

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

**Case No. A16-1985**

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Regents of the University of Minnesota,

Relator,

v.

Service Employees International Union, Local 284

and

Bureau of Mediation Services,

Respondents.

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**BRIEF OF AMICUS CURIAE UMN FACULTY EXCELLENCE**

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## **LEGAL ISSUE ADDRESSED IN THIS BRIEF**

Whether the Bureau of Mediation Services (“BMS”) erred by moving certain “Disputed Teaching Classifications” of University of Minnesota employees from their statutorily-assigned bargaining Unit 11 to Unit 8, comprised of the University of Minnesota Faculty.

## **INTEREST OF THE AMICI**

UMN Faculty Excellence (“UMN FE”) is comprised of exclusively Unit 8 Faculty (“Faculty”) from the University of Minnesota (“University”) concerned about the continued excellence of the institution and its vital role in generating economic and cultural vitality for the state and the region.<sup>1</sup> Broadly speaking, there are two types of higher education institutions: (1) schools with a primary function of teaching; and (2) universities that emphasize the creation of knowledge and its dissemination. The Twin Cities campus of the University, alone among Minnesota schools, is the latter—a world-class research university with the mission of creating knowledge through research and disseminating knowledge through teaching and service to the state, country, and the world. The research performed at the University literally puts it on the map.<sup>2</sup>

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<sup>1</sup> Pursuant to Minn. R. Civ. P. 129.03, the amici state that no counsel for any party in this action authored this brief in whole or part, nor has anyone made a monetary contribution for its preparation or submission. Jessica Roe and Shannon Cooper of Roe Law Group, PLLC authored this brief at the request of and on behalf of UMN FE.

<sup>2</sup> The Mapping Scientific Excellence project, which displays the major research centers across the nation, identifies the University as the region’s research leader north of Texas and between Madison and the West Coast. See *Mapping Scientific Excellence*, available at <http://www.excellencemapping.net> (last visited March 23, 2017).

While UMN FE opposes the Service Employees International Union (“SEIU”) unionization drive of the Unit 8 Faculty at the University, its specific concern here is that the BMS, at the direct request of SEIU, made an extra-legislative decision to move the Disputed Teaching Classifications from Minn. Stat. § 179A.11, subd. 1(11) (“Unit 11”) into the bargaining unit described in Minn. Stat. § 179A.11, subd. 1(8) (“Unit 8”)—a move directly contrary to long-standing legislative intent.

The BMS’s decision was based on an erroneous conclusion that the Faculty and the Disputed Teaching Classifications share a Community of Interest sufficient to warrant placing the two groups in to the same bargaining unit. However, even a cursory review of the BMS’s decision shows its confusion with the clear and undisputed importance of the Tenure Code and its tripartite requirement of Faculty.

There is little question that this is a legislative matter not in the purview of the BMS.<sup>3</sup> The legislature never intended to treat these starkly different groups of University faculty interchangeably—evidenced by the groups being assigned to separate and distinct units—because the Faculty and the Disputed Teaching Classifications have *fundamentally-different roles and responsibilities*. See Minn. Stat. § 179A.11, subd. 1(8), (11); see also 1991 Minn. Laws ch. 77, § 1, at 163-65.

This decision by the BMS belies the clear statutory intent and the manner in which highly-respected research institutions, such as the University of Minnesota, operate. While the BMS cites to the Tenure Code and the tripartite function of the Faculty in its Unit

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<sup>3</sup> See Brief of Relator at 8-10, 23-40.

Determination Order (“Order”), it then ignores the critical aspects of these differences—the precise reason the legislature separated them in the first place. Moreover, the BMS glosses over other important and necessary factors, including but not limited to, the extent of organization<sup>4</sup> and the recommendation of the parties.<sup>5</sup>

UMN FE’s interest in this case is both public and private as the outcome will affect both the University’s status as a world-class research institution and the University’s ability to attract and retain excellent faculty. UMN FE is concerned that the decision of the BMS threatens the University’s position as a world-class research institution by undermining the quality of the University’s Faculty and the institution as a whole. As the pace of knowledge creation and technological change accelerates, strength in research will be even more essential for regional competitiveness. This is not the time to risk weakening our region’s only research university.

