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,

v.

Service Employees International Union, Local 284,

and

Bureau of Mediation Services,
Respondents.

RELATOR'S MEMORANDUM IN RESPONSE TO COURT'S ORDER DATED DECEMBER 28, 2016

BUREAU OF MEDIATION SERVICES CASE NO. 16-PCE-0644

DATE OF UNIT DETERMINATION ORDER: September 20, 2016, as amended by Ruling on Request for Reconsideration dated November 29, 2016

Relator Regents of the University of Minnesota (the "University") submits this informal memorandum in response to the Court's December 28, 2016 Order directing the parties to answer two questions related to the Court's jurisdiction to hear this appeal.

I. INTRODUCTION

The University's appeal seeks this Court's review of a decision of the Minnesota Bureau of Mediation Services (the "Bureau" or "BMS") to expand Unit 8, the bargaining unit defined by the Legislature for the University's Twin Cities faculty. The Bureau's decision is set forth in the Unit Determination Order – Community of Interest (the "Unit Determination Order" or the "Order") of September 20, 2016. The Unit Determination Order granted the request of the Service Employees International Union, Local 284 (the

"Union") to re-assign four non-faculty job classifications—Teaching Specialist, Lecturer, Senior Teaching Specialist, and Senior Lecturer (collectively, the "Disputed Teaching Classifications")—to Unit 8.

The University appealed the Unit Determination Order on October 17, 2016.[1] At the Court's direction, the parties submitted informal memoranda on the question of the Court's jurisdiction. By Order dated November 15, 2016, this Court held that the Bureau's Unit Determination Order is an appealable final order and dismissed the University's appeal without prejudice until the Bureau ruled on the University's pending Request for Reconsideration. The Bureau denied the University's Request for Reconsideration on November 29, 2016,[2] and the University promptly commenced this appeal.

The jurisdiction of this Court to hear the University's appeal arises from Minn. Stat. § 179A.051, which provides that Bureau decisions "relating to . . . appropriateness of a unit . . . may be reviewed on certiorari by the Court of Appeals." The Court's jurisdiction to hear this appeal under Minn. Stat. § 179A.051(a) is consistent with the Bureau's recognition that employees have a "**fundamental right** . . . to be clear about the make-up of the appropriate bargaining unit **before they vote."**[3]

---

[1] Appeal No. A16-1666.

[2] The Bureau amended the Unit Determination Order in its November 29, 2016 Ruling on Request for Reconsideration by correcting one typographical error.

[3] Ruling on Request for Reconsideration, Certain Faculty of the Univ. of Minn./Morris Campus and Certain Faculty of the Univ. of Minn./Crookston Campus and University of Minnesota and University Education Assoc., BMS Case Nos. 97-PCE-444 and 97-PCE-458 (Oct. 25, 1996) (emphasis added). BMS orders in unrelated cases, unpublished

Although this Court unequivocally ruled in Appeal No. A16-1666 that the Unit Determination Order is an appealable order, Respondents nevertheless assert that this Court lacks jurisdiction over the University's appeal. In an effort to avoid review of the Order by this Court, the Bureau adopts the Union's view and argues, for the first time, that the Order cannot be appealed until an election has been held and its results certified or the petition dismissed. For the reasons described herein, the Bureau's September 20, 2016 Unit Determination Order and November 29, 2016 Ruling on Request for Reconsideration remain appealable at this time.

II. RELEVANT PROCEDURAL HISTORY

The University first sought appeal of the Unit Determination Order on October 17, 2016. (Pet. for Writ of Cert., In re Petition for Determination of an Appropriate Unit & Certification as Exclusive Representative, A16-1666 (Minn. Ct. App. Oct. 17, 2016).) As directed by the Court, the parties submitted informal memoranda on November 7, 2016 regarding whether the Unit Determination Order was appealable.

The Union argued that the Unit Determination Order will not become final, and thus is not appealable, until the election results are certified. (Resp't SEIU Local 284's Informal Jurisdictional Mem. at 4, In re Petition for Determination of an Appropriate Unit & Certification as Exclusive Representative, A16-1666 (Minn. Ct. App. Nov. 7, 2016).) The Court rejected this argument. (See Order at 2, In re Petition for

---

orders, and docket sheets are attached to the Affidavit of Krista A.P. Hatcher ("Hatcher Aff.") as Exhibit G.

Determination of an Appropriate Unit & Certification as Exclusive Representative, A16-1666 (Minn. Ct. App. Nov. 15, 2016).)

The Bureau took a different approach. It did not argue that the University must wait until the results of an election are certified to appeal the Order. Instead, it asserted that the Unit Determination Order was not final because of pending issues related to its implementation, such as which employees would be excluded due to their supervisory status. (Resp't Bureau of Mediation Services' Informal Mem. in Resp. to Court's October 31, 2016 Order at 1-2, In re Petition for Determination of an Appropriate Unit & Certification as Exclusive Representative, A16-1666 (Minn. Ct. App. Nov. 7, 2016); see also Statement of the Case of Resp't Bureau of Mediation Services at 1-2, In re Petition for Determination of an Appropriate Unit & Certification as Exclusive Representative, A16-1666 (Minn. Ct. App. Nov. 7, 2016).) The Court rejected this argument as well.

