. The policy has been issued, reissued, and reiterated continuously since at least 1989.<sup>22</sup> It would be difficult to imagine more clarity. Employees have been reimbursed under the terms of the policy for at least 25 years. Hence, longevity. No complaint was heard from MGEC or any other union before the present grievance dated April 30, 2012. These facts imply over 20 years acceptance.

The fourth element, mutual acknowledgement of the pattern, is denied by the Union. They argue that PERSL #1410 was never mutually bargained. While true, this argument misses the point. Past practices are usually deviations from CBA provisions and rarely bargained. They are simply a manner of doing things that both parties, if not explicitly, have tacitly tolerated to for a significant length of time. The mere fact that PERSL #1410 has operated without complaint from at least 1989 to 2012 is overwhelming evidence of mutual acknowledgement.

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<sup>20</sup> See State Exhibit 5A which indicates “As part of the negotiations for the 1989-1991 contracts, the State has agreed to continue the statewide policy regarding the amount of money agencies will reimburse employees who are required to purchase safety footwear. The policy which we have agreed to implement is based upon the present procedures followed by the Department of Transportation...” (Emphasis added)

<sup>21</sup> State Exhibit 13.

<sup>22</sup> State Exhibits 5 A through E.

In summary, it would be difficult to imagine a set of facts that better fit the criteria for a past practice. All the elements are present; clarity, longevity, acceptability and mutual acknowledgement. Reimbursement limitations on safety foot ware have become, through past practice, the parties' interpretation of Article 16, Sec. 2B.

Did the State violated Article 24 by failing to discuss the reimbursement work rule with MGEC? There is insufficient evidence before me to find a violation. Neither side presented evidence of interactions between the parties when PERSL #14 was first adopted in 1989. While present-day MGEC officers may not have discussed it, the fact the policy went unchallenged for 23 years suggest some initial mutual understandings. At this point, we simply do not, and perhaps cannot, know what discussions took place between the parties in 1989.

Thus, we are left with this: 1) clear CBA language that does not limit reimbursement, and: 2) a deeply entrenched past practice of limiting reimbursement. Some arbitrators refuse to recognize past practices when there is clear, unambiguous CBA language. I cannot agree in this instance. While facially logical, it breaks down with the facts of this case -- where the parties have established a pattern of conduct differing from the CBA language that stretches over 20 years. Reimbursement limits for safety footwear has been the day-to-day reality and interaction between this employer and this union. It would be illogical and disruptive to ignore this history. At this point, any changes to those practices must be sought at the bargaining table, not through arbitration.

Based on the rationale outlined above, I find the State's reimbursement policy is a firmly entrenched past practice and does not violated Article 16, Sec. 2.B. Further, I find there to be insufficient evidence to find a violation of Article 24.

**AWARD**

The grievance is DENIED.

Dated: \_\_\_\_\_

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Richard A. Beens, Arbitrator