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 SUPPORT OF MOTION FOR STAY** Court of Appeals Case No.: A16-1985 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

INTRODUCTION

This appeal arises from a decision of the Minnesota Bureau of Mediation Services (the "Bureau") to expand the statutorily defined bargaining unit of approximately 1,800 Twin Cities faculty at the University of Minnesota (the "University") by adding more than 1,000 non-faculty employees for purposes of a union representation election. The Bureau's unprecedented decision is set forth in the Unit Determination Order – Community of Interest (the "Unit Determination Order" or the "Order") of September 20, 2016.

At the heart of the controversy is the Bureau's decision to bypass the language of the state law that establishes bargaining units for the University to accommodate the wishes of a union that seeks to represent nearly 3,000 faculty and non-faculty employees

in the same bargaining unit. The Bureau and the Service Employees International Union, Local 284 ("SEIU" or the "Union") want to press forward towards an election before this court completes its review of the Order. In light of the Court's January 24, 2016 Order confirming that the University is entitled to appellate review before the results of the election are certified, the University asks that this Court stay all proceedings before the Bureau until the Court's review is completed. Without a stay the University's right to a meaningful appeal of this critical issue is lost, public dollars are spent needlessly, and University employees' right to an informed choice when casting a ballot.

The University does not dispute that its employees have the right to choose or reject union representation. In fact, the University has respectful and productive working relationships with its represented employees on all five of its campuses, including the faculty on the Duluth and Crookston campuses. The University does, however, legitimately expect that all of its employees will be allowed to make that choice in a secret ballot election in a bargaining unit established by the Minnesota Legislature and codified in the Public Employment Labor Relations Act ("PELRA"), Minn. Stat. Ch. 179A, and that the contours of the bargaining unit will be known to employees before they cast their ballots.

The Bureau and SEIU circumvented the legislatively-designed bargaining units by tying together all of the employees who provide "instruction" of some kind to University students. While that is a link that the Union and the Bureau might employ in other work settings, it fundamentally undermines the statutory mission of the University of Minnesota, as set forth in the University's charter and advanced by PELRA. The core

mission of the University rests with its faculty. They are the heart of the University. They shoulder all three parts of the mission of our land grant mission: research, teaching, and service. The Bureau and SEIU are jeopardizing what it means to be a university by mis-reading Minnesota law in a way that compromises the University's core principles and waters down the unique attributes of the faculty.

Both the faculty and the non-faculty employees should have the right to vote on union representation–just not as one unit in one election. The charter mission of the University of Minnesota is at stake.

A. The Bureau Misconstrues PELRA.

The Minnesota Legislature long ago created separate bargaining units for University faculty. Recognizing their unique role in the state's premier research institution, the Legislature reserved a separate bargaining unit, known as "Unit 8," for Twin Cities faculty. PELRA reflects that faculty are uniquely responsible for delivering and advancing all three parts of the University's interrelated public missions of research, teaching, and service. Faculty shape the University by advancing the boundaries of knowledge, training the graduate students who become the next generation of scholars, furthering the state's economy, and creating solutions that address the challenges of our world that transcend local and national borders. The terms and conditions of faculty employment alone are protected by the University's Tenure Code, which gives faculty the freedom to chart their own course and the responsibility to do it so well that they develop national and international recognition in their fields.

In contrast, employees in the four non-faculty job classifications that the Bureau added to Unit 8 (the "Disputed Teaching Classifications") are classroom instructors who are primarily responsible for teaching undergraduate courses. Their contributions are important to the University's success, as are the contributions of its researchers, graduate assistants, counselors, and others who serve the needs of University students and the educational enterprise. But, as the Legislature recognized, these employees are not faculty or even sufficiently similar to faculty that they are placed in the same bargaining unit. Their work contributes to, but does not define, the University or establish its identity as a top public research institution. The Bureau has consistently disregarded this fundamental distinction.

B. The Bureau Seeks to Proceed Towards an Election.

In a clear effort to avoid timely review by the Court of its unauthorized attempt to reconfigure the bargaining units established by the Legislature, the Bureau seeks to proceed towards an election even while this appeal is pending. Proceeding towards an election before this Court rules on the legality of the Bureau's Order is not only inconsistent with state law, but deprives the University of its right to a meaningful appeal and denies individual employees a fair vote. Rather than allow the core issues to benefit from judicial review, the Bureau is pressuring the University to implement the Bureau's unit-defining order in ways that make it hard to undo—particularly once unit members are asked to vote on what is, at best, an election that is contingent on judicial review. That pro-union tactic is not fair to the significant legal questions now squarely before this Court.

The Bureau argues that the Union and University employees are entitled to a speedy election,[1] conveniently overlooking that its actions are largely responsible for the time that has passed since the Union filed its representation petition. It is indeed ironic that the Bureau now treats proceeding to an election as an urgent matter that supersedes all else. The Bureau took more than a month to act on the Union's request to add the Disputed Teaching Classifications to the bargaining unit, another six months to issue the Order, and over two months to act on the University's Request for Reconsideration of the Order, and then did so only after being directed by the Court to act promptly. Moreover, its challenge to this Court's jurisdiction even after the Court had already ruled on the issue caused further unnecessary delay.

By creating an artificial bargaining unit using an unbalanced process, the Bureau generated legal and factual issues of first impression that even it has acknowledged must be resolved before an election can be conducted. The issues are complex and require careful and thoughtful review. The Bureau has failed to engage in thoughtful analysis or address the issues preliminary to an election in a constructive or meaningful fashion. To date it has issued five separate orders and directives for the University to produce information, arbitrarily reversing course and placing inconsistent demands on the University as the Bureau lurches towards its stated goal of conducting an election as soon as possible. In the process it has ignored the University's repeated offers to meet with

[1] (See Ruling on Request for Reconsideration, In re Pet. For Determination of An Appropriate Unit & Certification as Exclusive Representative, BMS Case No. 16PCE0644, at 10 (BMS Nov. 29, 2016) ("Reconsideration Ruling"); Affidavit of Karen G. Schanfield ("Schanfield Aff.") Exs. A & B.)

both it and the Union to explain the way in which the University maintains the relevant data and discuss ways in which the University can provide the information that is legitimately needed to determine voter eligibility.

