

CASE NO. 07-1620

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Alexandria Housing and Redevelopment Authority,

Appellant,

vs.

Judith Rost and
Bureau of Mediation Services,

Respondents

**ALEXANDRIA HOUSING AND REDEVELOPMENT
AUTHORITY'S BRIEF**

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STATEMENT OF THE LEGAL ISSUES

- I. Whether Respondent Judith Rost's ("Rost") challenge to Alexandria Housing and Redevelopment Authority's ("AHRA") quasi-judicial employment decision(s) is limited to review by writ of certiorari to the court of appeals.

The Bureau of Mediation Services ("BMS") held that Rost was not required to file a writ of certiorari with the court of appeals to challenge AHRA's employment decisions.

List of apposite cases:

Dokmo v. Independent School Dist. No. 11, 459 N.W.2d 671 (Minn. 1990)
Dietz v. Dodge County, 487 N.W.2d 237 (Minn.1992)
Willis v. County of Sherburne, 555 N.W.2d 277 (Minn. 1996)
Tischer v. Cambridge HRA, 693 N.W.2d 426 (Minn. 2005)

List of apposite statutes:

Minn. Stat. § 179A.25
Minn. Stat. § 606.01

- II. Whether BMS's decision/order reinstating Rost is based on an erroneous interpretation of the law, is unreasonable, and/or is unsupported by substantial evidence in the record.

The Bureau of Mediation Services held that its decision/order in this matter is legal and enforceable.

List of apposite cases:

Boe v. Polk County Library Board, 299 Minn. 226, 217 N.W.2d 208 (Minn. 1974)
Waller v. Powers Department Store, 343 N.W.2d 655, 657 (Minn. 1984)
Dietz v. Dodge County, 487 N.W.2d 237 (Minn.1992)

List of apposite statutes:

Minn. Stat. § 179A.25

- III. Whether BMS exceeded its statutory authority under Minn. Stat. §179A.25 in reversing AHRA's employment decision and ordering Rost's reinstatement along with back pay, benefits and other relief.

The Bureau of Mediation Services held that it had authority to order the relief awarded to Rost.

List of apposite cases:

Mattice v Minnesota Property Ins. Placement, 655 N.W.2d 336 (Minn. App. 2002)

List of apposite statutes:

Minn. Stat. § 179A.25;

Minn. Stat. § 645.17(2)

STATEMENT OF THE CASE

Respondent Judith Rost (“Rost”) was an employee of Appellant Alexandria Housing and Redevelopment Authority (“AHRA”) who resigned her employment after the AHRA Board of Commissioners made findings of employee misconduct against her. Rost failed to seek review of the AHRA’s decisions via a writ of certiorari to the Minnesota Court of Appeals as required by Article III, Section 1 of the Minnesota Constitution. *See Dietz v. Dodge County*, 487 N.W.2d 237 (Minn. 1992). Instead, Rost filed a petition for independent review with Respondent Bureau of Mediation Services (“BMS”) pursuant to Minn. Stat. §179A.25. BMS’s policies and practices interpret Minn. Stat. §179A.25 to allow the agency to conduct independent review in the form of binding arbitration proceedings over non-union employee grievances involving terms and conditions of employment. AHRA requested BMS dismiss Rost’s petition for independent review because BMS lacked jurisdiction. Specifically, AHRA argued that 1) Rost, as an at-will employee, had no terms and conditions of employment and 2) Rost’s sole means of challenging the AHRA’s quasi-judicial decisions involving Rost’s employment was by writ of certiorari to the Court of Appeals. BMS denied AHRA’s requests for dismissal and ordered the parties to submit to binding arbitration.

AHRA attempted to challenge BMS’s jurisdiction and authority for binding arbitration by bringing a declaratory judgment action in district court. The district court found that it was without jurisdiction over claims challenging the jurisdiction of a state agency. This Court, in a decision dated October 10, 2006 (A06-75), agreed with the district court and held that in order to challenge BMS independent review of a public

employer's administrative decision, AHRA was required to proceed by writ of certiorari to the Court of Appeals after a final agency decision. Thus, the matter was remanded to BMS for a final decision on Rost's petition for independent review.

On June 6, 2007 Rost and AHRA participated in an independent review hearing before Arbitrator Joseph L. Daly. AHRA preserved its right to contest BMS's jurisdiction. On July 23, 2007, Arbitrator Daly issued an "Opinion and Award" reversing the AHRA's termination decision and ordering reinstatement of Rost along with back pay and benefits. This appeal followed.

