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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 REPLY BRIEF AND APPENDIX

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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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LEGAL ARGUMENT

II. ROST HAD NO TERMS AND CONDITIONS OF EMPLOYMENT

Respondent BMS and Rost agree with Appellant AHRA that BMS is without jurisdiction to impose independent review under Minn. Stat. § 179A.25 over termination decisions involving at-will public employees. *See Boe v Polk Co. Library Bd.*, 299 Minn. 226, 217 N.W.2d 208 (1974). Respondents also agree that whether BMS has jurisdiction in this matter because Rost had contractual terms of employment is a question of law reviewed de novo by the appellate court. *See Hunt v. IBM Mid America Employees Fed Credit Union,* 384 N.W.2d 853 (Minn. 1986) (whether a contract for cause employment was formed is a question of law). *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979). Because Rost was an at-will employee as a matter of law, BMS is without jurisdiction over Rost's petition for independent review. Thus, this Court should reverse the agency decision ordering Rost's reinstatement.

Respondents argue that Rost had contractual terms of employment to maintain the applicability of independent review. However, Respondents cite either selectively or erroneously to the factual record to support their arguments.[1] Respondents acknowledge and then discard the undisputed and explicit language found in AHRA's personnel policy

[1] Indeed, this selective reference to the record, particularly to AHRA's personnel policy, has occurred throughout this litigation. In her petition for independent review filed with BMS, Rost submitted a few select pages of AHRA's personnel policy to establish support for alleged terms and conditions of employment while notably leaving out the entire policy provision establishing the at-will nature of her employment. In addition, Arbitrator Daly ignored AHRA's policy disclaimer language and its applicability to the central issues in this case.

that confirms the intent of the AHRA to establish at-will employment relationships. Specifically, the AHRA policy manual given to Rost explicitly states that the "Alexandria Housing and Redevelopment Authority *shall* consider *all* employees to be employed at will. There shall be *no* contract with any employee." *AA-7-8 (emphasis added).* Respondents argue that this disclaimer language is not controlling because 1) it is modified by other policy provisions limiting termination for just cause; 2) the overall policy language concerning terms of employment is conflicting and/or ambiguous; 3) a probationary period implies a change in status away from at-will employment; and 4) the disclaimer is deficient in placement and delivery.

No Modification of At-Will Status

Respondents identify the introductory "basic principles" paragraph of AHRA's personnel policy which sets forth goals of hiring and employment based on merit, as well as the separation of employment and progressive discipline provisions contained in AHRA's policy manual as alleged "modifications" to the at-will/contract disclaimer language. Respondents also refer to these same provisions in arguing that the policy language creates an ambiguity as to Rost's employment status and that this ambiguity must be resolved by the trier of fact (i.e., the arbitrator).

A plain reading of the policy sections identified by Respondents show that the provisions are consistent with at-will employment and that the language is clear and free from ambiguity. No reasonable interpretation exists that these provisions restrict the AHRA's ability to remove employees only "for cause."

For example, Respondents allege the AHRA's policy section titled "Basic Principals" modifies the at will status of Rost's employment. Specifically, the AHRA policy states: "The employment of personnel and all actions affecting the employees of the [AHRA] shall be based solely on merit, ability and justice." *AA-5* This language is insufficient as a matter of law to alter Rost's at-will status. Language in an employer's policies indicating mission and values statements are insufficient to alter an employee's at will status. *Lee v. Metro. Airport Comm'n*, 428 N.W.2d 815, 822 (Minn. App. 1988) (statement that a personnel manual is designed to provide guidance in dealing effectively, fairly and uniformly with employees insufficient to meet requirements of a unilateral offer); *Rawlings v. Riverside Medical* Center, 1995 WL 352916 (Minn. App) (unpublished decision) (language of the mission and values merely describe employer's aspirational management policies and are insufficient to alter employee's at will status). *Poff v. Western Nat'l Mut. Ins. Co.*, 13 F.3d 1189 (8th Cir. 1994) (language that employer prided itself in treating employees fairly and in a consistent manner lacked specificity required to establish unilateral contract); *Miller v. Certainteed Corp* , 971 F.2d 167, 172 (8th Cir. 1992) (language of fair treatment insufficient to whether contract breached); *Matson v. Cargill, Inc.,* 618 F.Supp. 278, 285 (D. Minn. 1985) (language alluding to "fair treatment" no more than general policy statement).