C. The Bureau Ignores the Wishes of the Faculty.

The Bureau's haste—and its obvious desire to proceed to an election before this Court determines whether the bargaining unit it created withstands judicial scrutiny—is especially troubling in light of the recent activity of an independent group of University faculty, UMN Faculty Excellence. This group has gathered signatures from at least 631 tenured and tenure-track University faculty, representing more than one-third of the faculty in Unit 8.[2] (Not. & Pet. to File an Amicus Curiae Br. By UMN Faculty Excellence at 2 (Dec. 29, 2016).). UMN Faculty Excellence vigorously opposes the addition of the Disputed Teaching Classifications to Unit 8. (Schanfield Aff. Ex. E.) In fact, in October 2016, UMN Faculty Excellence filed a Petition for Exclusion or Severance with the Bureau asking that tenure and tenure-track faculty be severed from

[2] UMN Faculty Excellence was granted appearance status by the Bureau in October 2016. (See Schanfield Aff. Ex. C.) Under Bureau rules, appearance status allows "a nonparty having an interest in a matter before the commissioner to participate in bureau proceedings." Minn. R. 5510.0310, Subp. 3. However, the Bureau has failed to notify UMN Faculty Excellence of important communications and rulings. For example, although UMN Faculty Excellence submitted a letter to the Bureau concurring in the University's request for a stay, counsel for UMN Faculty Excellence was not copied on the Bureau's January 3, 2017 Ruling on Request for Stay Pending Appeal. (Schanfield Aff. ¶ 5 & Ex. D.)

Unit 8 as modified by the Unit Determination Order.[3] (Id. Ex. C.) It is reasonable to assume that at least some members of UMN Faculty Excellence may favor union representation in a bargaining unit limited to faculty, but would vote differently in a bargaining unit that includes the Disputed Teaching Classifications. UMN Faculty Excellence has urged the Bureau to stay the proceedings to promote efficiency and the conservation of taxpayer resources, particularly in light of this Court's rejection of the argument made by the Bureau and the Union that the Court lacked jurisdiction until after certification of the election. (Id. Ex. G).

Against this backdrop the University asks the Court to stay all proceedings now pending before the Bureau. Simply put, the University seeks the Court's assistance in assuring that it and the nearly 3,000 faculty and staff that are affected by the Order have an opportunity for meaningful judicial review of an agency decision that overrides the Legislature's determination of the appropriate bargaining unit for University faculty. The Court should not allow administrative agency action that is at odds with the requirements of a state law which has stood unchallenged for over thirty-five years to proceed without the constraints needed to assure an election that respects the informed wishes of the voters.

[3] The Bureau denied UMN Faculty Excellence's Petition, refusing to even recognize it as part of the record in this case. (Schanfield Aff. Ex. F.)

BACKGROUND

I. STATUTORY FRAMEWORK

The Public Employment Labor Relations Act ("PELRA") governs relationships between public employers, public employees, and the unions that represent public employees. Under PELRA, nearly all University employees are assigned to one of thirteen statutorily defined bargaining units.[4] Minn. Stat. § 179A.11, subd. 1. Seven of the thirteen bargaining units are currently represented by labor unions, including Unit 9, the bargaining unit for faculty at the University's outstate campuses. (Schanfield Aff. ¶ 53.) Unit 8 is comprised of University faculty "with the rank of professor, associate professor, assistant professor, including research associate or instructor, including research fellow, located in the Twin Cities campuses." Minn. Stat. § 179A.11, subd. 1(8). Unit 8 has never been represented for collective bargaining purposes. (Schanfield Aff. ¶ 53.) The two faculty bargaining units are the only University bargaining units where the Legislature specifically enumerated the job classifications included in the bargaining unit. See Minn. Stat. § 179A.11, subd. 1.

The Disputed Teaching Classifications—Lecturer, Senior Lecturer, Teaching Specialist, and Senior Teaching Specialist—have long been part of Unit 11, the Academic Professional and Administrative ("P & A") Staff Unit.[5] By statute, Unit 11 is

[4] Confidential and managerial employees are not assigned to a bargaining unit. Minn. Stat. § 179A.11, subd. 1.

[5] Prior to 1991, the University's P & A employees and civil service employees were assigned to a single bargaining unit. The current Unit 11 for P & A employees was added

comprised of "all academic professional and administrative staff positions that are not defined as included in an instructional unit, the supervisory unit, the clerical unit, or the technical unit." Minn. Stat. § 179A.11, subd. 1(11). Unlike Unit 8, Unit 11 is not limited to employees on the Twin Cities campus. See id.

II. PROCEDURAL HISTORY

Upon receipt of a union representation petition, the Bureau is charged with determining whether the petition is supported by sufficient evidence that at least 30 percent of the employees in the appropriate bargaining unit wish to be represented by the petitioning union. Minn. Stat. § 179A.12, subds. 3, 5, 6. If so, the Commissioner holds hearings to determine the rights of the affected employees and the employer, ultimately identifying the individual employees who are eligible to vote and issuing an election order. It then oversees the election, counts the ballots that it determines are valid, and certifies the results. Application of these procedures to Unit 8 faculty is relatively straightforward.