STATEMENT OF THE FACTS

Respondent Judith Rost ("Rost") was hired by Appellant Alexandria Housing and Redevelopment Authority ("AHRA") in March, 2001. *Appellant's Appendix ("AA") AA-197.* The executive director was the highest administrative employee of the AHRA. *AA-138.* The executive director was responsible for all other AHRA employees and had the sole authority to "appoint, promote, transfer, demote, suspend, and separate personnel." *Id.; AA-18.* The executive director's decisions over other employees were final; i.e. they did not require review and approval by the AHRA Board of Commissioners. *AA-139; AA-22.*

The executive director reported to the AHRA Board of Commissioners. *AA-39.* The AHRA Board is made up of five members appointed by the Alexandria City Council. *AA-37.* The Board members elect a chair person on an annual basis. *AA-42.*

The executive director, as with all employees of the AHRA, was subject to written personnel policies. *AA-5.* Pursuant to these personnel policies, all employees of the

AHRA are considered to be employed at will. Specifically, the policies state the following:

The Alexandria Housing and Redevelopment Authority shall consider all employees to be "employed at will." There shall be no employment contracts with any employee. At the time of hire, the new or promoted employee shall receive a letter which describes the following details: Title of job position; employee status of position; job description which lists duties; starting wage; starting date; hours to work each week; and a description of benefits; i.e., paid holidays, vacation/sick leave, health insurance, life insurance and pension. On the first (1st) day of employment the employee shall receive a copy of the policy manual and personnel handbook. It shall be the responsibility of the executive director to orientate the employee to the authorities, procedures and provide the practical training necessary for the position.

AA-7-8.

On March 9, 2004, AHRA Chairperson Colleen Thompson was given notice of a complaint made against Respondent Rost. Specifically, another Board member provided Chairperson Thompson with a letter that had been written by an AHRA employee subordinate to Rost.¹ *AA-44,45.* The letter described an incident which occurred on March 5, 2004 in AHRA offices. *AA-198-199.* Specifically, the employee reported that she observed Rost looking through a box of items recovered from an AHRA apartment which was recently vacated. The box contained various containers of medications. Rost, upon discovering a bottle of Zoloft, indicated that because she took the same prescription, she was going keep the Zoloft for her own use. The employee claimed that Rost, while

¹ The BMS arbitrator ordered that the name of this employee be kept confidential throughout the independent review proceedings. This decision was based upon the AHRA's request and on the privacy protections afforded to employees under Minnesota's whistleblower statute, Minn. Stat. § 181.932, and the Minnesota Government Data Practices Act, Minn. Stat. § 13.43. *AA-45-47.*

holding the bottle of Zoloft, made comments such as "Do you know how much these things are? I pay over \$100 for a bottle of these. How many do you think are in there?"
AA-198-199.

The employee reported that Rost opened the bottle and shook the pills out into her hand, counting 26 pills. She turned the bottle over in her hand and indicated that at one time there were 30 pills in the bottle and that she has paid over \$100 for a bottle of 30. The employee then indicated she saw Rost put the pills in her pocket and put the empty bottle back into the box. Rost told the employee to record the prescription numbers of the medications in the box and then dispose of them. The employee was not comfortable recording the bottle of Zoloft knowing that the pills themselves were taken by Rost. Specifically, the employee wrote "as of 4:30 p.m. Monday, March 8, 2004, I have not recorded Rx numbers or types, or disposed of anything in the box, and do not intend to without further advisement. As requested, I am sending this report to David Benson, after a brief conversation on Monday, March 8, 2004." Mr. Benson was a Board member of the AHRA. *AA-198-199.*

Although there was an AHRA Board meeting on March 9, 2004, the day Chairperson Thompson received notice of this complaint, she felt it prudent to first seek legal counsel before taking any action. *AA-45.* Chairperson Thompson was very concerned about the reported conduct of Rost. She knew that, according to the complaining employee, the procedure directed by the tenant's case worker was to inventory the prescription medicines, document the prescription number, and then have two people dispose of the medications. Chairperson Thompson also knew that there were

regulations governing prescription medications and that the only way to get certain drugs such as Zoloft was to have a prescription for them. *AA-48*.

Upon receiving legal advice and determining how to best address the situation, Chairperson Thompson scheduled a special meeting of the AHRA Board of Commissioners for Friday, March 12, 2004. The purpose of the meeting was to consider the complaint made by an AHRA employee against Rost, the executive director. *AA-200*. Prior to this meeting, Chairperson Thompson met with Rost and provided her with a Tennessee warning pursuant to Minn. Stat. §13.04, subd. 2. Chairperson Thompson then informed Rost that the Board would be meeting to discuss an incident involving the prescription Zoloft. *AA-52, 110*. Chairperson Thompson testified that during this meeting Rost admitted that she took Zoloft because she had the same prescription and that rather than destroying the pills she was going to use them to save money. Rost admitted to taking the pills but then told Chairperson Thompson, "I didn't do anything wrong." Chairperson Thompson told Rost that she would be bringing this matter to the AHRA Board and that Rost was welcome to attend and present her side to the Board. *AA-52-53*.

The AHRA Board meeting on March 12, 2004 was recorded and a written transcript created. *AA-202*. Minutes of the special meeting were also completed. *AA-200*. The minutes and transcript reflect that Rost was provided an opportunity to explain her conduct involving the Zoloft. Rost admitted to taking the pills with the intention of using them for her own purposes. Rost indicated that the pills were still in her possession and that she thought she was not doing anything wrong because they were "going to flush

them down the toilet anyway.” *AA-203* Rost also responded that she felt it significant that she was “forthright” and did not hide her conduct from other employees or “didn’t sneak around and do it.” *AA-204-205*. Rost stated “I wanted another employee to know that this is what I was doing and that I was going to use them basically to save money for myself.” *AA-205*.

