

CASE NO. 07-1620

STATE OF MINNESOTA
IN COURT OF APPEALS

Alexandria Housing and Redevelopment Authority,

Appellant,

vs.

Bureau of Mediation Services and
Judith A. Rost

Respondents.

BRIEF AND APPENDIX OF AMICUS CURIAE
MINNESOTA SCHOOL BOARDS ASSOCIATION

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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**Pursuant to Rule 4 of the Special Rules of Practice for the Minnesota Court of Appeals, all cited unpublished opinions are included in Amicus Curiae Minnesota School Boards Association's Appendix.*

INTEREST OF THE AMICUS CURIAE

The Minnesota School Boards Association (“MSBA”) is a voluntary nonprofit association of all public school boards in the State of Minnesota. MSBA represents school districts in public forums such as the courts and the State Legislature. MSBA also provides information and services to its members and coordinates their relationships with other public and private groups. In addition, MSBA provides advice and guidance to its member school districts in a wide variety of areas, including policy matters, public finance and legal issues.

Many of the activities of MSBA, on behalf of its members, are explicitly sanctioned or recognized by the Legislature. See, e.g., Minn. Stat. § 18B.095 (requiring the commissioner to consult with MSBA to establish and maintain a registry of school pest management coordinators and provide information to school pest management coordinators); Minn. Stat. § 123B.09, subd. 2 (requiring school board members to receive training in school finance and management developed in consultation with MSBA); Minn. Stat. § 123B.91, subd. 1 (encouraging districts to use MSBA’s Model Transportation Safety Policy); Minn. Stat. § 125A.023 (requiring that MSBA appoint one member to the interagency committee to develop and implement an interagency intervention service system for children with disabilities); Minn. Stat. § 179A.04, subd. 3 (requiring MSBA, as the representative organization for Minnesota school districts, to provide a list of names of arbitrators to conduct teacher discharge or termination hearings to the Bureau of Mediation Services); and Minn. Stat. § 354.06 (requiring that one

member of the board of trustees of the Teachers Retirement Association be a representative of the MSBA).

MSBA has an ongoing relationship with school districts in the State of Minnesota.¹ As public employers subject to the Public Employment Labor Relations Act, Minnesota Statutes Chapter 179A (hereinafter "PELRA"), Minnesota school districts undoubtedly will be affected by the decision in this case. MSBA, therefore, seeks to provide the perspectives of more than 300 school districts and school boards concerning the potential impact this Court's ruling will have on the employer–employee relationship in public education.

STATEMENT OF THE ISSUES, CASE AND FACTS

MSBA concurs with Appellant's Statement of the Issues, Statement of the Case and Statement of Facts.

ARGUMENT

I. THE BUREAU OF MEDIATION SERVICES HAS APPLIED MINNESOTA STATUTES SECTION 179A.25 IN AN UNCONSTITUTIONAL MANNER BY CONDUCTING A DE NOVO *QUASI-JUDICIAL* REHEARING OF EMPLOYMENT DECISIONS MADE BY COUNTY AND LOCAL GOVERNMENTS.

Minnesota Statutes Section 179A.25 provides as follows:

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*

¹ Rule 129.03 Certification: No party to this proceeding authored this brief in whole or in part. Further, no person or entity, other than the *Amicus Curiae*, its members or its counsel, made a monetary contribution to the preparation or submission of this brief.

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.

(Emphasis added.)

In the instant case, the Bureau of Mediation Services (“BMS”) concluded that Respondent was entitled to an “independent review” under Section 179A.25 because she was a “public employee” as defined in PELRA, and she had no other available avenue to obtain such a review.