A. The Union Seeks to Add Non-Faculty Employee Job Classifications to Unit 8.

On January 20, 2016, the Union filed a petition with the Bureau requesting certification as the exclusive representative of Unit 8. (Schanfield Aff. Ex. I.) On February 3, 2016, it informally asked to reassign selected job classifications from Unit 11

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to PELRA by amendment in 1991 at the request of the Minnesota Association of Professional Employees. 1991 Minn. Laws Ch. 77, § 1. (Schanfield Aff. Ex. H.)

to Unit 8 for purposes of the election,[6] ultimately identifying ten non-faculty job classifications that it wanted the Bureau to reassign to Unit 8. (Id. ¶ 11.)

When the University objected, the Bureau requested briefs from the parties as to its authority to act on the Union's request. (Schanfield Aff. Ex. K.) The University argued that Unit 8 is limited to the specific faculty ranks listed in Minn. Stat. § 179A.11, subd. 1(8) based on the plain language of PELRA, well-documented legislative history, and Bureau precedent. (Id. Exs. L & M.) The University also argued that the statutory precondition in Minn. Stat. § 179A.10, subd. 4—that the classifications in question had not been assigned—was not met because the Disputed Teaching Classifications have been assigned to Unit 11 since it was created. (Id.)

On March 15, 2016, the Bureau rejected the University's arguments. Despite clear evidence to the contrary, it held that the Disputed Teaching Classifications had not been previously assigned and ordered a lengthy hearing to determine whether a community of interest exists between these job classifications and Unit 8 faculty.[7] (Schanfield Aff. Ex.

[6] Specifically, the Union sought "[a]ssignment of Twin Cities instructional classifications that are not referenced in the statute to Unit 8 based on community of interest pursuant to Minn. Stat. Sec. 179A.10, Subd. 4." (Schanfield Aff. Ex. J.)

[7] If a prerequisite for the Bureau to assign classifications is met, the assignment must be made "on the basis of the community of interest" of the employees in the classifications to be assigned with those in the unit to which they may be assigned. Minn. Stat. § 179A.10, subd. 4. PELRA identifies the following factors to be used in determining the appropriateness of a proposed unit: the principles and the coverage of uniform comprehensive position classification and compensation plans of the employees; professions and skilled crafts, and other occupational classifications; relevant administrative and supervisory levels of authority; geographical location; history; extent of organization; the recommendation of the parties; and other relevant factors, with

N.) The University promptly requested reconsideration of the Bureau's ruling and a stay of the proceedings pending the Bureau's decision. (Id. Ex. O.) A week later, even before ruling on the University's request,[8] the Bureau issued an Order for Hearing Schedule for four weeks of hearing "on the community of interest issue" to determine whether the P &A classifications identified by the Union should be included in Unit 8. (Id. Ex. Q.)

B. The Bureau Conducts A Community Of Interest Hearing.

Bureau Hearing Officer Jill Kielblock conducted the Community of Interest hearing on 13 days between April 19 and May 13, 2016. (Schanfield Aff. ¶ 17 & Ex. R.) The Union bore the burden of proving a community of interest between the majority of members in each of the Disputed Teaching Classifications and the faculty in Unit 8. Minn. Stat. § 179A.10, subd. 4 (Id. Ex. R.) The evidence the Union presented fell far short of meeting this standard.

In fact, the University demonstrated that Unit 8 faculty play a unique and central role in leading the state's flagship institution in its land grant mission of teaching, research, and service, and that employees in the Disputed Teaching Classifications play a limited role, one that is primarily confined to teaching undergraduate courses. (See Schanfield Aff. Ex. S.) In addition, the University reiterated that the Bureau lacks jurisdiction to determine the community of interest question under PELRA because the

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particular importance placed on the history and extent of organization and the desires of the petitioning employee representatives. Minn. Stat. § 179A.09, subd. 1.

[8] On March 25, 2016, the Bureau denied the University's request for reconsideration of its March 15, 2016 Ruling. (Schanfield Aff. Ex. P.)

Disputed Teaching Classifications had previously been assigned to Unit 11. (Id.) Finally, the University argued that it was technically impossible for SEIU to demonstrate a community of interest between the *majority* of members of each Disputed Teaching Classification with the incumbent members of Unit 8 because the number of employees in each of the Disputed Teaching Classifications had not been established. (Id.)

C. The Bureau Moves The Disputed Teaching Classifications To Unit 8.

On September 20, 2016, approximately six months after ordering the Community of Interest hearing, the Bureau issued the Unit Determination Order that is the subject of this appeal. (Schanfield Aff. ¶ 19.) Confirming the Bureau's unfounded view that it had jurisdiction to conduct the community of interest inquiry, it expanded Unit 8 to include classifications not enumerated in Minn. Stat. § 179A.11, subd. 1(8). (Unit Determination Order at 30-31.) The Bureau ordered the job classifications of Lecturer, Teaching Specialist, Senior Lecturer, and Senior Teaching Specialist added to Unit 8. (Id.)

The University submitted a Request for Partial Reconsideration[9] on September 28, 2016. (Schanfield Aff. Ex. T.) The University also asked the Bureau to stay the

[9] Six of the ten classifications at issue are in the University's Extension program. The Bureau held that the Extension classifications were not properly included in Unit 8. (Unit Determination Order at 30-31.) SEIU did not appeal that determination. (Schanfield Aff. ¶ 19.)

proceedings in the interim; the Bureau preliminarily denied the request for a stay the following morning.[10] (Id. & Ex. U).