Rost did not seem to comprehend that this conduct reflected poor judgment on her part. The Board indicated that they were concerned about Rost’s conduct and the message that it sent. The message being that “it’s okay to take something from a client’s belongings for personal use.”²

The AHRA Board spent considerable time deliberating the appropriate response to Rost’s conduct. Ultimately, the Board decided to give Rost an opportunity to resign. If she chose not to resign, the Board notified Rost that they would be terminating her employment. *AA-200-201*. The AHRA Board decided that Rost lost her credibility and that it would be impossible for her to be the top manager of the agency. *AA-55-56*. Rost requested time to consult with her attorney before submitting a resignation. *AA-200*. The Board agreed but made a specific request for Rost’s resignation and took steps to appoint an interim executive director. *AA-200-201*. Although Rost wrote up a letter of

² The following is an exchange between AHRA Board member Benson and Rost:

CB: Well, we’ve talked a little bit about how in your position leading by example is pretty important and that by taking a prescribed drug to someone else for your own use is a pretty serious matter regardless. And what it --

JR: I guess I didn’t know that it was.

CB: Obviously, as I said, we’re in two different places here.

JR: Uh-Huh.

AA-205.

resignation dated March 15, 2004, she claims that she did not immediately tender this to any Board member. Rather, Rost made a specific request to the AHRA Board that they reconsider their decision and reinstate her. *AA-120-121; AA-232-233*. Specifically, Rost asked the Board to “consider giving me my job back as director.” *AA-232*. She also requested that the Board meet to discuss her reinstatement request and referred to the AHRA personnel policy as support for such a meeting.³

On March 17, 2004, the AHRA Board met to discuss Rost’s request. Again, this meeting was recorded and a transcription created. *AA-237* Minutes of the meeting were also taken and completed. *AA-235-236*. The stated purpose of the meeting was to consider the written request received from Rost asking that the Board reconsider their decision asking for her resignation. *Id.* After deliberating and evaluating the process previously provided, a majority of the Board concluded that the following fact remained undisputed: Rost took personal possession of the Zoloft with the intention to use the medication herself because of the expense of the prescription. *Id.* The Board believed additional meetings would not change this fact. Therefore, the AHRA Board denied Rost’s request for reconsideration. Chairperson Thompson then advised the other Board members that she had been informed by Rost that if the Board did not grant a

³ Specifically, Rost referenced the “Separation from Employment” provision in the AHRA personnel policy which states:

An employee who gives unsatisfactory service or who is guilty of substantial violation of regulations shall be subject to dismissal without notice. In such cases the employee, if he/she desires, shall be given a hearing before the Board of Commissioners. *AA-19*.

Under the plain language of this policy, however, Rost was not entitled to a hearing because she was given notice of the charges against her, and an opportunity to respond,

reconsideration hearing, Rost would resign her position. *Id.* Subsequently, upon learning of the Board's decision, Rost tendered her resignation. *AA-121; AA-234.* Rost's resignation was effective March 19, 2004.

On or about May 24, 2004, Rost filed a petition for independent review with the Bureau of Mediation Services ("BMS") pursuant to Minn. Stat. § 179A.25.⁴ *AA-295.* In her petition for independent review, Rost alleged that the AHRA violated its employment policy when it terminated her employment without cause. *AA-288.* On or about June 9, 2004, AHRA filed an Answer to Rost's petition for independent review requesting that the Bureau of Mediation Services dismiss the Petition for lack of jurisdiction because review of AHRA's decisions involving Rost's employment is limited to certiorari review as established in *Dietz v Dodge County*, 487 N.W.2d 237 (Minn. 1992) and *Willis v. County of Sherburne*, 555 N.W.2d 277 (Minn. 1996). *AA-295.* AHRA also requested dismissal of Rost's petition on the basis that because an at-will employment relationship existed, there are no terms and conditions of employment subject to review under Minn.

before the AHRA asked for her resignation in lieu of termination.

⁴ Minn. Stat. § 179A.25 provides:

It is the public policy of the State of Minnesota that every public employee should be provided with the right of independent review, by a disinterested person or agency, of any grievance arising out of the interpretation of or adherence to terms and conditions of employment. When such review is not provided under statutory, charter, or ordinance provisions for a civil service or merit system, the governmental agency may provide for such review consistent with the provisions of law or charter. If no other procedure exists for the independent review of such grievances, the employee may present the grievance to the commissioner under procedures established by the commissioner.

Stat. §179A.25. *AA-301*. BMS rejected AHRA's requests and ordered the parties to submit to binding arbitration. *AA-296, 330*

Bureau Policy VII is the BMS policy that "establishes procedures for administering Minnesota Statute §179A.25, Independent Review." *AA-355*. The stated objective of BMS by initiating Bureau Policy VII is to "effectuate the purposes of the Public Employment Labor Relations Act (PELRA); Minn. Stat. Chapter 179A." *Id.* Besides providing for standards and guidance in the area of petition/answer filing and contents, briefs and notices, Policy VII gives BMS the discretion to assign arbitrators to conduct "independent review" hearings and ultimately determine the rights of the parties. The policy is not limited in its application to only termination decisions, however, but applies to *any* terms and conditions of employment a public employee may claim was violated. Most notably, Policy VII does not provide any mandated deference to the public employer's decision-making and Policy VII requires that arbitrator decisions and orders "shall be binding on all parties." *AA-359, Sec. XV.*

