

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,

BRIEF AND APPENDIX OF RESPONDENT JUDITH ROST

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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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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
LEGAL ISSUES.....	1
STATEMENT OF CASE AND FACTS.....	1
ARGUMENT.....	4
II. SCOPE OF REVIEW.....	4
III. THE INDEPENDENT REVIEW STATUTE REPRESENTS A PROPER DELEGATION OF POWER BY THE LEGISLATURE TO BMS TO REVIEW EMPLOYMENT DECISIONS.....	5
A. The Minnesota Constitution Specifically Permits a Legislative Scheme That Gives One Administrative Agency Full Review of the Actions of Another Municipal Agency Like the HRA.....	5
B. Minn. Stat. § 179A.25, Does not Implicate Separation of Powers Concerns.....	7
III. TERMS AND CONDITIONS OF MS. ROST'S EMPLOYMENT.....	12
A. HRA Employment & Personnel Policies Established Terms and Conditions of Ms. Rost's Employment.....	12
B. Whether the Policy Terms Applied to the Termination of Judith Rost Was a Question of Fact for the Arbitrator.....	15
C. The Arbitrator's Decision Concerning Ms. Rost's Terms and Conditions of Employment Was Based on Evidence in the Record.....	19

IV. BMS DID NOT COMMIT ERRORS OF LAW..... 21

**A. De Novo Review By BMS Of A Discharge
Is The Appropriate Standard..... 21**

**B. An Independent Review Arbitration Decision
Is Final and Binding On the Parties..... 22**

CONCLUSION..... 24

TABLE OF AUTHORITIES

Page

CONSTITUTION, STATUTES and REGULATIONS

Minn. Const. Art. III, § 1	6
Minn. Const. Art. XII, § 3	6, 7, 8
Minn. Stat. § 14.02	9
Minn. Stat. §179A.25	6-8, 11, 22 – 24
Minn. Stat. § 469.014	10, 11
2 C.F.R. § 215.25 (c),	20
85 C.F.R. § 85.30 (d)	21

CASES

<i>Alexandria Housing and Redevelopment Authority v. Bureau of Mediation Services, et al</i> , No. A06-75, October 10, 2006 (unpublished)	4
<i>Audette v. Northeast State Bank of Minneapolis</i> , 436 N.W.2d 125 (Minn. Ct. App. 1989).	16
<i>Boe v. Polk County Library Board</i> , 217 N.W.2d 208 (Minn. 1974)	23
<i>Board Order, Kells (BWSR) v. City of Rochester</i> , 597 N.W.2d 332 (Minn. App. 1999)	5
<i>Bratton v. Menard's, Inc.</i> , 438 N.W.2d 116 (Minn. App. 1989)	15
<i>Brookshaw v. South St. Paul Feed, Inc.</i> , 381 N.W.2d 33 (Minn. App. 1986);	15, 17
<i>City of Richfield v. Local No. 1215</i> , 276 N.W.2d 42 (Minn. 1979)	5, 7, 12
<i>Cross v. County of Beltrami</i> , 606 N.W.2d 732 (Minn. App. 2000)	22
<i>Dietz v. Dodge County</i> , 487 N.W.2d 237 (Minn. 1992)	4, 8, 9, 21
<i>Dokmo v. Ind. Sch. Dist. No. 11</i> , 459 N.W.2d 671 (Minn. 1990)	8, 21
<i>Gilbertsen v. Codex</i> , 1990 U.S. Dist LEXIS 19869 (D. Minn. 1990)	15
<i>Hunt v. IBM Mid America Employees Fed. Credit Union</i> , 384 N.W.2d 853 (Minn. 1986)	17
<i>In re Cold Spring Granite Co.</i> , 136 N.W.2d 782 (Minn. 1965)	5
<i>Kline v. Berg Drywall, Inc.</i> , 685 N.W.2d 12 (Minn. 2004)	5
<i>Lewis v. Equitable Life Assurance Society</i> , 389 N.W.2d 876	14, 15, 17