D. The University Appeals the Unit Determination Order.

On October 17, 2016, the University sought an appeal of the Unit Determination Order.[11] (See Pet. for Writ of Cert., In re Pet. for Determination of an Appropriate Unit & Certification as Exclusive Representative, A16-1666 (Minn. Ct. App. Oct. 17, 2016).) On November 15, 2016, this Court held that the Unit Determination Order is an appealable final order relating to the appropriateness of a unit, and dismissed the appeal without prejudice because the parties agreed that allowing the Bureau to rule on the University's pending Request for Reconsideration promoted judicial economy. (Order, In re Pet. for Determination of an Appropriate Unit & Certification as Exclusive Representative, A16-1666 (Minn. Ct. App. Nov. 16, 2016).) On November 29, 2016, the Bureau denied the University's Request for Reconsideration. The Bureau's ruling consisted of a defense of the Unit Determination Order and the correction of one typographical error. (See generally Reconsideration Ruling.)

This appeal was filed on December 15, 2016. Although the Bureau and the Union challenged this Court's prior ruling on jurisdiction, the matter is now squarely before the

[10] The Bureau subsequently confirmed its denial of the request for a stay when it denied the University's Request for Reconsideration on November 29, 2016. (Reconsideration Ruling at 10.)

[11] UMN Faculty Excellence, the independent group of University faculty represented by Jessica Roe, Esq., filed a Notice and Petition to File *Amicus Curiae* brief with this Court on November 1, 2016.

Court. See Order (Jan. 24, 2017). The same day that it filed this appeal the University asked the Bureau to stay an election and further proceedings that are preliminary to an election, including requiring the University to gather significant amounts of additional data related to the nearly 3,000 potentially eligible voters for three academic semesters, participate in hearings, submit legal memoranda, and attend meetings that focus on the eligibility of individual employees in the Disputed Teaching Classifications to vote, until this Court rules on the University's appeal. (Schanfield Aff. Ex. V.)

E. The Bureau Continues to Move to an Election.

On January 3, 2017 the Bureau denied the University's request for the stay. (Schanfield Aff. Ex. W.) It premised its decision on its view that the Court does not have jurisdiction of this appeal, disregarding this Court's prior determination. The Bureau again noted the importance of conducting representation proceedings promptly.

As it moves toward an election, the Bureau must first resolve the several complex issues that bear upon identification of eligible voters. Its efforts to do so began with a letter dated September 23, 2016,[12] in which it requested the parties to submit statements of their positions on eight open issues and issued its first directive that the University produce voluminous data regarding the potential voters in the expanded bargaining unit.[13]

[12] Even before issuing the September 23, 2016 letter, the Bureau had authorized the disclosure of extensive amounts of information by both parties pursuant to administrative subpoenas of March 9, 2016, March 10, 2016, March 15, 2016, and March 22, 2016. (Schanfield Aff. ¶ 25.)

[13] The Bureau ordered that the University:

(Schanfield Aff. Ex. X.) The Bureau conducted a pre-hearing conference on October 18, 2016, seeking to resolve some or all of the outstanding issues. (Id. ¶ 27.) Only one substantive issue was resolved at the pre-hearing conference, although the Bureau indicated how each of the remaining issues would be resolved, whether on the parties' written submissions or by means of a hearing. (Id.)

Since the prehearing conference, the Bureau has issued four separate Orders that require the University to produce significant amounts of data primarily related to the Disputed Teaching Classifications.[14] The most complex and time-consuming open issue is the identification of employees who are ineligible to vote because they are part-time employees who work fewer than 14 hours per week or 35 percent of the normal work week in the applicable bargaining unit. See Minn. Stat. § 179A.02, subd. 14(a)(5). This issue primarily affects the Disputed Teaching Classifications. Nearly all faculty satisfy the statutory standard because the University's Tenure Code requires tenured and tenure-

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> Be prepared to present a list in paper and electronic form at the pre-hearing conference that includes all of those potentially eligible pursuant to the unit defined in the Bureau's September 20, 2016 order who are employed for the current semester (Fall 2016) along with those who were employed during the 2015-2016 school year for which there is a reasonable expectation of employment during the 2016-2017 school year. The list should include an indication of those the University believes should be excluded due to their supervisory (Minn. Stat. §179A.03, Subd.17) or confidential (Minn. Stat. §179A.03, Sub. 4) status and those that should be excluded as not meeting the definition of a public employee (Minn. Stat. §179A.03, Subd. 15 [sic]).

(Schanfield Aff. Ex. Y.)

[14] The Orders are dated October 31, 2016, December 2, 2016, December 12, 2016, and January 12, 2017. (See Schanfield Aff. Exs. Z, AA & BB, & CC.)

track faculty to hold appointments of at least two-thirds time. (See Schanfield Aff. Ex. DD.) No such requirement applies to employees in the Disputed Teaching Classifications. The resolution of this issue requires complex data collection and analysis and will be rendered moot if the University prevails on appeal. A stay of all proceedings is necessary because this and other issues related to the determination of the employees who are by law eligible to vote is inextricably intertwined with issuance of an order for an election, conducting an election, and certification of election results.

ARGUMENT

I. STANDARD ON MOTION TO STAY.

Enforcement of the Bureau's decisions may be stayed in accordance with the appellate rules. Minn. R. App. P 108.01, subds. 1-2. The University first sought a stay with the Bureau. See Minn. R. Civ. App. P. 115.03, subd. 2(b); Minn. R. Civ. App. P. 108.02, subd 1. It did so despite representations from the Bureau's Commissioner that no stay would be granted. (Schanfield Aff. ¶ 22.)

A stay should be granted where, as here, the balance of interests favors the appealing party in "preserving the status quo, so that effective relief will be available if the appeal succeeds, against the interest of the . . . prevailing party in enforcing the decision and ensuring they remain 'secure in victory' while the appeal is pending." DRJ, Inc. v. City of St. Paul, 741 N.W.2d 141, 144 (Minn. Ct. App. 2007).

