A16-1666

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 OCTOBER 31, 2016

BMS Case No. 16-PCE-0644

Date Of Decision: September 20, 2016

Relator Regents of the University of Minnesota (the "University") submits this informal memorandum in response to the Court's October 31, 2016 Order directing the parties to answer three questions related to the Court's jurisdiction to hear this certiorari appeal.

I. Procedural History

The University seeks review of the September 20, 2016 Unit Determination Order (the "Unit Determination Order" or the "Order") issued by the Bureau of Mediation Services (the "Bureau" or "BMS"). It does so because, above all, it seeks a fair election for its employees. BMS is the state agency charged with neutral oversight of union elections for Minnesota's public employees in accordance with the Public Employment

Labor Relations Act ("PELRA"), Minn. Stat. Ch. 179A. PELRA sets forth thirteen separate bargaining units for University employees.

The Order in question granted the request of the Service Employees International Union, Local 284 (the "Union") to re-assign certain job classifications[1] to the bargaining unit reserved for Twin Cities Faculty ("Unit 8") and declined the Union's request to re-assign six additional job classifications to that same unit. 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 purposes of collective bargaining and the four job classifications added to it by the Bureau's Order—Teaching Specialist, Lecturer, Senior Teaching Specialist, and Senior Lecturer (collectively, the "Disputed Teaching Classifications")—have never been part of Unit 8.[2] Although BMS has ordered and overseen several union representation elections for the Twin Cities faculty since PELRA was enacted, the Disputed Teaching Classifications have not been included in the faculty bargaining unit in those elections. (*See* Unit Determination Order, 25-27, for a partial list of the elections).

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[1] The job classifications are Lecturer, Teaching Specialist, Senior Lecturer, and Senior Teaching Specialist.

[2] The Disputed Teaching Classifications have long been in Unit 11, the Academic Professional and Administrative ("P & A") Staff Unit. Minn. Stat. § 179A.11, subd. 1(11).

On September 28, 2016, the University filed a Request for Partial Reconsideration of the Unit Determination Order and requested a stay of proceedings, asking the Bureau to reconsider the portion of the Order assigning the Disputed Teaching Classifications to Unit 8. (*See* Affidavit of Karen G. Schanfield ("Schanfield Aff."), Ex. A.) The Bureau denied the request for a stay on September 29, 2016. (*Id.*) With no deadline imposed on the Bureau for ruling on the Request for Partial Reconsideration and the 30-day period to appeal nearly run,[3] the University petitioned this Court for certiorari review of the Unit Determination Order on October 17, 2016. The University also filed a Request for Stay Pending Appeal with the Bureau. (*See* Schanfield Aff., Ex. B.) The Bureau denied the University's Request for Stay Pending Appeal on October 31, 2016, but has not yet ruled on the University's Request for Partial Reconsideration or indicated when it will do so. (*See id.*, at ¶ 3)

[3] Had the University waited for the Bureau to rule on its Request for Partial Reconsideration, it risked its appeal being held untimely because motions for reconsideration do not toll the time to appeal. *See Baker v. Amtrak Nat'l R.R. Passenger Corp.*, 588 N.W.2d 749, 755-56 (Minn. Ct. App. 1999); *Little v. Arrowhead Reg'l Corr.*, 773 N.W.2d 344, 346 (Minn. App. 2009) (noting that a request for reconsideration of an agency decision is not on Minn. R. Civ. App. Pro. 104.01's list of tolling motions). Although the Administrative Procedures Act (the "APA") provides that if a timely request for reconsideration is made to an agency, the time for serving and filing the petition for certiorari does not begin to run until the request for reconsideration is decided, Minn. Stat. § 14.64, that portion of the APA does not apply to BMS decisions and PELRA does not contain similar tolling language.

An independent group of University faculty, UMN Faculty Excellence, has taken an active interest in this matter and has been granted appearance status[4] by the Bureau. (*See* Schanfield Aff., Ex. C.) UMN Faculty Excellence gathered signatures from over 509 tenured and tenure-track University faculty in just 45 hours (Schanfield Aff., Ex. D), and its size has quickly grown to at least 530 (Schanfield Aff., Exs. E-G). Already representing over one-third of Unit 8, UMN Faculty Excellence vigorously opposes the addition of the Disputed Teaching Classifications to Unit 8 and challenges the Bureau's determination that it received the mandated showing of interest before commencing union representation proceedings. (Schanfield Aff., Ex. G.) On October 30, 2016, UMN Faculty Excellence filed a Petition for Exclusion or Severance with the Bureau asking that tenure and tenure-track faculty be excluded or severed from Unit 8 as modified by the Unit Determination Order (the "UMN Faculty Excellence Petition"). (Schanfield Aff., Ex. H.) In short order, on November 3, 2016, the Bureau denied the UMN Faculty Excellence Petition, refusing to even recognize the Petition as part of the record in this case. (Schanfield Aff., Ex. I.)