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<sup>4</sup> One factor in the Community of Interest analysis is the Extent of the Organization. This requires a 30% showing of interest in support of a Petition for Determination of Appropriate Unit and Certification of Exclusive Representation. (Doc. 1.) While UMN FE quickly obtained 631 Faculty signatories (without an organizing campaign) who opposed the creation of this extra-legislative Unit 8, it became clear that there were documented concerns with SEIU’s purported showing of interest in its initial Petition. UMN Faculty Excellence asked the BMS to investigate clearly documented irregularities in SEIU’s purported 30% showing of interest in support of its Petition. (Doc. 520, Doc. 527.) Thus far, the BMS has failed to provide UMN Faculty Excellence with public data it has requested under the Minnesota Data Practices Act in an effort to further evaluate the serious concerns UMN FE has about the underlying Petition. (Doc. 523.) UMN FE believes that SEIU cannot meet this mandatory burden of 30% showing. It appears that the BMS recognizes the potential ramifications of this concern. As it noted in the Memorandum in Opposition to Relator’s Motion to Stay Agency Proceedings, the Commissioner must decide whether there will be an election and, if the Commissioner finds there is not a sufficient showing of interest, the petition may be dismissed altogether.

<sup>5</sup> *See, generally*, Brief of Relator at 43-50.

## INTRODUCTION

Unit 8 Faculty at the University—those with the rank of professor, associate professor, assistant professor, and instructor—are governed by the Tenure Code. This role requires the Faculty to further the University’s tripartite mission of teaching, research, and service. Recognizing this, the Minnesota Legislature assigned only Faculty job titles on the Twin Cities Campus<sup>6</sup> to Unit 8 for collective bargaining purposes. *See* Minn. Stat. § 179A.11, subd. 1(8).

Conversely, other teaching employees— the Disputed Teaching Classifications—are classified as Teaching Specialists, Senior Teaching Specialists, Lecturer, and Senior Lecturer (the “the Disputed Teaching Classifications”) and are treated by the University as Academic Professional and Administrative (“P&A”) staff – a group of employees that the Disputed Teaching Classifications are actually more aligned with in terms of pay practices,

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<sup>6</sup> This Court granted Education Minnesota leave to file an amicus brief in support of SEIU and the BMS. Education Minnesota is a union that primarily represents K-12 public school teachers, but also represents the instructional units at the Duluth and Crookston campuses of the University. Any parallels Education Minnesota may draw between its representation and the present dispute, however, are misplaced. The faculty represented by Education Minnesota (through its affiliate, the University Education Association), were specifically assigned to Unit 9 by the Legislature. *See* Minn. Stat. § 179A.11, subd. 1(9). Adjunct faculty are not members of the certified unit represented by University Education Associate. *See Collective Bargaining Agreement Between the Regents of the University of Minnesota and University Education Association* at p. 2 ¶ 002.165, p. 66 ¶ 002.169, available at [https://humanresources.umn.edu/sites/humanresources.umn.edu/files/wau074-01\\_unit\\_9\\_uea\\_contract.pdf](https://humanresources.umn.edu/sites/humanresources.umn.edu/files/wau074-01_unit_9_uea_contract.pdf) (last visited March 23, 2017). In fact, a Memorandum of Understanding relating to the Crookston campus specifically reiterates that the union members are covered by the University’s Tenure Code, with the exception of the Senate Judiciary Committee. *Id.* at p. 90. Moreover, the Legislature recognized the differences between outstate and Twin Cities faculty, assigning them to separate bargaining units. *See* Minn. Stat. § 179A.11, subd. 1(8)-(9).

policies, procedures and methods for hiring and firing. *See* Minn. Stat. § 179A.11, subd. 1(11). Significantly, the Disputed Teaching Classifications have job duties that vary by college and department and are not subject to the Tenure Code—completely the opposite of the Faculty. Moreover, and critically, performance of the Disputed Teaching Classifications’ jobs does not require creation of original research, which is what drives all world-renowned research institutions.