Respondents also seem to misread or ignore the plain meaning of AHRA's policy language on removals. Under "Separation from Employment" the personnel policy 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 [AHRA] Board of Commissioners. *AA-19 (emphasis added).*

Clearly this language is meant to provide AHRA the ability to act immediately and without notice on termination decisions involving employees engaged in unsatisfactory service or who are guilty of substantial violation of regulations. It does not equate to a limitation on the ability to remove employees only for cause because the policies clearly allow for removals without cause, i.e., at-will employment. The plain language of the personnel policy at issue only limits the AHRA's ability to remove "without notice"[2] under certain circumstances; no language limits the AHRA's removal authority to "for cause" or "just cause" situations. Respondents ignore this plain language, however, and adopt an interpretation that benefits their position in support of BMS jurisdiction in this matter. BMS even goes so far as to misquote the removal provision in the AHRA policy manual stating: "Rost was entitled to independent review by the BMS because she could be dismissed only for unsatisfactory service or a substantial violation of regulations." (Respondent BMS brief, p. 9).

Respondents also argue that the existence of a progressive discipline system in AHRA's personnel policy modifies employees' at-will employment status. A personnel

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[2] Respondents fail to acknowledge that Rost did indeed receive notice of the charges against her and an opportunity to respond before the AHRA Board of Commissioners who voted to ask for her resignation. Rost was not dismissed "without notice" and, therefore, the cited policy language on removals is not applicable to this case. This policy provision also does not, by its very language, create any contractual right to continued employment.

handbook which contains a progressive discipline policy is not binding on the employer where there is also a contractual disclaimer. *See Feges v Perkins Rest., Inc.* 483 N.W.2d 701 (Minn. 1992) (handbook which contained the progressive discipline policy but also the contractual disclaimer was not binding on the employer*); Le v. City of Maplewood,* 2007 WL 2302646 (Minn. App) (unpublished) (no contract formed by inclusion of progressive discipline policy where policy manual contained disclaimer language clearly indicating employer's intent to maintain at-will status). In the present case, AHRA's disclaimer was clear in its intent to create at-will employment relationships. The policy language referencing a progressive discipline system does not meet the requirements of a unilateral contract of employment.

Finally, Respondents assert that because the AHRA's personnel policy includes a probationary period, by implication, a contract for employment is created or, at the very least, a fact issue is created for the arbitrator to resolve. Rost does not provide any legal authority for this argument, however. Indeed, while no Minnesota court has expressly addressed this precise issue, the Eighth Circuit, in interpreting Minnesota law, has explicitly rejected the argument that successful completion of a probationary period constitutes a definite offer of "for cause" employment. *See Piekarsky v. Home Owners Savings Bank,* 956 F.2d 1484, 1490 (8th Cir. 1992).

Disclaimer Effective in Delivery and Location

Respondent Rost argues that AHRA's policy language is not binding on her because she did not get a copy of the manual until three to four months after she was hired and she claims the contract disclaimer was "buried" in the policies. Because Rost

herself reviewed and authored the revisions to the manual during her employment with AHRA, and in doing so consciously maintained and endorsed the at-will language, the argument that Rost was not subject to the personnel policy because she did not receive a copy of it on the day she was hired is frivolous. In addition, by remaining on the job after becoming aware of the at-will nature of her employment, Rost accepted the terms of her employment. *See, Brookshaw v. South St. Paul Feed, Inc* 381 N.W. 2d 33, 36 (Minn. App. 1986) citing *Pine River,* 333 N.W.2d at 627 (an employer can offer or modify existing policies or contracts after the date of hire and the employee can signify acceptance of the modifications by remaining on the job). It is undisputed that Rost was aware of the at-will language in the policy. It is also undisputed that Rost acknowledged and condoned the disclaimer language by preserving it in revised policies specifically authored by her. Rost's actions clearly signify the acceptance of an at-will employment relationship with the AHRA.

