

NO. A06-0892

State of Minnesota
In Court of Appeals

REGENTS OF THE UNIVERSITY OF MINNESOTA,
Relator,

vs.

CERTAIN EMPLOYEES OF THE UNIVERSITY OF
MINNESOTA, UNIT 9, CROOKSTON, MN,

and

UNIVERSITY EDUCATION ASSOCIATION,
EDUCATION MINNESOTA

and

BUREAU OF MEDIATION SERVICES (BMS),

Respondents.

BMS No. 06-PDE-0791

**REPLY BRIEF OF RELATOR
REGENTS OF THE UNIVERSITY OF MINNESOTA**

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The Regents of the University of Minnesota (hereinafter "University") hereby submits its Reply to the Opposition Brief of Respondent UEA.

I. THE BMS DECISION FINDING THAT OUTSTATE INSTRUCTIONAL UNIT, UNIT 9 IS ONE UNIT FOR PURPOSES OF DECERTIFICATION, AND DISMISSAL OF THE PETITION FOR DECERTIFICATION IS PROPERLY BEFORE THIS COURT.

In choosing not to address this issue in its brief, Respondent UEA concedes that the BMS decision is appealable. Pursuant to Minn. Stat. § 179A.051 (2004), "Decisions of the [BMS] commissioner relating to . . . appropriateness of a unit . . . may be reviewed on certiorari by the Court of Appeals," and the BMS Order of April 12, 2006 expressly identifies the key issue in that proceeding as whether the appropriate unit for purposes of decertification consists of just the UMC Faculty, or whether it must include the UMD Faculty as well. RL App. at 77. The Order clearly constitutes a decision relating to appropriateness of the bargaining unit, thereby permitting an appeal under Minn. Stat. § 179A.051.

II. THE UNIVERSITY IS A PROPER PARTY FOR PURPOSES OF APPEALING THE BMS' DISMISSAL OF THE DECERTIFICATION PETITION AND HAS STANDING TO SEEK RELIEF FROM THIS COURT.

Respondent argues that the University is not a proper party to the proceedings and therefore, this Court should dismiss the pending appeal because the University had no standing below. (Respondent's Brief at 8-10.) Respondent's argument, however, are not supported by the relevant statutory provisions, rules, or facts in the instant case. The Court should affirm the BMS ruling on this issue

The BMS has adopted rules relating to the administration of PELRA that define a “party” as “any exclusive representative, employee organization, or *public employer* recognized by the commissioner whose legal rights, duties, and privileges will be *directly determined* in the proceedings, or any public employee who has filed a fair share fee challenge or decertification petition.” Minn. R. 5510.0310, subp. 16 (2005) (emphasis added). *See also* Minn. Stat. § 179A.04, subd. 3(6) (2004). Contrary to Respondent’s assertion, the University is a public employer whose legal rights, duties, and privileges will be directly determined in the proceedings on appeal. RL App. at 81. The outcome of the decertification proceedings below will directly determine whether the University has a legal obligation to recognize and bargain with Respondent UEA with respect to UMC Faculty, or whether UMC Faculty will return to directly meeting and conferring with the University regarding terms and conditions of employment. Minn. Stat. § 179A.07, subds. 2 and 4 (2004). These are legal rights and duties that will be directly, not indirectly, determined by the appeal and therefore Respondent’s argument that the University is not a party to the proceedings fails. The University is clearly a party to the proceedings as defined in Minn. R. 5510.0310, subp. 16.

Respondent’s second claim that the University lacks standing to be a party to the BMS proceedings below is similarly flawed. As Respondent noted, “[s]tanding is acquired in two ways: either the plaintiff has suffered some ‘injury-in-fact’ or the plaintiff is the beneficiary of some legislative enactment granting standing.” *Edina Community Lutheran Church, et al., v. State*, 673 N.W.2d 517, 521 (Minn. App. 2004) (citing *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490, 493 (Minn. 1996)).