(Minn. 1986)	
<i>Minnesota State Fair v. Anderson</i> , 1997 Minn. App. LEXIS 423 (Minn. App. 1997)	17-19
<i>Mount Pleasant v. Beckwith</i> , 100 U.S. 514 (1879)	6
<i>Pine River State Bank v. Mettille</i> , 333 N.W.2d 622 (Minn. 1983).	14, 17
<i>Proctor v. Andrews</i> , 972 S.W.2d 729 (Tex. 1998)	6
<i>Quinn Distributing Co. v. Quast Transfer, Inc.</i> , 181 N.W.2d 696 (Minn. 1970).	5
<i>Sampson v. City of Babbitt</i> , 2004 WL 193083 (Minn. App. Feb. 3, 2004)	21
<i>Senior v. City of Edina</i> , 547 N.W.2d 411 (Minn. App. 1996)	5
<i>Staeheli v. City of St. Paul</i> , 732 N.W.2d 298 (Minn. App. 2007)	4, 5
<i>Swanson v. Liquid Air</i> , 826 P.2d 664 (Wash. 1992).	15
<i>Tischler v. Housing & Redevelopment Authority of Cambridge</i> , 693 N.W. 2d 426 (Minn. 2005)	8, 10, 11
<i>Untiedt v. Grand Laboratories, Inc.</i> , 552 N.W.2d 571 (Minn. App. 1996)	15
<i>Willis v. County of Sherburne</i> , 555 N.W. 2d 277 (Minn. 1996)	9
Bureau of Mediation Services Decisions	
<i>In Re Arbitration between City of Maple Grove, Minnesota and Sergeant Jeff Garland</i> , BMS Case #98-PIR-1780	22
<i>Mashuga v. Anoka-Hennepin Technical College</i> , BMS Case No. 04-PIR-112	23

STATEMENT OF CASE, LEGAL ISSUES AND FACTS

Respondent Judith Rost agrees with the Statement of Case and Facts, and Statement of Legal Issues of Respondent Bureau of Mediation Services. See, Brief of BMS, at v, 1 and 2.

Ms. Rost cites provisions of HRA's employment policies in here Argument herein, and she will not duplicate them here.

In addition, the record contains facts supporting the Arbitrator's decision on the merits, which is summarized as follows:

In connection with the discovery of the unused Zolofit medication that had been left by a resident, Ms. Rost testified about the circumstances of her retaining the pills for possible future use by herself. See, Appellant HRA's Appendix at 101 – 105, 111 – 112. 120.¹

The arbitrator found that Ms. Rost remarked in the presence of her assistant that the pills were expensive, that it was the same prescription that she took, and it was a shame to have to flush them down the toilet. The arbitrator also found that Ms. Rost thought that she should check and see if she could take the pills for her own use or not, but that this was interrupted by visitors to the office. She put the pills in her pocket and then into a plastic

¹ References to the Record are to the documents contained in Alexandria Housing and Redevelopment Authority's Appendix filed herein. Pages are indicated as "AA- ____."

bag in her desk and forgot about them. See, Decision and Order, at 10 and 19 AA – 343. Specifically, Ms. Rost testified that she counted the pills and

“walked over to where [Ms. Rost’s assistant] was working on the computer and I showed them to her. I said it was a shame, that we shouldn’t have to flush this Zoloft down the toilet as it was the exact prescription that I take. And I told her that the pills were fairly expensive and that I had just purchased 60 of them at Target. And I did make a comment to [assistant] that I should consider taking the pills home and use them up instead of flushing them down the toilet. I was thinking to myself that I really need to check it out and see if I could do that or not. And right when I was standing there holding the pills, an elderly tenant came into the office. I was standing by her computer and she was busy typing, so I ask if I could help him and he said he needed change.” AA – 103.

In addition, Ms. Rost testified that the 60 days during which she understood HRA must hold abandoned property before disposing of it had not yet run, so she knew she could do nothing with the medicines at that time. AA – 111-112.

Based on the foregoing, the arbitrator found that the pills had been abandoned and that Ms. Rost had no intention to steal them. AA – 352.

The arbitrator further found that Zoloft was not a controlled substance and that the HRA had no regulations covering the disposal of medicines. AA – 352. Ms. Rost testified to this. AA – 118. Indeed, Colleen Thompson, HRA’s board chair admitted that there was no HRA regulation governing the

disposal of medicines. AA – 77-80. Thompson could cite no law or regulation prohibiting Ms. Rost from taking the abandoned pills for her own use, even if she had done that. AA – 68-69. The record is devoid of any proof by HRA of a regulation prohibiting what Ms. Rost only considered doing with the pills. As the arbitrator wrote:

There was no proof offered by the Alexandria Housing and Redevelopment Authority of any criminal statute, civil statute, regulation or policy that prohibits Ms. Rost's conduct. None was cited when Ms. Rost was given the option to resign or be terminated. None was cited at the Independent Review. There is no proof that Ms. Rost did anything criminal, illegal or otherwise proscribed. What Ms. Rost did was to comment about what a shame it was to destroy the pills; put them in her pocket; take them out of her pocket and put them in a sandwich bag; put them on the desk; and then forget about them until she was confronted with the Special meeting of March 12, 2004.