There is little question, when reviewing the record and testimony, that the BMS improperly analyzed the Community of Interest standard, ignoring the critical and fundamental differences between the Faculty and the Disputed Teaching Classifications—namely the effect of the Tenure Code and the tripartite requirements for Faculty, not the Disputed Teaching Classifications. By doing so, the BMS completely overlooked the effect of its flawed Order on the reputation and quality of the University.

The University Faculty are required to be and are engaged in rigorous research. This commitment has been recognized nationally and internationally. Sixteen Faculty have won Nobel Prizes.<sup>7</sup> Thirty-eight Faculty have been elected to the National Academy of

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<sup>7</sup> Univ. of Minn., *Nobel Prize*, available at [http://www.scholarswalk.umn.edu/awards/national\\_intl/Nobel.html](http://www.scholarswalk.umn.edu/awards/national_intl/Nobel.html) (last visited March 24, 2017).

Sciences,<sup>8</sup> sixteen to the National Academy of Medicine,<sup>9</sup> and thirty-eight to the National Academy of Engineering.<sup>10</sup> Current or past Faculty have won Pulitzer Prizes, Guggenheim Fellowships, and the National Book Award, among other scholarly honors.<sup>11</sup> In 2014, the Center for Measuring University Performance ranked the University of Minnesota 16th among US research universities and 6th among US public universities.<sup>12</sup> Of the U.S. Universities in the 2015 Academic Ranking of Worldwide Universities, zero percent of those in the top 50 have unionized faculty. Moreover, none of these high honors are won by the Disputed Teaching Classifications.<sup>13</sup> Yet it is these honors that reflect the unique

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<sup>8</sup> Univ. of Minn., *National Academy of Sciences*, available at [http://www.scholarswalk.umn.edu/awards/national\\_intl/NAS.html](http://www.scholarswalk.umn.edu/awards/national_intl/NAS.html) (last visited March 24, 2017).

<sup>9</sup> Univ. of Minn., *National Academy of Medicine (formerly Institute of Medicine)*, available at [http://www.scholarswalk.umn.edu/awards/national\\_intl/Medicine.html](http://www.scholarswalk.umn.edu/awards/national_intl/Medicine.html) (last visited March 24, 2017).

<sup>10</sup> Univ. of Minn., *National Academy of Engineering*, available at [http://www.scholarswalk.umn.edu/awards/national\\_intl/NAE.html](http://www.scholarswalk.umn.edu/awards/national_intl/NAE.html) (last visited March 24, 2017).

<sup>11</sup> Univ. of Minn., *Faculty Awards*, available at <http://www.scholarswalk.umn.edu/awards/faculty.html> (last visited March 24, 2017).

<sup>12</sup> John v. Lombardi et. al, The Ctr. for Measuring Univ. Performance, *The Top American Research Universities: 2014 Annual Report*, available at <https://mup.asu.edu/sites/default/files/mup-2014-top-american-research-universities-annual-report.pdf> (last visited March 27, 2017).

<sup>13</sup> See University of Minnesota Scholar's Walk, *Faculty Awards*, available at <http://www.scholarswalk.umn.edu/awards/faculty.html> (last visited March 28, 2017) (“The research, scholarship, and creative activity of **faculty** at the University have long been recognized both nationally and internationally . . . Both current and past University **faculty** are included.”) (emphasis added).

status of Faculty that the legislature contemplated when separating these two distinct groups.<sup>14</sup>

Not a single top research university in the country has unionized faculty that operate under the Tenure Code, let alone combined them into a single bargaining unit representing all instructional employees. This is for good reason: a recent study on the unionization drive at the University of Washington at Seattle, ranked 11th among U.S. research universities, finds that faculty who are more productive at research are less likely to be supportive of unionization, even among those in the same academic department.<sup>15</sup> Thus, many research-productive faculty do not view unionization as an attractive job attribute. Unionization would make it harder for the University to hire and retain the faculty who best advance the university's knowledge creation mission. UMN FE strongly believes that over time, the quality of the University's faculty would decline, ultimately harming the state and region both economically and culturally – and changing the research institution this state values so deeply.