While the University may not have suffered an injury in the usual sense, its rights are determined in this proceeding. In addition, and more importantly, the legislature granted the University party status in PELRA. The language of Minn. Stat. § 179A.051 clearly provides that any party to a BMS decision regarding the appropriateness of a unit may appeal by writ of certiorari. Minn. Stat. § 179A.051 (2004). In addition, the apposite BMS rules grant the University party status as a public employer whose legal rights, duties and privileges will be directly determined in the proceedings, including in any appeal. Minn. R. 5510.0310, subp. 16 (2005). As such, the University is the “beneficiary of some legislative enactment granting standing” and is a proper party to this appeal.

III. OUTSTATE INSTRUCTIONAL UNIT, UNIT 9 IS TWO UNITS FOR PURPOSES OF DECERTIFICATION, AND THE BMS FINDING TO THE CONTRARY SHOULD BE REVERSED.

A. Standard Of Review Of Agency Decisions.

An appellate court will reverse an agency decision if it is based on an error of law, is arbitrary and capricious, or is not supported by substantial evidence. *In re Application of N. State Power Co. for Approval of Its 1998 Res. Plan*, 604 N.W.2d 386, 389 (Minn. App. 2000), *rev. denied* (Minn. Mar. 28, 2000); *County of Scott v. Pub. Employment Relations Bd.*, 461 N.W.2d 503, 504 (Minn. App. 1990) (citations omitted), *rev. denied* (Minn. Dec. 20, 1990). Respondent initially states this correct standard of review, then contradicts itself and seeks to narrow the standard, citing *Hibbing Educ. Ass’n v. Pub. Employment Relations Bd.*, 369 N.W.2d 527 (Minn. 1985) for the proposition that when “the present appeal involves a question of statutory interpretation, the only possible basis for reversal is if the BMS erred as a matter of law.” (Respondent’s Brief at 7.) In fact, the

Hibbing court never stated such a standard. Rather, *Hibbing* notes that, “[T]he construction of a *statute* such as the Public Employment Labor Relations Act is clearly a question of law. In such a case, the decision of the administrative agency (here the PERB) is fully reviewable by this court.” 369 N.W.2d at 529 (emphasis added).

Further, Respondent asserts that “although appellate courts are not bound by the agency’s interpretation or construction of a statute, ‘the agency’s decision is presumed to be correct and courts give deference to the agency’s expertise and special knowledge in the field of its technical training, education, and experience.’” (Respondent’s Brief at 7) (citation omitted). This statement is contrary to the standard subsequently established by this Court that “[w]hen reviewing questions of law, this court is not bound by the agency’s decision and need not defer to the agency’s expertise.” *Minnesota Teamsters Pub. & Law Enforcement Employee’s Union, Local No. 320, Minneapolis v. County of McLeod*, 509 N.W.2d 554, 556 (Minn. App. 1993) (citing *State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 854 n.17 (Minn. 1985)). Therefore, when reviewing the April 12 BMS Order, this Court is not required to defer to the agency’s expertise and there is no presumption that the BMS Commissioner reached the correct decision.

B. The Outstate Instructional Unit, Unit 9 Is Not One Unit For All Purposes.

Respondent UEA would have the Court believe that Outstate Instructional Unit, Unit 9 is one monolithic unit for all purposes. In fact, determinations of what constitutes the appropriate unit for Outstate Instructional Unit, Unit 9 differs according to the circumstances at hand. For purposes of representation, Outstate Instructional Unit, Unit 9

is three separate units: Duluth, Crookston, and Morris, each of which must vote separately on whether to be represented by an exclusive representative. Once UMC Faculty voted to be represented, Unit 9 became two units, Duluth and Crookston, for purposes of meeting and negotiating with the University. As the Hennepin County District Court held, the three campuses are also separate units for purposes of collective bargaining, and a collective bargaining agreement in place on one campus does not automatically apply to the other campuses. It is therefore perfectly appropriate, and indeed consistent with the statutory scheme established by the legislature, that Outstate Instructional Unit, Unit 9 be considered two separate units for purposes of a decertification petition by the UMC Faculty.

C. In The Absence Of Express Statutory Authority To The Contrary, And Ambiguous Statutory Language, This Court Must Look To The Legislature's Purpose In Enacting PELRA.