Decision and Order, AA – 352-353.

HRA admitted that during the discharge process, before her single meeting with the Board, Ms. Rost was not informed that she was accused of violating any law, rule or regulation, nor even that discharge was being considered. AA – 94. Nor was she given a copy of the written complaint against her by her assistant at or before she was terminated. AA – 80. The arbitrator found that these circumstances rendered any notice and hearing inadequate. AA - 353.

HRA Chair Colleen Thompson testified that the Board acted pursuant to HRA Policy provision that allowed an employee who gives “unsatisfactory service or is guilty of a substantial violation of regulations” to be “dismiss[ed] without notice.” AA-86.

ARGUMENT

I. SCOPE OF REVIEW.

Respondent Judith Rost agrees with the applicable scope of review described by Bureau of Mediation Services. Brief of Respondent BMS, at 3 – 4. This Court has held that the BMS’ decision in this Independent Review case was a quasi-judicial decision, the limitations of review of certiorari appeals will apply. *Alexandria Housing and Redevelopment Authority v. Bureau of Mediation Services, et al*, No. A06-75, October 10, 2006 (unpublished).²

Ms. Rost emphasizes that the factual determinations of the arbitrator in this case are to be reviewed on this certiorari review for “whether the order or determination . . . 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); *Staheli v. City of St. Paul*, 732 N.W.2d 298, 303 (Minn. App. 2007).

² See, Appellant HRA’s Appendix, at AA-384.

An administrative agency's factual findings must be viewed in the light most favorable to the agency's decision and will not be reversed if the evidence reasonably sustains them. *Board Order, Kells (BWSR) v. City of Rochester*, 597 N.W.2d 332 (Minn. App. 1999). "As a reviewing court, we will not retry facts or make credibility determinations, and we will uphold the decision "if the lower tribunal furnished any legal and substantial basis for the action taken." *Senior v. City of Edina*, 547 N.W.2d 411, 416 (Minn. App. 1996)." *Staheli*, 732 N.W. 2d at 303 – 304. There must be a substantial judicial deference to fact-finding processes of the administrative agency." *Quinn Distributing Co. v. Quast Transfer, Inc.*, 181 N.W.2d 696 (Minn. 1970).

II. THE INDEPENDENT REVIEW STATUTE REPRESENTS A PROPER DELEGATION OF POWER BY THE LEGISLATURE TO BMS TO REVIEW EMPLOYMENT DECISIONS.

A. The Minnesota Constitution Specifically Permits a Legislative Scheme That Gives One Administrative Agency Full Review of the Actions of Another Municipal Agency like the Alexandria HRA.

A statute is presumed to be constitutional; therefore courts are required to place a construction on the statute that will find it so if at all possible. *Kline v. Berg Drywall, Inc.*, 685 N.W.2d 12, 23 (Minn. 2004); *City of Richfield v. Local No. 1215*, 276 N.W.2d 42, 45 (Minn. 1979); *In re Cold Spring Granite Co.*, 136 N.W.2d 782, 787 (Minn. 1965) ("If the act is

reasonably susceptible of two different constructions, on of which would render it constitutional and the other unconstitutional, we must adopt the one making it constitutional.”)

The Minnesota Constitution permits one branch of government to exercise the powers of another, “in the instances expressly provided in this constitution.” Minn. Const. Art. III, § 1.

Minn. Const. Art. XII, § 3, authorizes the legislature to “provide by law for the creation, organization, administration, consolidation, division and dissolution of local government units and their functions . . .” The United States Supreme Court held long ago that local governmental units are subject to the authority of the legislature that created them. *See, Mount Pleasant v. Beckwith*, 100 U.S. 514, 524 (1879). Under similar circumstances, in approving the a legislative delegation of final decision making authority in certain police discipline cases to arbitrators, the Texas Supreme Court held, “Municipal corporations . . . are created for the exercise of certain functions of government In so far as their character is governmental, they are agencies of the state, and subject to state control.” *Proctor v. Andrews*, 972 S.W.2d 729, 734 (Tex. 1998).