The Bureau now argues that the Court misconstrued its position and that the Order is not appealable until an election has been held and the ballots counted. (Statement of the Case of Resp't Bureau of Mediation Services at 3 (Dec. 29, 2016).) This is the very argument that the Union made previously and the Court rejected; it is not an argument that the Bureau has made to this Court.[4]

On November 15, 2016, the Court held that the Unit Determination Order is appealable under Minn. Stat. § 179A.051(a) as a final order relating to the

[4] That the Bureau now joins the Union in arguing that an election is a jurisdictional prerequisite to this Court's review under Minn. Stat. § 179A.051 reflects a lockstep approach to issues that significantly affect over two thousand public employees and warrant careful—and independent—judgment.

appropriateness of a unit. (Order at 3, In re Petition for Determination of an Appropriate Unit & Certification as Exclusive Representative, A16-1666 (Minn. Ct. App. Nov. 15, 2016).) The Court ruled, "BMS has completed its decision-making process on the issue of the university employee classifications that are included in the bargaining unit." (Id.) The Court also found, however, that "[e]ven when an appeal is not premature, a pending post-decision motion may provide an appropriate basis for deferring appellate review." (Id. at 3.)

Because the parties agreed that allowing the Bureau to rule on the pending Request for Reconsideration promoted judicial economy, the Court dismissed the University's October 2016 appeal without prejudice. (Id.) The Court ordered the Bureau to promptly issue a response to the Request for Reconsideration, holding that the University's appeal could be filed within thirty days thereafter. (Id. at 3-4.)

On November 29, 2016, the Bureau denied the University's Request for Reconsideration. On December 15, 2016, pursuant to this Court's November 15, 2016 Order, the University filed the instant appeal.

Dismissing the appeal at this time would convert the Court's prior dismissal into a dismissal with prejudice. The efforts of the Bureau and the Union to circumvent review of the Unit Determination Order by this Court, as the Legislature authorized under Minn. Stat. § 179A.051(a), should be recognized for what they are—efforts to postpone judicial review to such time as it is not meaningful—and rejected.

III. THE COURT'S NOVEMBER 17, 2016 ORDER ESTABLISHED THE LAW OF THE CASE AS TO THE COURT'S JURISDICTION AND SHOULD NOT BE DISTURBED.

A. The Court Should Reject the Bureau's Attempt to Circumvent the Law of the Case As to the Court's Jurisdiction By Shifting Its Appellate Position.

The Bureau seeks to circumvent the law of the case established by this Court's November 15, 2016 Order by revising its position regarding the Court's jurisdiction. As set forth above, when the Bureau challenged the Court's jurisdiction to hear Appeal No. A16-1666, it asserted that the Unit Determination Order was not final because of pending issues related to its implementation. (Resp't Bureau of Mediation Services' Informal Mem. in Resp. to Court's October 31, 2016 Order at 1-2, In re Petition for Determination of an Appropriate Unit & Certification as Exclusive Representative, A16-1666, (Minn. Ct. App. Nov. 7, 2016); see also Statement of the Case of Resp't Bureau of Mediation Services at 1-2, In re Petition for Determination of an Appropriate Unit & Certification as Exclusive Representative, A16-1666 (Minn. Ct. App. Oct. 27, 2016).)

The Bureau did not argue then that the University must wait until the results of an election are certified to appeal the Order. In fact, since these proceedings began the Bureau has had multiple opportunities to identify the point at which it believes this Court has jurisdiction to review the Unit Determination Order. Not once before submitting its Statement of the Case has the Bureau asserted that the Court lacks jurisdiction until the election has been conducted and the votes counted.

Under the law-of-the-case doctrine, "once an issue is considered and adjudicated, that issue should not be examined in that court or any lower court throughout the case."

Peterson v. BASF, 675 N.W.2d 57, 65 (Minn. 2004), vacated on other grounds, 544 U.S. 1012, 125 S.Ct. 1968 (2005). "Law of the case applies when the appellate court has ruled on a legal issue and remanded for further proceedings on other matters. The issue decided becomes the 'law of the case' and may not be relitigated in the trial court or reexamined in a second appeal." Sigurdson v. Isanti County, 448 N.W.2d 62, 66 (Minn. 1989). "Failure to challenge a court's decision results in that decision becoming the law of the case." P.H.T. Sys., Inc. v. Tropical Flavors, Inc., 2006 WL 1516022 (Minn. Ct. App. May 30, 2006), rev. den. (Aug. 15, 2006).

On November 15, 2016, this Court unequivocally held that the University may seek review of the Unit Determination Order by filing and serving a petition for writ of certiorari within 30 days of the Bureau's ruling on the University's request for reconsideration, making the Unit Determination Order appealable at this time under Minn. Stat. § 179A.051. (Order at 3, In re Petition for Determination of an Appropriate Unit & Certification as Exclusive Representative, A16-1666 (Minn. Ct. App. Nov. 15, 2016).) The Court ruled that the University's appeal was *not* premature, and dismissed the appeal *without prejudice* to allow the Bureau to rule on the University's pending request for reconsideration.