AHRA did not agree to delegate its managerial authority over its employees to BMS. Nor did the AHRA consent to BMS's jurisdiction over employee grievances about terms and conditions of employment. *AA-1*. In addition, AHRA policies state that employees are employed "at-will." Thus, Rost had no contractual terms or conditions of employment subject to independent review. *Id.*

AHRA attempted to challenge BMS's jurisdiction and Bureau Policy VII by bringing a declaratory judgment action in district court. The district court found that it was without jurisdiction over this matter because AHRA was challenging the jurisdiction

of a state agency. This court, in a decision dated October 10, 2006 (A06-75), agreed with the district court and held that in order to challenge BMS's independent review of a public employer's administrative decision under Minn. Stat. § 179A.25, AHRA was required to proceed by writ of a certiorari to the court of appeals after a final agency decision. Thus, the matter was remanded to BMS for a final decision on Rost's petition for independent review. *AA-384*.

On June 6, 2007 Rost and AHRA participated in an independent review hearing before Arbitrator Joseph L. Daly. AHRA preserved its right to contest BMS jurisdiction. *AA-30-34*. Arbitrator Daly took witness testimony and received evidence and arguments from both Rost and AHRA. On July 23, 2007, Arbitrator Daly issued an "Opinion and Award" reversing the AHRA's termination decision and ordering reinstatement of Rost to the executive director position. *AA-334, June 6, 2007 Order*. Specifically, Arbitrator Daly concluded:

Ms. Rost's discharge is reversed. She is reinstated immediately with all back pay and lost benefits and reimbursement for all of her out of pocket expenses caused by lost benefits, such amounts to be computed by the parties, with any disagreement to be submitted to this independent hearing officer for resolution. There shall be a set off for all wages, unemployment benefits and other money earned in other employment endeavors.

AA-354. BMS adopted Arbitrator Daly's decision without review or comment. Indeed, Bureau Policy VII mandates that the arbitrator's decision becomes the final agency decision upon service on all parties and the BMS Commissioner. *AA-358*.

STANDARD OF REVIEW

The Court of Appeals' review of this matter on writ of certiorari is limited to an inspection of the record to determine the propriety of jurisdiction and procedures and, with respect to the merits, to determine whether the decision at issue was arbitrary, oppressive, unreasonable, fraudulent, or unsupported by evidence or applicable law. *See Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992); *Willis v. County of Sherburne*, 555 N.W.2d 277 (Minn. 1996); *Reiersen v. City of Hibbing*, 628 N.W. 2d 201, 204 (Minn. App. 2001); *Senior v City of Edina*, 547 N.W.2d 411, 416 (Minn. App. 1996). Whether subject-matter jurisdiction exists is a question of law, which the appellate courts review de novo. *Shaw v. Bd of Regents of Univ. of Minn.* 594 N.W.2d 187, 190 (Minn. App. 1999), *review denied* (Minn. July 28, 1999). Here, BMS had no jurisdiction over the AHRA because it acted outside of its constitutional and statutory authority in ordering binding arbitration. In addition, BMS based its arbitration decision on several erroneous theories of law, including 1) Rost had contractual terms and conditions of employment and 2) BMS had final and binding authority over AHRA's administrative decisions. Therefore, because BMS violated the Minnesota Constitution and exceeded its statutory authority under Minn. Stat. § 179A.25, Appellant AHRA requests this Court reverse BMS's order for Rost's reinstatement and grant judgment in favor of Appellant AHRA.

LEGAL ARGUMENT

I. ROST'S CHALLENGE TO AHRA'S QUASI-JUDICIAL EMPLOYMENT DECISION(S) IS LIMITED TO REVIEW BY WRIT OF CERTIORARI TO THE COURT OF APPEALS.

The decision to ask for Rost's resignation was made by the executive body of a political subdivision: the AHRA's Board of Commissioners. The decision itself was quasi-judicial in nature. In her petition for independent review, Rost is clearly challenging the manner in which the AHRA exercised its administrative discretion. Rost claims that AHRA "violated the terms and conditions of her employment, which limit discharge to enumerated reasons – 'for cause.'" AA-288. As such, Rost's sole means for challenging this decision was by writ of certiorari to this Court pursuant to Minn. Stat. §606.01. *See, Dietz v. Dodge County*, 487 N.W.2d 237 (Minn.1992). Thus, just as the district court has no jurisdiction over review of a political subdivision's administrative decision-making, BMS, a state agency attempting to impose a form of judicial review over public employers, is also without jurisdiction.

The Minnesota Supreme Court has repeatedly held a petition for a writ of certiorari provides the *exclusive* means by which a public employee can secure judicial review of quasi-judicial decisions including those involving termination of employment. *See, Dokmo v. Independent School Dist. No. 11*, 459 N.W.2d 671 (Minn. 1990); *Dietz v. Dodge County*, 487 N.W.2d 237 (Minn.1992); *Willis v. County of Sherburne*, 555 N.W.2d 277 (Minn. 1996); *Tischer v. Cambridge HRA*, 693 N.W.2d 426 (Minn. 2005). This body of law, sometimes called the *Dietz* doctrine, is based on constitutional principles of separation of powers. The Minnesota Supreme Court has recognized

constitutional barriers involved in the judicial review of a political subdivision's administrative decision making. To illustrate the need for judicial restraint in these circumstances, the Supreme Court has stated:

The issue which [the public employee] would have the court review demands scrutiny of the manner in which the [public body] has discharged its administrative function; the very type of scrutiny that runs a grave risk of usurping the [public body]'s administrative prerogative. Thus, to the extent that she has characterized her contract as requiring cause to dismiss, she has raised a threshold issue which at least arguably renders the [public body]'s termination decision quasi-judicial in nature, warranting the issuance of a writ of certiorari.