In addition, AHRA's personnel policy reflects that the disclaimer itself was not buried or inconspicuous but rather was (and is) a part of the actual policy manual suitably located under the section on hiring employees. *AA-7.* The language in the disclaimer clearly sets forth the establishment of at-will employment for all AHRA employees. The location of the disclaimer is conspicuous and not "buried" – it is included in a separate, clearly written paragraph on page 7 of a 26 page policy. As a matter of law, this disclaimer is sufficient to defeat any claim for a contractual right to employment with AHRA. *See Audette v. Northeast State Bank of Minneapolis*, 436 N.W.2d 125, 127 (Minn. App. 1989) (when the plain language in an employment manual clearly and

effectively indicates an employer's intent not to create an employment contract, the employment manual does not create a unilateral contract). *See also Miller v. Citizens Sec. Group, Inc.,* 116 F.3d 343, 349 (8th Cir. 1997) (a disclaimer prevents an employee from claiming contractual rights under an employee handbook even when other provisions are specific and unequivocal); *Ewald v. Wal-Mart Stores, Inc.,* 139 F.3d 619 (8th Cir. 1998) (under Minnesota law, handbook disclaimers bar the formation of a unilateral contract); *Morrow v. Air Methods, Inc.*, 897 F. Supp. 418, 422 (D. Minn. 1995) (same), aff'd, 92 F.3d 1189 (8th Cir. 1996); *Lee v Sperry Corp.*, 678 F. Supp. 1415, 1418 (D. Minn. 1987) (same). Therefore, as an at-will employee, BMS is without jurisdiction over Rost's petition for independent review and this Court should reverse BMS' order for reinstatement.

III. BMS IS WITHOUT LEGISLATIVE OR CONSTITUTIONAL AUTHORITY TO IMPOSE BINDING ARBITRATION

Respondents argue that BMS rules and procedures requiring binding, de novo arbitration over Rost's termination grievance submitted pursuant to Minn. Stat. §179A.25 are constitutional and within the agency's specific authority granted to it by the legislature. However, Respondents base their arguments on a fictitious distinction between judicial and administrative review and an absurdly broad and erroneous interpretation of the plain language of the independent review statute.

BMS Review is Judicial Review

Respondents argue that the *Dietz* doctrine is not applicable in this case because the separation of powers concerns raised by *Dietz* and its progeny were centered on court or

judicial review; not *administrative review* as provided by BMS pursuant to Minn. Stat. § 179A.25. The distinction is artificial after one takes a closer look at the government agencies involved and the *nature* of their actions and authority. It is true that state agencies such as BMS and political subdivisions such as AHRA are both creatures of the legislative branch of government. However, the nature of the actions taken by state agencies and political subdivisions defines the scope of intervention or review that is constitutionally permissible by one against the other. The fact that both BMS and AHRA are legislatively created governmental units does not end the inquiry. Instead, just as the Minnesota Supreme Court saw fit to apply limited review by the judicial branch over other government entities acting in a quasi-judicial role, constitutional issues of separation of powers require BMS to acknowledge and limit their authority over public employers acting in their administrative or executive capacity. *See Dokmo v. Independent School Dist. No. 1*, 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).

In addition, the procedures created by BMS for independent review under Minn. Stat. § 179A.25 mirror a trial-like proceeding and thus is very much akin to "judicial review." Bureau Policy VII and a previous BMS decision both reflect that the review procedures established are indeed judicial in nature. *See AA-355-359; Smutka v. City of Hutchinson*, BMS Case No. 04-PIR-230 (independent review arbitrator required to conduct hearing that is a mere image, albeit less formal, of a trial court proceeding). Thus, the holdings and rationale for limited review of public employer termination

decisions as established in the *Dietz* line of cases is applicable to the present case.[3] The result: BMS is without authority to impose binding, de novo judicial review over the discretionary administrative decisions of public employers such as AHRA because to do so would violate the separation of powers principles established in Article III, Section 1 of the Minnesota Constitution. BMS' insistence on imposing a binding trial-like procedure for purposes of "independent review" under Minn. Stat. §179A.25 is therefore unconstitutional.[4] In the present case, because BMS policies and orders are