On November 1, 2016, UMN Faculty Excellence filed a Notice and Petition to File *Amicus Curiae* brief with this Court. The extraordinary efforts of UMN Faculty Excellence, including its request to sever from the bargaining unit that the legislature created specifically for Twin Cities faculty, demonstrate the unprecedented and

[4] 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.

unfounded nature of the Bureau's decision to add Teaching Specialists and Lecturers to Unit 8.

II. Responses to Questions Raised in the Order of October 31, 2016

A. Does the September 20, 2016 order constitute the final ruling on the appropriateness of the unit?

Yes. The September 20, 2016 Unit Determination Order is the Bureau's final ruling on the appropriateness of the unit. As such, it is immediately appealable under the express language of Minn. Stat. § 179A.051(a). As this Court has stated, "[i]n determining whether a decision is a final one appropriate for certiorari review, courts will examine the relevant statutes or rules or assess whether the parties treated the matter as final." *Univ. of Minn. v. Woolley*, 659 N.W.2d 300, 304 (Minn. Ct. App. 2003).

The relevant statute, PELRA, expressly provides for appeals from decisions relating to the appropriateness of bargaining units, stating:

> 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). PELRA defines "appropriate unit" as a unit "determined under sections 179A.09 to 179A.11." Minn. Stat. § 179A.03, subd. 2. Sections 179A.09 to 179A.11 address the criteria for determining appropriate units for public employers such as cities, counties, and school districts that are not defined by statute and also sets forth the statutorily defined units for employees of the State, the Courts, the Board of Public Defense, and the University. Notably, the cited statutory provisions do not address election orders, elections or certifications. Election orders and

certifications are governed by a provision not cited in the definition of "appropriate unit," Minn. Stat. § 179A.12.

The Unit Determination Order is a final order "relating to . . . appropriateness of a unit" within the meaning of PELRA. The Order was issued after a 13-day evidentiary hearing "held to determine the appropriate unit assignment of the classifications in question." (Unit Determination Order, 6.) 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).

(*Id.* 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.) 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.

The Bureau now argues that the Order is not appealable because it is not "the final determination of the appropriate unit." (BMS Statement of the Case, 1.) It has not, however, indicated when it believes the Order will be final and appealable. Although agency interpretations of their own rules and regulations may be entitled to judicial

deference, "[q]uestions of statutory interpretation are reviewed de novo." *In re R.B.P.*, 640 N.W.2d 351, 353-54 (Minn. Ct. App. 2002). To the extent the Bureau considers rulings related to the appropriateness of a unit non-final until an election has been held and the results of the election certified, the agency's position is inconsistent with the statutory text and overall scheme of PELRA and is entitled to no deference from this Court. *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)).

It is also inconsistent with the Bureau's prior position in this matter. When the University earlier sought appeal of orders related to the Bureau's determination that it had the legal authority to conduct the community-of-interest hearing, the Bureau argued that the orders were not appealable because the Bureau had not yet "decided what classifications of employees belong in the unit." (Schanfield Aff., Ex. J, at 4.) The Unit Determination Order did precisely that—it decided the classifications of employees the Bureau believes can and should belong in Unit 8—and is thus appealable under Minn. Stat. § 179A.051.

The Union argues that any appeal in this matter is premature until the votes have been cast and the Bureau certifies the results of the election. (SEIU Statement of the Case, 2.) In support of its argument, the Union cites *AFSCME Council 5 and City of Bloomington*, BMS Case Nos. 12-PCE-1115 & 12-PCE-1116 and *City of Bloomington v.*

AFSCME, Council 5, Nos. A12-1829, A12-2016, 2013 WL 3491133 (Minn. Ct. App. July 15, 2013).[5] The Union miscontrues the procedural history of *City of Bloomington*. That case actually supports the conclusion that the September 20, 2016 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).[6] The 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

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[5] BMS orders, unpublished orders and cases, and docket sheets are attached to the Affidavit of Karen G. Schanfield as Exhibit M.

[6] 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). Later Bureau decisions in the *City of Bloomington* administrative proceeding reference only the second appeal, A12-2016, despite the fact that the Court of Appeals expressly held that it had jurisdiction over the earlier appeal, A12-1829.

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."[7] *Id.* at 2-3.