UMN FE represents a broad swath of the University. Of the supporters signing the Petition to Separate, 61% are full professors, 20% associate professors, and 19% assistant professors. These supporters represent all eight of the colleges in which Faculty are eligible to vote. The wide-ranging and overwhelming support of Faculty underscores the

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<sup>14</sup> See Brief of Relator at 30.

<sup>15</sup> Joel Waldfogel, *NBER Working Paper Series: Faculty Preferences Over Unionization: Evidence from Open Letters at Two Research Universities*, NAT'L BUREAU OF ECON. RESEARCH (2016), available at <http://www.nber.org/papers/w22149> (last visited March 27, 2017).

importance of this decision on the University, Minnesota, and the country. With no precedent for unionized Faculty, let alone a collective bargaining group made up of both Faculty and the Disputed Teaching Classifications, UMN FE does not want the region's only research university to be the test case; the risks are simply too great.

Accordingly, UMN FE respectfully asks this Court to reverse the BMS's Order and preserve Minnesota's highly-respected research institution.

### **ARGUMENT**

Full consideration of all the elements of the Community of Interest standard was essential for a complete ruling by the BMS and is especially important here, where the stakes are undisputedly high. *See Minn. Teamsters Pub. & Law Enf't Employees Union, Local No. 320, Minneapolis v. City of Brooklyn Park*, No. A13-0059, 2013 WL 4404600 (Minn. Ct. App. Aug. 19, 2013). Yet the BMS engaged in only a cursory review of the critical differences between the Faculty and the Disputed Teaching Classifications. And though it minimally referenced the Tenure Code in its Order, the BMS never engaged in a critical analysis of the tripartite requirement and standard to which Faculty—and only the Faculty—are held.<sup>16</sup>

In fact, it appears that the BMS made its decision without conducting even the most basic analysis of the hearing testimony. Though the 3,000-page hearing transcript contains significant testimony from both SEIU and University witnesses that Faculty and the Disputed Teaching Classifications have unique job duties and are subject to different

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<sup>16</sup> The BMS discusses the tripartite mission of the University only in the Order's conclusion. (*See* Doc. 425 at 28.)

requirements, the BMS completely discounted substantial differences between the two employee groups. (*See* Doc. 425 at 23-24.) In fact, the BMS cited the hearing transcript only once in its 31-page Order. (*See id.* at 12.) As a result, the BMS failed to analyze the critical differences between Faculty and the Disputed Teaching Classifications in research, hiring, termination, and working conditions and requirements.

This is akin to the incomplete analysis performed by the BMS in *Minn. Teamsters*. In that case, the union sought to include police cadets in the community service officer (“CSO”) bargaining unit. *Minnesota Teamsters*, 2013 WL 4404600, at \*2-3. Witnesses at the hearing testified to fundamental differences between the police cadets and CSOs relating to their primary objectives, education, hiring, benefits, and funding. *Id.* at \*3. Despite this, the BMS granted the union’s request and issued a unit clarification order including the cadets in the CSO bargaining unit. *Id.* at \*2. This Court reversed, holding that the BMS conclusion that the groups shared a community of interest was unsupported by the evidence. *Id.* at \*3.

Similarly, the BMS failed to perform the difficult but important work of analyzing and discussing the full, tripartite role of the Faculty in the present case. Instead, the BMS simply focused on one job duty—teaching—as the basis for ignoring the legislative history and intent, and the obvious, fundamental differences between University Faculty and the Disputed Teaching Classifications. In doing so, the BMS rewrote the statutory framework—the province of the Legislature—to create an entirely new Unit 8. Thus, the BMS’s Order was made in error and warrants reversal.

