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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.

RESPONDENT BUREAU OF MEDIATION SERVICE'S BRIEF

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LEGAL ISSUES

I. Did the Bureau of Mediation Services have jurisdiction to provide independent review of the Alexandria Housing and Redevelopment Authority's decision to terminate Respondent Judith Rost's employment?

The Bureau of Mediation Services held in the affirmative.

Apposite cases:
Dietz v. Dodge County, 487 N.W.2d 237 (Minn. 1992).
Tischer v. Housing & Redevelopment Auth., 693 N.W.2d 426 (Minn. 2005).
Dokmo v. Independent Sch. Dist. No. 11, 459 N.W.2d 671 (Minn. 1990).

II. Did Respondent Judith Rost have terms and conditions of employment that entitled her to independent review by the Bureau of Mediation Services?

The Bureau of Mediation Services held in the affirmative.

Apposite cases:
Boe v. Polk Co. Library Bd., 299 Minn. 226, 217 N.W.2d 208 (1974).

III. Was the Bureau of Mediation Services' review of Rost's appeal within its authority?

The Bureau of Mediation Services held in the affirmative.

Apposite cases:
State Office of State Auditor v. Minnesota Assoc. Professional Employees, 504 N.W. 2d 751 (Minn. 1993)
Cross v. County of Beltrami, 606 N.W.2d 732, 735 (Minn. Ct. App. 2000).
City of Richfield v. Local No. 1215, 276 N.W.2d 42, 47 (Minn. 1979).

STATEMENT OF THE CASE AND FACTS

Respondent Judith Rost ("Rost") is a former employee of the Alexandria Housing and Redevelopment Authority ("AHRA"). Rost filed a petition seeking independent review by the Bureau of Mediation Services ("BMS") of the decision by the AHRA, a public employer, to terminate her employment. The AHRA's Appendix ("AA") at 288. Rost sought BMS review because the AHRA had not established its own system of independent review.

The AHRA requested that the BMS dismiss the petition, arguing that the BMS lacked jurisdiction to review its employment decision. AA at 295. The BMS denied the AHRA's request and directed the parties to select a hearing officer. AA at 296. The AHRA opted instead to commence an action in district court seeking a ruling that the independent review statute, Minn. Stat. § 179A.25 (2006), is unconstitutional.

The BMS moved to dismiss the complaint on the ground that the district lacked subject matter jurisdiction. The district court granted the BMS' motion, holding that it lacked subject matter jurisdiction because the AHRA was required to proceed by writ of certiorari to this Court. This Court affirmed the district court's decision, holding that the AHRA's sole means of obtaining judicial review of a decision of the BMS was by writ of certiorari to this Court. AA at 384-393. The case was remanded to the BMS for a hearing. *Id.*

The BMS' has final authority to decide public employee grievances. Minn. Stat. § 179A.25. Hearings are conducted "under procedures established by the commissioner." *Id.* The BMS has the authority to appoint an arbitrator to make findings of fact and conclusions of law.

An arbitration hearing was held on June 6, 2007 before BMS arbitrator Joseph L. Daly. The arbitrator heard witness testimony, received evidence and heard oral argument from the parties. The BMS ruled that it had jurisdiction to hear the grievance pursuant to Section 179A.25 and *de novo* authority to review the evidence presented at the hearing. AA at 351. The BMS also ordered the AHRA to reinstate Rost and pay her for lost benefits and back pay. AA at 354. The AHRA appealed the BMS' decision to this Court on writ of certiorari.

SCOPE OF REVIEW

"Review by certiorari 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 v. Dodge County,* 487 N.W.2d 237, 241 (Minn. 1992) citing *State ex rel. Ging v. Bd. of Education of Duluth,* 213 Minn. 550, 571, 7 N.W.2d 544, 556 (1942) (overruled on other grounds). Whether the BMS has subject matter jurisdiction in this case is a question of law that this Court reviews *de novo*. *Defenders of Wildlife v. Ventura,* 632 N.W.2d 707, 711 (Minn. Ct. App. 2001). Similarly, the construction of Minn. Stat. § 179A.25 (2006) is a question of law that is reviewed *de novo*. *AFSCME v. County of Scott*, 530 N.W. 2d 218, 220 (Minn. Ct. App.) *review denied* (Minn. May 16 and June 14, 1995).