Section 179A.25 anticipates that the BMS will create “procedures established by the commissioner” in the event that no other procedure exists for an independent review. Presumably in response to this statutory language, the BMS has adopted “Bureau Policy VII” (the “Policy”), which describes the procedures it employs upon receiving a petition for an “independent review.” This Policy requires the litigants to submit to an administrative hearing, where it is “the duty of the presiding officer to inquire fully into the facts in dispute, and to insure a complete hearing record. The parties may call, examine, and cross-examine witnesses. The presiding officer may require the production of documentary or other evidence as he/she deems necessary to become fully acquainted with the facts of the case.” See BMS, Bureau Policy VII at 4–5 (Appellant’s Appendix, pp.

355-359). The policy further provides that “[d]ecisions and orders shall be binding on all parties.” Id. at 5.

From a standpoint of legal substance and procedure, this Policy effectively nullifies the executive decision-making function of county and local government agencies by *requiring* both parties to submit to a binding hearing process where the public employer’s employment decisions are reexamined without giving any deference to what preceded the employee’s petition for an independent review. In other words, a public employee gets a complete “do-over”—mostly at the government employer’s expense.

Counties and local governments (including school districts) have been recognized by the courts as derivative of the executive branch of State government. See, e.g., Dietz v. Dodge County, 487 N.W.2d. 237, 239 n. 3 (Minn. 1992). Because they are part of the executive branch, Minnesota courts have been loathe to supplant the employment decisions of counties and local governments using a de novo judicial review. See Dietz, 487 N.W.2d at 240; Dokmo v. Indep. Sch. Dist. No. 11, 459 N.W.2d. 671, 674 (Minn. 1990). In the view of Minnesota courts, de novo review of local government employment decisions would “demand[] scrutiny of the manner in which [the government body] has discharged its administrative function; the very type of scrutiny that runs the grave risk of usurping the [government entity’s] administrative prerogative.” Dietz, 487 N.W.2d at 240.

Dietz and Dokmo generally recognize that it is constitutionally impermissible for a court to conduct a de novo judicial review of administrative decision-making. It would appear equally unconstitutional to allow a *quasi-judicial* de novo review of those same decisions by another administrative agency, such as the BMS. Under either scenario, the reviewing body, whether a court or State-level administrative agency, invades the province of county and local governments by rendering impotent their independent right to make employment decisions.

Such *quasi-judicial* de novo review is especially problematic where, such as in this case, not only has BMS invoked its authority to review, it has created its own procedure; a procedure that was never subjected to the legislative or administrative review process, and which grants to BMS the ability to conduct de novo review of another agency's decision. If de novo *quasi-judicial* review is constitutionally permissible, then BMS effectively becomes the executive authority for local governments. Surely, the Minnesota Legislature did not intend such a result when it enacted Section 179A.25.

II. THE BUREAU OF MEDIATION SERVICES LACKS JURISDICTION TO REVIEW *QUASI-JUDICIAL*, AT-WILL EMPLOYMENT DECISIONS UNDER MINNESOTA STATUTES SECTION 179A.25.

Under Section 179A.25, independent review, subject to other restrictions, is permitted only for a “grievance arising out of the interpretation of or adherence to terms and conditions of employment.” The plain text makes clear that any

grievances that do not arise out of “the interpretation of or adherence to terms and conditions of employment” are outside of the jurisdiction provided to BMS under Section 179A.25. In the present case, BMS failed to follow this jurisdictional requirement of Section 179A.25.

Minnesota Statute Section 179A.03 establishes that under PELRA, “terms and conditions of employment” is defined as “the hours of employment, the compensation therefor including fringe benefits except retirement contributions or benefits other than employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay, and the employer’s personnel policies affecting the working conditions of the employees.”

Minnesota Statute Section 179A.07 thereafter recognizes that matters of inherent managerial policy, including, but not limited to “such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure, selection of personnel, and direction and the number of personnel” are excluded from the definition of “terms and conditions of employment.”