Neither the Bureau nor the Union has provided any basis for this Court to now depart from the November 15, 2016 Order. There has been no change in controlling law or evidence. Although the Bureau asserts that the Court misunderstood its "longstanding position" that its orders are not appealable until after an election has been certified or the

petition dismissed, it is hard to imagine how the Court misconstrued the Bureau's view when the Bureau had not made this argument.

The change in the Bureau's jurisdictional posture reflects the inconsistent and arbitrary posture it has taken throughout these proceedings. In addition to arguing in October and November 2016 that the appeal could not be taken because of pending issues related to implementation of the Order, it argued in April 2016 that the University's appeal was premature because "[t]he Commissioner clearly has not reached a 'decision' regarding SEIU's position **because he has not decided what classifications of employees belong in the unit.**"[5] (BMS's Informal Mem. in Resp. to Court's March 31, 2016 Order at 4, In re Petition for Determination of an Appropriate Unit & Certification as Exclusive Representative, A16-0510 (Minn. Ct. App. Apr. 12, 2016) (emphasis added).) There is no doubt that the Commissioner has now made that decision.

Again, in April 2016, the Bureau addressed the issue of the Court's jurisdiction to hear the University's appeal. And again, it did not assert that jurisdiction would lie only after an election is held. Rather, it argued that the Court would have jurisdiction after the Bureau "issued a final decision regarding the appropriate unit." (Resp't Bureau of Mediation Services' Memo. in Resp. to Relator's Motion for Stay of Agency Proceedings at 5, In re Petition for Determination of an Appropriate Unit & Certification as Exclusive

[5] In March 2016, the University sought certiorari appeal of a BMS order holding that it had jurisdiction to reassign the Disputed Teaching Classifications to Unit 8 and related orders in Appeal No. A16-0510. On April 18, 2016, the Court issued an Amended Order dismissing that appeal, noting that "[n]one of the orders makes a determination of the appropriate unit for the ten classifications of employees at issue." (Amended Order at 2, In re Petition for Determination of an Appropriate Unit and Certification as Exclusive Representative, A16-0510 (Minn. Ct. App. Apr. 18, 2016).)

Representative, A16-0510 (Minn. Ct. App. Apr. 12, 2016); see also Statement of the Case of Resp't Bureau of Mediation Services at 1-2 In re Petition for Determination of an Appropriate Unit & Certification as Exclusive Representative, A16-0510 (Minn. Ct. App. Apr. 12, 2016) (arguing that the Court lacked jurisdiction because "[t]here . . . has not been a hearing on the merits of this case, and BMS has not issued a final decision regarding the appropriate unit").) It has now done so.

Likewise, in its own prior rulings the Bureau has never asserted that the appeal may only be taken after the election results are certified or the petition dismissed. When the University sought a stay from the Bureau in connection with Appeal No. A16-0510, the Bureau stated on April 4, 2016 that the appeal was premature because "**[t]he Bureau has not issued a decision on whether the classifications in question are or can be placed in Unit 8.**" (Hatcher Aff. Ex. A (emphasis added).) That decision was indisputably made in the Unit Determination Order.

On October 31, 2016, when the Bureau denied the University's request for a stay pending Appeal No. A16-1666, the Bureau expressed its opinion that the appeal was premature because certain issues—unrelated to the determination of the appropriate unit—remain unresolved. (Hatcher Aff. Ex. B.) It still did not assert that the Order is appealable only after an election is held.

More recently, on November 29, 2016, when the Bureau denied the University's Request for Reconsideration and Stay of the Unit Determination Order, it again made no claim that the Order is appealable only after an election held. (Hatcher Aff. Ex. C.) Now facing review under this Court's November 15, 2016 Order that relied on the Bureau's

earlier position, the Bureau has introduced the new jurisdictional prerequisite of an election—a bold effort to circumvent this Court's earlier directive and, in effect, moot the Court's ability to shape the contours of the electorate—the very issue for which the University requires the Court's assistance.

The Bureau's newly stated position on the finality of its orders is inconsistent not only with its prior statements, but also with the statutory text and overall scheme of the Public Employment Labor Relations Act ("PELRA"). "Questions of statutory interpretation are reviewed de novo." In re R.B.P., 640 N.W.2d 351, 353-54 (Minn. Ct. App. 2002). The Bureau is entitled to no deference from this Court on this important legal issue. See St. Otto's Home v. Minn. Dep't of Human Servs., 437 N.W.2d 35, 39-40 (Minn. 1989) ("When a decision turns on the meaning of words in a statute or regulation, a legal question is presented. . . . In considering such questions of law, reviewing courts are not bound by the decision of the agency and need not defer to agency expertise." (citations omitted)). This Court's jurisdiction to hear the University's pending appeal is the law of the case. The Legislature established that jurisdiction in Minn. Stat. § 179A.051, and the Bureau's and Union's efforts to usurp the Court's jurisdiction should be denied.

B. The Bureau's Latest Jurisdictional Condition—An Election—Effectively Deprives the Court of *Its* Jurisdiction to Frame the Contours of the Voting Constituency and Presents Voters with a Predetermined Choice.