Dietz, 487 N.W.2d at 240.

In the present case, Rost is characterizing her grievance as a failure of the AHRA to establish cause under its policies to terminate her employment. Because of this characterization, as well as the discretionary nature of the Board of Commissioners' actions being scrutinized, the standard of review on certiorari is more appropriate than would be the standard of review of "an independent proceeding." *See Id.* at 239.

Rost argues that independent review under Minn. Stat. § 179A.25 is outside the *Dietz* doctrine because it is statutory authority for a different process. *See Willis v. County of Sherburne*, 555 N.W.2d 277 (Minn. 1996). While there are limited exceptions to writ of certiorari review, the process developed by BMS for review under Minn. Stat. § 179A.25 is not one of them. In *Willis* the Minnesota Supreme Court identified an exception to the *Dietz* doctrine where there is "statutory authority for a different process." 555 N.W.2d at 283. However, the Supreme Court went on to explain the types of statutes which would meet this exception. The Court gave examples of statutes which provide for

a specific and separate cause of action; i.e., the Minnesota Human Rights Act (Minn. Stat. § 363.01) and the Whistleblower statute (Minn. Stat. §181.75). *Id.* Unlike these listed statutes, however, Minn. Stat. § 179A.25 is not an exception to the *Dietz* doctrine because it is not substantive in nature; i.e., it does not proscribe conduct nor does it provide for a specific claim for relief. Instead, Minn. Stat. § 179A.25 is a procedural statute; mandating a process of review over certain public employer decisions.

Rost also argues her right of independent review is based on the plain language of Minn. Stat. §179A.25 because the AHRA did not provide another avenue for “independent review.” BMS agreed with this argument and found that writ of certiorari did not satisfy the requirement for independent review. *AA-334*. However, the process provided under the *Dietz* doctrine is an independent review. While constitutional principles require a limited standard of review on certiorari, this Court acts as a check against arbitrary, unreasonable and unlawful decisions. Therefore, Rost always had an independent right of review by the Court of Appeals; she simply elected not to utilize it.

In addition, BMS has promulgated rules (Bureau Policy VII) requiring binding arbitration as the only form of review no matter the nature of the decision being challenged. BMS is not above the Minnesota Constitution, however, and Minn. Stat. § 179A.25 does not vest a state agency such as BMS with the authority to conduct judicial review of administrative actions of public bodies in circumvention of the *Dietz* doctrine. Because BMS’s orders in this case violate the Minnesota Constitution, and Rost did have a right of independent review by writ of certiorari to the Court of Appeals, Appellant AHRA requests this Court reverse BMS and grant judgment in its favor.

II. BMS'S DECISIONS AND ORDERS ARE BASED ON ERRONEOUS INTERPRETATIONS OF THE LAW

Even if BMS's procedures for independent review are constitutional, which they are not because of the constitutional conflict identified by the *Dietz* doctrine, BMS's decisions in this case should still be reversed because they are based on several errors of law. First, Rost did not have terms and conditions of employment, and as such, was not entitled to review under Minn. Stat. §179A.25. Second, BMS exceeded its legislatively granted authority in mandating binding arbitration over Rost's petition for independent review. Third, BMS erred in applying a *de novo* standard of review over the hearing process.

No Terms and Conditions of Employment

Because Rost was an at-will employee she did not have terms and conditions of employment sufficient to satisfy the requirements of Minn. Stat. § 179A.25. The Minnesota Supreme Court has held that employees must demonstrate that they have terms and conditions of employment rising to the level of an employment contract in order to be entitled to independent review. *Boe v. Polk County Library Board*, 299 Minn. 226, 217 N.W.2d 208 (Minn. 1974). BMS has adopted and accepted this principle of jurisdiction. *See AA-296, AA-337*. BMS even highlighted the following quote from a 1975 decision of the Public Employment Relations Board:

It is clear that Minnesota Statute 179.76 (*now*, Minn. Stat. § 179A.25) provides merely a procedural remedy and does not create any substantive rights. While the Board is authorized to review a grievance arising out of the interpretation of or adherence to the terms and conditions of employment, it is not authorized to create a term or condition of employment. Instead, the substantive rights of a petitioner must be

ascertained by reference to an independent source such as contract or statute. *In the absence of an existing term or condition of employment which the Board is required to construe or which has allegedly been breached, the Board is without authority to provide independent review*

AA-299, quoting *Nornberg and City of Little Falls*, BMS Case No. 75-IR-44-B, November 19, 1975 (emphasis added).