**I. The BMS Ignored the Clear and Unquestionable Requirement that the Faculty—and not the Disputed Teaching Classifications —Operate under the Tenure Code with Its Tripartite Mission.**

There are numerous key differences between Faculty and the Disputed Teaching Classifications that were discounted (and at times ignored) by the BMS’s Order; one of the most critical is that the Faculty are governed by the Tenure Code, and the Disputed Teaching Classifications are not.

The Tenure Code’s Preamble summarizes the importance of tenure to the University, its Faculty, and the State of Minnesota:

The people of Minnesota are best served when faculty are free to teach, conduct research, and provide service without fear of reprisal and to pursue those activities with regard for long term benefits to society rather than short term rewards. In return, faculty have the responsibility of furthering the institution's programs of research, teaching, and service, and are accountable for their performance of these responsibilities. Additionally, a well-designed tenure system attracts capable and highly qualified individuals as faculty members, strengthens institutional stability by enhancing faculty members' institutional loyalty, and encourages academic excellence by retaining and rewarding the most able people. Tenure and promotion imply selectivity and choice; they are awarded for academic and professional merit, not for seniority. The length and intensity of the review leading to the grant of tenure ensures the retention only of well-qualified faculty committed to the University’s mission.

(Doc 360.1.)

The Tenure Code governs the hiring, daily work, research, termination, actions, and standards of all Faculty. Most importantly, the Tenure Code requires that all Faculty hold three roles: world-class researcher, teacher, and provider of service to the University community. These three roles comprise their “tripartite” mission at the University. (*See Tr. 1073:7, 1126:18-23, 1616:17-23.*) While the BMS recognized that the Faculty are uniquely

governed by the Tenure Code and the Disputed Teaching Classifications are not, it engaged in only minimal analysis of the impact of this difference and completely ignored the multi-faceted role of the Faculty.

**A. Faculty—and not the Disputed Teaching Classifications—are required to engage in substantial peer-reviewed research.**

Only Faculty are required to produce high-quality, peer-reviewed research at the most advanced level and have it published in high-quality international publications. (Tr. 1488:22-1489:7, 1490:2-12, 1492:4-1493:19.) Unlike the Disputed Teaching Classifications, Faculty are expected to uncover new knowledge, develop new ideas or demonstrate accomplishments of merit in their fields. (See Tr. Tr. 1011:12-22, 1073:4-6, 1380:20-25.)

This research prong is critical to the Faculty's tripartite mission. (Tr. 1006:7-24, 1533:24-1534:3.) Faculty spend half of their time or more engaged in research. (See Tr. 218:17-18, 1403:14-24.) The University invests heavily in this research through its allocation of funds, space, travel expenses, and leave programs for Faculty. (See Tr. 1332:7-1336:2, 1447:22-25, 1566:11-1567:1.) This includes providing Faculty with thousands of dollars in research assistance.<sup>17</sup> (Tr. 232:4-14, 2385:15-19.) The University does not make these same investments in the research of the Disputed Teaching

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<sup>17</sup> Though the University supports Faculty research, Faculty are often expected to secure outside funding as well. (See Tr. 911:10-912:11, 1367:10-24, 1942:25-1943:3, 2070:14-18, 2071:3-10, 2227:20-2228:15, 2585:22-2586:2.)

Classifications because high-caliber research is not a job requirement for them. (See Tr. 1448:16-18, 1556:17-21, 1562:14-22, 2035:25-2036:9.)<sup>18</sup>

While it can be true that many lecturers or teaching specialists have Ph.D. degrees or their equivalent, this is quite far from the BMS conclusion that “*all of the groups are at different levels but very similar in type, thus this factor, supports inclusion of all the Classifications in Question ... in Unit 8*” (emphasis added). A doctorate degree does not qualify someone for tenure nor does it qualify someone to produce original or path-breaking research and ideas. Indeed, *possession* of a terminal degree does not qualify someone to be a tenured faculty member at a major research university. For example, not every lawyer with a J.D. can engage in sophisticated intellectual property litigation. Similarly, not everyone with a Ph.D. can engage in ground-breaking research. In fact, according to one study of Ph.D. economists, “Most of the graduates of even the very highest-ranked departments produce little, if any, published research.”<sup>19</sup>

While it is undisputed that Faculty and the Disputed Teaching Classifications both devote part of their work to teaching undergraduates, the BMS incorrectly analyzed this factor in a vacuum and then found it supported the end-result it was looking for. Again, this is similar to the BMS finding that was reversed in *Minn. Teamsters*.