In finding the BMS decision final and reviewable in *City of Bloomington*, the Court of Appeals relied on *In re Intra-LATA Equal Access and Presubscription,* 532 N.W.2d 583, 588 (Minn. Ct. App. 1995). *City of Bloomington v. AFSCME, Council 5*, Order, No. A12-1829, at 2 (Minn. Ct. App. Nov. 13, 2012). *Intra-LATA* held that an order issued by the Minnesota Public Utilities Commission ("MPUC") regarding whether to require equal access presubscription was immediately appealable even though implementation of equal access presubscription would occur later. 532 N.W.2d 583, 588 (Minn. Ct. App. 1995). 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. *Id.* Accordingly, *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

[7] 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.

resolve issues necessary to implement its decision. Here, the Bureau has conclusively determined which job classifications are to be part of the petitioned-for unit and is poised to resolve issues necessary to implement that decision.

In the absence of a stay, the parties in this matter continue to cooperate with the Bureau in resolving 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* Schanfield Aff. Ex. K.)

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 crucial to 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).

B. If the answer to (a) is no, should this appeal be dismissed as taken from a nonappealable, interlocutory order? *See State ex. rel. Mosloski v. Martin County*, 248 Minn. 503, 506, 80 N.W.2d 637, 639 1957 (holding that generally, certiorari is only available upon a final determination of rights).

No, even if the Court determines that the September 20, 2016 order is not the final ruling on the appropriateness of the unit, the Order is nevertheless appealable under Minn. Stat. § 179A.051(a) and the collateral order doctrine.

1. Minn. Stat. § 179A.051 does not require that a decision relating to the appropriateness of a unit be final to form the basis for an appeal.

The scope of the Court of Appeals jurisdiction to review administrative decisions is defined by statute. *See Beuning Family LP v. County of Stearns*, 817 N.W.2d 122, 126 (Minn. 2012). When the legislature intends to limit the Court of Appeals' jurisdiction to appeals of final orders, it includes that language in the statute.[8] *See id.* ("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)).

[8] Many statutes stand in contrast to Minnesota Statutes § 179A.051 and demonstrate that the legislature uses particular language to limit appeals to final orders or decisions. *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).

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 of Appeals 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."

In making orders related to the appropriateness of a unit appealable, the legislature recognized that designation of the bargaining unit is a watershed in the representation process and thus the 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 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 case cited in Question (b), *State ex rel. Mosloski v. Martin County*, 80 N.W.2d 637 (Minn. 1957), does not alter this conclusion. The statute at issue in *Mosloski*

provided for judicial review over "any order made by the county board . . . establishing . . . any drainage system." Minn. Stat. § 106.631, subd. 4 (1957); *see Mosloski*, 80 N.W.2d at 638-39. The relator in that case appealed an order of the county board following a preliminary hearing in a ditch proceeding. *Mosloski*, 80 N.W.2d at 639-40. The court held that the order was not yet appealable because "there has not yet been a final determination . . . on location or placement of the open ditch within the proposed ditch area, binding on the parties . . . ." *Id.* at 641. *Mosloski* actually supports the conclusion that the Unit Determination Order is presently appealable under Minn. Stat. § 179A.051(a). Unlike the preliminary order at issue in *Mosloski*, in which the county board had not finished "establishing" the drainage system such that the statute providing for judicial review was satisfied, here the Bureau has completed the process of establishing the bargaining unit by determining which job classifications comprise the petitioned-for bargaining unit under Minn. Stat. § 179A.11, subd. 1.

Moreover, although "certiorari will not **ordinarily** lie unless there is a final determination of rights," *Mosloski*, 80 N.W.2d at 639 (emphasis added), this general principle must yield to the text of the statute providing for certiorari review, as this Court recognized in the April 18, 2016 Amended Order dismissing the University's prior appeal, noting that "**Absent a statutory basis for appeal**, certiorari is available only upon a final determination of rights . . . ." (Schanfield Aff., Ex. M (emphasis added)). Minn. Stat. § 179A.051 provides the statutory basis for the University's appeal.

2. 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 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 determines whether certain disputed job classifications are included in Unit 8. Second, the issues determined by the Unit Determination Order are separate from the merits of the action, 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 in a secret ballot election.

Third, the Unit Determination Order is effectively unreviewable if the University is required to wait until an election order is issued or an election held and the results certified. 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. A review of BMS election orders reveals that only 10 to 13 calendar days typically pass between the date an election is ordered and the date the election begins. (*See* Schanfield Aff. Ex. R.) In view of this short time frame, the University will have no meaningful opportunity to seek review and a stay of an election order before thousands of voters cast their ballots if it is forced to wait until an election order is issued or an election conducted to seek an appeal. 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. In the meantime, the legal requirement to maintain the status quo pending the election will continue to restrain the University's ability to make and implement significant decisions that impact its faculty and teaching professionals.

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.

C. If the September 20, 2016 decision is final and appealable, would judicial economy be served by dismissing the appeal without prejudice and remanding to the BMS for a ruling on relator's request for reconsideration? *See Little v. Arrowhead Regional Corrections*, 773 N.W.2d 344, 346 (Minn. App. 2009) (explaining the benefits of allowing the original decision-maker to consider and rule on post-decision motions before appellate review).

