

NO. A07-1620

State of Minnesota
 In Court of Appeals

Alexandria Housing and Redevelopment Authority,
Appellant,

vs.

Judith Rost and Bureau of Mediation Services,
Respondents.

BRIEF OF AMICUS CURIAE
 ASSOCIATION OF MINNESOTA COUNTIES

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INTRODUCTION

The Association of Minnesota Counties (“AMC”) is a voluntary statewide organization made up of Minnesota’s 87 counties. It is the mission of AMC to assist its members with issues related to local governance. To accomplish this mission, AMC works closely with the legislative and administrative branches of Minnesota state government.¹ Specifically, AMC works with counties involving the adoption, enforcement and modification of laws that affect the counties. AMC represents the position of the counties before state and federal government agencies and the citizens of the state.

The issues in this case involve constitutional and procedural questions as to the proper scope and application of Minn. Stat. § 179A.25 to at-will non-union employees. AMC has a public interest in the issues presented in this case regarding the constitutionality of Minn. Stat. § 179A.25, as applied to the jurisdiction of the Bureau of Mediation Services (“BMS”).

AMC is most concerned with the public policy implications created if the BMS is found to have jurisdiction because such a decision:

- (1) fails to provide deference to a local governing body’s quasi-judicial decisions;

¹ AMC received contribution in the preparation of the brief and binding costs from Minnesota Counties Insurance Trust. MCIT is a joint powers entity created pursuant to Minn. Stat § 471.59 that provides risk management advice and coverage for its members. This brief was based upon an amicus brief submitted by AMC in appeal No. A06-75. That brief was authored by Terrence Foy and Ann Goering of the Ratwik, Roszak & Maloney, P.A. law firm on behalf of AMC.

- (2) provides “two bites of the apple” to public employees possibly resulting in inconsistent results;
- (3) fails to provide a statute of limitations for seeking relief resulting in further uncertainty and impacting county budget and employment related decisions, and
- (4) increases the costs attendant to discretionary employment related decisions substantially at a time when public entities, including counties, are experiencing significant financial constraints.

For the foregoing reasons, finding that the BMS has jurisdiction causes great concern for counties.

**STATEMENT OF LEGAL ISSUES, CASE, FACTS AND
STANDARD OF REVIEW**

AMC agrees with the Statement of Legal Issues, Statement of the Case, Statement of Facts and Standard of Review contained in the Appellant’s Brief.

ARGUMENT

In its brief, Appellant explains why Minn. Stat. § 179A.25 does not vest jurisdiction with the BMS in this case. AMC agrees with Appellant’s legal arguments and conclusions articulated in its brief. AMC believes that constitutional and public policy considerations mandate a finding that Minn. Stat. § 179A.25 does not grant the BMS jurisdiction in this case.

I. *THERE HAS BEEN NO CONSTITUTIONAL DELEGATION OF JUDICIAL AUTHORITY TO BMS TO REQUIRE THE PARTIES TO SUBMIT TO BINDING ARBITRATION.*

The BMS rule requiring parties to submit to binding arbitration constitutes an impermissible transfer of judicial power to the executive branch, in violation of the separation of powers required by Minn. Const. Art. III, Section I. The vesting of quasi-judicial powers in a legislatively created agency is constitutional only:

...as long as the [agency's decisions] are not only subject to review by certiorari, but lack judicial finality in not being enforceable by execution or other process in the absence of a binding judgment entered thereon by a duly established court.

Breimhorst v. Beckman, 227 Minn. 409, 433, 35 N.W. 2d 719, 734 (Minn. 1949). The Supreme Court later characterized these requirements as marking the outside limits of allowable quasi-judicial powers in Minnesota. Wulff v. Tax Court of Appeals, 288 N.W. 2d 221 (Minn. 1979).