While a public employer may chose to voluntarily negotiate matters of inherent managerial policy, it is not required to do so. See, e.g., Arrowhead Pub. Serv. Union v. City of Duluth, 336 N.W.2d 68, 71 (Minn. 1983). Therefore, as in this case, matters of inherent managerial policy, including hiring and firing decisions of an at-will employee, remain the sole discretion of the public employer. As such, hiring and firing decisions are not terms and conditions of

employment, and therefore, such decisions are not subject to independent review under Section 179A.25.

Pursuant to Section 179A.25, a party seeking independent review must comply with Minnesota Rules 7315.0200, *et seq.* These rules further emphasize the restricted applicability of Section 179A.25 to review only the terms and conditions of employment. These rules make clear that Section 179A.25 does not apply to review of the *quasi-judicial*, inherently managerial decisions of a public employer. For example, Rule 7315.0500 establishes that “an employee may petition the board in writing for independent review of a grievance arising out of the interpretation of or adherence to terms and conditions of employment...”

Additionally, the petition must include a concise statement specifying:

- (1) the terms and conditions of employment claimed to be violated;
- (2) whether the terms and conditions of employment claimed to be violated are established by law, rule, contract, or practice;
- (3) the law, rule, contract provision, or practice claimed to be violated;
- (4) the conduct which is claimed to violate the law, rule, contract, or practice;
- (5) the relief requested; and
- (6) why independent review of the grievance is not available under any other procedure.

From the applicable statutory and regulatory language and relevant case law, it is clear that an at-will employee has no contractual terms and conditions of employment and is, therefore, unable to raise a grievance related to the terms and conditions of employment. As such, an at-will employee is therefore unable to seek independent review of a termination decision under Minnesota Statute

Section 179A.25. See Boe v. Polk County Library Bd., 217 N.W.2d 208 (Minn. 1974).² This is directly analogous to the present case.

In Boe, two public, at-will employees sought to challenge their discharge pursuant to what is now Minnesota Statute Section 179A.25. Then, as now, the applicable statute created a right of review “of any grievance arising out of the interpretation or of adherence to terms and conditions of employment.” Boe, 217 N.W. 2d at 209.

The Court of Appeals noted that any rights that the public employees had could only be ascertained by a review of their contract of employment. Id. The Court further noted that “[u]nless [a] plaintiff can establish that she was to be dismissed only for cause by proving a contract to that effect, her employment could be terminated at any time and without cause.” Id. at 209-10. By definition, an at-will employee has no contractual or tenure rights. Therefore, it is impossible for an at-will public employee to present a grievance arising out of the interpretation of or adherence to terms and conditions of employment. Id. at 210. In the present case, as in Boe, Respondent is an at-will employee and, therefore, there are no applicable terms or conditions of employment from which independent review under Section 179A.25 could be sought. Therefore, review of the *quasi-judicial* decision of the public employer is unavailing under Section 179A.25.

² Cross v. Beltrami County, 606 N.W.2d 732 (Minn. App. 2000) does not affect this analysis. In Cross, the employer and employee voluntarily consented to submit the issue for independent review.

Additionally, even if Respondent is determined to possess terms and conditions of employment, in reality, Respondent is not seeking to challenge a decision relating to her terms and conditions of employment. Rather, she is impermissibly seeking to challenge a termination decision which is an inherently managerial, *quasi-judicial* decision excluded from review under Section 179A.25. To hold otherwise would undermine the underlying public policy reasons behind PELRA.

Minnesota Statute Section 179A.01 establishes that “[i]t is the public policy of this state and the purpose of sections 179A.01 to 179A.25 to promote orderly and constructive relationships between all public employers and their employees.” These “constructive relationships” between public employers and their employees have long included at-will employment relationships. To conclude that inherent managerial decisions in the at-will context are subject to extensive, expensive independent review under Section 179A.25, under ambiguous and varying levels of review, runs counter to the public policy underlying PELRA.

