

**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 REPLY
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

The Bureau of Mediation Services (“BMS” or the “Bureau”) and the Service Employees International Union, Local 284 (“SEIU” or the “Union”) split their responses to the Regents of the University of Minnesota’s (the “University”) motion for stay between emphasizing the appellate standard of review—abuse of discretion—and blaming the University for the protracted and circuitous administrative process below.¹ Neither of these avenues of argument is persuasive. In fact, the administrative record is rife with examples of the Bureau’s abuses of discretion, including in repeatedly denying

¹ While the responses contain numerous factual errors, particularly the Union’s characterizations of the University’s actions, these factual errors are not addressed in this Reply Brief as they are not material to the issue now before the Court.

the University's well-founded requests for stay. These actions, not the University's conduct, have caused the delay in the administrative proceedings below. For the reasons articulated in its Memorandum in Support of Motion for Stay and those stated below, the University respectfully requests that this Court order the administrative proceedings before the Bureau to be stayed pending the outcome of this appeal.

ARGUMENT

The Bureau should grant a stay where 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).² This Court reviews for abuse of discretion. The Bureau abuses its discretion when it applies an incorrect legal standard or when it relies on erroneous legal assumptions. See City of N. Oaks v. Sarpal, 797 N.W.2d 18, 24 (Minn. 2011) (it is an abuse of discretion to render a decision “based on an erroneous view of the law”); Clark v. Clark, 642 N.W.2d 459, 465-66 (Minn. Ct. App. 2002) (relying on an incorrect legal interpretation is an abuse of discretion). The Bureau also abuses its discretion when it renders a decision against the facts in the record or fails to consider all relevant factors. Green v. BMW of N. Am., 826 N.W.2d 530, 539 (Minn.

² The standard for granting a stay pending appeal is currently before the Minnesota Supreme Court in Webster v. Hennepin County & Hennepin County Sheriff's Office, No. A16-0736 (filed May 3, 2016).

2013); City of N. Oaks, 797 N.W.2d at 24. Even when the Bureau’s decision “is free of legal or factual errors,” it must be overturned if the agency’s “discretion is exercised in ‘an arbitrary or capricious manner.’” City of N. Oaks, 797 N.W.2d at 24.

I. THE BUREAU ABUSED ITS DISCRETION IN DENYING THE UNIVERSITY’S DECEMBER 15, 2016 REQUEST FOR STAY.

The Bureau’s January 3, 2017 denial of the University’s request for stay must be reversed for three reasons. First, the Bureau’s denial represents an abuse of discretion because it rested on an incorrect interpretation of law. Second, the Bureau abused its discretion by making a determination against the facts in the record before it and without considering all relevant factors. Finally, in light of the totality of the underlying administrative proceedings, the Bureau’s denial of stay is the culmination of a lengthy series of arbitrary and capricious actions by the agency.

A. The Bureau abused its discretion because its denial of stay was based on an incorrect interpretation of law.

When an agency’s decision is based on an incorrect interpretation of law, it represents an abuse of discretion. City of N. Oaks, 797 N.W.2d at 24; Clark, 642 N.W.2d at 465-66. To illustrate, in Clark, the district court denied a party’s motion to reopen judgment relying on a case called Tomscak v. Tomscak, 352 N.W.2d 464 (Minn. Ct. App. 1984). 642 N.W.2d at 465. However, the district court’s application of Tomscak was in error because, under later case law, Tomscak did not apply in the precise circumstances of the Clark case. Id. The Court of Appeals reversed the district court’s denial of the motion holding that “[a]n incorrect application of the law constitutes an abuse of the district court’s discretion.” Id. at 466. Just as the Clark district court abused

its discretion by relying on an incorrect legal analysis, here, the Bureau's denial of the University's request for stay represents an abuse of discretion because it is fundamentally premised on the incorrect notion that the University's "appeal filed with the Court is premature." (January 27, 2017 Affidavit of Karen G. Schanfield ("Schanfield Aff.") Ex. W.) In its January 3, 2017 Order denying the University's request for stay pending appeal, the Bureau took the position that a stay pending appeal was unnecessary because the Unit Determination Order could not be reviewed by this Court "until an election has been conducted or the petition is dismissed due to inadequate showing of interest." (Id.)