Yes, even though the September 20, 2016 decision is final and immediately appealable and the University strongly prefers that the appeal proceed at this time, the University recognizes that it may serve judicial economy to dismiss this appeal without prejudice and remand to BMS with directions to issue a prompt ruling on the University's pending Request for Partial Reconsideration of the Unit Determination Order so long as the University's interests are fully protected in the interim.

Even when an appeal is not premature, it may nonetheless serve judicial economy to dismiss the appeal without prejudice to allow the original decision-maker to make a decision on a pending matter. *Little v. Arrowhead Reg'l Corr.*, 773 N.W.2d 344, 346 (Minn. Ct. App. 2009); *see also Marzitelli v. City of Little Canada*, 582 N.W.2d 904, 907 (Minn. 1998).

Remanding gives the Bureau the opportunity to correct errors it made in the Unit Determination Order, potentially obviating the need for judicial review. *Little*, 773 N.W.2d at 346. In the pending Request for Partial Reconsideration, the University identified numerous errors of law and fact and believes that the Bureau could benefit from further consideration of the tripartite mission of the University as a land grant institution and the faculty's unique standing to accomplish that mission, as recognized by the legislature when it created a separate bargaining unit for University faculty. The

Bureau's treatment of the inquiry as one-dimensional reflects a fundamental misunderstanding of the role of tenured and tenure-track faculty in the state's nationally recognized public research University.

The UMN Faculty Excellence Petition underscores the misguided nature of the Order and the serious impact that the Bureau's strained reading of PELRA will have on the faculty who are responsible for continuing the University's excellence in research, teaching, and service. The voices of over 500 of the University's top scholars in strong opposition to the Order cannot be ignored.

Even if the University seeks judicial review after the Bureau issues a decision on the University's Request for Partial Reconsideration, the parties will have the opportunity to more fully develop the critical aspects of the record and the Bureau has "the opportunity to flesh out the reasoning behind its ruling." *Little*, 773 N.W.2d at 346 (internal quotation marks and alterations omitted). This may well facilitate appellate review.

The University respectfully requests that if this Court remands to the Bureau with instructions to rule on the University's Request for Partial Reconsideration, the Court also order that the Bureau render the decision within fifteen days and that the University's right to appeal to this Court will be considered ripe upon issuance of the Bureau's decision or the passage of fifteen days, whichever comes first. The University

makes this request to assure that a date certain is established by which it may seek review by this Court of the merits of its appeal.[9]

The University seeks a deadline for a decision on the Request for Partial Reconsideration to assure that a dismissal with prejudice is not an invitation to the Bureau to defer the appeal indefinitely or until a time it sees as convenient or strategically advantageous. Absent a deadline, BMS has the ability to convert a dismissal without prejudice into an action that is, in fact, very prejudicial to the University. If it continues to consider matters related to the implementation of the Order and proceeds to conduct an election, it nullifies the University's ability to obtain meaningful judicial review of an agency order that is in clear conflict with a legislative mandate. Prompt judicial review is important to the University community and serves the state's public policy of promoting orderly and constructive relationships between Minnesota's public employers and their employees, particularly in light of the stated concerns of UMN Faculty Excellence. *See* Minn. Stat. § 179A.01.

III. Conclusion

For the foregoing reasons, the University respectfully submits that the Bureau's September 20, 2016 Unit Determination Order – Community of Interest is appealable

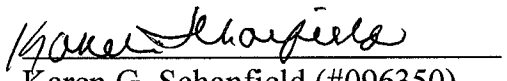
[9] On October 17, 2016, the University filed with the Bureau a Request for Stay Pending Appeal, which the Bureau denied after soliciting and receiving a response from the Union. (*See* Schanfield Aff., Ex. B.) Accordingly, the University also respectfully requests that the Court rule that Minn. R. App. P. 108.02, subd. 1 has been satisfied and that the University may bring a motion for a stay before this Court without having to first seek another stay from the Bureau.

under Minn. Stat. § 179A.051. Nevertheless, the University recognizes that judicial economy may be served if this Court were to dismiss the University's appeal without prejudice, remanding to BMS for a prompt ruling on the University's Request for Partial Reconsideration. In this event the University seeks assurance from the Court that its appeal will be ripe upon the Bureau's issuance of this decision or the passage of fifteen days from issuance of the Court's order, whichever comes first, and that, should it wish to proceed with this appeal, the University may seek a stay of BMS proceedings directly from this Court in conjunction with its appeal.

Dated: November 7, 2016

Respectfully submitted,

FREDRIKSON & BYRON, P.A.



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