III. MINNESOTA STATUTES SECTION 179A.25 DOES NOT AUTHORIZE A DE NOVO *QUASI-JUDICIAL* TRIAL BY THE BMS.

A. BMS is Only Empowered to Conduct an Independent “Review.”

Assuming *arguendo*, this Court holds that Minnesota Statutes Section 179A.25 is constitutional as applied to the facts of this case and holds that BMS has jurisdiction; the language of that statute still does not empower the BMS to implement a de novo hearing process.

When interpreting a statute, this Court should be guided by the natural and obvious meaning of the statutory language in dispute. See State v. Newman, 538 N.W.2d 476, 477 (Minn. App. 1995); see also Glen Paul Court Neighborhood Ass'n v. Paster, 437 N.W.2d 52, 56 (Minn.1989) (when applying a statute, courts must give effect to its plain meaning, which takes into account the structure of the statute and the language of the specific statutory provision in the context of the statute as a whole).

As discussed above, Section 179A.25 affords public employees an independent *review*. It does not expressly authorize a *de novo* trial on the merits. The word “review” denotes a simple reexamination of the proceedings already had without the taking of any new evidence. The Minnesota Supreme Court itself has recognized that a “*review’ of a decision ordinarily contemplates something less than an outright trial de novo.*” St. Paul Companies v. Hatch, 449 N.W.2d 130, 137–38 (Minn. 1989) (construing Minn. Stat. § 60D.12) (emphasis added).

Had the Legislature intended for BMS to conduct *de novo* hearings under Section 179A.25, it would have so stated. Indeed, the Legislature has specifically accorded such authority in other areas of administrative review. See Minn. Stat. § 176.106, subds. 6, 9 (authorizing a *de novo* hearing in workers’ compensation matters); Minn. Stat. § 268.105, subd. 1 (authorizing *de novo* due process hearing in unemployment compensation disputes).

Unless created by the State Constitution, an administrative agency has only such powers as the Legislature chooses to confer upon it by statute. See Matter of

Hibbing Taconite Co., 431 N.W.2d. 885, 890 (Minn. App. 1988) (“The extent of jurisdiction or authority bestowed on an administrative agency is measured by the statute from which it derives its authority. . . . Authority is not obtained by the agency’s own acts, or by its assumptions of authority”).

Ironically, under BMS’s current interpretation of Section 179A.25, it has unilaterally granted itself greater review authority than is possessed by the Court of Appeals. When the Court of Appeals examines a *quasi-judicial* termination decision of a governmental entity via a writ of certiorari, the Court is limited to:

An inspection of the record of the inferior tribunal in which the court is necessarily confined to questions affecting the jurisdiction of the board, the regularity of its 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.

Dietz, 487 N.W.2d at 239.

A reviewing court is not empowered to substitute its judgment for that of the governmental body. Rather, the purpose of the review is to merely ensure that the *quasi-judicial* action of the governmental entity was not arbitrary or capricious.

Clearly, BMS’s Policy reaches beyond the limits of Section 179A.25 by requiring the public employer (who already may have provided the employee extensive due process and review) to restart at ground zero in a binding *quasi-judicial* hearing in which *no* deference is accorded to the previous actions or decision of the local government.

B. Interpreting Section 179A.25 To Authorize a De Novo Hearing Would be Contrary to Well-Established Tenants of Statutory Construction and Employment Law.

In construing state statutes, the courts may presume that the Legislature did not intend for the law in question to work an absurd or unreasonable result. See Minn. Stat. § 645.17(1).

In the instant case, allowing BMS to conduct an “independent review,” consisting of a de novo evidentiary hearing, would create significant administrative and financial burdens on local governments. When conducting a de novo review, the reviewing tribunal exercises its own judgment and re-determines each issue of fact and law. In such a review, the reviewing tribunal accords the initial decision absolutely no deference.