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[3] Respondent Rost also argues that Minn. Stat. §179A.25 is statutory authority for a different process for review of a public employer's termination decision. Citing *Willis*, 555 N.W.2d 277 and *Tischer*, 693 N.W.2d 426, Rost argues that Minn. Stat. § 179A.25 is similar to the Minnesota Human Right Act and the Minnesota Whistleblower Act and thus her grievance is exempt from the certiorari review requirement because it is statutory authority for a different process. Interestingly, Rost does not respond to AHRA's assertion that certiorari review, pursuant to Minn. Stat. § 606.01, itself satisfies the requirement of an independent mechanism for review. Certiorari review acts as a check against arbitrary or otherwise unlawful decisions made by public employers acting in their administrative capacity. It is well settled law that this form of review is required in Minnesota when the decisions being challenged involve an executive body's use of discretion. Indeed, if Rost's argument is correct, the employees in both *Willis* and *Tischer* were not properly before the appellate courts because both, being employees of political subdivisions, had BMS procedures for binding arbitration available to them. Indeed, BMS' broad interpretation of independent review to include jurisdiction over *all* public employee grievances, in reality, makes the entire *Dietz* doctrine null and void.

[4] It is perplexing why BMS, a state agency with limited resources, has adopted this aggressive and overly broad approach to independent review; one that, in essence, makes BMS a super personnel board over any and all employment grievances involving political subdivisions in the state of Minnesota. MPERLA broadly defines the term "public employer" to include all political subdivisions, the state of Minnesota, the University of Minnesota, the state court administrator, the state Board of Public Defense; and Hennepin Healthcare System. Minn. Stat. § 179A.03, subd. 7. In addition, the plain language of the statute does not require this broad approach; nor does any stated legislative intent. Throughout this litigation, BMS has always had the authority to modify its procedures and adopt a constitutional form of review such as a review in which deference is provided to the political subdivision's discretionary decision-making (similar to the standard of review this Court applies) or a policy acknowledging that certiorari review to this Court

unconstitutional, Appellant requests that Rost's petition for independent review be dismissed and BMS' order for Rost's reinstatement be reversed.

BMS Exceeded Its Authority

Respondents argue that independent review must be binding and based on a de novo review of the evidence or the statute would be "nonsensical" and have "no meaning." However, in this case, BMS is clearly acting outside the authority granted to it by the legislature and, in the process, has ignored the public policy implications of an overly broad interpretation and unauthorized expansion of agency authority. The plain language of Minn. Stat. § 179A.25 refers to "independent review" not "binding compulsory arbitration." If the legislature intended to mandate arbitration over public employee grievances it would have said so explicitly. Compulsory arbitration is a commonly known process in labor relations and is repeatedly identified and referred to throughout Minnesota's Public Employment Labor Relations Act ("MPELRA"). *See e.g.,* Minn. Stat. §§ 179A.16 (interest arbitration); 179A.21 (grievance arbitration) and 179A.20 (requiring compulsory binding arbitration in collective bargaining agreements).

No where in MPELRA is independent review defined as compulsory binding arbitration. Nor is there any universal understanding that the definition of the term "review" is the same as that for "arbitration." MPERLA is centered on labor relations in the public sector involving the creation and enforcement of collective bargaining agreements between organized labor and public employers. With this backdrop, it must

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under the principles of the *Dietz* doctrine satisfies the requirements of Minn. Stat. § 179A.25.

be presumed that written negotiated labor agreements will be created in compliance with the numerous provisions of MPELRA. Section 179A.25 does not apply to grievances in the union setting because these labor agreements are already required to include "binding compulsory arbitration" as part of any negotiated grievance procedure. *See*, Minn. Stat. § 179A.20, subd. 4(a).