Rost was subject to the personnel policies adopted by the AHRA. AA-1. These policies clearly state that all employees are to be considered at-will and that “there shall be no employment contracts.” AA-7. Under Minnesota law, such a disclaimer is enforceable against a claim of contractual rights. *Miller v. Citizens Sec. Group, Inc.*, 116 F.3d 343, 349 (8th Cir. 1997); *Audette v Ne. State Bank of Minneapolis*, 436 N.W.2d 125, 127 (Minn. App. 1989). BMS (through Arbitrator Daly) acknowledged AHRA’s argument of at-will employment but then ignored the facts and the law and, without explanation, decided Rost’s grievance on the assumption that she had enforceable terms and conditions of employment.⁵ Rost did not have any contractual rights to employment.

⁵ Arbitrator Daly does not identify the language in the AHRA’s policy which he concludes creates enforceable terms and conditions of employment. He lists as “potentially relevant policy” the paragraph in the personnel policies entitled “Basic Principals” which includes the following language:

The employment of personnel and all actions affecting the employees of the Alexandria Housing and Redevelopment Authority shall be based solely on merit, ability and justice. There shall be no discrimination against employees or applicants for employment based on race, color, religion, sex of household head, national origin, marital status, handicap, age, receipt of public assistance, political or union affiliation. Federal Statue 5 U.S.C. §1501 restricts the political activities of any Public Housing Authority officers and its employees if their principal employment is in connection with an activity financed in whole or in part by Federal funds. The U.S. Merit Systems Protection Board enforces these restrictions.

She was employed at-will and therefore BMS was without jurisdiction to hear her petition for independent review.

No Authority for Binding Arbitration

AHRA did not agree to submit to binding arbitration or BMS jurisdiction over its employment grievances. BMS's orders and policies requiring binding decisions on all employee grievances submitted for independent review are outside the agency's express authority given to it by the legislature. Therefore, BMS exceeded its statutory authority in ordering binding arbitration over Rost's grievance and its decision should be reversed on this basis.

BMS is an agency created by statute. BMS only has those powers given to it by the legislature. The legislature states what the agency does and how it is to do it. "Neither agencies nor courts may under the guise of statutory interpretation enlarge the agency's powers beyond that which was contemplated by the legislative body." *Waller v. Powers Department Store*, 343 N.W.2d 655, 657 (Minn. 1984).

The statute providing for independent review is silent as to the scope and nature of review proceedings and decisions. *See* Minn. Stat. § 179A.25. The statute provides that "[I]f the employing agency does not provide procedures for independent review, the employee may present [her] grievance to the Commissioner [of BMS] under procedures established by the Commissioner." *Id.* Pursuant to this authority, BMS established Bureau Policy VII for administering independent review proceedings. BMS has

AA- 5. No where in the personnel policies is there "for cause" language or a limitation on removals.

exceeded its statutory authority by enacting in this policy as binding and de novo arbitration over all public employee grievances.

An arbitration award which addressed this very issue of scope and nature of review is instructive here. *In Re Arbitration between City of Maple Grove, Minnesota and Sergeant Jeff Garland*, BMS Case #98-PIR-1780, Arbitrator Jeffrey W. Jacobs reviewed the issue submitted by the parties whether he had the right to render a binding decision. Arbitrator Jacobs referenced prior arbitration award decisions as well as the Minnesota Supreme Court's decision in *Boe v. Polk County Library Board*, 299 Minn. 226, 217 N.W. 2d 208 (Minn. 1974), in concluding that the "clear implication" of the nature of the right to independent review "derives from the employment relationship between the parties." *In Re Arbitration between City of Maple Grove, Minnesota and Sergeant Jeff Garland*, BMS Case #98-PIR-1780. AA-372. In determining the scope of review in the *Garland* matter, Arbitrator Jacobs looked to the facts of the case before him:

In this instance, the authority for a binding decision would be governed by the City's Personnel Policies. *The question is thus whether these policies provide for a binding decision by the arbitrator.*

Id. (emphasis added).

While finding no language in Maple Grove's policies that provide for binding arbitration, Arbitrator Jacobs found merit to the argument that the legislature did not intend to impose binding review without the employer's consent. Arbitrator Jacobs wrote:

M.S. 179A.25 is silent with respect to the binding nature of decisions rendered thereunder. Other parts of the statute however do specifically provide for arbitral decisions to be binding. This leads to the conclusion under generally accepted principles of legislative interpretation that the legislature did not intend for all such decision under M.S. 179A.25 to be binding. It is rather more consistent with the legislative intent of the statute as well as the Bureau Policy, that the issue of whether a decision is binding is *one which must derive from the contract, ordinance or other contractual document giving rise to the right of review in the place*

Id at 14 (*emphasis added*)

Arbitrator Jacobs' reasoning and conclusions were rejected by BMS. Instead, BMS revised its policies to explicitly provide for binding orders and decisions without any clarification from the legislature as to its authority to do so.⁶

In addition, this Court is required to consider the consequences of a particular interpretation when ascertaining legislative intent. Minn. Stat. § 645.16. It must also presume that the legislature did not intend a result that is absurd or unreasonable. Minn. Stat. § 645.17(2). In practice, BMS's broad interpretation of Minn. Stat. § 179A.25, as articulated in its orders in this case, results in a gross absurdity and undesirable