To be within the parameters of the constitution, the orders of an agency exercising legislatively vested quasi-judicial powers require approval by a district court unless the system is a statewide, integrated and comprehensive program that responds to pressing social need, such as the workers' compensation program. Holmberg v. Holmberg, 578 N.W. 2d 817, 823 (Minn. 1998) A limited exception to this rule also exists where the system is part of a unique legislative function, such as taxation Wulff, supra. The BMS independent review process is not such a program. BMS' orders requiring public employers to submit to arbitration are binding upon the parties once those orders are

issued. Minn. Rule 7315.2200 (2005). Because there is no mechanism for approval of BMS orders by a court, this requirement for constitutionality is not met.

II. THE BMS' POLICIES AND PROCEDURES MANDATING DE NOVO BINDING REVIEW APPLIES AN UNCONSTITUTIONAL SCOPE OF REVIEW.

BMS' policies and procedures that mandate *de novo* binding review of a public employer's discretionary employment decision apply an unconstitutional scope of review. The Minnesota Supreme Court recognizes that the principles of separation of powers limits the scope of judicial scrutiny of a public governing body's quasi-judicial decisions: including discretionary employment decisions. As opposed to a *de novo* review, a limited standard of review by way of certiorari is conferred upon the courts.

Certiorari review is confined to questions affecting the jurisdiction of the public employer, the regularity of its proceedings and as to the 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. A court cannot put itself in the place of the board, try the matter *de novo*, and substitute its findings for those of the public employer. Willis v. County of Sherburne, 555 N.W.2d 277, 280-281, (Minn. 1996). See also, Dietz v. Dodge County, 487 N.W.2d 237, 239 (Minn. 1992); Tischer v. Cambridge HRA, 693 N.W.2d 426 (Minn. 2005). The BMS' policies and procedures requiring binding arbitration far exceed the constitutional scope of permissible inquiry.

BMS' orders and policies providing for binding arbitration grants the arbitrator the full authority to hear the grievance *de novo* and to act as the trier of fact in rejecting or

accepting testimony of witnesses and making credibility determinations. See Sampson v. City of Babbitt, 2004 WL 193083 (Minn. App. Feb. 3, 2004). The arbitrator is empowered to issue findings of fact, conclusions of law, and orders as the arbitrator deems appropriate. Bureau Policy VII. BMS' policies providing for a *de novo* binding arbitration are unconstitutional as applied to a public employer's quasi-judicial decisions.

III. PUBLIC POLICY CONSIDERATIONS ESTABLISH THAT THE BMS' PROCEDURE IS CONTRARY TO THE LEGISLATIVE INTENT OF A SPEEDY CONCLUSION TO PUBLIC EMPLOYMENT DISPUTES AS SET FORTH IN THIS CASE.

Interpreting Minn. Stat. § 179A.25 to allow binding arbitration in this case would run contrary to the well-established rules of statutory construction. Minn. Stat. § 645.16, requires that when the words of a law are not explicit, legislative intent may be ascertained by considering, among other things, the consequences of a particular interpretation. Minn. Stat. § 645.16 (6). The consequences of allowing binding arbitration in such cases as the one before this Court, mandate a finding that such a review is neither contemplated nor permitted by Minn. Stat. § 179A.25.

A. BMS' POLICIES FAIL TO ESTABLISH A STATUTE OF LIMITATIONS.

Because BMS policies fail to establish a statute of limitations for employees seeking independent review, public employers face a lack of finality regarding its decisions. The purpose of a statute of limitations is "to prescribe a period within which a right may be enforced and after which a remedy is unavailable for reasons of private

justice and public policy.” Entzion v. Ill. Farmers Inc. Co., 675 N.W.2d 925, 928 (Minn. App. 2004). In part, a statute of limitation discourages endless litigation. *Id.* When a public employer’s termination decision is reviewed by certiorari, the writ must be issued within sixty days of notice of the adverse determination. Similarly, in binding arbitration under a CBA, the contractual grievance procedure imposes time limits within which a grievance must be filed.

