

A07-1418

NO. A07-1388

State of Minnesota
In Court of Appeals

Design Electric, Inc.,

Appellant,

vs.

International Brotherhood of Electrical Workers,
Local No. 292,

Respondent.

APPELLANT'S BRIEF

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STATEMENT OF LEGAL ISSUES

I. Did the District Court err in determining that Minn. Stat. § 13.43, subd. 6 (2006) does not restrict a labor organization's access to personnel data under the Minnesota Government Data Practice Act, Minn. Stat. § 13.01–.99?

The district court determined that Minn. Stat. § 13.43, subd. 6 (2006) does not limit a labor organization's access to personnel data under the Minnesota Government Data Practice Act, Minn. Stat. § 13.01–.99.

Most Apposite Authorities:

State v. Kalvig, 296 Minn. 395, 209 N.W.2d 678 (1973);

State v. Williams, 396 N.W.2d 840 (Minn. App. 1986);

Minn. Stat. § 13.43, subd. 2, 6 (2006);

Minn. Stat. § 645.26, subd. 1 (2006).

II. Did the District Court err by determining that home addresses are public personnel data under the Minnesota Government Data Practice Act, Minn. Stat. § 13.01–.99?

The District Court determined that home addresses are public personnel data under the Minnesota Government Data Practice Act, Minn. Stat. § 13.01–.99 with the exception of home addresses of employees who work in jails, prisons, and correctional facilities.

Most Apposite Authorities:

In re Common Sch. Dist. No. 1317, 263 Minn. 573, 117 N.W.2d 390 (1962);

Minn. Stat. § 13.43, subd. 2 (2006);

Minn. Stat. § 13.43, subd. 5a (2006).

STATEMENT OF THE CASE

Respondent International Brotherhood of Electrical Workers, Local No. 292 (IBEW) filed a lawsuit against the City of St. Cloud (City) on February 8, 2007.¹ In its Complaint, IBEW asserted that the City violated the Minnesota Government Data Practice Act, Minn. Stat. § 13.01–.99 (2006)(MGDPA) when it refused to release certified payroll records which were requested by IBEW and which IBEW claims are “public data” under the MGDPA.

IBEW filed a Motion for Summary Judgment on April 6, 2007. On the same day, Appellant Design Electric, Inc. (Design) filed a motion to intervene. The District Court granted Design’s motion to intervene on April 24, 2007 and granted Design Defendant/Intervenor status. On May 7, 2007, IBEW’s summary judgment motion came before the District Court, which heard arguments from all parties, including Design. On May 21, 2007, the District Court granted IBEW’s summary judgment motion and ordered the City to release the certified payroll data. Judgment was entered on May 24, 2007. In its order granting summary judgment, the District Court also awarded IBEW attorney fees in the amount of \$500. The matter of attorney fees has been separately appealed by IBEW (A07-1418). On May 28, 2007, Design filed a motion to stay the District Court’s order to release the data. That motion was granted on June 5, 2007 and the District Court’s order releasing the data was stayed pending the disposition of this appeal.

¹ The City was originally captioned as a Respondent in this appeal. However, pursuant to this court’s August 2, 2007 order, the City has been removed from the case caption entirely, as it is neither a respondent nor an appellant.

Design filed its Notice of Appeal and Statement of the Case on July 16, 2007. Design now appeals the District Court's May 21, 2007 order granting summary judgment in favor of IBEW and ordering the City to release the payroll records.

STATEMENT OF THE FACTS

I. BACKGROUND

This litigation arises under the MGDPA, Minn. Stat. § 13.01–.99 (2006). Design is a commercial electrical contractor with its primary place of business located in Stearns County, Minnesota. (App. 94.) In 2006, Design was hired by the City to perform certain subcontracting work on the reconstruction of the East St. Germain Utility Project, Project No. 100570774. (App. 95.)

The Minnesota Prevailing Wage Act requires that contractors on certain public jobs pay the “prevailing wage” for the area of the state in which the project is located. Minn. Stat. § 177.41. The Department of Labor and Industry (Department) sets the various prevailing wages for use in different sections of the state. Minn. Stat. § 177.43, subd. 4. The Act further provides for “certification” of payrolls by the Department; in other words, the Department (and other governmental bodies) have the right to require review of certified payrolls of contractors on public projects. Minn. Stat. § 177.44, subd. 4. This “certification” usually takes the form of the contracting governmental body requiring a review of the payroll records of the contractor.