II. A STAY PROMOTES IMPORTANT PUBLIC INTERESTS AND DOES NOT DISADVANTAGE THE UNION OR THE BUREAU.

In permitting review by certiorari of any Bureau decision "relating to . . . appropriateness of a unit" before a union representation election is held, the Minnesota Legislature recognized the civic importance of orderly and constructive labor relationships between public employers and their employees. Minn. Stat. § 179A.01. The University respectfully requests that the Court grant its motion for a stay pending resolution of this appeal to serve this important public interest and assure that the nearly 3,000 employees who are affected have the opportunity for a secret ballot election in a legally recognized bargaining unit. A stay also serves the interests of governmental economy and avoids the expenditure of additional time and public resources to resolve the factual and legal issues related to the Disputed Teaching Classifications now pending before the Bureau, which may well be rendered moot by judicial review.

A. A Stay Promotes Important Public Interests.

The Bureau's decision to deny each of the University's requests for a stay of its proceedings, often without time for reflection, highlights its overriding interest in providing a union representation election without regard to its legal authority to do so or an assurance that the factual and legal underpinnings on which it rests are accurate.[15] The

[15] Ironically, while requiring the parties to move forward, although not always in a linear fashion, the Bureau refuses to assure that the most fundamental prerequisite for an election has been met, repeatedly indicating that it will not confirm in writing that the Union has satisfied the legally required "showing of interest." This is a legitimate concern since the bargaining unit has nearly doubled in size since the representation petition was filed and the University has requested this confirmation on September 28,

Bureau seeks to proceed toward an election as quickly as possible, denying the University's right for meaningful and timely review of the Bureau's ill-considered decision to expand Unit 8 in a manner that is both unprecedented and contrary to law.

Fairness requires pausing the agency process at this juncture. Identifying individual employees who may hypothetically be eligible to vote[16] in a disputed bargaining unit before the Court determines whether the Order on which it is based is a valid exercise of agency authority is simply irresponsible. Not only does proceeding towards an election while this appeal is pending risk misleading thousands of public employees, it precludes accurate identification of the employees who will meet the statutory voting eligibility requirements at the time of the election. Determining voter eligibility before this Court rules disregards the fluid nature of employment in the Disputed Teaching Classifications, whose ranks are often filled by the semester or by the academic year. Identifying employees as eligible voters far in advance of an election necessarily means that some employees will move out of the ranks of eligible voters and others will move in. The integrity of the voting process and the outcome of the election

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2016, September 29, 2016, October 1, 2016, and October 18, 2016. (Schanfield Aff. ¶ 32.) UMN Faculty Excellence has made the same request on several occasions, most recently on January 19, 2017, only to have each of its requests summarily denied. (Id. Ex. EE).

[16] Voter eligibility within the petitioned-for unit turns on various factors, including, but not limited to, whether an individual is a supervisory employee, whether the individual works sufficient hours to be considered a "public employee" within the meaning of PELRA, and the employee's status at a yet to be determined cut-off date.

require that the employees who receive ballots are actually eligible to vote at the time of the election, rather than at some arbitrarily determined date.

Had the Bureau not acceded to the Union's request to expand the bargaining unit, the proceedings would have been straightforward and the union election could have been conducted months ago. While the University has always stood ready to proceed to an election in statutory Unit 8 on short notice, the situation presented to it leaves little choice but to seek a stay while this Court considers whether University faculty and the employees in the Disputed Teaching Classifications should remain in the separate bargaining units that the Legislature created and that have remained undisturbed for decades. Its fundamental purpose in doing so is to avoid proceeding with an election that is unsupported by the law and interferes with its role as a land grant institution whose faculty is uniquely responsible for the University's interrelated public missions of research, teaching, and service.

B. A Stay Assures an Orderly Process and Promotes Efficiency.

By adding employees outside of the statutory bargaining unit to Unit 8, the Bureau created unprecedented legal and factual issues that must be resolved before an election can be conducted. To date, the Bureau has made little progress in resolving these issues despite holding many days of hearings, and receiving thousands of pages of evidence, extensive amounts of data, legal memoranda and other written submissions on a range of topics. Without the Court's intervention to stay these proceedings, more hearings, more legal memoranda, and the production of more data can be expected.

As the University has repeatedly advised the Bureau, a considerable portion of the information it has ordered the University to produce requires an individualized inquiry into the thirteen affected colleges and administrative units, and in some cases, individual University departments. (Schanfield Aff. ¶ 34.) The University estimates that it will take hundreds of employee hours to compile the information sought by the Bureau. (Id.) The University has worked diligently to comply with the Bureau's requests in a timely fashion despite the fact they are ambiguous, inconsistent with one another, and do not reflect the reality and complexity of the University's data management systems. (Id. ¶ 34 & Ex. FF.)

For example, the Bureau's Supplemental Order for Production of Information of December 12, 2016 (the "December 12, 2016 Order"), required the University to create multiple spreadsheets that, for the first time, identified the number of credits taught by each of the employees who may potentially be eligible to vote. (See Schanfield Aff. Ex. CC.) In the December 12, 2016 Order, the Bureau abandoned the two prior orders that required the University to create spreadsheets reflecting the Full Time Equivalent for each of these employees, stating that it had now determined that this approach was "unworkable" and ignoring the voluminous data the University had already submitted pursuant to the Bureau's previous Orders. (Id. Ex. CC; see also id. Ex. FF.)

The University objected to the December 12, 2016 Order on various grounds. (Schanfield Aff. Exs. GG & HH.) Not only is the legal basis for the use of a credit hours

standard in this instance tenuous,[17] but the University does not use credits for other purposes, such as such as determining eligibility for benefits and leaves, and thus does not maintain the information in the form the Bureau seeks. (Id.)