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<sup>18</sup> Importantly, the BMS did not cite in its Order to any of the transcript testimony referenced in this section.

<sup>19</sup> John P. Conley and Ali Sina Önder, *The Research Productivity of New PhDs in Economics: The Surprisingly High Non-Success of the Successful*, 28(3) JOURNAL OF ECON. PERSPECTIVES, 205 (2014), available at <http://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.28.3.205> (last visited March 27, 2017).

To review a Faculty's research accomplishments, the University invites experts to examine a tenure candidate's productivity and impact and to advise on whether the University would be improved by offering tenure to the faculty member. (Tr. 999:12-1000:6, 2698:5-22.) Faculty must create field-shaping research that attracts attention and respect from the leading scholars in the faculty member's field. Failing this—even if teaching and service are excellent—an untenured faculty member does not receive tenure and his or her employment is terminated. Candidates lacking the promise of this sort of achievement are not hired; and candidates failing to meet this standard will have their employment terminated. (Doc. 360.1 at §§ 7.11, 9.2.)

This evidence, substantiated through hearing testimony, was before the BMS. Nonetheless, it concludes that “[t]he occupational skills and training for all of the groups are at different levels but very similar in type” supporting “inclusion of all of the Classifications in Question including the Extension Professor Series, Extension Educator Series, Lecturer Series and Teaching Specialist Series classifications in Unit 8.” (Doc. 425 at 23.) Clearly, the BMS chose to ignore the important role of research in a research university and tenure as a means of assuring that a University maintain its world-class research Faculty.

**B. Faculty—and not the Disputed Teaching Classifications—are compensated based on research contributions.**

The amount of and criteria for compensation of Faculty and the Disputed Teaching Classifications differs greatly. Faculty are compensated “for their contributions to teaching and advising, research and scholarship, and service.” (Doc. 360.124, Doc. 362.37C.)

Faculty salaries vary on market conditions, including competition with other universities and the nature of the assigned department. (Tr. 1555:10-1557:12.) In addition to the base salary paid by the University, Faculty salaries may be augmented “through internal sources, such as overload teaching, or from external sources such as research funds or approved external consulting.” (Doc. 360.124, Doc. 362.37C.) Salaries can also be supplemented for taking on certain administrative duties, such as serving as a department chair, through merit increases, or in conjunction with an honorary or endowed title or professorship. (Tr. 1964:4-8, Doc. 360.124, Doc. 362.37C.) On the whole, University of Minnesota professors receive an average annual effective salary of \$171,915, while associate professors receive an average of \$119,742.<sup>20</sup> Faculty, particularly those who are successful at research and sought after by other major research universities, typically receive higher compensation.<sup>21</sup>

The Disputed Teaching Classifications, however, receive salary increases and promotion based on departmental processes and not the Tenure Code. (Doc. 360.134, Doc. 362.37B.)<sup>22</sup> Research contributions are not generally a consideration. (*See* Doc. 360.134,

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<sup>20</sup> *Faculty Salaries*, available at <http://faculty-salaries.startclass.com/> (last visited March 27, 2017).

<sup>21</sup> John P. Conley and Ali Sina Önder, The Research Productivity of New PhDs in Economics: The Surprisingly High Non-Success of the Successful, 28(3) JOURNAL OF ECON. PERSPECTIVES, 205 (2014), available at <http://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.28.3.205> (last visited March 27, 2017).

<sup>22</sup> *See also* Univ. of Minn., *Administrative Policy, Performance Management for Academic Professional and Administrative Employees*, available at <https://policy.umn.edu/hr/paperformance> (last visited March 28, 2017).