Minn. Stat. §179A.25, the Independent Review Statute, is sanctioned by the Minnesota Constitution because it clearly governs the “administration

. . . of local government units and their functions,” as permitted by Minn. Const., Art. XII, § 3. Appellants are admittedly local units of government. Therefore, they are made subject to the legislature’s requirements and limitations on their administration. This surely includes the requirement of administrative independent review by the BMS of their discharge decisions under the circumstances described in Minn. Stat. § 179A.25, to wit: when the municipal agency has abdicated its duty to provide such review.

B. Minn. Stat. § 179A.25, Does Not Implicate Separation of Powers Concerns.

Appellants cannot overcome the presumption of constitutionality of Minn. Stat. § 179A.25. Indeed, §179A.25 has been held constitutional in the face of a challenge similar to that raised by Appellants. In *City of Richfield*, the Minnesota Supreme Court held that PELRA’s requirement of mandatory arbitration of impasses in collective bargaining negotiations was not an unconstitutional delegation of powers. *City of Richfield*, 276 N.W.2d at 45. Similarly, in *Kline*, 685 N.W.2d at 23, the Court held that the Minnesota Workers Compensation Act’s private ADR provision was constitutional, so long as appeals were ultimately subject to court review. This appeal by HRA shows that §179A.25 complies with this condition.

HRA’s argument that the Independent Review Statute is unconstitutional as violating the separation of powers doctrine is misplaced

for several reasons. First, as demonstrated above, Article XII, § 3 of Minnesota Constitution specifically permits legislation such as § 179A.25.

Second, Appellant's argument³ that §179A.25 violates separation of powers principals, which argument rests on *Dokmo v. Ind. Sch. Dist. No. 11*, 459 N.W.2d 671 (Minn. 1990); *Dietz v. Dodge County*, 487 N.W.2d 237 (Minn. 1992); *Willis v. County of Sherburne*, 555 N.W.2d 277 (Minn. 1996) and *Tischer v. Cambridge HRA*, 693 N.W.2d 426 (Minn. 2005), ignores that these cases were concerned by the constitutional propriety of review by courts of quasi-judicial decisions of municipalities, not review by another administrative body. Respondent BMS, at Brief of BMS, at 6 -8, patiently and persuasively explains that § 179A.25 provides for administrative, not judicial review, by BMS, and, therefore, those cases are immaterial.

Third, even if the holdings in the judicial review cases from *Dokmo* to *Tischer*, were grafted onto the administrative review provided by § 179A.25, imaginary separation of powers concerns would be overcome because there is "statutory authority" for full administrative review by BMS. *Dietz*, 459 N.W.2d at 240-241. *Dietz* considered whether any statute provided for a specific judicial *or administrative* avenue of appeal of the public employee's

³ Brief of Appellant HRA, at 12 – 14.

discharge before deciding that certiorari was the employee's only method of appeal. The court pointed out that the employee:

“was not entitled by statute to appeal the decision by traditional means. The county, not having statewide jurisdiction, is not subject to the Minnesota Administrative Procedure Act, Minn. Stat. § 14.02, subd. 2 (1990), and no statute specifically provides appeal to the courts from an administrative decision to terminate a county nursing home administrator.”

Id. at 239. It is clear that if a statute had provided for an administrative remedy in the *Dietz* case, like the Administrative Procedure Act, the Supreme Court would have found that the employee could well have availed himself of that administrative forum to contest his discharge.

Subsequently, in *Willis v. County of Sherburne*, 555 N.W. 2d 277, 282 (Minn. 1996), the Court held that

“when the alleged breach of employment contract of a governmental employee results in termination of the claimant's employment by an executive body which does not have statewide jurisdiction – for example, a county – the claimant may contest the employer's action by certiorari alone, **absent statutory authority for a different process . . .**”

(Emphasis added.) Again, in *Willis*, the Minnesota Supreme Court recognized that the legislature may impose limits on a municipality's ability to discharge its employees and may provide for any degree of review of those discharges, and the procedure for doing so.