In response, the Bureau called a meeting with the parties' attorneys on December 23, 2016 and agreed to replace its three prior Orders for Production of Information with a revised order. (Schanfield Aff. ¶ 38.) At the Bureau's instruction, counsel for the University prepared a draft revised order reflecting the content of the December 23, 2016 meeting. (See id. ¶ 38, Exs. II, JJ.) After the Union submitted its voluminous comments on and substantial revisions to the draft revised order, the University made several objections to the Bureau; *inter alia*, the University objected to the Union's continued and inappropriate focus on credit hours in order to determine "public employee" status. (Id. Exs. II, KK, LL, MM.)

The Bureau issued the Revised Order for Production of Information on January 12, 2017. (Schanfield Aff. Ex. NN.) Despite the University's objections, the Bureau again reversed itself, now requiring submission of information regarding credit hours taught by instructional employees. In addition, the Revised Order for the first time adds an additional requirement, the submission of information regarding the number of courses taught by instructional employees. These two changes require the University to abandon the substantial efforts it had undertaken under the prior Orders and to instead create

[17] Although PELRA provides for a credit hour standard for certain employees of the Minnesota State Colleges and Universities system, Minn. Stat. §179A.03, subd. 14(11), it does not include a similar standard for University of Minnesota faculty or employees.

additional information primarily related to the Disputed Teaching Classifications that it does not maintain in its normal course of operations. Moreover, the Revised Order did not extend the deadlines proposed at the December 23, 2016 meeting to reflect the substantial additional burdens that the Revised Order for Production of Information, as issued by the Bureau, imposes. The University objected to the Revised Order for Production of Information for these and other reasons by letter on January 18, 2017 and provided affidavits from three University officials explaining the limitations imposed by the structure of its data management systems to deal with the Bureau's unreasonable demands. (Id. Ex. OO.) To date the Bureau has not responded to the University's objections.

While the University acknowledges the Bureau's willingness to void the inconsistent and ambiguous directives and orders it issued previously, the University has good reason to ask the Court to intervene. It seeks the Court's help to assure that the Legislature's bargaining unit construct is satisfied, avoid the confusion that has marked these proceedings to date, and limit the unnecessary expenditure of additional resources to create and provide data, legal memoranda, prepare for possible hearings, and participate in additional proceedings that are ill-conceived and will be rendered moot if the University prevails on appeal.

If the Unit Determination Order is reversed on appeal, an election conducted in the unit defined by the Order will be invalid because the employees voting in the election do

not properly constitute an "appropriate unit" under PELRA.[18] See Minn. Stat. § 179A.12, subd. 7 (authorizing the Commissioner to issue an order for election only with respect to "a designated appropriate unit"). Proceeding with an election—especially one involving thousands of employees—knowing that the results may be invalid is wasteful, compromises the University's ability to conduct its academic operations, and overlooks the real confusion that doing so will cause for University employees and their families.

Employees who are told they are eligible to vote will legitimately ask: Are they voting for a union representing the interests of faculty only or are they voting for a union that extends nearly 1000 votes to non-faculty employees? Are the voters asked to be held to their vote no matter how this Court rules? Will this Court's Order re-shape the unit in some other way?

These are questions that employees should not face. In the Bureau's own words, 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

[18] Even if the Bureau were to proceed with an election while the appeal is pending, it could not issue an order certifying the results of that election until this Court rules on the University's appeal, and then only if this Court finds that the Bureau did not err in its determination. Under Minnesota Rule of Civil Appellate Procedure 108.01, subd. 2, the filing of the appeal suspended the Bureau's authority "to make any order that affects the order or judgment appealed from," such that it has jurisdiction over independent, supplemental, or collateral matters only. See also Little v. Arrowhead Regional Corrections, 773 N.W.2d 344, 345-46 (Minn. Ct. App. 2009) (applying Minn. R. Civ. App. P. 108.01 to a certiorari appeal of an agency decision).

Minn./Crookston Campus and University of Minnesota and University Education Assoc., BMS Case Nos. 97-PCE-444 and 97-PCE-458 (Oct. 25, 1996)[19] (emphasis added).

Continuing to advance toward an election in these circumstances undermines PELRA's stated policy of "promot[ing] orderly and constructive relationships between" the University and its faculty and employees. See Minn. Stat § 179A.01. A stay, on the other hand, will ensure a fair and orderly process.

C. A Stay Does Not Prejudice the Bureau or the Union .

The Bureau argues that the representation election should not be delayed by the University's appeal because the election should be conducted promptly. The Bureau's argument ignores the months of delay it has caused. Not only did the Bureau take over a month to decide whether to hold a community of interest hearing, it took approximately six months after ordering the hearing to issue a decision. The Bureau has further delayed the proceedings by challenging this Court's jurisdiction under Minn. Stat. § 179A.051(a) after the Court had ruled on this issue. It flouted the Legislature's determination that this Court has jurisdiction at this stage of the proceedings, just as it flouted the Legislature's determination of the appropriate bargaining unit for University faculty, reflecting its failure to recognize and abide by the limits of its own authority.

Beyond the delays it caused, the Bureau has largely ignored, and in some cases flatly denied, the University's attempts to expedite the process by meeting with it and the

[19] NLRB and BMS orders in unrelated cases are attached to the Affidavit of Karen G. Schanfield as Exhibit VV.

Union so that the University can explain the significant discrepancies between what the Bureau seeks and what the University's data systems can readily provide. By failing to take advantage of the University's offers the Bureau has repeatedly missed opportunities to establish a more efficient process of identifying eligible voters.[20] All along, the University has sought to provide information that is reliable, replicable, and reflects the reality of its operations, rather than acceding to an arbitrary standard imposed by the Bureau. The Bureau should not now be heard to complain that this appeal is an unwarranted delay when it has repeatedly shown that it is unable to manage the administrative process in a consistent or meaningful fashion.