The goal of statutory interpretation is to ascertain legislative intent when there is an ambiguity in the statutory language. Minn. Stat. § 645.08(1) (2000). Respondent argues that under Minn. Stat. § 179A.11, subd. 1(9) (2004), PELRA specifically identifies Outstate Instructional Unit, Unit 9, as one bargaining unit and therefore, "the language is unambiguous and speaks for itself, leaving no room for judicial construction." (Respondent's Brief at 10.) However, the statute that creates the Outstate Unit, Unit 9, is silent with respect to decertification. The purpose of PELRA is to allow self-determination by employees. Accordingly, the same statutory scheme that permits UMC Faculty to determine whether to unionize should be utilized by the UMC Faculty to determine not to unionize. Ambiguity also exists in the statutory language because with

regard to the decertification process, PELRA and the apposite Minnesota Rules modify “unit” differently with the words, “proposed,” “appropriate,” and/or “established.” Implicit in these modifications is the premise that for purposes of decertification, the “appropriate” unit may differ from the “unit” or “established unit” described in Minn. Stat. 179A.11, subd. 1. This premise is borne out by the existing statutory scheme in which all of the University coordinate campuses are part of Outstate Instructional Unit, Unit 9, but each is a separate group for purposes of voting whether to certify an exclusive representative with respect to their individual campuses. That being said, Respondent UEA’s argument that to allow the University’s Duluth, Crookston and Morris campuses to be treated as though they are separate units in any way violates PELRA is clearly flawed. The University is not asking the Court for the right of UMC Faculty to set up a separate bargaining unit apart from Outstate Instructional Unit, Unit 9 with a different union representative, but merely to allow the UMC Faculty to have the choice to return to the unrepresented status it enjoyed before joining Unit 9 on the same basis that it chose to be represented.

It is clear from analyzing the relevant statutory provisions and rules that there is no express statutory language prohibiting or allowing UMC Faculty alone from voting to decertify and therefore, this Court must look to the legislature’s purpose in enacting PELRA. Respondent UEA asserts that statutory language prohibiting separate voting can be found in Minn. Stat. 179A.12, subd. 3 (2004), which UEA argues requires a showing of thirty percent of the “established” unit for a decertification election. Minn. Stat. § 179A.12, subd. 3 (2004). However, that same subsection also requires a showing of

thirty percent of the proposed appropriate unit for representation, a statutory scheme clearly at odds with the PELRA provision governing representation elections on the University coordinate campuses.

PELRA specifically provides:

[T]he positions of instructional employees of the same ranks at the Morris, Crookston, or Waseca campuses shall be included within this unit if *a majority of the eligible employees voting at a campus* so vote . . . The election shall be held when an employee organization or group of employees petitions the commissioner stating that *a majority of the eligible employees at one of these campuses* wishes to join the unit and this petition is supported by a showing of at least 30 percent support from *eligible employees at that campus*

Minn. Stat. § 179A.11, subd. 1(9) (2004) (emphasis added). Although the Legislature clearly established Outstate Instructional Unit, Unit 9 as the only unit for all coordinate campuses, it does not require a showing of thirty percent of all members of that unit, but instead requires a showing of only thirty percent of the employees on *each specific campus* for representation. Therefore, the only logical conclusion is that in unequivocally allowing UMC Faculty members to determine for themselves whether or not to become part of Outstate Instructional Unit, Unit 9 and be represented by UEA, the legislature also intended for UMC Faculty members to determine for themselves whether or not to no longer be exclusively represented by UEA.

Respondent further misunderstands the University's argument by claiming that "the legislature determined that if the UMC Faculty made these choices, they would make further representation decisions as part of the larger group and not independently

from the rest of the unit.” (Respondent’s Brief at 12.) Respondent confuses the distinct concept of making bargaining decisions with the concept of making representation decisions. The University is not arguing that Outstate Instructional Unit, Unit 9 should be permitted to elect different exclusive representatives for each coordinate campus. The BMS Commissioner was correct in stating that Outstate Instructional Unit, Unit 9 is one bargaining unit that is represented exclusively by UEA. However, for purposes of decertification, this Court should find that Outstate Instructional Unit, Unit 9 is composed of two units, because if UMC Faculty alone can decide to join Outstate Instructional Unit, Unit 9 and be exclusively represented by UEA, UMC Faculty alone should decide to not have any representation at all, whether by UEA or anyone else.