The BMS policy mandating arbitration under Minn. Stat. § 179A.25 does not provide for a statute of limitations. Instead, the BMS allows petitions for review at any time after the adverse employment action. Given the lack of statute of limitations, the public employer faces a dilemma in determining whether to fill a position when the very real possibility exists that the terminated employee may, at any time, file an appeal. The lack of any meaningful statute of limitations injects substantial uncertainty into a public employer’s budgetary and staffing decisions following a termination decision since the employee may be reinstated with back pay and benefits. This is especially true in the case of department heads, where a decision reinstating a highly compensated county employee could wreak havoc on county budgets. See Generally, Dokmo v. ISD No. 11, Anoka Hennepin, 459 N.W.2d 671, 677 (Minn. 1990) reh’g den. October 12, 1990 (finding certiorari versus declaratory judgment the appropriate method of review in part because school districts will hesitate to dismiss or refuse to rehire a teacher if every decision is met with *de novo* review and a six-year period before a declaratory judgment action need be commenced).

Also, the lack of any meaningful statute of limitations may potentially prejudice a public employer's ability to defend its termination decision. As stated by the Minnesota Supreme Court,

Statutes of limitation * * * are designed to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Clearly, the main consideration underlying these statutes is one of fairness toward the defendant. "There comes a time when [a defendant] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations * * *."

Fabio v. Bellomo, 504 N.W.2d 758, 763 (Minn. 1993)(citations omitted.)

Finding that the legislature contemplated that the BMS would have jurisdiction to review all discretionary employment decisions without establishing a limited time limitation for those challenges runs contrary to this well-established principle. It should be presumed that if the legislature intended such a consequence it would have specifically and unequivocally articulated it.

B. BMS POLICIES WILL LEAD TO A SIGNIFICANT INCREASE OF TIME AND MONEY.

The Minnesota Supreme Court has recognized that certiorari review results in savings in both public time and public money compared to *de novo* forms of judicial review. See, Dietz v. Dodge City, 487 N.W.2d at 240, Dokmo v. ISD No. 11, Anoka Hennepin, 459 N.W.2d 671. As stated by the Minnesota Supreme Court in Dokmo:

The use of appellate procedures other than Writ of Certiorari would be costly for school districts and tax payers. School Districts need to make personnel decisions economically and

expeditiously. Declaratory Judgments lead to cases like the present appeal, significant time passes between the school board's action and the filing of the complaint.

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

The same analysis applies to *de novo* binding arbitration by the BMS.

The policies and orders requiring binding arbitration will substantially increase the costs attendant to discretionary employment related decisions. Under the BMS procedures, an arbitrator is given broad authority to resolve a grievance. The arbitrator may require the production of documents or other evidence as deemed necessary for a complete review of the case. The arbitrator has full authority to conduct a *de novo* hearing. At the hearing, the parties may call and examine witnesses, who testify under oath and are subject to cross examination. Upon a showing of good cause, the arbitrator may order that depositions to preserve testimony may be taken. Bureau Policy VII . The independent review hearing is the mirror image, albeit less formal, of a trial court proceeding. Such a proceeding will be more expensive for a government entity versus a review by certiorari.

Public entities not only face the cost of the arbitration proceeding itself, but also significant financial exposure in the form of back pay, if this court finds that such relief is authorized. The facts of this case are illustrative of this exposure. Termination of Ms. Rost occurred in March 2004. This court decided the first appeal in October, 2006. Arbitration did not occur until July, 2007, over three years after the date of termination. The arbitrator ordered reinstatement and back pay. The HRA now faces the prospect of paying over three years in salary and benefits to Ms. Rost.

If this court finds the BMS had authority, it will have the effect of exposing counties and all public entities to great financial risk whenever they terminate a non-union at will employee. This exposure is even greater when taking into consideration that no meaningful statute of limitation exists. Employees will have no incentive to seek review by Writ of Certiorari, and every incentive to seek review by the BMS. It will also have the effect of obliterating, the court's jurisprudence in this area. There can be little doubt that public employers will incur greater costs and expense if the BMS policies and procedures mandating binding arbitration are upheld. It will have the impact of requiring counties to make administrative decisions based upon the potential cost of the hearing versus what is in the best interest of county operations.