Doc. 362.37B.) The Disputed Teaching Classifications are typically paid less than Faculty. (Tr. 2096:4-13.) For example, lecturers at the University receive an average salary of \$50,711.<sup>23</sup> Some teaching specialists even use their University employment to supplement a full-time position elsewhere. (Tr. 580:25-581:9, 1424:11-16.)

Faculty, particularly those who are successful at research and sought after by other major research universities, are most often paid more.<sup>24</sup> And, indeed, the way the labor market for Faculty functions is that universities around the world seek out promising or accomplished scholars (based on their research records) and then try to attract them away from competing universities.

Additionally, the criteria for salary increases and promotion differ. For Faculty, the criteria “must be similar to those used for promotion and tenure,” which has a heavy focus on research (*See* Doc. 360.124, Doc. 362.37C.) In fact, research is what primarily drives Faculty compensation.<sup>25</sup>

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<sup>23</sup> *Faculty Salaries*, available at <http://faculty-salaries.startclass.com/> (last visited March 27, 2017).

<sup>24</sup> *See, e.g.,* William J. Moore., et. al, *Academic Pay in the United Kingdom and the United States: The Differential Returns to Productivity and the Lifetime Earnings Gap*. 73(3) SOUTHERN ECON. JOURNAL 717-732 (2007).

<sup>25</sup> Suzanne O’Keefe and Ta-Chen Wang, *Publishing Pays: Economists’ Salaries Reflect Productivity*, 50 THE SOCIAL SCIENCE JOURNAL 45 (2013); *see also* James Steven Fairweather, *Beyond the Rhetoric: Trends in the Relative Value of Teaching and Research in Faculty Salaries*, 76(4) THE JOURNAL OF HIGHER EDUC. 401 (2005) (finding that publishing remains the strongest predictor of pay among faculty).

Despite this, the BMS places together Faculty, whose job and compensation revolves principally around research, with employees whose jobs do not require research responsibilities at all—and in many instances, are engaged for a single year, semester, or even course. (Tr. 381:22-24, 1423:15-1424:10, 1339:19-1340:8, 1532:2-9 1746:7-12, 1748:2-6, 2554:17-18.) The BMS erred in discounting this crucial difference, already acknowledged by the Legislature.

**C. Faculty—and not the Disputed Teaching Classifications—are required to engage in service.**

Faculty are required to engage in service as part of their tripartite role at the University. (Doc. 360.1 at FN 3; Tr. 1007:11-1008:4.) Service, per the Tenure Code, means “performance within the faculty members’ expertise, other than teacher and research” and may include service to the profession, the University, or to the local, state, national or international community. (Doc. 360.1 at FN 1, FN 3.) Indeed, Faculty are evaluated, in part, on their contributions to service and outreach—the Disputed Teaching Classifications are not. (*Id.* at § 7a.1.)

Within the University, this may include administrative or committee service to a Faculty member’s department or college. (*Id.* at FN 3). For example, Faculty serve on committees reviewing curriculum and serving on Faculty search committees. (Tr. 1696:5-1697:18, 1389:4-16.) Faculty also serve on the Faculty Senate and University research initiatives. (Tr. 2783:8-10.) Within the community, Faculty present research at seminars around the world (and on campus), serve on editorial boards for publications in their discipline, peer-review research, provide lectures to the public, and organize professional

conferences. (Tr. 1533:10-1534:7, 1261:10-13, 1371:21-1372:16, 1718:1-18, 1945:20-23, 1123:24-1124:2, 2589:22-23.)

Conversely, the University does not require external service of the Disputed Teaching Classifications. (Tr. 151:21-152:1, 1261:20-1262:3; 471:24-472:9.) While the Disputed Teaching Classifications may engage in internal service to the University, the service is more limited in scope than that of the Faculty and often does not affect the way in which they are evaluated for continued employment. (Tr. 471:24-472:9, 136:16-22, 1261:20-1262:3, 1432:10-20.) This internal service requirement for the Disputed Teaching Classifications is determined not by the Tenure Code, but by University departments. In fact, some departments do not require service at all. (Tr. 136:16-22, 1432:10-20.) This third element of the tripartite mission is quite different for Faculty versus the Disputed Teaching Classifications.