But the Bureau's reasoning rested on its narrow and incorrect view of this Court's jurisdiction over the appeal. As demonstrated in the January 24, 2017 Order, the University's appeal was not premature and the Court of Appeals indeed has subject matter jurisdiction to review the September 20, 2016 Unit Determination Order. See Order (Jan. 24, 2017). Nor should the existence of appellate jurisdiction have come as a surprise to the Bureau. In an Order dated November 15, 2016, well before the Bureau issued its denial of stay on January 3, 2017, this Court advised the parties that the Unit Determination Order was the proper subject of an immediate appeal, stating:

We agree with the university that the September 20, 2016 order is appealable under Minn. Stat. § 179A.051 (a) as a final order relating to the appropriateness of the unit. BMS has completed its decision-making process on the issue of the university employee classifications that are included in the bargaining unit.

(Order, In re Pet. for Determination of an Appropriate Unit & Certification as Exclusive Representative, A16-1666 (Minn. Ct. App. Nov. 15, 2016).) The Bureau's reliance on a legal assumption it knew to be incorrect as justification to deny the University's request

for a stay pending appeal amounts to an abuse of discretion.³ Accordingly, the Bureau's denial of stay should be reversed.

The Union's insistence that this Court may "affirm on any ground" does not excuse the Bureau's incorrect legal assumptions undergirding its denial of stay. The Union cites no case demonstrating that the "affirm on any ground" rule applies when the issue on appeal is whether the decision-maker below abused its discretion by knowingly misinterpreting the law. Nor is it logical for the "affirm on any ground" rule to apply in these circumstances. The abuse of discretion standard of appellate review is necessarily tethered to the agency's actual reasoning below. The appellate court's task is limited to determining whether the agency "exercised an honest and reasonable discretion, or whether it acted capriciously, arbitrarily, or oppressively." Miller v. City of St. Paul, 363 N.W.2d at 806, 811 (quoting Sabes v. City of Minneapolis, 120 N.W.2d 871, 875 (Minn. 1963)).

B. The Bureau abused its discretion because its denial of the stay was against the facts in the record and did not consider all relevant factors.

This Court must reverse the Bureau's denial of the University's request for stay because the denial was rendered against the facts in the record before the agency and did not consider all relevant factors. Green, 826 N.W.2d at 539; City of N. Oaks, 797

³ The Bureau continues this mischaracterization of the timing of the University's appeal in its briefing on the instant motion, describing the Unit Determination Order as a "preliminary decision" no less than four times in its six-page response to the University's motion for stay and indicating that after the Court rules, the Bureau may eventually order that an election be conducted. Resp't Bureau of Mediation Servs. Mem. in Opp. to Relator's Mot. to Stay Agency Proceedings 4.

N.W.2d at 24. Although meaningful review of the Bureau’s understanding of the University’s request for stay is difficult given the extremely minimal analysis included in the January 3, 2017 Order,⁴ it does not appear that the Bureau considered in any manner the University’s assertion that a stay would serve the interests of both the Unit 8 incumbent employees and the members of the Disputed Teaching Classifications by eliminating confusion regarding the composition of the appropriate bargaining unit.

Specifically, the University argued to the Bureau that:

[H]olding further hearings and undertaking further legal briefings while the appeal is pending risks causing even more confusion for the many thousands of incumbent faculty in Unit 8 and employees in the Disputed Teaching Classifications. To proceed toward holding an election that may later be declared invalid simply does not further PELRA’s stated policy of “promot[ing] orderly and constructive relationships” between the University and its faculty and employees. See Minn. Stat. § 179A.01.

(See Schanfield Aff. Ex. V, at 8-9 (alteration in original).) Moreover, UMN Faculty Excellence, an independent group of University faculty, supported the University’s request for stay and informed the Bureau via letter dated December 27, 2016, it had serious doubts about whether the Union’s claimed showing of interest represented eligible voters given the group’s independent investigation of the issue. (Id. Ex. D.) This doubt about the eligibility of the individuals making up the purported showing of interest

⁴ Indeed, the Bureau’s failure to adequately document its reasoning is further evidence that the agency abused its discretion in denying the request for stay. See DRJ, Inc., 741 N.W.2d at 145 (noting that there must be an adequate record for the appellate court to review in order to determinate whether the trial court “actually considered” all relevant factors).

further underscores the confusion about the content of the appropriate bargaining unit and the need for judicial clarification of that issue.