In *Tischler v. Housing & Redevelopment Authority of Cambridge*, 693 N.W. 2d 426 (Minn. 2005), the Supreme Court considered whether a particular statute constituted, under *Willis*, “statutory authority for a different process” than limited certiorari review for a public employee’s discharge. *Id.* at 428-9. The Court in *Tischler* recognized that the legislature had created procedural alternatives to limited cert review in the Minnesota Human Rights Act and the Minnesota Whistleblower Act, which conferred district court jurisdiction by authorizing a “civil action.” *Id.* at 429. However, the Court declined to accord Minn. Stat. § 469.014 the same weight, and held that it did not confer subject matter jurisdiction on the district court over the employee’s breach of contract claim.⁴ The Court distinguished § 469.014 from the Human Rights and Whistle Blower Acts, reasoning that § 469.014 “does not explicitly state that an HRA employee may bring a civil action in district court...” *Id.* The Court also noted that

⁴ M.S. § 469.014 provides in pertinent part:

Subject to the provisions of chapter 466, an authority shall be liable in contract or in tort in the same manner as a private corporation. . . The property or funds of an authority shall not be subject to attachment, or to levy and sale on execution, but, if an authority refuses to pay a judgment entered against it in any court of competent jurisdiction, the district court . . . may, by writ of mandamus, direct the treasurer of the authority to pay the judgment.

“the fact that these other statutes [MHRA and Whistleblower Act] specifically authorize civil actions compels the conclusion that, had the legislature intended to permit HRA employees to bring employment claims in district court, the legislature would have specifically said so, as it did in the Whistleblower and Human Rights Acts.” *Id.* at 431. The Court also noted that references to “district court” and “in the same manner as a private corporation” in § 469.014 only mean the substantial rights and obligations of the parties, but do not authorize district courts to entertain such cases. *Id.* at 430-1.

In contrast to § 469.014, the Independent Review Statute, Minn. Stat. § 179A.25, provides that where no unbiased, independent mechanism for review of its employment decision is provided by a local government employer, an “employee may present the grievance to the commission under procedures established by the commissioner.” Thus, again setting aside the distinction between administrative and judicial review, §179A.25 would qualify under *Tischler* as a statutory alternative to certiorari review, because §179A.25 literally and specifically identifies an alternative forum (BMS), in which to contest a violation of terms and conditions of employment, including public employee discharges. § 179A.25 passes the specificity test of *Tischler*.

III. TERMS AND CONDITIONS OF MS. ROST'S EMPLOYMENT.

A significant underpinning of Appellant HRA's and amici's arguments is that Ms. Rost was an employee at will and had no "terms and conditions" of employment.

With reference to former Minn. Stat. § 179.63, subd. 18, defining "terms and conditions," the Supreme Court has held, "If an issue in a labor dispute affects employees' welfare, and is not part of managerial function, it is a term or condition of employment." *City Of Richfield, Appellant, v. Local No. 1215*, 276 N.W.2d 42, 49 (Minn. 1979).

A. HRA Employment & Personnel Policies Established Terms and Conditions of Ms. Rost's Employment.

BMS determined that Ms. Rost had terms and conditions of employment embodied in HRA's Employment and Personnel Policies. See, ORDER, June 23, 2004, at 4, granting Rost's Petition for Independent Review. AA - 296.

Ms. Rost attached to her Petition for Independent Review portions of Respondent's employment policy that create terms and conditions of employment. HRA's Employment & Personnel Policies (AA - 1, et. seq) contain the following relevant provisions:

Under the section entitled "Basic Principals" the policy directs: "The employment of personnel and all actions affecting the employees of the

[HRA] shall be based solely on merit, ability and justice.” AA – 5.
(emphasis added.)

Under “Employees – Probationary Period” the policy provides: “It shall be customary for the Executive Director’s position to be considered probationary for the first (1st) year of employment unless noted in the official hiring process.” AA – 8. This implies that during the first year of employment an Executive Director may be discharged for no reason, without explanation, but that after one year, something different governs the employment relation. The “something different” is contained in the forgoing “Basic Principals” and in the sections called Changes in Status” and “Separation from Employment.”

Under “Changes in Status of Employees,” the policy provides that “An employee may be subject to demotion under the following circumstances: If the employee has been found unsuited for their present position, but may be expected to give satisfactory service in a lesser skilled position; . . .” AA - 18. That section also provides that “An employee may be suspended from duty without pay for a period not to exceed fifteen (15) days for disciplinary reasons; or pending investigation. . .” Id. at 19.

Under “Separation from Employment,” the 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 Board of Commissioners.” AA – 19. The “Separation from Employment” section also contains provisions for oral and written disciplinary warnings. Id. at 20. These provisions establish a progressive discipline system, in that the written discipline provision refers to “the previous oral warning” and each refer to consequences of repeat violations or continuing inappropriate behavior.

This disciplinary/discharge scheme indicates that discharge without first applying progressive - oral or written – discipline may only be imposed for “serious” violations that are true and substantiated (are based on “merit” and “justice.”)