⁶ BMS's contention that it need not look to the employment relationship created by the parties to determine the nature of review is contradicted by its own decisions. In *Mashuga v Anoka-Hennepin Technical College*, BMS Case No. 04-PIR-112, BMS rejected a public employee's petition for independent review after "scrutinizing" the contractual terms and conditions of his employment. The employee in *Mashuga* was a member of the Minnesota Association of Professional Employees (MAPE). However, as an unclassified employee, he did not have any grievance or appeal rights under the MAPE bargaining agreement. The employee cited public policy language in Minn. Stat. § 179A.25 to support his theory that every public employee should be provided the right to request BMS to conduct an independent review over an adverse employment termination decision by binding arbitration. BMS admitted that the employee had terms and conditions of employment but denied his petition for review on the basis that BMS must adhere to the terms of the employment relationship created by the employer and the union. BMS declared that doing otherwise would be an "unreasonable interpretation of

consequences of statewide proportions. BMS has gone beyond any authority delegated it by the legislature to provide for “review” of public employee grievances and instead has assumed the power to divest executive bodies of their sovereign authority related to resource delegation and personnel management.⁷ If BMS’s argument is accepted, the constitutional and public policy principles established by the *Dietz* doctrine will be moot. Every grievance involving a challenge to a public entity’s administrative decision-making would have to go through the binding and de novo trial process established by BMS under Bureau Policy VII. The absurdity of BMS acting as a statewide personnel board for all municipalities including cities, counties and school districts is apparent. BMS would be eviscerating the sovereignty of local government to exercise authority over fundamental issues including management of personnel and establishment of workplace standards.

The plain language of Minn. Stat. §179A.25, as well as the clear legislative intent, provides, at most, that BMS has authority to review certain grievances but not authority to totally usurp a public entity’s power over its employment decisions. Therefore, because BMS is without statutory authority to impose binding arbitration over AHRA’s

PELRA.”

⁷Explicit statutory powers given to political subdivisions illustrate this point. For example, in city government the legislature gave authority to the city council or city manager to appoint employees and agents for the city as deemed necessary for the proper management and operation of city affairs. Minn. Stat. § 412.661 (2001). The statutes explicitly provide cities *shall* have full authority over their financial affairs, and *shall* provide for the safekeeping and disbursement of public moneys. Minn. Stat. § 412.241 (2001).

employment decisions in this case, BMS's decision ordering Rost's reinstatement must be reversed.

Improper Scope of Review

BMS also erred in rejecting AHRA's request for a limited standard of review in the independent review proceedings. Arbitrator Daly determined de novo review was appropriate but reached this conclusion based on a misinterpretation of the procedural posture of this case and the adoption of another arbitrator's misplaced conclusions.⁸

Principles of separation of powers mandate that the proper scope of review on a petition for independent review is the same as that which the Court of Appeals applies on a Writ of Certiorari. Minnesota Constitution Article III, Section 1 provides:

DISTRIBUTION OF THE POWERS OF GOVERNMENT

Section 1. Division of powers. The powers of government shall be divided into three distinct departments; legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

Like any municipal body, AHRA is considered an extension of the executive branch of government. *See Dietz v. Dodge County, supra* at 237, 239. BMS is a state agency created by the legislature to administer the Public Employers Labor Relations

⁸ Arbitrator Daly references *Smitka v. City of Hutchinson*, BMS Case. No. 04-PIR-230 (November 1, 2004) in which Arbitrator A. Ray McCoy concluded that because the arbitrator in a BMS independent review proceeding gets his/her "marching orders" from BMS, and those orders require de novo and binding review, there is no merit to the employer's argument of limited review based on separation of powers principles. This circular reasoning is flawed and unhelpful. Essentially both arbitrators skirt the real issue claiming the de novo standard of review is legal because BMS says it's legal.

Act, Minn. Stat. §179A.25; Minn. Rules Part 5510. Just as the judicial branch recognizes the separation of powers principles by exercising very limited review when a public employee challenges a termination decision through judicial review, so must a state agency exercise limited review when it mandates a trial-like process over review of a public entity's administrative decisions.

Dokmo v. Ind. Sch. Dist. No. 11, 459 N.W. 2d 671 (Minn. 1990) and *Dietz v. Dodge County*, *supra*, are informative on this point, because they discuss judicial recognition of separation of powers concerns and confirm the deference afforded public entities by virtue of the fact that such a body is a derivative of the executive branch of government. The holding in *Dokmo* arose from a judicial recognition of separation of power concerns and deference accorded a school board by virtue of the fact that such a body is a derivative of the executive branch of government. *Dietz*, *supra*, at 439. In *Dokmo*, the Minnesota Supreme Court held that a declaratory judgment action to judicially review the school board's adverse determination was inappropriate because such a potentially searching review would unconstitutionally invade the school board's decision making processes and impermissibly upset efficiency concerns. *Dokmo*, 459 N.W. 2d at 674-677.