When reviewing the decision made by the BMS, this Court is limited to determining whether the specific language contained in the AHRA policies precludes the

award made by the arbitrator. *City of Bloomington v. Local 2828*, 290 N.W.2d 598, 602 (Minn. 1980). In the absence of an agreement limiting the BMS' authority, the BMS is the final judge of both law and fact; the award will not be set aside for mistake of either law or fact in the absence of fraud, mistake in applying his own theory, misconduct, or other disregard of duty. *Cournoyer v. American Television & Radio Co.*, 249 Minn. 577, 83 N.W.2d 409 (1957). Only where it is clearly established that the arbitrator exceeded his authority must a court vacate an award. *State v. Berthiaume*, 259 N.W.2d 904, 910 (Minn. 1977).

ARGUMENT

I. THE BMS HAS JURISDICTION TO PROVIDE INDEPENDENT REVIEW OF THE AHRA'S DECISION PURSUANT TO MINNESOTA STATUTE SECTION 179A.25.

The BMS held that it had jurisdiction to conduct an independent review of Rost's grievance pursuant to Section 179A.25. AA at 351. The AHRA does not challenge the BMS' jurisdiction to hear grievance appeals, but asserts that Rost's grievance was a termination appeal, not a grievance that arose out of a term or condition of employment. Appellant's Brief at 12. The BMS held that the AHRA's Employment and Personnel Policies were terms and conditions of employment that entitled Rost to independent review under Section 179A.25. AA at 352-353. Decisions of administrative agencies are presumed to be correct and deference should be shown by the courts to an agency's expertise and its special knowledge, technical training, education and experience. *Reserve Mining Co. v. Herbst,* 256 N.W.2d 808 (Minn. 1977); *Matter of Friedenson,* 574 N.W.2d 463 (Minn. Ct. App. 1998).

A. The BMS Has Statutory Authority To Provide Independent Review Of Public Employees' Grievances Where The Public Employer Has No Procedure for Independent Review.

All public employees have the right to independent review by the BMS of grievances arising out of the terms and conditions of employment. Minn. Stat. § 179A.25 (2006). The right to independent review by is not limited to those with contracts of employment. *Id.* The public policy behind § 179A.25 is set forth expressly in the Public Employee Relations Act ("PELRA") and the review process effectuates that public policy:

> 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 [of the BMS].

The statute clearly contemplates review by the public employer or, if the public employer fails to provide a procedure for independent review, by the BMS. *Id.* Every law must be construed, when possible, to give effect to all of its provisions. Minn. Stat. § 645.16 (2004). Moreover, where a statute's language is clear, the courts must give effect to the legislature's clear intent. *See Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). If the statute's language is unambiguous, "further construction is neither necessary nor permitted." *Owens ex. rel. Owens v. Water Gremlin Co.*, 605 N.W.2d 733, 736 (Minn. 2000); *see also* Minn. Stat. § 645.16 (2006). A statute is only ambiguous when it is subject to more than one reasonable interpretation.

See American Family Ins. Group v. Schroedl, 616 N.W.2d 273 (Minn. 2000). Section 179A.25 is subject to only one reasonable interpretation. A governmental agency that fails to provide for independent review is subject to the Commissioner of BMS' procedures.

The AHRA did not provide a procedure for independent review of its decision to terminate Rost, so Rost was entitled to independent review by the BMS using the procedures established by the Commissioner. Minn. Stat. § 179A.25. The BMS' authority to conduct an independent review includes conducting an evidentiary hearing and making a final decision regarding the resolution of grievances. *Cross v. County of Beltrami*, 606 N.W.2d 732, 735 (Minn. Ct. App. 2000). Pursuant to its procedures, BMS appointed an arbitrator to conduct the hearing and make findings of fact and conclusions of law. AA at 355-359.

B. The Availability Of Judicial Review Does Not Preclude Administrative Review.

The AHRA's argument that its decision to terminate Rost is reviewable only on writ of certiorari to this Court does not give effect to any of the provisions of Section 179A.25, a result that is both illogical and untenable. "If [a statute's] language embodies a definite meaning which involves no absurdity or contradiction, the statute is its own best expositor." *Waller v. Powers Dept. Store*, 343 N.W.2d 655, 658 (Minn. 1984). Had the legislature intended a writ of certiorari to be the means for a public employee to obtain review of an employment decision, Section 179A.25 would have no meaning.