C. **BMS' POLICIES FAIL TO RECOGNIZE THAT DEPARTMENT HEADS HAVE A SPECIAL RELATIONSHIP WITH THE BOARD THAT MUST NOT BE INTERFERED WITH BY BINDING ARBITRATION.**

A special relationship exists between public employers and their department heads. Generally, department heads are entrusted with substantial discretion and authority to act on behalf of the public employer. Department heads frequently administer budgets involving substantial amounts of public money. Obviously, a public board must have confidence and trust in a department head to carry out the duties and responsibilities of the position. When a board makes a quasi-judicial determination that a department head can no longer perform the duties and responsibilities of the position, writ of certiorari provides a speedy, cost effective review of the board's discretionary decision.

However, the BMS has without any specific statutory language granted all employees, including department heads, binding arbitration. The BMS' policies and procedures overrule a public employer's discretion to make decisions regarding the terms and conditions of a department head's employment, particularly regarding termination. See Generally, Dietz v. Dodge County, 487 N.W.2d at 240 (The issue which Dietz would have the court review demands scrutiny of the manner in which the county has discharged its administrative functions; the very type of scrutiny that runs a grave risk of usurping the county's administrative prerogative.)

Department heads are vested with the obligation to implement the board's policies. Forcing elected boards to work closely with department heads once the board has determined that the department head can no longer effectively perform the duties of the position, is unworkable, unreasonable and absurd. Minn. Stat. § 645.17 (1)(the legislature does not intend a result that is absurd, impossible of execution, or unreasonable.) It also disregards the fact that county boards are in the best position to decide what type of conduct by department heads should be tolerated and the effect that such conduct will have on the operations and reputation of the county. The county board is the elected decision making body of the county government, not the BMS. Yet BMS' policies usurp the authority and discretion of county's representative board. Had the Legislature intended the result proffered by the BMS, it surely would have said so clearly and unambiguously.

In construing statutes "the legislature intends to favor the public interest as against any private interest." Minn. Stat. § 645.17 (5). It is clear that the public interest

favors allowing public boards the discretion to terminate their department heads, reviewable by certiorari only, when no specific statute or contractual language of employment provides for binding arbitration. Contrary to the speedy, efficient and economical resolution of a public employment dispute provided under certiorari review, or pursuant to the grievance timelines of a CBA, the BMS' policies and procedures mandating binding arbitration may result in the reinstatement of an employee months or even years after the public employer's quasi-judicial decision terminating employment. The private interest of the employee in seeking binding arbitration, involving *de novo* review and a more lengthy and costly proceeding, must give way to the public interest in a speedy and finite resolution.

D. BMS POLICIES AND PROCEDURES MANDATING BINDING ARBITRATION GIVES EMPLOYEES TWO BITE OF THE APPLE.

BMS policies and procedures mandating binding arbitration may also give employees two bites of the apple and lead to inconsistent results. The BMS does not recognize certiorari review as independent review for purposes of Minn. Stat. § 179A.25. The BMS also imposes no statute of limitations on when an employee can bring a petition for review. Therefore the potential exists for an employee to seek certiorari review, and if dissatisfied with the result, pursue binding arbitration through the BMS with the possibility of reinstatement. Nothing in the plain language or current interpretation of the BMS's current policies and/or rules prohibits such conduct. Such a result would turn centuries of jurisprudence and the balance of power between the various government branches on its head.

IV. THE BMS' ORDER IGNORES THE REQUIREMENT THAT THE RIGHTS OF AN EMPLOYEE MUST BE ASCERTAINED BY THE NATURE OF EMPLOYEE'S CONTRACT OF EMPLOYMENT.

BMS' orders and policies requiring binding arbitration on all employee grievances submitted for independent review fall outside the agency's express grant of authority from the Legislature. Minn. Stat. § 179A.25 is silent regarding the scope and nature of the review proceedings and decisions. The statute states, in relevant part:

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. . . . 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 commissioner.