In the present case, Arbitrator Daly ignored the constitutional principles requiring deferential review and instead erroneously concluded that this Court has already ruled on the issue. See *Alexandria Housing and Redevelopment Authority v. BMS, et al*, File No. A06-75 (unpublished case). AA-384. In referring to the first appeal filed by AHRA, Arbitrator Daly concluded that this Court held "[the independent review] hearing officer

has jurisdiction over the matter and has de novo authority to make a decision premised on the evidence presented at the independent hearing.” *AA-351*. This is a clear misreading of the prior decision. This Court did not rule on the legal arguments raised by AHRA challenging BMS’s jurisdiction over Rost’s petition for independent review. Instead, this Court held that writ of certiorari of a final agency decision was required in order to properly position the legal issues which are at the heart of this appeal. *Alexandria Housing and Redevelopment Authority v. BMS*, CX-04-11127, p. 9.

In addition, had BMS applied the correct standard of review, AHRA decisions involving Rost’s employment would have required affirmance. The appropriate standard is one of deference. BMS is confined to review questions affecting the jurisdiction of the public body, the regularity of the proceedings, and, as to merits of the controversy, whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it. *State ex rel. Ging v. Bd of Education of Duluth*, 213 Minn. 550, 571, 7 N.W.2d 544, 556 (1942); *see also Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992). In the present case, the evidence presented at the independent review hearing shows that Rost’s lack of good judgment, which she admitted to on multiple occasions⁹, resulted in a substantial loss of credibility in her continued leadership of the agency. The evidence also shows that the AHRA complied with its policies in asking for Rost’s resignation. *AA-1*. Therefore, because BMS applied an erroneous standard of review in

⁹ Rost admitted to a lack of good judgment in her request for reconsideration (*AA-232*) and at the independent review hearing. *AA-157, 164, 175*.

the hearing process, and there is substantial support in the record for AHRA's decisions, this Court should reverse BMS's order reinstating Rost.

III. BMS EXCEEDED ITS STATUTORY AUTHORITY UNDER MINN. STAT. §179A.25 IN ORDERING BACK PAY AND BENEFITS AND OTHER RELIEF.

BMS, through Arbitrator Daly, also exceeded its statutory authority in ordering restitution for Rost, to be borne by AHRA, including payment of back pay and benefits, reimbursement of all Rost's out of pocket expenses, and removal *and destruction* of all references to Rost's discharge/resignation from the AHRA records. Specifically, BMS ordered the following:

[Payment of] all back pay and lost benefits and reimbursement for all of [Rost]'s out of pocket expenses caused by lost benefits, such amounts to be computed by the parties, with any disagreement to be submitted to this independent hearing officer for resolution...

and

All references to Ms. Rost's discharge and the reasons therefore should be removed from the Alexandria HRA personnel records and destroyed.

AA-334.

However, BMS (and Arbitrator Daly) had no authority to grant this broad relief. BMS's authority is limited by the statutory language of Minn. Stat. § 179A.25. The plain language of the statute does not vest BMS with the authority for awarding lost wages or other monetary relief. It certainly does not give BMS the authority to remove and destroy official public records. Indeed, public entities are required by law to preserve official records. *See* Minn. Stat. § 138.17 and Minn. Stat. § 15.17. The broad relief awarded

Rost by Arbitrator Daly, and adopted by BMS, is not lawful because there is simply no legal authority vested in BMS to grant such an award.

The plain language of Minn. Stat. § 179A.25 only provides a right of independent review of certain grievances affecting terms and conditions of public employment. It must be presumed that the legislature intended the entire statute to be effective and certain. Minn. Stat. § 645.17(2). Indeed, if the legislature intended to provide a cause of action with rights of relief in Minn. Stat. § 179A.25 it could have done so. It did not, and BMS, Arbitrator Daly, and the courts are without authority to write in a statutory remedy where one does not exist. *See Mattice v. Minnesota Property Ins. Placement*, 655 N.W.2d 336 (Minn. App. 2002) (court's role is to simply interpret statutory language, not to look beyond plain meaning in order to in effect rewrite a statute to accomplish a specific result). Therefore, this Court should reverse BMS's order for back pay and other specific relief awarded to Rost.

CONCLUSION

Respondent Rost's sole means of challenging AHRA's employment decisions was by writ of certiorari to this Court. Thus, Respondent BMS was without jurisdiction to order binding arbitration over Rost's grievance. Even if BMS had jurisdiction, this Court must reverse the arbitration award because it is based on several errors of law. Rost did not have enforceable terms and conditions of employment; BMS exceeded its statutory authority in ordering binding and de novo arbitration over the grievance; and BMS was without authority to order back pay and benefits and other relief. Therefore, Appellant

AHRA respectfully asks this Court to reverse BMS decision ordering reinstatement and enter judgment in favor of AHRA.

LEAGUE OF MINNESOTA CITIES

Date: November 30, 2007

A handwritten signature in black ink, appearing to read 'Patricia Y. Beety', is written over a horizontal line.

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STATE OF MINNESOTA
IN COURT OF APPEALS

CASE TITLE:

Alexandria Housing and Redevelopment
Authority,

Appellant,

CERTIFICATE OF BRIEF LENGTH

vs.

Judith Rost and
Bureau of Mediation Services,

Respondents.

I hereby certify that this brief conforms to the requirement of Minn. R. Civ. App. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 7,080 words. The brief was prepared using Word 2000 word processing software.

LEAGUE OF MINNESOTA CITIES

Date: November 30, 2007



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