In response to a request from the City, Design turned over its certified payroll records from the East St. Germain Project to the City. (App. 95-96.) As per industry standard practice, these records included such information as Social Security Numbers, employee addresses, withholdings, child support orders, etc. (App. 96.) These records were apparently satisfactory, and there has been no

allegation in this matter, or any other, that Design did not correctly compensate its employees. In anticipation of a situation such as that involving the current dispute, Design marked its payroll record “confidential” and as constituting “trade secrets.” (*Id.*)

IBEW is a labor organization within the meaning of the National Labor Relations Act, 29 U.S.C. § 141 *et seq.* IBEW does not represent any of Design’s employees, who are represented by the Christian Labor Association, a union “competitor” of IBEW. (App. 95.) IBEW has, however, attempted to organize Design’s employees on several occasions. (*Id.*) In November 2006, IBEW made a data practice request to the City asking the City for copies of Design’s certified payroll records from the St. Germain Project. (App. 80.) On December 14, 2006, the City responded that Design had marked its materials confidential, and that the City would therefore not produce those materials. (App. 81.)

II. THE CURRENT LAWSUIT

IBEW filed this lawsuit on February 8, 2007, claiming that the materials in question were “public” within the meaning of the MGDPA, Minn. Stat. § 13.01–.99 (App. 1-2.) The City continued to refuse to produce the documents, serving and filing an Answer denying the Plaintiff’s allegations. (App. 5.)

From the outset, Design sought to intervene in this lawsuit. On February 22, 2007, one of Design’s attorneys, Douglas Seaton, spoke with IBEW’S counsel, Marshall Tanick, regarding Design’s interest in intervening in the current litigation. (App. 40.) Mr. Tanick stated that he would speak to his client about

agreeing to Design's intervention and "get back" to Mr. Seaton, which he never did. (*Id.*) Design's attorneys received no further response to their request, in spite of two follow-up phone calls. (*Id.*) Although Mr. Tanick did leave two messages on Design's attorneys' voicemail, he merely left a phone number and did not reply to Design's question regarding intervention. (*Id.*) In April 2007, Design filed a motion to intervene. (App. 8.) The District Court granted Design's motion to intervene, holding that Design could intervene as a matter of right. (App. 46.)

Prior to Design's intervention, IBEW had filed a motion for summary judgment on April 6, 2007. (App. 48.) The District Court heard arguments from all parties, including Design, on the summary judgment motion on May 7, 2007. (App. 111.) On May 21, 2007, the court granted summary judgment in favor of IBEW and ordered the City to release the data. (*Id.*) Judgment was entered on May 24, 2007. (App. 121.) In its Order granting summary judgment, the District Court also awarded Respondent IBEW attorney fees in the amount of \$500.² (*Id.*)

On May 28, 2007, Design filed a motion to stay the District Court's order to release the records. (App. 122.) The court granted that order on June 1, 2007 and the records have not been released. (App. 133.) Design is now appealing the May 21, 2007 order granting summary judgment in favor of IBEW and ordering the City to release the certified payroll records.

² The issue of attorney fees has been separately appealed by IBEW (Appeal No. A07-1418). Although the appeals have been consolidated for purposes of oral argument and decision, they are to be briefed separately, so the issue of attorney fees will not be addressed within this brief.

III. THE PREVIOUS LAWSUIT

In 2001, the same parties – IBEW, City of St. Cloud, and Design Electric – litigated a similar case involving a data practice request by IBEW, to the City, for Design’s certified payroll records. (App. 72.) In that case, the City had already released the documents to IBEW prior to the litigation. (*Id.*) Consequently, the Honorable Richard J. Ahles, Judge of the District Court for Stearns County, held that the issue was moot, as the City had already released the records. (App. 78-79.)