Unlike arbitration pursuant to a CBA, where the arbitrator's authority to issue binding decisions is set forth in statute and specified in the CBA's grievance procedure and arbitration clauses, Minn. Stat. § 179A.25 does not reflect the manifest intent of the Legislature that independent review be *de novo* and binding in nature. In Boe v. Polk County Library Board, 299 Minn. 226, 217 N.W.2d 208 (Minn. 1974), the Minnesota Supreme Court concluded that, under independent review, the rights of an employee must be ascertained by the nature of the employee's contract of employment. Accordingly, the authority not only for a binding decision, but also for arbitration itself must arise out of the public employer's personnel policies. If the employer's policies fail to provide for binding arbitration, the BMS is without authority to order binding arbitration.

V. THE BMS POLICY REGARDING BINDING ARBITRATION IS INVALID BECAUSE IT WAS NOT PROPERLY ENACTED.

Moreover, BMS Policy VII, providing for binding arbitration of hearings conducted under Minn. Stat. § 179A.25, is invalid. It was promulgated as a policy and not as a rule as required by the Minnesota Administrative Procedures Act (“MAPA”).

The term “rule” means “every agency statement of general applicability and future effect * * * adopted to implement or make specific the law enforced or administered by it.” Minn. Stat. § 14.02, subd. 4. Rules must be adopted in accordance with the rulemaking requirements of the MAPA. Minn. Stat. § 14.05, subd. 1. See White Bear Lake Care Center, Inc. v. Minnesota Department of Public Welfare, 319 N.W.2d 7, 9 (Minn. 1982) (“the failure to comply with the necessary procedures results in invalidity of the rule”); Johnson Brothers Wholesale Liquor Co. v. Novak, 295 N.W.2d 238, 242-43 (Minn. 1980). “An agency interpretation that ‘make[s] specific the law enforced or administered by the agency’ is an interpretive rule that is valid only if promulgated in accordance with the [Minnesota Administrative Procedure] Act.” Mapleton Community Home, Inc. v. Minnesota Department of Human Services, 391 N.W.2d 798, 801 (Minn. 1986) (quoting Minnesota-Dakotas Retail Hardware Association v. State, 279 N.W.2d 360, 364 (Minn. 1979)); See also Minn. Stat. § 14.05, subd. 1.

The BMS “policy” in this case was not promulgated through the appropriate rulemaking process. Therefore, AMC and the other affected entities had no opportunity to review and comment on what constitutes rules of general applicability with widespread implications. The actions of the BMS in implementing this “policy” is improper and a violation of the MAPA. Failure to follow the rule making process invalidates the rule.

Since the BMS' policies and procedures requiring binding arbitration in independent review proceedings were not promulgated pursuant to rule making procedures under the MAPA, the portion of the policy calling for binding decisions is invalid.

VI. THE BMS IS IMPROPERLY REMOVING THE DOCTRINE OF EMPLOYMENT AT-WILL FROM PUBLIC SECTOR EMPLOYMENT IN MINNESOTA.

The Minnesota Supreme Court held in Boe v. Polk County Library Board, 217 N.W.2d 208 that independent review was not available to "at-will" public employees. There has been no amendment to the statutory language since this decision to alter this ruling, nor has the Minnesota Supreme Court overturned its decision in the three subsequent decades.

Nevertheless, the BMS has enacted and is attempting to enforce a policy requiring all public employers to submit to binding arbitration with respect to at-will employees: not merely a review to guard against arbitrary and capricious decisions, but binding *de novo* review of those decisions by an arbitrator appointed by the BMS. This simply cannot stand.

Even though the statute has been modified slightly over time, there has been no change regarding the finality or overall authority of the BMS with respect to independent review, nor has there been any express intent of the Legislature to institute binding arbitration. "When a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language." Minn. Stat. § 645.17 (4).

CONCLUSION

For all the reasons articulated above, and those articulated in the Appellants' brief, the Association of Minnesota Counties respectfully urges that the district court's decision be reversed.

Respectfully submitted,

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