The forgoing provisions contain the type of language that is definite enough to create a unilateral contract, or at least present a fact question on the existence of a contract. *Pine River State Bank v. Mettillie*, 333 N.W.2d 622, 630 (Minn. 1983); *Lewis v. Equitable Life Assurance Society*, 389 N.W.2d 876, 883 (Minn. 1986) (imprecise rights limiting discharge held sufficiently definite, and exact parameters of those rights was a fact question for the jury.)

However, in the fifth and last paragraph of its “Hiring Process” section, of the policies contradict themselves with the following language: “The [HRA] shall consider all employees to be ‘employed at will’. There shall be no employment contracts with any employee.” AA - 7.

B. Whether the Policy Terms Applied to the Termination of Judith Rost Was a Question of Fact for the Arbitrator.

HRA and *amici* argue that the purported contract disclaimer hidden in the fifth paragraph at the end of the “Hiring” section of the policy renders meaningless and illusory the policy’s mandatory language that “all actions . . . shall be based solely on merit, ability and justice,” and the language of the Separation provision that, as relevant to this case, the only ground for dismissal without notice is substantial violation of regulations.

HRA’s argument, and similar arguments by *amici*, ignores the law. Conflicts between specific promises in employment policies and inconsistent contract disclaimers must be resolved in favor of the specific promise. *Pine River, supra*; *Lewis v. Equitable Life Assurance Society*, 389 N.W.2d 876, 883 (Minn. 1986); *Bratton v. Menard’s, Inc.*, 438 N.W.2d 116, 118 (Minn. App. 1989); *Brookshaw v. South St. Paul Feed, Inc.*, 381 N.W.2d 33, 36 (Minn. App. 1986); *Gilbertsen v. Codex*, 1990 U.S. Dist LEXIS 19869 (D. Minn. 1990) at * 15 (wherein Judge Doty observed that “the law will not tolerate [the] absurd result of robbing specific promises of all meaning.”)

A disclaimer that conflicts with mandatory language in an employment policy at most creates an ambiguity, to be resolved by the fact finder. *Swanson v. Liquid Air*, 826 P.2d 664, 674-676 (Wash. 1992). The ambiguity must be resolved against the party that chose the words. *Id*; *Untiedt v. Grand Laboratories, Inc.*, 552 N.W.2d 571, 574 (Minn. App. 1996). The language of HRA's policy was provided by HRA. Ms. Rost testified that she only organized and cleaned up the document but did not contribute substance to it. AA – 134 – 138.

The HRA's "disclaimer" is deficient in placement and delivery. In Minnesota, in order for a disclaimer to prevent a handbook from constituting a contract, the disclaimer must be "conspicuously" located in the handbook. *Audette v. Northeast State Bank of Minneapolis*, 436 N.W.2d 125, 127 (Minn. Ct. App. 1989). HRA's purported disclaimer, is buried in the section called "Hiring Process," hardly the place where a new employee, newly hired, would first look, since it is not to be delivered until after hiring. The disclaimer does not say that the policy manual is not a contract, but only limits the scope of hiring letters. The same paragraph also requires delivery of a copy of the policy manual to a new employee on his/her first day of work, but Ms. Rost did not receive a copy for three or four months after she was hired. AA-134-138. Finally, the two sentences relied on by HRA are

subject to the conflicting specific discharge/discipline language of the policy, the result of which was a fact question whether HRA's right to fire Ms. Rost was limited.

In 1997, the Minnesota Court of Appeals summarized the law of conflicting employment policy provisions in *Minnesota State Fair v. Anderson*, 1997 Minn. App. LEXIS 423 (Minn. App. 1997) (unpublished) in an Independent Review proceeding under Minn. Stat. § 179A.25.⁵ The Court reversed administrative summary judgment against the employer that had been granted by the BMS. The Court of Appeals stated, at * 6-8:

The provisions in a personnel handbook may become enforceable as part of an employment contract if they meet the requirements for formation of a unilateral contract. *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 627 (Minn. 1983). To create a unilateral contract, an offer must be definite in form, communicated to the offeree, and accepted. *Id.* at 626. Whether an offer was intended is determined by the outward manifestations of the parties rather than their subjective intentions. *Id.*

When the language in a policy manual is the basis for a contract claim and that language is unambiguous, the determination of whether an employee has contractual rights to employment is a question of law. See *Hunt v. IBM Mid America Employees Fed. Credit Union*, 384 N.W.2d 853, 857 (Minn. 1986) (in reviewing summary judgment dismissing claim, determination of whether contract for indefinite "for cause" employment was formed is question of law). But when that language is ambiguous or contradictory, the determination may present a question of fact for the fact finder. See *Lewis v.*

⁵ See, Respondent Rost's Appendix, RA - 1.