Instead of meaningfully engaging with this position, the Bureau summarily concluded that the interest in avoiding delay outweighed the University's interest in "further effort and administrative expense." (Id. Ex. W.) However, and as the Bureau itself has recognized, 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 & Certain Faculty of the Univ. of Minn./Crookston Campus & Univ. of Minn. and Univ. Educ. Ass'n, BMS Case Nos. 97-PCE-444 and 97-PCE-458 (Oct. 25, 1996) (emphasis added) (attached to Schanfield Aff. as part of Ex. VV). The Bureau's failure to consider the confusion that may result from parallel administrative and appellate proceedings in this manner is an abuse of discretion.

C. The Bureau's denial of the stay is the culmination of a lengthy series of arbitrary and capricious actions and decisions.

Finally, even if the Bureau's decision "is free of legal or factual errors," it must be overturned if the agency's "discretion [has been] exercised in 'an arbitrary or capricious manner.'" City of N. Oaks, 797 N.W.2d at 24. A brief examination of the procedural history of this matter demonstrates that the denial of the University's most recent request for a stay is the culmination of a long series of arbitrary and capricious actions by the Bureau. Since it received the Union's representation petition, the Bureau has ignored the

requirements of PELRA and the agency's own administrative rules. It has abused its discretion by its arbitrary and capricious actions, including those described below.⁵

The Bureau continues to move towards a union election in a fictitious bargaining unit without regard for the interests of the public sector employees whose jobs are directly affected by its actions. The University seeks a stay of the Bureau proceedings so that its employees will have a fair opportunity to cast meaningful ballots in a bargaining unit that comports with state law. Asking University employees to vote on union representation without a final judicial determination of which job classifications are in their bargaining unit does not serve the legitimate interests of the affected employees. As the Appellate Division of the New York Supreme Court recognized in analogous circumstances, it serves the "best interest of the [University] and its employees" to "avoid costly and time-consuming intermediate procedures." In re Civil Serv. Emps. Ass'n, Inc. v. Helsby, 31 A.D.2d 325, 329 (N.Y. App. Div. 1969).

1. *The Bureau's decision to proceed with a community of interest hearing when it lacked the legal authority to do so was arbitrary and capricious.*

The Bureau ignored the legislative history, statutory language, and its own decisions in proceeding to the community of interest hearing. As set forth in detail at pages 27-31 of the University's Memorandum in Support of Motion for Stay, the Bureau lacked the legal authority to conduct the community of interest hearings that resulted in

⁵ For a more complete recitation of the procedural history of this matter, please see the Relator's Memorandum in Support of Motion for Stay at pages 9-16.

the Order re-assigning the Disputed Teaching Classifications to Unit 8. It should not be allowed to compound this error by now moving towards an election in the bargaining unit that it created.

2. *The Bureau permitted the Union to use the representation petition process in a novel manner instead of insisting on proceeding through the well-defined unit clarification process.*

The Bureau permitted the Union to use the representation petition process to alter the composition of the statutory bargaining unit in a manner not anticipated by the rules governing its procedures. Specifically, the Bureau allowed the Union to use the representation process as a mechanism to combine the question of exclusive representation with the question of appropriate bargaining unit.⁶ One substantial drawback to this novel approach is that it casts in doubt whether the most fundamental prerequisite for an election has been met—whether the Union has satisfied its legally required “showing of interest.”⁷

By contrast, under BMS Rule 5510.0310, subp. 24, the “Unit Clarification” or “Clarification Petition” process provides for a determination of the contours of a bargaining unit to be made after union representation has been established. This process,

⁶ As described in the University’s opening brief, it was not until after the Union filed the representation petition that it sought to wrap new job classifications into the statutory unit it wished to represent. See Relator’s Mem. in Supp. of Mot. for Stay 9-10. (See also Schanfield Aff. Ex. S, at 8.)