Requiring the University to wait until an election has been held to secure this Court's review of the contours of the voting electorate precludes meaningful judicial

review of the Order, an outcome that the Bureau and the Union understand and actively seek. Their view, that ballots can be cast conditionally, to be counted if the Order is upheld on appeal and discounted if the Order is reversed, is nothing more than an ill-conceived effort to assure that the University's appeal is rendered moot. It is indeed difficult to imagine how an election that, under the Bureau's Order, will likely involve over two thousand voters can be undone once votes have been cast.

Proceeding with an election on a conditional basis will certainly affect voters' choices, particularly the faculty in statutory Unit 8. It is disingenuous to act as if the decision whether to vote in favor of union representation can be made in a vacuum. It is unfair to expect University employees to make a thoughtful decision while a critical issue, the scope of the bargaining unit, remains uncertain.

The University's concerns in this regard are far from hypothetical. They are underscored by the fact that an independent group of University faculty who vigorously oppose the addition of the Disputed Teaching Classifications to Unit 8 have been granted appearance status by the Bureau and filed a Notice and Petition to File *Amicus Curiae* Brief with this Court. (See Hatcher Aff. Ex. D; Notice and Petition to File Amicus Curiae Brief by UMN Faculty Excellence (filed Dec. 29, 2016).) It is reasonable to assume that at least some members of this group, which comprises more than one-third of the faculty in Unit 8, would vote differently in a bargaining unit that includes the Disputed Teaching Classifications than they would in the statutorily defined Unit 8 limited to faculty.

The Bureau's approach to this issue is further evidence of its blind and stubborn desire to compel an election among all "instructional employees" on the Twin Cities campus without regard to the longstanding principle that tenured and tenure-track faculty are responsible for the University's tripartite mission: research, service, and teaching.

C. The Bureau's Shift in Jurisdictional Positon Should Not Cloud the Question of This Court's Jurisdiction at This Juncture.

The Bureau's current argument is a misplaced attempt to respond to the University's request to this Court to stay the Bureau proceedings once the Court accepts its appeal in accordance with the Court's November 15, 2016 Order. Having denied the University's request for a stay of proceedings while this appeal is pending on January 3, 2017,[6] the Bureau is keenly aware that the University will soon turn to this Court for assistance.

The current Bureau proceedings are aimed at identifying eligible voters in each of the job classifications that it has assigned to Unit 8 for purposes of an election and resolving other administrative issues, such as whether the election will be conducted by mail ballot or on-site balloting. The question of this Court's jurisdiction to review the Unit Determination Order at this juncture is separate from the question of whether some of all of the agency proceedings that are preliminary to an election should be stayed while an appeal is pending. Despite the Bureau's efforts to conflate these two issues, they should be separately considered by the Court.

[6] Hatcher Aff. Ex. E.

IV. RESPONSES TO QUESTIONS RAISED IN THE ORDER OF DECEMBER 28, 2016

A. Has BMS completed its decision-making process on the determination of the appropriate unit for the disputed classifications?

Yes, BMS has fully and completely decided which job classifications are part of the petitioned-for bargaining unit, Unit 8.

In In re Intra-LATA Equal Access and Presubscription, 532 N.W.2d 583, 588 (Minn. Ct. App. 1995), the Court held that a 1985 order issued by the Minnesota Public Utilities Commission ("MPUC") regarding whether to require intra-LATA equal access presubscription was immediately appealable even though implementation of equal access presubscription would occur later.[7] 532 N.W.2d 583, 588 (Minn. Ct. App. 1995). The appeal in In re Intra-LATA arose out of the fact that Minnesota initially had only one authorized provider of intra-LATA toll service. In 1984, other long distance carriers requested intra-LATA service authority, and MPUC held in the 1985 order that equal-access presubscription was necessary for effective competition. Id. To address outstanding issues related to technology and payment, MPUC initiated a study commission, which took nearly two years to complete its investigation and establish guidelines for the implementation of equal access presubscription. Id. at 587-88.

On appeal, the Court of Appeals refused to consider whether equal access presubscription would be required, reasoning that this decision was "complete" as of a 1985 order denying reconsideration of the MPUC's decision requiring equal access

[7] The Court explained that "intra-LATA" is telephone service "within a LATA [local access and transport area], including both local telephone service and short-haul long distance toll service." 532 N.W.2d at 587.

presubscription. Id. As recognized by this Court in its November 15, 2016 ruling in Appeal A16-1666, Intra-LATA stands for the proposition that agency decision-making may be completed and the agency order final and appealable, even if the agency has yet to resolve issues necessary to implement its decision.

The relevant statute in this case provides:

> Decisions of the commissioner **relating to** supervisory, confidential, essential, and professional employees, **appropriateness of a unit**, or fair share fee challenges may be reviewed on certiorari by the Court of Appeals.

Minn. Stat. § 179A.051(a) (emphasis added). In interpreting Section 179A.051, it is useful to examine PELRA's definition of the term "appropriate unit." PELRA defines "appropriate unit" as a unit "determined under sections 179A.09 to 179A.11." Minn. Stat. § 179A.03, subd. 2. Those sections set forth the statutorily defined units for employees of the University, as well as those of the State, Courts, and Board of Public Defense, and also address the criteria for determining appropriate units for public employers that are not defined by statute. Minn. Stat. §§ 179A.09-179A.11. Notably, these sections of PELRA do not address election orders, elections, or certification, which are governed by a provision not cited in the definition of "appropriate unit," Minn. Stat. § 179A.12.