Design appealed the District Court’s decision to the Court of Appeals, which agreed with the District Court’s ruling. The Court of Appeals held that the case was moot because the records had already been released and accordingly, declined to address the substance of the MGDPA argument. (*Design Elec. v. City of St. Cloud*, No. C1-01-734, 2001 WL 1402763 (Minn. App. Nov. 13, 2001); App. 129.)

ARGUMENT

I. STANDARD OF REVIEW

On an appeal from summary judgment, the court must determine “(1) whether there are any genuine issues of material fact and (2) whether the [District] [C]ourt[] erred in [its] application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of

material fact and that either party is entitled to a judgment as a matter of law. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993)(citation omitted). On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted. *Id.* No genuine issue for trial exists “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” *DLH Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997)(quotation omitted).

To defeat a summary judgment motion, the nonmoving party must present evidence that does more than merely create a “metaphysical doubt as to a factual issue” and cannot rest on mere averments. *Id.* at 71. But “[a] party need not show substantial evidence to withstand summary judgment...[S]ummary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents sufficient evidence to permit reasonable persons to draw different conclusions.” *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006). The interpretation of a statute presents a question of law, which the appellate court reviews *de novo*. *Hibbing Educ. Ass’n v. Public Employment Relations Bd.*, 369, N.W.2d 527, 529 (Minn. 1985).

II. MINN. STAT. § 13.43, SUBD. 6 RESTRICTS A LABOR ORGANIZATION’S ACCESS TO PERSONNEL DATA UNDER THE MINNESOTA GOVERNMENT DATA PRACTICE ACT

The MGDPA “regulates the collection, creation, storage, maintenance, dissemination, and access to government data in state agencies, statewide systems, and political subdivisions” and creates “a presumption that government data are

public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public.” Minn. Stat. § 13.01, subd. 3.

Minn. Stat. § 13.03, subd. 1 provides that “all government data collected, created, received, maintained or disseminated by a government entity shall be public unless classified by statute, or temporary classification pursuant to section, or federal law, as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential.” Minn. Stat. § 13.43, subd. 1 defines “‘personnel data’ as data on individuals collected because the individual... acts as an independent contractor with a government entity.” Minn. Stat. § 13.43, subd. 2, provides that:

Except for employees described in subdivision 5 and subject to the limitations described in subdivision 5a . . . the following personnel data on current and former employees, volunteers, and independent contractors of a government entity is public:

- (1) name; employee identification number, which must not be the employee's Social Security number; actual gross salary; salary range; contract fees; actual gross pension; the value and nature of employer paid fringe benefits; and the basis for and the amount of any added remuneration, including expense reimbursement, in addition to salary;
- (2) job title and bargaining unit; job description; education and training background; and previous work experience;
- (3) date of first and last employment;
- (4) the existence and status of any complaints or charges against the employee, regardless of whether the complaint or charge resulted in a disciplinary action;
- (5) the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify confidential sources who are employees of the public body;

- (6) the terms of any agreement settling any dispute arising out of an employment relationship, including a buyout agreement as defined in section 123B.143, subdivision 2, paragraph (a); except that the agreement must include specific reasons for the agreement if it involves the payment of more than \$10,000 of public money;
- (7) work location; a work telephone number; badge number; and honors and awards received; and
- (8) payroll time sheets or other comparable data that are only used to account for employee's work time for payroll purposes, except to the extent that release of time sheet data would reveal the employee's reasons for the use of sick or other medical leave or other not public data.

While Minn. Stat. § 13.43, subd. 2 provides that certain personnel data is public, Minn. Stat. § 13.43, subd. 6 places *specific, concrete limitations* on the circumstances under which that personnel data may be accessed by a labor organization. Specifically, subdivision 6 provides that:

Personnel data may be disseminated to labor organizations to the extent that the responsible authority determines that the dissemination is necessary to conduct elections, notify employees of fair share fee assessments, and implement the provisions of chapters 179 and 179A. Personnel data shall be disseminated to labor organizations and to the Bureau of Mediation Services to the extent the dissemination is ordered or authorized by the commissioner of the Bureau of Mediation Services.