**D. Faculty—and not the Disputed Teaching Classifications—are subject to Tenure Code standards in hiring, termination, and the terms and conditions of their employment.**

Because Faculty and the Disputed Teaching Classifications fulfill different roles at the University, they are subject to different terms and conditions of their employment. In fact, SEIU's witnesses agreed that there are clear differences between the performance review, promotion and termination processes that apply to each group. (*See* Tr. 150:3-151:3, 169:20-171:6, 353:3-23.)

When it comes to hiring, Faculty participate in a worldwide labor market for their research and talents—the Disputed Teaching Classifications do not. (*See* Tr. 943:19-21, 1538:25, 1557:13-24, 2096:11-22.) The Disputed Teaching Classifications are not required

to have the same degrees, knowledge, training, or research accomplishments (or the promise thereof) as the Faculty. (Tr. 394:13-16, 1764:23-1765:4, 2277:8-2280:2.) The Disputed Teaching Classifications are often hired to fill a specific role for a single year or even a single semester, and are hired based solely on teaching needs. (See Tr. 381:22-24.) While Faculty are governed by the Tenure Code, the terms and conditions of the Disputed Teaching Classifications' employment are simply based on offer letters. (Tr. 1440:13-20, 1549:7-20.) Additionally, their hiring, promotions, and terminations are not tied to research or service requirements as the Tenure Code requires for the Faculty. (See Tr. 1380:20-1381:3, 1432:5-20, 1725:8-14.)

Faculty also enjoy more autonomy within their careers than the Disputed Teaching Classifications. They decide what, how, and when to research in order to advance their fields of study. (See Tr. 1515:18-1516:2, 1984:22-25, 2163:22-24, 2347:20-2348:5, 2813:7-12.) They may take sabbaticals. (Tr. 1332:16-20, 1337:8-16.) They hire graduate students to support their research. (Tr. 1447:3-17.) They choose their research priorities and cover the material of choice in their courses. (Tr. 355:2-4, 2163:22-24, 2245:17-2246:1.) In contrast, the Disputed Teaching Classifications teach different levels of classes than Faculty, they do not decide which courses to teach, they do not prepare their own course syllabi, nor do they collaborate with Faculty regarding courses. (Tr. 93:21-94:3, 355:2-356:4.)

Importantly, SEIU acknowledges that Faculty and the Disputed Teaching Classifications have different needs, and notes as much in its letters and statements

submitted to the BMS. For example, SEIU supports its Petition to combine Faculty with the Disputed Teaching Classifications in one bargaining unit with the following statement:

For tenured and tenure-track faculty, that means the opportunity to halt the erosion of research funding, community connections, teaching resources, and tenure lines. For the increasing percentage of faculty who are adjunct or contingent, that means the power to fight for better pay, job security, and access to basic support for research, scholarship, and professional development.<sup>26</sup>

Through this framing of the issue, SEIU reveals the divergent communities of interest at issue here. Faculty share interests with other Faculty regarding research, academic freedom, and other aspects of the tenure process. The Disputed Teaching Classifications share interests with other Unit 11 employees—not the Faculty—regarding pay, job security, and support. A single bargaining unit consisting of all employees who “teach” is an incredibly misguided analysis by the BMS, which finding is detrimental not only to the Faculty and the Disputed Teaching Classifications, but to the standard of the research institution the state cares so much about.

### **CONCLUSION**

Given the evidence in the record regarding the diverging interests between the Disputed Teaching Classifications and the Faculty, the BMS’s determination that the groups share a Community of Interest is unsupported by the evidence. UMN FE therefore respectfully urges this Court to reverse the BMS’s decision to move the Disputed Teaching Classifications from Unit 11 to Unit 8.

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<sup>26</sup> Minnesota Academics United, *Public Faculty Support*, available at <http://mnacademics.org/dearcolleagues/> (last visited March 23, 2017).

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