The Bureau issued the Unit Determination Order after it conducted a 13-day evidentiary hearing over the course of four weeks in April and May 2016 "to determine the appropriate unit assignment of the classifications in question." (Unit Determination Order, at 1, 6.) Collectively, the Union and the University presented testimony from 40 witnesses and presented thousands of pages of exhibits. (Hatcher Aff. ¶ 2.) The parties

submitted post-hearing briefs on July 1, 2016. (Unit Determination Order, at 1.) More than two and a half months later, the Bureau issued the 31-page Unit Determination Order, which conclusively determined the scope of Unit 8, assigning the Disputed Teaching Classifications to it.

Now that the contours of the unit have been set, the only issues that remain relate to the implementation of that decision. That is, issues related to the eligibility of *individual employees* to vote in an election. For example, the Bureau has requested the parties to identify individual employees in the Unit 8 job classifications who are not eligible to vote for various reasons, such as not working sufficient hours to meet the definition of "public employee" under Minn. Stat. § 179A.03, subd. 14(a)(5) or being a "supervisory employee" within the meaning of Minn. Stat. § 179A.03, subd. 17. (See Hatcher Aff. Ex. F.)

That these issues are unresolved does not render the Unit Determination Order non-final. These are issues relating to the eligibility of individual employees to vote, not whether entire job classifications are included in the bargaining unit. Resolution of these issues is not part of the determination of the appropriate unit—a determination that takes place at the job classification level, not at the individual employee level—and has already occurred. See Minn. State Emps. Union, AFSCME, Council 6 and Univ. of Minn., Unit 6, BMS Case No. 02-PCL-1141, at 9 (May 28, 2003) (holding that the Bureau has authority under the applicable statute to assign entire classifications, not individual positions). In issuing the Unit Determination Order, the Bureau has completed the process for determining the University employee classifications that are included in the

petitioned-for bargaining unit. Its efforts, and those of the Union, to suggest otherwise by arguing that the outstanding decisions render the Order non-final have no basis in law or fact.

Moreover, proceeding with implementation of the Unit Determination Order while the appeal is pending is impractical. The decisions that remain require the expenditure of considerable time and resources to resolve and are contingent on the viability of the Unit Determination Order. To undertake the efforts necessary to resolve these complex issues, which relate almost exclusively to employees in the Disputed Teaching Classifications, before this Court can review the Order serves no purpose other than to thwart the University's ability to secure meaningful review of the Bureau's ill-advised Order.

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)?

Yes, the Bureau's September 20, 2016 Unit Determination Order—Community of Interest and its November 29, 2016 Ruling on Request for Reconsideration are subject to certiorari review under the express language of Minn. Stat. § 179A.051(a).

The Unit Determination Order is a final order "relating to . . . appropriateness of a unit" within the meaning of Minn. Stat. § 179A.051. The Bureau titled the Order "Unit Determination Order—Community of Interest" and articulated the issue it addressed as:

> Should the classifications of Assistant Extension Educator, Assistant Extension Professor, Associate Extension Educator, Associate Extension Professor, Extension Educator, Extension Professor, Lecturer, Teaching Specialist, Senior Lecturer and Senior Teaching Specialist . . . be included in the **appropriate bargaining unit** defined at Minnesota Statute § 179A.11, Subd. 1(8).

(Unit Determination Order at 1-2 (emphasis added).) The issue as framed clearly goes to the appropriateness of a unit. The Bureau considered the applicability of Minn. Stat. § 179A.10, subd. 4, applied the factors identified in Minn. Stat. § 179A.09, subd. 1, and directed which job classifications would be added to Unit 8 and which would not. (Id. at 14-16, 19-29.) The Unit Determination Order clearly and finally decided the classifications of employees the Bureau believes can and should belong in Unit 8, and is thus appealable at this time under Minn. Stat. § 179A.051(a).

The cases cited by the Union for the proposition that this Court does not exercise jurisdiction to review Bureau unit determination orders until after election results are certified are inapposite. The Union cites City of Bloomington v. AFSCME, Council 5, Nos. A12-1829, A12-2016, 2013 WL 3491133 (Minn. Ct. App. July 15, 2013), just as it did in response to the Court's order for jurisdictional briefs in Appeal No. A16-1666. The Union again misconstrues the procedural history of the City of Bloomington case, which supports the conclusion that the Unit Determination Order is appealable. In City of Bloomington, the City employer/relator brought appeal A12-1829 on October 12, 2012 seeking review of a BMS ruling on a request for reconsideration of a unit determination order. See City of Bloomington v. AFSCME, Council 5, Order, No. A12-1829 (Minn. Ct. App. Nov. 13, 2012). Appeal A12-1829 was brought *before* the Bureau certified the results of the election on October 17, 2012. AFSCME Council 5 and City of Bloomington, Certification of Exclusive Representative, BMS Case No. 12PCE1115

(Oct. 17, 2012) (certifying election results).[8] The respondent union brought a motion to dismiss Appeal A12-1829 as premature on October 18, 2012, which the Court denied in an order dated November 13, 2012, holding "the commissioner's decision regarding the appropriateness of the bargaining units is expressly appealable under Minn. Stat. 179A.051." City of Bloomington v. AFSCME, Council 5, Order, No. A12-1829, at 2 (Minn. Ct. App. Nov. 13, 2012). The Court further held that "the decision on the appropriateness of the bargaining units is final because the bureau completed its decision-making process on this matter and the result of the decision directly affects relator."[9] Id. at 2-3.