Here, Design supplied the certified payroll records to the City in its capacity as an independent contractor. The records it has supplied, therefore, qualify as personnel data as defined by Minn. Stat. § 13.43. Those records, which contain information defined as public data under section 13.43, subdivision 2, would *normally* be public, a fact that Design has previously conceded. Design has never argued, as the IBEW has previously suggested, that that the payroll records should not be turned over because they are not public, but instead because as a

labor organization, the IBEW is not entitled to the records, unless the request is for one of the purposes enumerated in section 13.43, subdivision 6.

A. A responsible authority may ask a requesting party to identify themselves if specifically authorized by statute.

The District Court held that Minn. Stat. 13.43, subd. 6 could not be interpreted as limiting a labor organization's access to personnel data. The District Court concluded that such a limiting interpretation would require a responsible authority to inquire about the identity of a requesting party and the party's purpose in making the request, which, the court determined, was barred by Minn. Stat. § 13.05, subd. 12.

Minn. Stat. § 13.05, subd. 12 provides that "unless specifically authorized by statute, government entities may not require persons to identify themselves, state a reason for, or justify a request[.]" The District Court determined that the City was prohibited from asking the identity of a requester (in this case, an IBEW representative) or the requesting party's purpose in making a request. The District Court concluded, therefore, that it could not interpret Minn. Stat. § 13.43, subd. 6 as limiting a labor organization's access to personnel data because to do so would require the City to inquire as to the requester's identity, in order to determine if a requesting party was a labor organization and if the purpose of the request was one which was authorized by section 13.43, subdivision 6. The District Court erred, however, in reaching this conclusion, because the statute states that the responsible

authority may not ask for a requester's identity or purpose in making the request "unless specifically authorized by statute."

In this case, Minn. Stat. § 13.43, subd. 6 lists the purposes for which a labor organization may request personnel data. This statute, therefore, clearly authorizes a responsible authority to enquire as to (1) the identity of a requesting party and (2) the purpose behind the request. The District Court erred in concluding otherwise.

B. Interpreting Minn. Stat. § 13.43, subd. 6 as restricting a labor organization's access to personnel data does not produce an absurd result.

The District Court further held that Minn. Stat. § 13.43, subd. 6 could not be interpreted as limiting a labor organization's access to personnel data because such a limitation would produce an "absurd result." (App. 117.) The District Court rationalized that because "an employee of a labor organization, or any other person, could simply request the documents in his or her name. . . and then provide them to the labor union," that to limit a labor union's access would produce an absurd result. (*Id.*)

Ordinarily, when a general provision of one statute conflicts with a specific provision of another statute, courts should construe the two statutes to give effect to both when possible. Minn. Stat. § 645.26, subd. 1. However, when two statutes irreconcilably conflict, the more specific provision should prevail over the more general provision unless the legislature intended the general provision to control.

Id.; *State v. Kalvig*, 296 Minn. 395, 398, 209 N.W.2d 678, 680 (1973); *see also State v. Williams*, 396 N.W.2d 840, 845-46 (Minn. App. 1986).

Here, Minn. Stat. § 13.43, subs. 2 and 6 *are* clearly in conflict. However, the District Court erred in concluding that the more general of the two statutes, subdivision 2, controls. Because while subdivision 2 generally states that certain personnel data is considered public, subdivision 6 specifically carves out and limits the circumstances under which a labor organization may access the otherwise public personnel data. Because these two statutes irreconcilably conflict, the more specific provision, subdivision 6, should control.

C. There is no authority to suggest that the general rule on personnel data should take precedence over the specific language of Minn. Stat. § 13.43, subd. 6.

The interpretation of Minn. Stat. § 13.43, subd. 6 appears to be an issue of first impression. Both Design and IBEW have conceded that there is no applicable case law or legislative history available to interpret the legislative intent behind Minn. Stat. § 13.43, subd. 6. Therefore, the Court is left with the plain language of the statute, and general rules of statutory construction. In light of those rules, it is apparent that the more specific statute, section 13.43, subdivision 6, should control.

D. Plaintiff's request for the prevailing wage is not for a purpose authorized by Minn. Stat. § 13.43, subd. 6.

Minn. Stat. § 13.43, subd. 6 states that personnel data may be disseminated to labor organizations only “to the extent that the responsible authority determines that the dissemination is necessary to conduct elections, notify employees of fair share fee assessments, and implement the provisions of chapters 179 and 179A.”