Finally, one of PELRA’s primary purposes is to “grant[] public employees certain rights to organize and *choose freely their representatives.*”¹ Minn. Stat. § 179A.01 (2004) (emphasis added). Inherent in this right to freely choose one’s representative is the right to decide whether or not to be represented at all. There is simply no way the legislature would have intended for UMC Faculty members to be able to vote by themselves in a representation election without also intending for them to be able to vote in a decertification election by themselves. The University only asks this Court to apply the same statutory scheme for decertification that the legislature and BMS Commissioner applied for the purpose of representation: to allow UMC Faculty and UMC Faculty alone to vote.

¹ Respondent misconstrues this statement by claiming that “[c]ertain rights do not equal unfettered rights.” (Respondent’s Brief at 11.) The University does not argue and never has argued that UMC Faculty has unfettered rights, but only that UMC Faculty should have the ability to “choose freely their representatives.” Minn. Stat. § 179A.01 (2004).

D. The Severance Procedure Outlined In Minn. Stat. § 179A.11, Subd. 2 Is A Distinct And Separate Statutory Scheme From A Decertification Election Under Minn. Stat. § 179A.12, Subd. 3.

Respondent UEA claims that it does not confuse severance from a bargaining unit with a decertification election, and yet interchangeably uses the terms “sever” and “decertify” to mean the same thing. (Respondent’s Brief at 15-16.) The University, on the other hand, recognizes that there is a difference between the severance procedure outlined in Minn. Stat. § 179A.11, subd. 2 and the decertification procedure outlined in Minn. Stat. § 179A.12, subd. 3.

First, Respondent’s argument that the legislature did not provide UMC Faculty “with the ability to separate in any way from Unit 9” is simply wrong. (Respondent’s Brief at 15.) While the University acknowledges that the severance procedure outlined in Minn. Stat. § 179A.11, subd. 2 does not apply here, that does not mean PERLA provides no recourse should the UMC Faculty decide to separate. Although the legislature created a severance procedure for certain University employees, it created a different statutory procedure for instructional employees on coordinate campuses that vote to join Outstate Instructional Unit, Unit 9. It is the decertification, not severance, process that applies.

The legislature created a statutory severance scheme whereby University employees who vote at the same time to join a bargaining unit may leave that bargaining unit by utilizing the severance process. A brief look at Minn. Stat. § 179A.11; subd. 2 reveals that the legislature intended severance to be available only to those specifically enumerated employee groups that are part of a PELRA specified unit that votes to join a bargaining unit all *at the same time*. Because these employees all vote simultaneously on

whether or not to be part of a particular bargaining unit,² these groups of employees have the right to sever, and not to decertify, from their corresponding instructional and supervisory units. On the other hand, Minn. Stat. § 179A.12, subd. 3 creates a separate decertification statutory scheme available to those University employees on coordinate campuses who vote separately to join a bargaining unit after the “Duluth campus has voted in favor of representation.” Minn. Stat. § 179A.12, subd. 1(9) (2004). There is no doubt that under the relevant provisions of PELRA, Outstate Instructional Unit, Unit 9 is an anomaly in that instructional employees on different campuses vote separately and at different times to join the bargaining unit.

Minn. Stat. § 179A.11, subd. 1(9) states:

The outstate instructional unit consists of the positions of all instructional employees . . . located at the Duluth campus, provided that the positions of instructional employees of the same ranks at the Morris, Crookston, or Waseca campuses shall be included within this unit if a majority of the eligible employees voting at a campus so vote during an election conducted by the commissioner, provided that the election shall not be held until the Duluth campus has voted in favor of representation. The election shall be held when an employee organization or group of employees petitions the commissioner stating that *a majority of the eligible employees at one of these campuses* wishes to join the unit and this petition is supported by a showing of at least 30 percent support *from eligible employees at that campus*

² For example, “instructional employees of the law school with the rank of professor, associate professor, including research associate, or instructor, including research fellow” would have the right to sever from the Twin Cities Instructional Unit, Unit 8 if the unit was unionized, because these law school instructional employees would vote to join the bargaining unit at the same time as other instructional employees.