A stay allows this Court to consider the important question of public policy this case raises—whether the Bureau has the authority to reconfigure University bargaining unit that the Legislature established specifically for University faculty—before ballots are cast or counted. It imposes no harm on the Bureau in its role as a neutral state agency charged with overseeing these proceedings in an even-handed manner. In fact, providing the Bureau with additional time may enhance its ability to effectively address the unique and complex issues that its Order created. Nor does a stay unfairly prejudice the Union whose actions precipitated the need for the Court to intervene so that an orderly process

[20] The University's requests and offers to explain its data systems began as early as March 2016 (see Schanfield Aff. Ex. PP), and have been repeated several times since then, most recently at the October 18, 2016 pre-hearing conference conducted by Hearing Officer Kielblock and in conversations with Commissioner Tilsen between December 6 and December 12, 2016 (id. ¶ 46). The University reiterated its request to meet with representatives of the Bureau and the Union in letters to the Bureau dated December 13, 2016 and December 20, 2016. (Id.)

can occur. If the Court affirms the Order, the Union has not lost the ability to pursue a representation election in the bargaining unit it seeks. The Union is hard pressed to identify a legitimate harm that it will suffer if a stay of proceedings is imposed. Neither the chance that it may lose the opportunity to represent thousands of employees or a delay in receiving dues and other fees from University employees if it wins the election are legitimate bases for proceeding towards an election before this Court determines whether the bargaining unit the Union seeks to represent comports with Minnesota law.[21]

The University asks this Court to stay all proceedings before the Bureau so that it and its employees can obtain effective relief. It is fundamentally unfair to ask public employees to vote on union representation without knowing which job classifications are included in their bargaining unit. This lack of critical information renders the outcome of a vote before the Order's validity is determined unreliable, particularly where, as here, the interests of the two groups at issue are not aligned. The faculty are, by and large, full time employees. They are responsible for fulfilling the University's mission of teaching, research, and service each year. Nearly half of the employees in the Disputed Teaching Classifications, on the other hand, are part-time employees whose employment status and workload vary semester by semester. They are responsible for only the instructional portion of a faculty member's duties.

[21] To the extent that the Court is concerned that a stay will unfairly delay the election, the University respectfully submits that an expedited proceeding on the merits of the University's appeal can mitigate this concern.

The University submits that before its employees can fairly decide whether they want union representation, the bargaining unit must reflect the law and the reality of the University's operations, including the special and distinct role of faculty at the University. Staying the Bureau's proceedings at this stage, before critical decisions that bear upon the bargaining unit's eligible voters are made, is necessary to assure the transparency that is required for voters to make an informed decision.

III. THE UNIVERSITY IS LIKELY TO SUCCEED ON APPEAL.

The University's appeal rests on three general grounds: (1) Unit 8 is limited to the faculty classifications specified in Minn. Stat. § 179A.11, subd. 1(8); (2) the Bureau lacks jurisdiction to reassign the Disputed Teaching Classifications to Unit 8 because the statutory precondition for doing so has not been met; and (3) the Bureau erred in holding that the Union sustained its burden of demonstrating that the majority of employees in each of the four Disputed Teaching Classifications share a community of interest with the faculty in Unit 8. The bargaining unit sought by the Union, and approved by the Bureau, is beyond the parameters of PELRA and inconsistent with decades of decisions related to faculty bargaining units.[22]

A. Unit 8 Is Limited To Specific Faculty Job Classifications.

The Bureau's expansion of Unit 8 to include the non-faculty Disputed Teaching Classifications rewrites a key provision of PELRA, something only the Legislature has

[22] See Minneapolis College of Art and Design, NLRB Case No. 18-RC-182546, at 17-18 (Decision and Direction of Election, Sept. 23, 2016).

the authority to do. The Bureau's decision is contrary to the plain language of PELRA, which clearly states: Unit 8 encompasses "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." Minn. Stat. § 179A.11, subd. 1(8) (emphasis added). These are the ranks that comprise the University's faculty in its Tenure Code. (Schanfield Aff. Ex. DD.)

"The rules of statutory construction call upon [the Bureau] to give effect to all of the words of the law." Univ. of Minn. and AFSCME Minn. Council 5, BMS Case Nos. 09PCL0964, 09PCL0965, 09PCL0966, at 10 (July 13, 2010). The Bureau's disregard for the Legislature's decision to limit Unit 8 to specified faculty positions is not entitled to deference. See, e.g., Arvig Tel. Co. v. Nw. Bell Tel. Co., 270 N.W.2d 111, 114 (Minn. 1978) (holding that in reviewing questions of statutory construction, the appellate courts are not bound by the determination of an administrative agency).

Both the Lecturer and Teaching Specialist classifications existed in 1980. If the Legislature had intended to include those or other classifications in Unit 8, it could have done so, but it did not. Likewise, when the Legislature amended PELRA to create the P & A Unit (Unit 11) in 1991, Unit 8 remained limited to Twin Cities faculty and the Disputed Teaching Classifications were assigned to Unit 11 with the University's other P & A classifications. Indeed, the Disputed Teaching Classifications have never been in Unit 8, a fact the Bureau acknowledges. (Unit Determination Order at 27.)

By adding the Disputed Teaching Classifications to Unit 8, the Bureau rendered superfluous the faculty ranks listed in Minn. Stat. § 179A.11, subd. 1(8). Nowhere in

PELRA is there a provision for carving out certain desired job classifications from an existing unit and adding them to a different unit.