Here, IBEW, a labor organization, has never stated why it has requested the certified payroll records in this matter. Regardless of this fact, however, it is clear that IBEW's request does not fall under one of the categories authorizing the request. IBEW does not represent Design's employees, so the request is clearly not for the purpose of notifying employees of fair share fee assessments. And, there is no evidence whatsoever that this evidence is for the purpose of elections, or to implement any of the provisions authorized by chapters 179 or 179A of the Minnesota Statutes. The District Court erred, therefore, in ordering the City to release the payroll data to IBEW as the IBEW has not shown that its request is for any of the purposes authorized under Minn. Stat. § 13.43, subd. 6.

Although there are no genuine disputes as to the facts of this case, Design *is* entitled to judgment as a matter of law. Because the District Court erred in its application of the law, the District Court's decision should be reversed.

III. HOME ADDRESSES ARE NOT PUBLIC DATA UNDER THE MINNESOTA GOVERNMENT DATA PRACTICE ACT

The District Court concluded that home addresses should be considered public data under the MGDPA. In doing so, the District Court rationalized that Minn. Stat. § 13.43, subd. 5a only “prohibits release of home addresses with respect to employees working in jails, prisons, or other correction facilities to inmates and certain others associated with the corrections facility.” (App. 118.) The Court concluded that “[t]his exclusion clearly establishes that home addresses of other employees not excluded are public information.” (*Id.*)

The District Court's conclusion is flawed in a number of respects. First, subdivision 5a does not prohibit the release of a correctional facilities' employee's home address *specifically* (which might imply that the home address is otherwise considered public personnel data). Instead, subdivision 5a actually prohibits the release of payroll data, which is public personnel data, only insofar as that payroll data might reveal an employee's home address or phone number. Further, Minn. Stat. § 13.43, subd. 2 *does* specifically enumerate which types of data will be considered public personnel data. All data not on that list is *not* public data. Home addresses are *not* on that list. In disregarding the fact that home addresses were not included within the types of data defined as public by Minn. Stat.

§ 13.43, subd. 2, the District Court failed to abide by the canon of statutory construction "expressio unius exclusio alterius," meaning the expression of one thing is the exclusion of another. *See In re Common Sch. Dist. No. 1317*, 263 Minn. 573, 575, 117 N.W.2d 390, 391 (1962) (invoking "[e]xpressio unius est exclusio alterius"). In other words, the legislature has specifically expressed which types of data will be considered public personnel data. Since home addresses are not on that list, the District Court should have properly concluded that the legislature did not intend that home addresses should be considered public data.

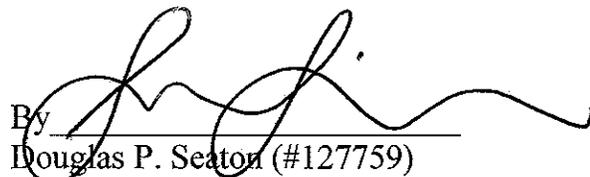
CONCLUSION

The evidence and law do not support the District Court's decision to grant summary judgment to IBEW in this case. Minn. Stat. §13.43, subd. 6 clearly

limits the circumstances under which a labor organization may access personnel data under the MGDPA to circumstances not present here, and home addresses are not public personnel data under Minn. Stat. §13.43, subd. 2. Accordingly, the District Court erred in granting summary judgment in favor of IBEW and should be reversed.

Dated: September 10, 2007

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**CERTIFICATION OF
BRIEF LENGTH**

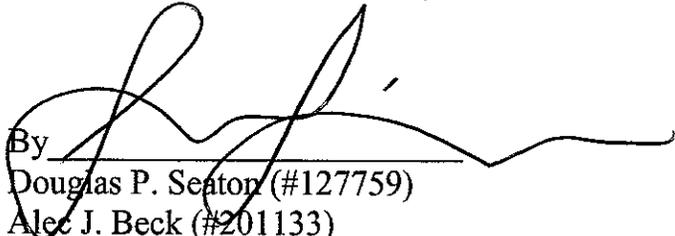
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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 3,776 words. This brief was prepared using Microsoft Word 2000 (9.06926 SP-3).

Dated: September 10, 2007

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