Likewise, Certain Employees of the University of Minnesota Crookston Campus and University of Minnesota and University Education Association, 1997 WL 243439 (Minn. Ct. App. May 13, 1997) does not support the Union's argument that this Court lacks jurisdiction to hear the University's appeal. There is no evidence or suggestion that

[8] Following the certification of the election and before the filing of the Court's order denying the union's motion to dismiss A12-1829, the City brought a second appeal, A12-2016, challenging the certification of the election results. See City of Bloomington v. AFSCME, Council 5, Order, Nos. A12-1289 & A12-2016 (Minn. Ct. App. Dec. 20, 2012); *see also* Minnesota Appellate Courts, Case Management System, No. A12-1829 Docket Sheet; Minnesota Appellate Courts, Case Management System, No. A12-2016 Docket Sheet. The Court of Appeals retained jurisdiction over both appeals and consolidated them for resolution. City of Bloomington v. AFSCME, Council 5, Order, Nos. A12-1289 & A12-2016 (Minn. Ct. App. Dec. 20, 2012).

[9] Although the Court subsequently noted that the City provided copies of the Bureau's October 17, 2012 order certifying the results of the election, finding there to be "no reason to delay certiorari review," (id. at 3), that an election has not yet been held in this matter does not change the fact that the Bureau has completed its decision-making process regarding which classifications to add to Unit 8.

the relator in that case, University Education Association, attempted to bring an appeal before the election was held.

The Union also cites cases from Oregon, Washington, and Illinois to suggest that the Court lacks jurisdiction under Minn. Stat. § 179A.051(a) to hear the University's appeal. (Resp't SEIU Local 284's Informal Jurisdiction Memo., A16-1985 at 15-17 (Jan. 9, 2017). Each of those cases is inapposite. Unlike Minn. Stat. § 179A.051(a), the statute providing for judicial review in Oregon was specifically limited to "'judicial review of a *final* order.'"[10] Klamath Cnty. v. Laborers Int'l Union of N.A., 534 P.2d 1169, 1170 (Ct. App. Or. 1975) (quoting O.R.S. 183.480(1)(a)) (emphasis added).

Likewise, judicial jurisdiction in Washington is established in the state's administrative procedures act and is explicitly limited by statute to "'final decision[s].'" See Renton Educ. Ass'n v. Wash. State Pub. Emp't Relations Comm'n, 603 P.2d 1271 (Ct. App. Wash. 1979) (quoting R.C.W. 34.04.130(1)). In fact, the Renton court expressly anticipated that its conclusion would be different if the statute provided for review of non-final orders. Specifically, it noted that it does not consider decisions arising under the National Labor Relations Act in this context because "that act specifically provides statutory bases for review apart from the provisions of the administrative procedures act." Id. at 1273.

[10] Moreover, the court in Klamath even recognized that the finality rule was not absolute, noting that under Oregon law a non-final order is appealable if there is a showing that the agency acted without probable cause or the party appealing will suffer irreparable injury if relief is not granted at that point. Klamath Cnty., 534 P.2d at 1172.

Like the Washington and Oregon statutes at issue in Klamath County and Renton Educational Association, the Illinois case cited by the Union lacks a statutory basis to review a nonfinal order. City of Wood Dale v. Ill. State Labor Relations Bd., 520 N.E.2d 1097, 1099-1100 (Ill. App. 1988) (relying on common law certiorari review of final agency orders). There was no indication in any of the three cases cited by the Union that appropriate bargaining units were set by statute, as they are for University of Minnesota employees.

The Supreme Court's interpretation of the federal National Labor Relations Act ("NLRA") in Boire v. Greyhound Corp., 376 U.S. 473 (1964) also does not support the Union's arguments. Unlike PELRA, the NLRA does not contain statutory bargaining units.[11] Even more importantly, it has no provision similar to Minn. Stat. § 179A.051(a). In Boire, the Court noted that National Labor Relations Board ("NLRB" or "Board") decisions are normally reviewable by a federal Court of Appeals only where the dispute results in a finding that an unfair labor practice has been committed. 376 U.S. at 476-77 (citing 29 U.S.C. § 160(d) and (e) (providing for appellate review of a final order of the NLRB in the circuit where in the unfair labor practice was alleged to have occurred)). Minnesota Statutes § 179A.051, on the other hand, contains no such requirement and specifically permits this Court's review of Bureau decisions relating to the appropriateness of a unit.

[11] Acute care hospitals are the exception under the NLRA, for which appropriate units are defined by regulation. 29 C.F.R. § 103.30.