B. The Bureau Exceeded its Statutory Authority.

Even if Unit 8 were not limited to the faculty ranks specified in PELRA, the Bureau erred in assigning the Disputed Teaching Classifications to Unit 8 because the statutory prerequisite for doing so was not met. The Bureau's authority to assign University classifications is, by law, limited to two circumstances: (1) when the classifications have not been assigned or (2) the classifications have been significantly modified in occupational content subsequent to assignment. Minn. Stat. § 179A.10, subd. 4; see also IBEW Local No. 292 and University of Minnesota, BMS Case No. 87-PR-8 (June 29, 1987). On March 15, 2016, the Bureau ruled:

> The University is free to assign previously unassigned job classifications to unrepresented bargaining units for administrative purposes. However, in a contested case, such classification assignments are subject to review by the commissioner pursuant to Minn. Stat. 179A.10, Subd. 4.

(Schanfield Aff. Ex. N.)

The Bureau erroneously determined that the Disputed Teaching Classifications have not been assigned.[23] In fact, the Disputed Teaching Classifications were assigned to

[23] In addressing the Bureau's jurisdiction to assign the Disputed Teaching Classifications, the Unit Determination Order also concluded "evidence demonstrates a significant modification in the occupational content of some classifications the University grouped as Academic Professionals." This was a substantial error because not only did the Bureau fail to provide notice to the parties that the question of significant modification in occupational content subsequent to assignment was at issue, but the Bureau's conclusion is unsupported by the greater weight of the evidence.

Unit 11 decades ago. Over thirty-five years ago, on July 24, 1980, the University notified the Bureau that it had assigned the classifications of Lecturer and Teaching Specialist to Unit 11.[24] (Schanfield Aff. Ex. QQ.) The Bureau has never challenged the University's assignment. Furthermore, when the Legislature created the current Unit 11 in 1991, it indisputably did so specifically for the P & A classifications that had previously been part of a bargaining unit with the University's civil service employees. (See id. Exs. RR & TT.) This includes the Disputed Teaching Classifications, which were identified on a list of P & A classifications the University provided to the Legislature.[25] (Id. Ex. TT.)

Because the Disputed Teaching Classifications have already been assigned, the prerequisite for the Bureau to reassign those classifications to Unit 8 has not been met and proceedings on this petition involving the Disputed Teaching Classifications are outside the Bureau's jurisdiction. See Minn. R. 5510.1910, subp. 2 ("Hearings or

[24] PELRA was substantially amended in 1980. The 1980 law directed the University to "petition the director [of the Bureau] within 90 days of the effective date" of the amendments, indicating the University's position with respect to "the allocation of all positions to the units provided" in the law. 1980 Minn. Laws ch. 617, § 40, p. 1604. At the time of the 1980 amendments to PELRA, Unit 11 encompassed job classifications in the University's civil service personnel category. In December 1980, the University's Board of Regents approved the creation of a new personnel category for academic professional and administrative staff. (Schanfield Aff. Ex. RR.) Thus, from December 1980 until PELRA was amended in 1991, Unit 11 included both civil service and P & A employees. When the current Unit 11 for P & A employees was added to PELRA in 1991, civil service employees became part of Unit 12, the Noninstructional Professional Unit. See Minn. Stat. § 179A.11, subd. 1(12). (See also Schanfield Aff. Ex. S at 38 n.31.)

[25] The list provided to the Legislature in 1991 identified Teaching Specialists and Lecturers, but not Senior Teaching Specialists and Senior Lecturers because the "senior" classifications were created as career paths for Lecturers and Teaching Specialists after the P & A Unit was established in 1991. (Schanfield Aff. Exs. RR, UU.)

investigations shall address all issues raised by a valid petition that are within the jurisdiction of the commissioner.").

C. The Union Did Not Prove Community Of Interest.

The Bureau also erred in concluding that the Disputed Teaching Classifications share a community of interest with the faculty in Unit 8. See Minn. Stat. § 179A.09. As a threshold issue, the Bureau lacked the most basic information necessary to determine whether the Union could meet its burden. PELRA requires the Union to demonstrate that a *majority* of employees in each of the Disputed Teaching Classifications share a community of interest with the faculty in Unit 8. Minn. Stat. § 179A.10, subd. 4. However, because the Bureau has not yet decided—or even held hearings on—which employees meet the definition of an "employee" under Minn. Stat. § 179A.02, subd. 14(a)(5), neither the parties nor the Bureau currently knows the number of employees in each of the Disputed Teaching Classifications. Without this information, the Bureau cannot say that the Union met its burden of proof.[26]

In reassigning non-faculty job classifications to Unit 8, the Bureau also misapplied PELRA's statutory text and its own long-standing precedent. Further, the Bureau's Order was arbitrary, capricious, and contrary to law.[27] Despite not having the burden of proof,

[26] Notably, the Union's case that there is a community of interest rested on the testimony of fifteen people who primarily described their own individual circumstances. The Union did not show—or even attempt to show—that those employees were a representative sample of all employees in the Disputed Teaching Classifications.

[27] The University will address the deficiencies in the Order in greater detail in its memorandum on the merits of this appeal.

the University presented overwhelming evidence over 13 days of hearings demonstrating the unique role the University's faculty play in delivering and advancing all three parts of the University's public missions of research, teaching, and service. The University seeks an opportunity to prove its case to this Court without being prejudiced by the Bureau's efforts to force a hasty and ill-conceived election.

CONCLUSION

For the reasons set forth above, the University respectfully requests that this Court promptly issue an Order staying the Bureau's Unit Determination Order and all further proceedings before the Bureau pending resolution of this appeal. To proceed with an election or the prerequisites to an election before this Court rules on the pending appeal deprives the University and its employees of the right to a meaningful appeal to the courts to interpret state law that has been misconstrued by an administrative agency and denies voters the opportunity to be fully informed before ballots are cast.

[Signature block on following page]

Dated: January 27, 2017

Respectfully submitted,

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