

No. A16-1985

STATE OF MINNESOTA
IN COURT OF APPEALS

In the Matter of a Petition for Determination of an Appropriate Unit and
Certification as Exclusive Representative

Regents of the University of Minnesota,

Relator,

vs.

Service Employees International Union, Local 284,

Respondent,

Bureau of Mediation Services,

Respondent.

**RESPONDENT BUREAU OF MEDIATION SERVICES' INFORMAL
MEMORANDUM IN RESPONSE TO COURT'S DECEMBER 28, 2016 ORDER**

FREDRIKSON & BYRON P.A.

KAREN G. SCHANFIELD
200 South Sixth Street, Suite 400
Minneapolis, MN 55402

DOUGLAS R. PETERSON
SHELLEY CARTHEN WATSON
University of Minnesota
360 McNamara Alumni Center
200 Oak Street SE
Minneapolis, MN 55455

ATTORNEYS FOR RELATOR

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

CAITLIN M. MICKO
Assistant Attorney General
Atty. Reg. No. 0395388

KELLY S. KEMP
Assistant Attorney General
Atty. Reg. No. 0220280
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2130
(651) 757-1352 (voice)

**ATTORNEYS FOR RESPONDENT
BUREAU OF MEDIATION SERVICES**

(Counsel for Additional Parties Listed Below)

JESSICA L. ROE
Roe Law Group, PLLC
60 South Sixth Street, Suite 2670
Minneapolis, MN 55402

**ATTORNEY FOR UMN
FACULTY EXCELLENCE,
SEEKING TO APPEAR AS
*AMICUS CURIAE***

BRENDAN D. CUMMINS
Cummins & Cummins, LLP
1245 International Centre
920 Second Avenue South
Minneapolis, MN 55402

**ATTORNEY FOR RESPONDENT
SERVICE EMPLOYEES
INTERNATIONAL UNION, LOCAL 284**

MEMORANDUM

This is an attempted certiorari appeal. On December 28, 2016, this Court ordered the parties to informally answer two questions. Those questions as well as the answers of Respondent Bureau of Mediation Services (“BMS”) are set forth below:

(a) Has BMS completed its decision-making process on the determination of the appropriate unit for the disputed classifications?

No. BMS has not completed its decision-making process on the determination of the appropriate unit for the disputed classifications. Rather, BMS made a single decision related to the community of interest of the disputed classifications—a decision related only to the scope of the appropriate unit. There are many unresolved issues to be investigated, heard, and decided before BMS will have completed its decision-making process on the appropriate unit for the disputed classifications. To be sure, BMS has not made a final determination subject to appeal in the matter at hand.

This attempted certiorari appeal arises out of a petition by Service Employees International Union, Local 284 (“SEIU”) to become the exclusive representative for certain employees of Regents of the University of Minnesota (“University”). The Public Employment Labor Relations Act requires BMS to investigate all petitions that raise a question of exclusive representation and to determine appropriate units under the criteria of Minn. Stat. § 179A.09. *See* Minn. Stat. § 179A.04, subd. 1(1); *see also* Minn. Stat. § 179A.03, subd. 2 (defining “appropriate unit” to mean a unit of employees determined under sections 179A.09 to 179A.11).

An appropriate unit is a group of workers or job classifications who share sufficient community of interest for purposes of collective bargaining and union representation. The purpose of determining the appropriate unit is to establish a group that can engage in orderly and constructive relationships with the employer and to facilitate an election for representation upon the proper showing of the petitioner. The appropriate unit identifies which job classifications and incumbent employees are eligible to be part of a potential certified bargaining unit, and therefore identifies what employees can vote in the matter. Determining the appropriate unit is a multifactorial consideration and is unique to each petition for exclusive representation.

Minnesota statute section 179A.09, subdivision 1 states the Commissioner shall consider a variety of issues in determining the appropriate unit, including: occupational classifications, levels of authority, geographic location, history, extent of the organization, recommendation of the parties, and other relevant factors. The statute prohibits the Commissioner from designating an appropriate unit which includes “essential employees” with other employees. *See* Minn. Stat. § 179A.09, subd. 2; Minn. Stat. § 179A.03, subd. 7. Additionally, there are statutory limits on the definition of certain bargaining units. *See e.g.*, Minn. Stat. § 179A.11.

The starting point of the Commissioner’s determination of the appropriate unit in the SEIU/University matter was to determine whether certain classifications of University employees (such as “Teaching Specialist” or “Senior Lecturer”) had a community of interest with the unit established by Minnesota statute section § 179A.11, subd. 1(8), also

known as “Unit 8.” Unit 8 is defined as the “Twin Cities Instructional Unit consist[ing] of the positions of all instructional employees with the rank of professor, associate professor, assistant professor, including research associate or instructor, including research fellow, located on the Twin Cities campuses.” *See* Minn. Stat. § 179A.11, subd. 1(8).