As the Minnesota Supreme Court has stated, "[i]f the public, cities, or public employees are dissatisfied with the procedures under PELRA, change should be made

through the legislature." *City of Richfield*, 276 N.W.2d at 48. The AHRA must comply with the system of review created by the legislature in Section 179A.25 or seek to have it changed by legislative enactment.

C. *Dietz* Does Not Preclude Independent Review By The BMS.

The AHRA asserts that the holding in *Dietz v. Dodge County,* 487 N.W.2d 237 (Minn. 1992) precludes review by the BMS of the AHRA's employment decision. The court in *Dietz,* however, addressed only the question of the procedures for obtaining judicial review of a local governmental entity's employment decision, not the propriety of review by an administrative agency. The court expressed concern that allowing the judicial branch to conduct a *de novo* review of an administrative decision by an executive body could violate the separation of powers clause. *Dietz v. Dodge County*, 487 N.W.2d at 239-40. The court disallowed the civil action Dietz had brought in district court and held that the only judicial review of the county board's decision would be by writ of certiorari. *Id.* at 240-41. Likewise, in *Tischer v. Housing and Redevelopment Auth.*, 693 N.W.2d 426 (Minn. 2005), a terminated employee sought review of a public entity's employment decision through a civil action in district court. In *Tischer*, the court held that the separation of powers doctrine prevented the former employee from seeking judicial review through a district court action. *Id.* at 430.

The reasoning of *Dietz* and *Tischer* does not apply to the instant case because Rost did not seek any form of review from the judicial branch. Instead, Rost sought review by an administrative agency. Under these circumstances, separation of powers issues do not arise. The Minnesota legislature authorized the BMS to review employment decisions when local governments provide no avenue of independent review for their employees.

No reading of the *Dietz* decision diminishes the authority of the BMS to step in where required by the facts. The concerns Minnesota courts have expressed about judicial infringement upon the other branches of government are not present in this case because Minn. Stat. § 179A.25 does not provide for review of one branch of the government by another. Both the BMS and the AHRA are part of the same branch of government. *See Mount Pleasant v. Beckwith*, 100 U.S. 514, 524 (1879) (stating that counties, cities, and towns are created by the authority of the legislature and are subject to its control).

D. Review By BMS Is Not Judicial Review.

The AHRA admits that the BMS is an administrative agency, but argues that review by the BMS is "judicial review" that contravenes the *Dietz* decision and violates the Minnesota Constitution. Appellant's Brief at 14. This Court has already held in this case that the independent review process prescribed under Section 179A.25 is a *quasi-judicial* process used by administrative agencies to resolve disputed claims. *Alexandria Housing & Redevelopment Authority v. Bureau of Mediation*, 2006 WL 2865496 (Minn. App. 2006) *rev. den.* (Dec. 12, 2006) (unpublished decision), AA at 384. The delegation of quasi-judicial powers to executive branch agencies, such as the BMS, does not violate separation of powers principles "so long as the determinations of those agencies lack judicial finality and are subject to judicial review." *Quam v. State*, 391 N.W.2d 803, 809 n.6 (Minn. 1986). *See also Breimhorst v. Beckman*, 227 Minn. 409, 424, 35 N.W.2d 719, 732-33 (Minn. 1949) (holding quasi-judicial actions by administrative agencies are constitutional so long as they are not "enforceable by execution or other process in the absence of a binding judgment entered thereon by a duly established court").

The BMS does not have the authority to enforce the decision of an arbitrator against an employer. Enforcement of such decisions may only occur through a district court action brought pursuant to Minn. Stat. § 179A.13 (2006). This statute provides that an aggrieved employee may bring an action for injunctive relief and damages if an employer refuses to comply with a lawful decision of the BMS. Separation of powers issues are not implicated because the BMS' decision may be enforced only through a binding order of a duly-established court. As an administrative agency, the BMS conducts a quasi-judicial review subject to review by writ of certiorari to this Court.