Minn. Stat. § 179A.11, subd. 1(9) (2004) (emphasis added). Further, Minn. Stat. § 179A.12, subd. 3 states:

An individual employee or group of employees in a unit may obtain a decertification election upon petition to the commissioner stating the certified representative no longer represents the majority of the employees in an established unit and that at least 30 percent of the employees wish to be unrepresented.

Minn. Stat. § 179A.12, subd. 3 (2004). Reading these two statutory provisions together, the inescapable and logical conclusion is that since eligible UMC Faculty members had the right to vote whether or not to join the bargaining unit without the participation of UMD Faculty, they also have the reciprocal right to vote by themselves whether or not to decertify UEA as their exclusive representative under Minn. Stat. § 179A.12, subd. 3. Therefore, the BMS and Respondent err in asserting that Outstate Instructional Unit, Unit 9 is one unit for purposes of decertification.

Further, Respondent misses the point of the University's argument that the severance procedure set out in Minn. Stat. § 179A.11, subd. 2 is distinguishable from the decertification procedure set out in Minn. Stat. § 179A.12, subd. 3. As discussed above, severance is available only to those employees who vote at the same time to join a particular bargaining unit. On the other hand, decertification is available to employees like the UMC Faculty members who vote separately to join an already established bargaining unit.³ PELRA clearly allows UMC Faculty and UMC Faculty alone to freely

³ Respondent's statement regarding the right to meet and negotiate versus the right to meet and confer is taken from the severance procedure established in Minn. Stat. § 179A.11, subd. 2 and is wholly irrelevant to the issue here.

choose whether or not to be represented, and in fact, sets out a separate statutory scheme distinct from severance for its members to exercise this right.

Finally, Respondent's contention that the University is unable to cite to any statutory authority defining Unit 9 as more than one unit flies squarely in the face of the separate and distinct statutory process set forth in PELRA for the coordinate campuses. (Respondent's Brief at 16.) By requiring separate representation elections, Minn. Stat. 179A.11, subd. 1(9) already separates Outstate Instructional Unit, Unit 9 into four distinct groups within one unit for purposes of representation.⁴ The status the UMC Faculty "would have if the Court were to grant its wish to decertify its exclusive representative, yet not be completely severed from Unit 9," is the same status the UMC Faculty had before they selected Respondent UEA as their exclusive representative. (Respondent's Brief at 16.) They would be included within that group of employees assigned by PELRA to Outstate Instructional Unit, Unit 9, but without exclusive representation.

E. The Disparity In The Number Of Members On The Crookston And Duluth Campuses Deprives UMC Faculty Of A Meaningful Choice To Decertify.

Respondent does not refute, and in fact completely ignores, the University's argument that UMC Faculty are effectively disenfranchised and denied the right to determine whether or not to be represented simply by virtue of the imbalance of faculty members between the University's Crookston and Duluth campuses. With this imbalance, the UMC Faculty voice in matters is miniscule at best, and more likely nonexistent; a critical factor if both campuses are considered one unit for purposes of

⁴ Crookston, Duluth, Morris and Waseca, which is no longer in existence.

decertification. It does not take a stretch of the imagination to understand why the legislature elected to have the largest of the Unit 9 units vote first for representation, leaving the smaller campuses with the option to vote separately whether or not to join. If Outstate Instructional Unit, Unit 9 is considered one unit for purposes of decertification, UMC Faculty will never have the opportunity to exercise a meaningful choice to decertify, clearly undermining PELRA's purpose and intent that each campus have the right to determine whether or not to be represented. *See* Minn. Stat. § 179A.01 (2004).

F. Since The University's Crookston And Duluth Campuses Are Considered Separate For Purposes Of A Collective Bargaining Agreement, They Should Also Be Considered Two Separate Units For Purposes Of Decertification.

Respondent peripherally addresses the University's argument that since Outstate Instructional Unit, Unit 9 is considered two separate units for purposes of a collective bargaining agreement, it should also be considered two separate units for purposes of decertification. (Respondent's Brief at 18-19.) However, Respondent does not contest the University's reasoning underlying that argument, merely stating that, "[t]he issue decided by the BMS and now on appeal before this Court has nothing to do with the status or history of bargaining, the existence of one or more contracts, or the obligation to bargain contracts." (Respondent's Brief at 18-19.)