More relevant to the case at hand is the decision in In re Civil Service Employees Association, Inc. v. Helsby, 31 A.D.2d 325, 328-29 (N.Y. App. Div. 1969). In that case, the applicable statute provided that judicial review is not available "'to challenge a determination which is not final or can be adequately reviewed by appeal to a court or some other body or officer.'" Id. (quoting CPLR 7801).

The court held that a unit determination issued by the New York Public Employment Relation Board was final even before an election was conducted and the result certified because "[t]he units deemed to be appropriate by the board are as final now as they will be upon certification" and the subsequent procedures anticipated by the agency "cannot alter the original determination." Id. at 329. The court further observed:

> Judicial review at this time may avoid costly and time-consuming intermediate procedures. There would be no economy in deferring the question of correctness of the board's determination until after all the proceedings required to ascertain and establish the employee representative for the five proposed units should the courts ultimately decide that the five units established were not appropriate. Resolution of the issues in this proceeding at the earliest possible moment is in the best interest of the State and its employees.
>
> * * * *
>
> We are here required to construe a unique statutory scheme, one that has as its main purpose the promotion of harmonious and co-operative relationships between government and its employees to protect the public by assuring at all times the orderly and uninterrupted operations and functions of government. Certainly such a statute should be construed with the liberality needed to carry out its public benefit purposes and, therefore, the determination involved should be afforded prompt and effective judicial review.

Id. at 329-30.

Here, the Bureau has fully determined which classifications are included in Unit 8. The Bureau's resolution of the remaining issues, such as whether to conduct an on-site or mail ballot election and the status of individual employees, will not alter that decision. Prompt judicial review of the Unit Determination Order will ensure that University employees are able to cast their ballots in a statutory bargaining unit for which the parameters have been determined and that their votes will count.

V. THE UNIT DETERMINATION ORDER IS APPEALABLE EVEN IF THE COURT CONCLUDES THAT IT IS NOT A FINAL ORDER

A. Minn. Stat. § 179A.051 Provides a Statutory Basis for Appeal That Does Not Require the Appealed-From Decision be A Final Order.

Rule 103.03 of the Minnesota Rules of Civil Appellate Procedure describes the orders and judgments that are appealable to this Court as a matter of right. An appeal may be taken, "except as otherwise provided by statute, from a final order, decision or judgment affecting a substantial right made in an administrative or other special proceeding." Minn. R. Civ. App. P. 103.03(g). As an exception to the general rule that appeals may only be taken from a final order, Rule 103.03(j) provides that appeals may also be taken "from such other orders or decisions *as may be appealable by statute* or under the decisions of the Minnesota appellate courts." Minn. R. Civ. App. P. 103.03(j) (emphasis added); see also In re: Guardianship of Doyle, 778 N.W.2d 342, 346 (Minn. 2010) (holding that the probate code permits interlocutory appeals under Minn. R. Civ. App. P. 103.03(j)).

As discussed above, Minn. Stat. § 179A.051(a) provides that "[d]ecisions of the commissioner relating to . . . appropriateness of a unit . . . may be reviewed on certiorari

by the Court of Appeals." By its terms, the statute does not limit the jurisdiction of the Court by requiring that a decision be final to form the basis for an appeal. Nor does the statute provide for judicial review of orders certifying the results of an election. Instead, the statute provides for judicial review of decisions that "relat[e] to" the "appropriateness of a unit." The language of Minn. Stat. § 179A.051 stands in contrast to those statutes in which the Legislature has specified that appeals are limited to final orders, demonstrating that the Legislature uses particular language to limit appeals to final orders or decisions.[12]

In making orders related to the appropriateness of a unit appealable, the Legislature recognized that designation of the bargaining unit is a watershed moment in the representation process and, thus, an appropriate time for meaningful judicial review. The bargaining unit determination sets the course for the election. The agency decisions that follow implement this key decision: the Bureau determines which employees in the job classifications that comprise the designated unit are entitled to vote and which are not, prepares and distributes a list of eligible voters, and shortly thereafter conducts the election and certifies the results. Once the watershed moment has passed, it is difficult, if

---

[12] See, e.g., Minn. Stat. § 13.085, subd. 5(d) ("A party aggrieved by a **final** decision on a complaint filed under this section is entitled to judicial review . . ."); Minn. Stat. § 60A.177, subd. 5 ("A **final** determination of the board of review under subdivision 4 may be appealed . . ."); Minn. Stat. § 116A.19, subd. 4 ("Any party aggrieved by a **final** order or judgment rendered on appeal to the district court . . . may appeal as in other civil cases"); Minn. Stat. § 123A.71 ("The appeal provisions of section 123A.49 shall be applicable only after the county board has issued its **final** order . . ."); Minn. Stat. § 216E.15 ("The appeal shall be filed within 30 days after . . . the filing of any **final** order by the commission"); Minn. Stat. § 260B.415, subd. 1(a) ("An appeal may be taken by the aggrieved person from a **final** order of the juvenile court . . .") (emphases added); see also Beuning Family LP v. County of Stearns, 817 N.W.2d 122, 126 (Minn. 2012) ("The legislature has limited our jurisdiction over the tax court to review of 'final order[s].' Minn. Stat. § 271.10, subd. 1." (alteration in original)).

not impossible, for the Court to offer meaningful review of this critical agency decision. Where, as here, the determination involves issues of first-impression under state law, impacts thousands of public employees, and will have profound and lasting effects on one of the state's most respected and visible institutions, providing timely and meaningful judicial review is critical. The Bureau has completed the process of establishing the bargaining unit by determining which job classifications comprise the petitioned-for bargaining unit, and Minn. Stat. § 179A.051 provides the statutory basis for the University's appeal.