Thus, for example, a public employer who expends personnel time and financial resources to investigate an employee performance issue, accords the employee a progressive discipline process and conducts a Loudermill hearing² gains no benefit. Under the Policy, the employer’s actions are rendered a legal nullity. Instead, the local government is required to reiterate, in a more formal and more expensive administrative hearing, a step-by-step justification for its actions

² In Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985), the United States Supreme Court held that public employees with a property interest in continued employment are entitled to due process prior to termination, including a pre-termination hearing at which the employee may present “. . . his side of the story.”

even though the employee previously received extensive and meaningful due process.

Applying BMS's interpretation of the right to "independent review" would mean that a local government cannot be secure in its employment decision until the conclusion of at least *two* administrative reviews; one at the local level and the second by BMS. The time and cost of taking any employment action, thus, are significantly increased to the point of impairing the efficient operation of government.

This concern, which cannot be overstated, was a primary justification for the Minnesota Supreme Court's decision to limit district courts from conducting *de novo* trials of local administrative decisions. For example, the Dokmo court observed:

Besides the underlying constitutional separation of powers principles, there are very strong practical reasons for using only certiorari to review school board decisions. The use of appellate procedures other than the writ of certiorari would be costly for school districts and taxpayers. School districts need to make personnel decisions economically and expeditiously.

Dokmo, 459 N.W.2d at 677.

The Minnesota Supreme Court re-echoed those same sentiments in Dietz, holding:

Finally, in terms of practicality and cost, this case vividly illustrates the inappropriateness of permitting Dietz to obtain judicial review of the county's termination decision by way of a wrongful termination claim. A six-year statute of limitations, extensive

discovery procedures, and a panoply of rules attend her cause of action. As a direct consequence, her wrongful termination claim remains unresolved and largely unexamined by the courts almost nine years after the termination of her employment. In stark contrast, the writ of certiorari must issue within 60 days of notice of the adverse determination, contemplates none of the procedural rules that accompany a civil action, and affords direct review by the court of appeals. . . . At this late date, we think it both unnecessary and improper to expose an executive body to such potentially extensive liability for exercising a discretionary administrative decision.

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

An “independent review” consisting of a de novo evidentiary hearing is laden with increased expense and delay. Such a process creates a chilling effect on public employers, who will most certainly think twice before embarking on difficult employment decisions. Executive decision-makers will be forced to weigh the cost of keeping a poor performing employee against the drain of money needed to finance a two-tiered review procedure.

Such circumstances can also create paralysis and unforeseen difficulties in school buildings. If, for example, a poor-performing at-will paraprofessional, who provides educational services to school children, seeks an independent review, the school district will be unable to safely replace the individual with another service provider at least until a decision by BMS is rendered.

This process, as has long been recognized by Minnesota courts, is not appropriate to resolve factual disputes because such acts tend to subvert the statutory authority granted to governmental entities. Comparatively, BMS’s

interpretation of Section 179A.25, contrary to the clear intentions underlying PELRA and the Dietz line of cases, will result in a flood of litigation ensuing from any and all governmental employer termination decisions. The result will be on an increased incentive to employees to challenge said employment decisions while creating a much more complicated and expensive process for the employer.

Additionally, BMS's interpretation of Section 179A.25 will have the extremely unfortunate consequence of restricting public employers' ability to utilize the basic tenants of at-will employment which are widely available for private employers. For public employers, this resulting inability to hire at-will employees will have deleterious effects on public employers' ability to fill positions such as short-term, temporary and/or substitution-type positions in a convenient and cost-effective manner. Schools will become either understaffed to the detriment of students, or school districts will face potential increased costs of hiring contracted employees, an unnecessary and unreasonable expense given the significant economic concerns and shortfalls already facing most school districts.

IV. ALLOWING PUBLIC EMPLOYEES TO RECEIVE A DE NOVO HEARING WOULD SIGNIFICANTLY UNDERMINE DIETZ AND DOKMO.

Both Dietz and Dokmo are unambiguously explicit in their conclusion that the writ of certiorari is the *exclusive* means by which all employment related matters decided by county and local governments are to be reviewed. See Dietz, 487 N.W.2d at 239 (“... we conclude that the writ of certiorari was the only mechanism by which Dietz could obtain judicial review of the county's decision to

terminate her employment”); Dokmo, 459 N.W.2d at 671 (“This court’s longstanding rule and repeated holding has been that the proper and only method of appealing school board decisions on teacher-related matters is by writ of certiorari”).