This inquiry was conducted pursuant to Minnesota statute section 179A.10, subdivision 4, which requires the Commissioner to assign University of Minnesota employee classifications to the appropriate units when the classifications or positions have not been assigned under 179A.11, or have been significantly modified in occupational content subsequent to the assignment under the statutes. The statute further requires that the Commissioner assign the classes based on the community of interest standard. *See id.*

Accordingly, on September 20, 2016, the Commissioner issued an order on the community of interest of the disputed classifications. The Commissioner decided that certain, previously unassigned classifications of employees had a community of interest with Unit 8, and decided others did not. This order amounts to a decision on a threshold question regarding the scope of the appropriate unit for purposes of SEIU’s petition to become the exclusive representative. On November 29, 2016, BMS denied the University’s request for reconsideration of that decision.

Now, the Commissioner continues the investigation of the petition which may result in a final determination of the appropriate unit. In order to do so, the

Commissioner must still make decisions on a host of issues related to the appropriateness of the unit. For instance, the Commissioner has not yet determined whether employees should be excluded from the unit because they do not work a sufficient amount to be considered a “public employee” pursuant to Minn. Stat. § 179A.03, subd. 14(5). The Commissioner must decide whether certain employees are excluded as “supervisory employees” within the meaning of Minn. Stat. § 179A.03, subd. 17, or “confidential employees” within the meaning of Minn. Stat. § 179A.03, subd. 4. The Commissioner must decide the status of employees who hold more than one University appointment, status of employees of the Hormel Institute, and the status of employees of the University’s Research and Outreach Centers.

These determinations will not be made on a pro forma basis. These determinations may require additional evidentiary hearings, submissions by the parties, and ultimately, the exercise of the discretion and expertise of the Commissioner. It is only after these issues have been decided that the appropriate unit will have been determined.

(b) If the answer to (a) is yes, are the September 20, 2016, and November 29, 2016 orders subject to certiorari review under Minn. Stat. § 179A.051(a)?

Even if the Court finds the answer to (a) is yes, the September 20, 2016 and November 29, 2016 orders are not subject to certiorari review under Minn. Stat. § 179A.051(a).

This is the University’s second certiorari appeal of the September 20, 2016 Order. On September 28, 2016, the University filed with BMS a Request for Partial

Reconsideration of Unit Determination. On October 17, 2016, the University filed a writ of certiorari with the Court of Appeals regarding the September 20, 2016 Order on community of interest. On November 7, 2015, the parties submitted informal memoranda on the question of jurisdiction. On November 15, 2016, the Court of Appeals dismissed the appeal and remanded to BMS for its decision on the request for reconsideration.

In its November 15, 2016 Order, the Court of Appeals wrote, “BMS does not contend that the University must wait until the results of the election are certified to appeal, but BMS argues that September 20, 2016 order is not final due to pending issues including which positions are part time, supervisory, managerial, or confidential.” Respectfully, BMS does contend that the University must wait until the results of the election are certified before it may appeal. In its informal memoranda, BMS limited its responsive answers to the specific questions that were posed by the Court of Appeals, and did not explain its position on when its orders are appealable. It has been the longstanding position of BMS that its orders are not appealable until there is a final agency determination of the questions raised by a petition. That is, the parties may appeal after an election has been certified or the petition has been dismissed.

Minnesota Statute section 179A.051(a) provides that this Court of Appeals *may* review decisions on the “appropriateness of a unit.” The statute does not permit or require review of every intermediate order relating to the appropriate unit. To grant review of each partial decision is contrary to the well accepted principle that agency

decisions are not reviewable until final and until the rights of the parties have been impacted.

As discussed above, the September 20, 2016 and the November 29, 2016 orders are not final agency decisions, and the rights of the parties have not been impacted. Indeed, it is possible that the issue regarding community of interest will become moot if SEIU cannot meet its burden to show sufficient interest after the determination of the appropriate unit, or if SEIU is not successful in its effort to become the exclusive representative.

Finally, it is important to note that to permit review in the midst of the Commissioner's investigation of the appropriate unit would unduly delay the election process contrary to public policy embedded in the Public Employment Labor Relations Act ("PELRA") at Minn. Stat. § 179A.01(c)(1). PELRA promotes the rights of public employees to organize and freely choose their representatives. In order to administer PELRA, BMS works as efficiently as possible to investigate petitions and oversee elections. The process would be thwarted if either aggrieved party was permitted to appeal each intermediate decision. Accordingly, this writ must be dismissed. The parties may appeal after an election has been certified or the petition has been dismissed, if they so desire.

Dated: January 9, 2017

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

/s/Caitlin M. Micko

CAITLIN M. MICKO

Assistant Attorney General

Atty. Reg. No. 0395388

KELLY S. KEMP

Assistant Attorney General

Atty. Reg. No. 0220280

445 Minnesota Street, Suite 900

St. Paul, MN 55101-2127

Telephone: (651) 757-1352

Fax: (651) 297-4139

caitlin.micko@ag.state.mn.us

kelly.kemp@ag.state.mn.us

ATTORNEYS FOR RESPONDENT
BUREAU OF MEDIATION SERVICES