B. Even if the Unit Determination Order is Not a Final Order, it is Immediately Appealable under the Collateral Order Doctrine.

Even if the Court determines that the Unit Determination Order is not a final order and that Minn. Stat. § 179A.051 does not provide a statutory basis for appealing a non-final order relating to the appropriateness of a unit, the Unit Determination Order is immediately appealable pursuant to the collateral order doctrine.

Under this doctrine, non-final orders are immediately appealable if they fall into "that small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Kastner v. Star Trials Ass'n, 646 N.W.2d 235, 240 (Minn. 2002) (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949)) (alteration in original). The collateral order doctrine applies when the non-final order at issue: "(1) conclusively determine[s] the disputed question, (2) resolve[s] an important

issue completely separate from the merits of the action, and (3) [is] effectively unreviewable on appeal from a final judgment." Id.

All three prongs of this test are satisfied. First, the Unit Determination Order conclusively determined that the Disputed Teaching Classifications are included in Unit 8. Second, the issues determined by the Unit Determination Order are separate from the merits of the action, that is, whether the Union may obtain a certification election in Unit 8 and subsequently be certified as exclusive representative of Unit 8 if it receives a majority of the votes cast.

Third, and most importantly, the Bureau's notion that its form of an election must take place before the Court can assess the Bureau's basis for determining the voting unit makes the Unit Determination Order effectively unreviewable, presenting voters with an unfair and conditional choice. University employees should not be required to wait until an election is held and the results certified to know whether their votes were considered legitimate. The University is committed to a fair election for its employees.

The bedrock of a fair election is the designation of a bargaining unit that comports with state law. If the Unit Determination Order is not immediately appealable, the parties will spend significant additional time and public resources moving forward with a union election that may well be overturned.

Not only is proceeding with an election in which the results may be invalidated wasteful, but it is likely to result in ongoing confusion for University employees and their families. Voters will face an unfair dilemma: Do I vote for union representation if representation means I am part of a bargaining unit that includes the Disputed Teaching

Classifications? Would my vote be different if the unit included only Unit 8 faculty? Forcing these questions on employees is inconsistent with the Bureau's own stated view that employees have a "fundamental right . . . to be clear about the make-up of the appropriate bargaining unit before they vote." Ruling on Request for Reconsideration, Certain Faculty of the Univ. of Minn./Morris Campus and Certain Faculty of the Univ. of Minn./Crookston Campus and University of Minnesota and University Education Assoc., BMS Case Nos. 97-PCE-444 and 97-PCE-458 (Oct. 25, 1996).

University employees should not be required to cast a ballot in an election that is no more than one step in a process, knowing that the choices of some or all voters may not count and that a second round of balloting could be required because the legality of the bargaining unit the Bureau designed is under Court review. Doing so impermissibly taints voters' choices and can reshape the election results. A conditional election defies the principle of finality that public employees rightfully expect when they cast ballots on an issue that will profoundly affect the terms and conditions of their employment.

Simply put, the circumstances and complexity of this election do not comport with a conditional election. Moreover, a conditional election does not reflect the value that Minnesotans attach to the right to vote in a meaningful way, a right that should not be compromised for the sake of expediency. University of Minnesota employees expect, and are entitled to, a fair election, not one that is speculative or subject to change after ballots are cast.

The Unit Determination Order raises an important question of public policy: whether the Bureau has the authority to reconfigure the University bargaining unit that

reflects the Legislature's understanding and codification of the role of University faculty. The employees of the University, its students, and the citizens of Minnesota are best served by judicial review of the Order at this juncture.

VI. CONCLUSION

For the foregoing reasons, the University respectfully submits that the Bureau's September 20, 2016 Unit Determination Order – Community of Interest, as amended by its November 29, 2016 Ruling on Request for Reconsideration, is immediately subject to certiorari review under Minn. Stat. § 179A.051.

Dated: January 9, 2017

Respectfully submitted,

FREDRIKSON & BYRON, P.A.

/s/ Karen G. Schanfield
Karen G. Schanfield (#096350)
Krista A.P. Hatcher (#387835)
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402
(612) 492-7000
Fax: (612) 492-7077
kschanfield@fredlaw.com

DOUGLAS PETERSON
General Counsel (#14437X)
University of Minnesota

By /s/Shelley Carthen Watson
Shelley Carthen Watson (#0216902)
Senior Associate General Counsel
360 McNamara Alumni Center
200 Oak Street SE
Minneapolis, MN 55455-2006
(612) 624-4100

Attorneys for Regents of the University of Minnesota

60400785