Equitable Life Assur. Soc., 389 N.W.2d 876, 883 (Minn. 1986) (noting that when terms of contract are unclear, determination of contract formation is for jury, and upholding jury verdict in favor of employee); *Brookshaw v. South St. Paul Feed, Inc.*, 381 N.W.2d 33, 36 (Minn. App. 1986) (reversing summary judgment because conflicting language in handbook with "disclaimer" created question of fact), *review denied* (Minn. Apr. 11, 1986).

The Court in *Anderson* then analyzed terms of a policy which contained conflicting the following provisions, recited at *id*, at * 8-9:

- All complaints against an officer * * * alleging violation of the rules of conduct shall be recorded on a standard complaint form.
- The chief or his designee * * * shall * * * notify the officer who is complained against.
- * * Any officer who is the subject of an internal investigation shall be afforded all of the rights and protections provided by the law and by departmental rules and regulations.
- “. . . notice of discharge will be given no less than two weeks prior to termination date.”
- “Employment in the department may be terminated at any time, for any reason. There are no guarantees of employment of any kind. This Personnel Manual creates no contract or property rights and the department retains the discretion to take whatever personnel actions they believe are appropriate.
- Employees may be terminated and disciplinary measures dispensed with "solely at the discretion of the executive vice president."
- “. . . employees are not guaranteed employment for a specific period of time nor do they have any right to continued employment.”

The Court in *Anderson* concluded that fact questions existed precluding summary judgment by the BMS:

We believe the contradictory nature of the language in these policies and the lack of clarifying evidence preclude a legal determination as to whether Anderson had contractual rights that became "terms and conditions" of his employment protected by Minn. Stat. § 179A.25.

* * *

We do not doubt that the State Fair has the authority to terminate freely its at-will employees. But when an employer establishes procedures and conditions to be followed prior to termination, those procedures may become the basis for a binding contract. When a contract has been formed, grievance and disciplinary measures, while procedural, take on a substantive character. In such cases the procedures may provide the employee with an opportunity to correct deficiencies to the employer's satisfaction and thus avoid discharge. *See Pine River*, 333 N.W.2d at 631. The State Fair has failed to produce evidence showing that Anderson, as a matter of law, was not entitled to the procedural safeguards outlined in the State Fair's Policy Manual. As a result the summary disposition dismissing his claim was in error. *Id.* at *9 – 11.

C. The Arbitrator's Decision Concerning Ms. Rost's Terms and Conditions of Employment Was Based on Evidence in the Record Supporting It.

Arbitrator Daly, in his Decision and Order dated July 23, 2007, identified potentially applicable terms and conditions of employment that were contained in HRA's policies made a part of the hearing record. AA – 335 – 338.

The Arbitrator then framed the issue on the merits as "did Ms. Rost 'steal' the Zoloft abandoned by the resident, as the Board seems to believe; or, did Ms. Rost violate the procedures and regulations, as the Board seems

to believe. AA – 251. Thus, it is clear that the Arbitrator determined that, at minimum, the governing policy provision was, “An employee who gives unsatisfactory service or who is guilty of substantial violation of regulations shall be subject to dismissal without notice. In such cases the employee, if he/she desires, shall be given a hearing before the Board of Commissioners.” AA – 19. This precisely the provision that Board Chair Thompson testified was applied in Ms. Rost’s discharge. AA-86.

Furthermore, given the Arbitrator’s determination that HRA did not give Ms. Rost fair notice of and thus provided an inadequate hearing, HRA’s requirement that employment decisions be based on “merit, ability and justice” was also applicable and was violated by HRA in this case.⁶

⁶ Ms. Rost also claimed that the terms and conditions of her employment included federal regulations governing government contractors, of which HRA was one. She testified that at the time of her discharge she was the author and named as project director on several grant applications and funded grants from the U.S. Department of Housing and Urban Development. AA – 90-100. This, she argued, required notice to and approval from HUD of her discharge, which neither given nor obtained.

2 C.F.R. § 215.25 (c), which provides:

For nonconstruction awards, recipients shall request prior approvals from Federal awarding agencies for one or more of the following program or budget related reasons.

* * *

(2) Change in a key person specified in the application or award document.