Thus, the public employee in the instant appeal could have (and should have) obtained an independent review of her employment claim by seeking a writ of certiorari within the sixty-day time period provided by law. Instead, she chose to seek an independent review in the form of a *de novo quasi-judicial* hearing before the BMS, using the procedures in Section 179A.25.

The independent review clearly was not available under that statute. Section 179A.25 provides that a grievance may be submitted to the BMS *only* if no other process for an independent review exists. See Minn. Stat. § 179A.25 (“If no other procedure exists for the independent review of such grievances, the employee may present the grievance to the commissioner. . . .”). Neither the BMS nor Respondent have argued that certiorari review was unavailable. Instead, they contend that if the “other procedure” referenced in Section 179A.25 includes the writ of certiorari, that statute is rendered superfluous because force and effect is not being given to all of its provisions.

While appealing on the surface, the argument, at bottom, is unconvincing. The language used by the Minnesota Legislature does not guarantee or require that a BMS review be made available. Crafting the beginning of the last sentence of Section 179A.25 with the preposition “If” plainly illustrates that the Legislature

envisioned the possibility that the BMS may not ever need to conduct an independent review *if* another procedure for an independent review is available.

Additionally, it is important to note that the aforementioned arguments do not, in effect, read Section 179A.25 out of existence. For example, independent review under Section 179A.25 is appropriate where a public employee is seeking redress arising out of the terms and conditions of employment and not arising out of inherent managerial acts, such as termination. See, e.g., Sampson v. City of Babbitt, 2004 WL 193083 (Minn. Ct. App. 2004) (unpublished opinion). (App. pp. 1 – 3.) In Sampson, the public employee challenged the employer's failure to provide him with severance pay as required by the terms and conditions of his employment. Importantly, the public employee was not challenging any *quasi-judicial* act of a governmental entity and therefore, his independent review was appropriate under Section 179A.25.

Consequently, in order to give full effect to all of its provisions, the Court should make clear that the writ of certiorari is the exclusive means by which to seek an independent review of *quasi-judicial* decision, such as the termination of an at-will employee. To hold otherwise would undermine several decades of well-reasoned court decisions, as well as the important public policies upon which they were founded.

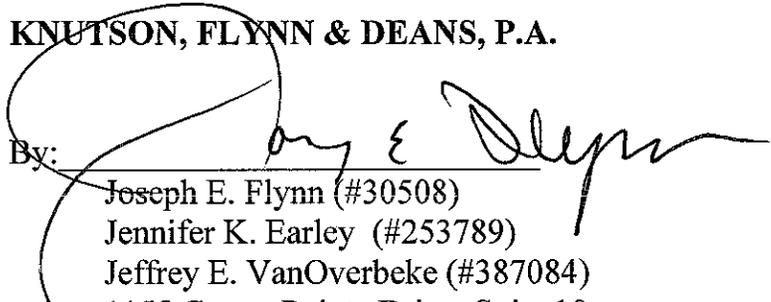
CONCLUSION

For all of the above reasons, as well as those cited by Appellant, the MSBA respectfully requests that the Court find Respondents' challenge to Appellant's employment decision is limited to review by writ of certiorari to the Court of Appeals.

Respectfully submitted,

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**CERTIFICATION OF BRIEF
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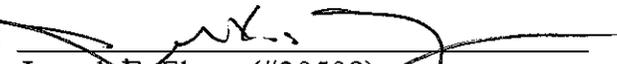
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Respondent.

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 4,071 words. This brief was prepared using Microsoft Office Word 2003.

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