No where in MPELRA, or any other law, are public employers required to include compulsory binding arbitration language in non-union contracts or individual employer personnel policies. BMS' position in this case, however, is that all public employees, union and non-union, are entitled to binding compulsory arbitration when grievances are submitted over terms and conditions of employment, and if the public employer does not provide for binding review over these grievances by a "disinterested person or agency" BMS can order binding arbitration under its policies. If this is the correct reading of MPELRA, labor unions would be superfluous to the grievance process and therefore not really needed; i.e., there is no need for unions to negotiate and participate in something (binding arbitration) that is required outside of the collective bargaining arena.[5] MPELRA, as with any other statute, must be construed, when possible, to give effect to

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[5] Respondents further confirm this unreasonable statutory interpretation by arguing that arbitrators in independent review proceedings have the same authority as arbitrators in compulsory binding arbitration required in collective bargaining agreements. The authority Respondents cite for this proposition is a litany of collective bargaining cases in which an arbitrator's authority is specifically derived from MPELRA and/or the negotiated terms of a written labor agreement. *See, e.g., Brookshaw v. South St. Paul Feed, Inc.* 581 N.W.2d 33 (Minn. App. 1986); *City of Bloomington v Local 2828*, 290 N.W.2d 598 (Minn. 1980); *State v Berthiaume*, 259 N.W.2d 904 (Minn. 1977).

all of its provisions. Minn. Stat. § 645.16 (2006). BMS' interpretation does not meet this requirement and is not a reasonable interpretation of the statute.

Respondents argue that this Court has already held that there is authority vested in BMS to conduct evidentiary hearings and to delegate final decision making authority to the hearing officer. *See Cross v. County of Beltrami*, 606 N.W.2d 732, 735 (Minn. App. 2000). In *Cross*, this Court looked at the language of Minn. Stat. § 179A.25 and concluded that "the statute speaks for itself." *Id.* The *Cross* court went on to conclude that independent review must be something other than an investigation because "without finality, the concept of independence of the review is meaningless." In the *Cross* case, however, this Court was not asked to review the constitutional issues involved in mandating binding de novo arbitration over all public employee grievances. The issue of whether such review usurps the discretionary administrative authority of executive bodies, such as the AHRA Board of Commissioners, is a matter of first impression. Therefore, this Court should distinguish and/or reverse the *Cross* decision to the extent necessary based on Appellant's arguments presented herein.

In responding to the public policy arguments, BMS ignores the absurd consequences of its position. BMS argues that it was vested with the authority to develop procedures for independent review and that it was not precluded from requiring binding arbitration over all grievances. However, BMS *is* precluded from *expanding* the authority vested in it by the legislature. *See People's Natural Gas Co. v. Minnesota Publ. Utils. Comm'n.* 369 N.W.2d 530, 534 (Minn.1985) (state agencies are prohibited from enlarging their statutory authority under the guise of interpretation). Requiring public

employers to submit any and all employee grievances to compulsory binding arbitration is such an expansion. Indeed this court has previously stated, "[t]here is nothing in the plain meaning of 'independent review' that demands an evidentiary hearing" and "[t]he plain meaning of the statute is that disputes must be "reviewed" by an independent third party." *State Fair v. Anderson*, 1997 WL 177665 (Minn. App.) (unpublished) (determining plain language of statute did not preclude BMS from conducting summary proceedings).

Inter-changing the words "independent review" and "compulsory binding arbitration" is beyond BMS' authority because it expands the legislative intent of this statute into grossly absurd and unintended situations resulting in vast expenditures of public resources and nullification of elected officials' administrative authority. (*See* amicus curae briefs filed in this matter.) Because BMS acted outside of its authority, any and all orders and decisions on Rost's petition for independent review should be reversed.

CONCLUSION

Respondent BMS was without jurisdiction to order binding arbitration over Rost's termination grievance. Even if BMS had jurisdiction, this Court must reverse the arbitration award because it is based on several errors of law including that Rost had contractual terms of employment. Therefore, Appellant AHRA respectfully asks this Court to reverse BMS' decision ordering Rost's reinstatement and enter judgment in favor of Appellant AHRA.

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