IV. BMS DID NOT COMMIT ERRORS OF LAW.

A. De Novo Review By BMS Of A Discharge Decision Is The Appropriate Standard.

Appellants' argument is that review by BMS of a discharge decision under § 179A.25 must be a deferential, certiorari-like review, is based on the notion that the *Dockmo-Dietz* line of cases. Brief of HRA, at 21-24. However, this is no authority at all because, as explained by BMS and argued above, *Dockmo, Dietz, et al*, stand only for the proposition that *judicial* review of administrative quasi-judicial decisions is limited and deferential. On the other hand, this Court has described independent review under § 179A.25 as *de novo*, trial like, review, putting this argument to rest. *Sampson v. City of Babbitt*, 2004 WL 193083 (Minn. App. Feb. 3, 2004).

Similarly, 85 C.F.R. § 85.30 (d) provides:

(d) Programmatic changes. Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

* * *

(3) Changes in key persons in cases where specified in an application or a grant award.

However, the Arbitrator did not consider these arguments in reaching his decision that

B. An Independent Review Arbitration Decision Is Final and Binding On the Parties.

HRA argues that the arbitrator's decision must be only advisory, because (1) § 179A.25 is silent on finality and (2) decisions of the BMS are inconsistent with the finality of arbitrations under § 179A.25. Brief of HRA, at 17-21.

As to the silence of the statute on the binding nature of arbitration decisions, as BMS points out, this Court held in *Cross v. County of Beltrami*, 606 N.W.2d 732 (Minn. App. 2000) that the decisions of arbitrators in Independent Review proceeds are final and binding. *Cross*, 606 N.W.2d at 735. The holding in *Cross* eviscerates the rationale of the arbitration decision relied on by HRA, *In Re Arbitration between City of Maple Grove, Minnesota and Sergeant Jeff Garland*, BMS Case #98-PIR-1780. AA – 372.

Further, in *Garland*, Arbitrator Jacobs relied on the absence of language in a CBA that independent review would be binding. Such reasoning renders § 179A.25 meaningless, because the statute requires Independent Review by BMS only when an employer does not provide for it. It is nonsensical to expect a municipal employer to provide for no independent review of its decisions, but to say that any independent review would be binding. It is likewise unreasonable to argue that the absence of language in the HRA's policies making independent review final and

binding is meaningful, when the HRA has failed to provide for independent review in the first place.

The other BMS decision relied on by HRA, *Mashuga v. Anoka-Hennepin Technical College*, BMS Case No. 04-PIR-112, does not help HRA.⁷ That case held that where an employee was covered by a collective bargaining agreement, which provided that the college President's decisions on certain disputes was "final," and gave up the right to arbitration, independent review had been waived. The significant, distinguishing, feature of *Mashuga* not present in this case, was the CBA waiver of grievances. BMS refused to apply § 179A.25, which was intended to cover non-union employees, to employees covered by CBA's negotiated under other provisions of PELRA, which CBA dispensed with arbitration.

The legislature may dictate how local governments conduct their employee relations. The Minnesota Legislature has simply required that local governments supply independent review of discharges of employees who have terms and conditions governing their discharge and who have not given up that right in a collective bargaining agreement. See, *Boe v. Polk County Library Board*, 217 N.W.2d 208 (Minn. 1974); *Mashuga v. Anoka-Hennepin Technical College*, supra. The legislature's authority to the BMS

⁷ Decision attached hereto at Respondent Rost's Appendix, at RA- 4.

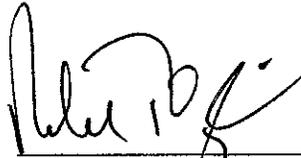
to create rules governing its review of terminations is fully consistent with its authority to manage local government operations vested by the Minnesota Constitution. Due process concerns are accommodated by ultimate review of BMS decisions by the Court of Appeals.

An argument that HRA provided no conditions or terms of employment to Ms. Rost that grant's BMS authority over her discharge is specious. First, it is the statute, ¶ 179A.25, that gives the right to independent review. However, the policies of the Alexandria HRA provided both limitations on that agency's ability to discharge its employees, and a right to review by the Board. Because Board review is not independent review, §179A.25 applies to provide independent, final administrative review. This brings the parties to the current appeal, in which limited cert review is available to Appellant HRA.

CONCLUSION

For the foregoing reasons, and for the reasons expressed in the Brief of Bureau of Mediation Services filed herein, the Decision of BMS reinstating Judith Rost with back pay and expunging her personnel file should be affirmed.

Dated: December 31, 2007.



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