II. ROST HAD TERMS AND CONDITIONS OF EMPLOYMENT THAT ENTITLED HER TO INDEPENDENT REVIEW.

Substantial evidence in the record supports the BMS' conclusion that Rost had terms and conditions of employment entitling her to independent review by the BMS. AA at 296-299, 335. The AHRA's Employment and Personnel Policies ("Policies") are specifically made applicable to "all Alexandria HRA employees." AA at 1. The position of Executive Director, the position held by Rost, is included in the "Classification" section of the Policies. AA at 5. Although the AHRA's Policies provide that its employees are "employed at will," this language is modified by the statement that only "[a]n employee who gives unsatisfactory service or who is guilty of substantial violation of regulations shall be subject to dismissal without notice." *Id.*

Appellant's reliance on *Boe v. Polk Co. Library Bd.*, 299 Minn. 226, 217 N.W.2d 208 (1974) is misplaced. In *Boe*, the employees could not establish that they were to be dismissed only for cause. Additionally, there was no standard for termination that could be reviewed by the BMS. The instant case is distinguishable from *Boe* because Rost is

not an employee at will. Rost's grievance arises out of the AHRA's interpretation of "substantial violation of regulations," a term or condition of her employment in the AHRA Policies. AA at 19. Rost was entitled to independent review by the BMS because she could be dismissed only for unsatisfactory service or a substantial violation of regulations.

III. THE BMS' QUASI-JUDICIAL REVIEW OF ROST'S APPEAL WAS WITHIN ITS AUTHORITY.

A. De Novo Review by the BMS Was Proper.

The BMS' order in this case was a quasi-judicial decision of an administrative agency. *See Minnesota Center for Environmental Advocacy v. Metropolitan Council,* 587 N.W.2d 838, 842 (Minn. 1999). The BMS' authority to order de novo review does not stem from the Rost's terms and conditions of employment, but from Section 179A.25. The legislature did not limit the right to independent review under § 179A.25 to "a mere investigation or recommendation," nor to the issues raised on a writ of certiorari.

B. The BMS' Order Did Not Exceed Its Authority Under Section 179A.25..

When the terms and conditions of employment do not define "just cause" or limit the available remedies, the arbitrator is free to "adopt a reasonable definition and to craft a remedy which would not conflict with the terms of the agreement." *State of Minnesota, Office of State Auditor v. Minnesota Association of Professional Employees*, 504 N.W. 2d at 755 (citing *Children's Hosp. Inc., v. Minnesota Nurses Association*, 265 N.W.2d at 653). In this case, the Policies stated that an employee could be terminated when "guilty of [a] substantial violation of regulations," but this terms was not defined. AA at 5. The BMS made a factual finding that Rost was not guilty of a substantial violation of

regulations. *Id.* The relief granted to Rost is a narrowly crafted remedy and should be affirmed.[1]

C. Section 179A.25 Does Not Require The BMS' Procedures To Be Promulgated As Rules.

Amicus curiae Association of Minnesota Counties ("AMC") asserts that the BMS policy on independent review hearings was not properly promulgated under the Minnesota Administrative Procedures Act. Brief of AMC at 13-14. Section 179A.25 does not require that the BMS promulgate procedural rules, but provides that independent review shall be "under procedures established by the commissioner [of the BMS]." If an the agency's action "is consistent with the plain meaning of the statute or rule, the agency's action is authorized by the statute itself." *Good Neighbor Care Centers, Inc. v. Minnesota Dep't. of Human Serv.*, 428 N.W.2d 397, 402-3 (Minn.App.1988). The issue of unpromulgated rulemaking was not raised by the parties below. Appellate courts generally decline to address issues neither considered by the district court nor raised by a party to the appeal. *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 687 n.7 (Minn. 1997).

D. The Arbitrator's Decision Was Final and Binding.

In *Cross,* this Court held that decisions of the BMS are final and binding. Moreover, when the BMS delegates its authority to an independent arbitrator, the

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[1] The AHRA asserts that the BMS did not have authority to order data about Rost deleted from the AHRA records. The Minnesota Government Data Practices Act ("MGDPA") does not require responsible authorities to keep all data created by public entities; instead, Minn. Stat. § 13.05, subd. 4 (2006), limits the collection and storage of private or confidential data. In addition, when an individual challenges government data as inaccurate or incomplete, Minn. Stat. § 13.04, subd. 4 (2006) provides that the data shall be completed, corrected, or *destroyed*. (Emphasis added).

decision of the arbitrator is final and binding. *See Cross,* 606 N.W.2d at 735. As this Court noted in *Cross*, the legislature's declaration of a right to independent review would be meaningless if the decisions of the BMS were not final and binding on the parties. The BMS had authority to order relief for Rost is consistent with its authority to conduct an independent review, including hearing testimony from witnesses and issuing a final decision on the merits of the case.

CONCLUSION

For the foregoing reasons, the decision of the BMS should be affirmed.

Respectfully submitted,

Dated: 12/21/07

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