⁷ Despite this concern, and the University’s repeated requests, the Bureau has refused to confirm that this prerequisite has been satisfied. See Relator’s Mem. in Supp. of Mot. for Stay 17-18 n.15. (See also Schanfield Aff. ¶ 32, Exs. D, II.) This issue is discussed in more detail below.

with which both the Bureau and the Union are familiar, is the typical process by which additional job classifications may be added to a bargaining unit and its description and unit structure may be modified. For example, in AFSCME Council Nos. 5 & 65, Minnesota Teamsters Public & Law Enforcement Employees Union Local No. 320 & State of Minnesota Court System, Judicial Branches 1, 2, 3, 4, 5, 6, 7, 9 and 10, BMS Case No. 15PCL0577 (July 7, 2016),⁸ the Bureau examined the community of interest factors to assign certain district administration employees to the Judicial District Units in response to a petition for unit clarification from the exclusive representatives for those Units. There is good reason for relying on the Unit Clarification process. It assures that a union has a sufficient basis for proceeding with its request to expand an established bargaining unit by adding job classifications to it, either because the union already represents the bargaining unit or because it has already demonstrated a sufficient showing of interest in the bargaining unit.

While the University maintains its objections to adding the Disputed Teaching Classifications to Unit 8 and denies that the Commissioner has the legal authority to do so even when proceeding in response to a Unit Clarification petition,⁹ the Commissioner nonetheless should have followed the typical process it created for these circumstances.

⁸ This Order is available at <http://mn.gov/bms/documents/BMS/125106-15PCL0577-Unit%20Clarification.pdf>.

⁹ Specifically, the University maintains that Unit 8 is limited to the job classifications specifically enumerated in the Minn. Stat. § 179A.11, subd. 1(8) and that the Bureau lacks jurisdiction to reassign the Disputed Teaching Classifications under Minn. Stat. § 179A.10, subd. 4. See Relator's Mem. in Supp. of Mot. for Stay, at pp. 27-31.

By ignoring the very rules it promulgated and creating a process that is not envisioned by the statute or the rules that govern its proceedings, the Bureau embarked on an arbitrary and capricious course of action and abused its discretion.

3. *The Bureau's refusal to confirm the required showing of interest among Unit 8 incumbents is arbitrary and capricious.*

The Bureau has consistently resisted requests for the information needed to confirm that the Union has a sufficient showing of interest as to Unit 8, calling into question the legitimacy of these proceedings. 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 numerous times, on September 28, 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).

The Bureau's efforts to cloak its refusals in the mantle of the Minnesota Government Data Practices Act (the "MGDPA") are misguided. There is nothing in the MGDPA that prohibits the Bureau from disclosing data about the signed authorization cards so long as it does not disclose the authorization cards or signatures themselves. See Minn. Stat. § 13.7908, subd. 1 ("Authorization signatures or cards furnished in support of a petition filed or election conducted under sections 179.16, 179.18 to 179.25, and 179A.12, and ballots, prior to the time of tabulation, are classified as protected nonpublic data or confidential data on individuals." (emphasis added)). Disclosure of the number of signed authorization cards it has received and as to each, information such as the job

classification of the individual who signed it, the date it was signed, and whether the individual is currently employed by the University is public data under the MGDPA and must be disclosed. The Bureau's failure to disclose public information that is not only relevant, but also material, to these proceedings is yet another example of the Bureau's arbitrary and capricious conduct leading to an abuse of discretion.

4. *The Bureau's continued refusal to meet with the University to understand the limitations on the data the University maintains and can realistically provide and its imposition of inconsistent obligations on the University is arbitrary and capricious.*

As set forth in its Memorandum in Support of Motion for Stay, the University made numerous offers to meet with the Bureau and the Union in an effort to expedite the process of seeing that the Bureau and the Union received the information legitimately needed for the representation process. See Relator's Mem. in Supp. of Mot. for Stay, at pp. 20-22. The Bureau flatly rejected or ignored each of these overtures. See id. Having done so and otherwise having created a good deal of the delay themselves, the Bureau and the Union should not now be heard to complain that they are prejudiced by the passage of time since the Union filed its representation petition.

Moreover, the Bureau has issued a series of orders and demands on the University that are both inconsistent and unrealistic, in many cases ignoring the University's explanation of the way in which its data is maintained. For example, the Bureau has reversed course on whether to require the University to provide the number of credit hours taught by all those potentially included in the bargaining unit it created. The request to provide such data demonstrates that the Bureau is either incapable or unwilling

to recognize the most basic understanding that faculty duties consist of research and service in addition to teaching and suggests that the Bureau has substituted its own judgment that the sole determinant relevant to voting status is the number of courses an individual teaches. Ignoring the obvious and well established job responsibilities of the University faculty in this way is a clear abuse of agency discretion.

II. THE COURT SHOULD ISSUE A STAY OF PROCEEDINGS THAT ADDRESSES THE NEEDS OF ALL PARTIES.

The submissions of the Bureau and the Union suggest, but do not clearly state, that this Court should not stay an election or certification of results of an election. Instead, they focus on the need to proceed with the various steps that are required to implement the Bureau's Order so that an election can be conducted.

The University strongly objects to proceeding with an election and certification of the results before judicial review is completed.¹⁰ Asking employees to cast ballots before the contours of the bargaining unit are set is, as the Bureau itself has recognized, the denial of a fundamental right. See Ruling on Request for Reconsideration, Certain Faculty of the Univ. of Minn./Morris Campus & Certain Faculty of the Univ. of Minn./Crookston Campus & Univ. of Minn. and Univ. Educ. Ass'n, BMS Case Nos. 97-PCE-444 and 97-PCE-458 (Oct. 25, 1996) Proceeding with an election in these

¹⁰ Under Minnesota Rule of Civil Appellate Procedure 108.01, subd. 2, the filing of the appeal suspends the Bureau's authority "to make any order that affects the order or judgment appealed from," such that the agency has jurisdiction over independent, supplemental, or collateral matters only. See Little v. Arrowhead Reg'l Corrs., 773 N.W.2d 344, 345-46 (Minn. Ct. App. 2009). Therefore, even without a stay, the Bureau is not authorized to certify the results of any election.

circumstances will almost certainly lead to skewed and unreliable results, adding to the uncertainty and possible ongoing legal challenges that will further delay resolution of the question of union representation.

There are certain issues that the Bureau indicates must be resolved before an election can be conducted: identification of the individual employees who satisfy and do not satisfy the statutory definition of “public employee,” the type of election that will be held, the cutoff date for voter eligibility, the status of dual function employees, and the status of faculty at certain University facilities.¹¹ The Bureau has ordered the University to produce significant amounts of data on a rolling basis no later than March 22, 2017 to assist it in resolving these issues. Much of the data relates solely or primarily to the Disputed Teaching Classifications. The University can foresee proceeding to gather and provide the information that is material and timely as to both Unit 8 faculty and the Disputed Teaching Classifications without gathering or providing information that either relates solely or primarily to the Disputed Teaching Classifications or to an election to be conducted at a time that does not fairly comport with the timeframes for which the information was provided.

Applying these standards, the University envisions that it may be required to produce the information that the Bureau has ordered as to the above items other than

¹¹ The Union misstates the number of open issues at pages 13-14 of its Memorandum in Opposition to the University’s Motion For A Stay Of The Election Proceedings. The status of these issues is accurately set forth in the Bureau’s Revised Order For Production of Information of January 12, 2017, which identifies six open issues and sets deadlines for production of data, written arguments, and legal briefs. Id. at 5-7.

identification of the individual University employees who are and are not “public employees” within the meaning of Minn. Stat. § 179A.03, subd.14 for an election to be held during the Fall semester 2017. The University recognizes that if the Court rules in its favor on appeal, the Bureau may decline to proceed with an election solely for Unit 8 faculty, rendering some of the work unnecessary. Nonetheless, this approach assures that time will not be unnecessarily lost while the appeal is pending, and at the same time protects the interests of the University in the wise use of public resources, avoids confusion among employees, and helps assure a fair and transparent voting process.

CONCLUSION

The University respectfully requests that the Court stay the proceedings before the Bureau pending the outcome of this appeal so that in the interim (1) no election is conducted, (2) no certification of election results occurs, (3) the University is not required to produce information or engage in other undertakings that relate solely or primarily to the Disputed Teaching Classifications, including identification of individuals who are and are not “public employees” within the meaning of Minn. Stat. § 179A.03, subd.14, and (4) the University is not required to produce information or engage in other undertakings that relate solely or primarily to an election to be conducted at any time other than during its Fall semester, 2017.

[Signature Block on Following Page]

Dated: February 8, 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
khatcher@fredlaw.com

and

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

60699758