The reasoning of the Hennepin County District Court denying UEA's attempt to automatically apply the Duluth Agreement to UMC Faculty is, in fact, applicable to the facts here. RL App. at 70-71. Noticeably absent from the text of Minn. Stat. § 179A.11 is any language suggesting that the terms of the Duluth Collective Bargaining Agreement

would automatically apply to UMC Faculty once eligible members vote to be included in the same bargaining unit. Similarly here, noticeably absent from the text of Minn. Stat. § 179A.11, subd. 1(9) is any language suggesting the proper unit for decertification. Therefore, even though UMC Faculty members voted in favor of joining Outstate Instructional Unit, Unit 9, the issue of their inclusion within the same bargaining unit as UMD Faculty is separate from the issue of whether the Duluth contract applies to UMC Faculty or whether UMC Faculty have the right to vote independently without UMD Faculty interference. Since Respondent did not and cannot refute this argument, this Court should affirm one of PELRA's primary purposes by finding that the case cited above supports the University's position: that for the purpose of decertification, Outstate Instructional Unit, Unit 9 is two units, with the UMC Faculty alone having the right to decertify Respondent UEA on the Crookston campus.

G. Having Induced The UMC Faculty Members To Vote For Unionization By Promising They Alone Could Vote To Decertify, UEA Should Be Estopped From Requiring A Vote Of Both Campuses And Profiting From Its Own False Representations.

Respondent simply errs in claiming pre-election campaign statements "provide no basis for or estoppel or reversal" (Respondent's Brief at 17) and that "other statements and information generated by Respondent UEA during the campaign" are irrelevant to the issue at hand. (Respondent's Brief at 17 n.10.) Respondent further misconstrues and/or ignores the University's estoppel argument when it cites the April 12 BMS Order that "the BMS cannot rely upon statements made during campaigns as a guide to *interpreting the statute.*" (Respondent's Brief at 17) (emphasis added). The University is

not arguing that this Court should look to the campaign misrepresentations as a guide to interpreting the statute, but instead look to these representations in order to estop and prevent UEA from capitalizing on its own false representations. Respondent UEA repeatedly recognized and represented, in both word and deed, that UMC Faculty and UMC Faculty alone would vote in any decertification election, and was elected as the exclusive representative for UMC Faculty as a result of these misrepresentations. Such conduct should not be rewarded and this Court should bar Respondent UEA from requiring both UMC Faculty and UMD Faculty to vote on decertification. RL App. 13, 34.

In addition, Respondent's claim that UEA Business Agent Gary Westorff's reply to the question, "[w]hat is the process to remove the Union at UMC?" (*Id.*) is "too vague and broad to provide the basis for any meaningful challenge" (Respondent's Brief at 17) is clearly erroneous. When asked the above question, Westorff unequivocally responded, "[t]he process would be the *same* as what we are going through right now." RL App. at 13, 34 (emphasis added). The question could have not been more direct, and there is no doubt that Westorff responded directly to this question. The only way to interpret Westorff's response is that since only UMC Faculty members were eligible to vote in the certification election, only UMC Faculty members would have the right to vote to decertify UEA as the exclusive representative as to the Crookston campus.

Finally, Respondent's argument that "the appropriate time to challenge the statement[s] was during the campaign or in a challenge to the election results" (Respondent's Brief at 17) misinterprets the University's estoppel argument. The

University is not challenging the statements themselves or the election results, and therefore Minn. R. 5510.2110, subpt. 1 (2005) does not apply. (*Id.* at 17.) Rather, the University argues that UEA should be estopped from promising the right to representational self-determination to UMC Faculty members on the one hand, and then renegeing on that promise by insisting that both the Crookston and Duluth campuses vote on the issue of decertifying UEA on the Crookston campus. This Court should find that the appropriate unit for purposes of decertification is two units in order to avoid a committing a manifest injustice on the UMC Faculty: eliminating their right to freely choose (or, as in this case, not choose) representation.

H. The BMS Commissioner Refused To Apply And/Or Correctly Evaluate The Factors Enumerated In Minn. Stat. § 179A.09, Subd. 1.

Minn. Stat. § 179A.09, subd. 1 (2004) clearly states that “the [BMS] commissioner shall consider . . . [among other things] . . . geographical location, the history, extent of organization, the recommendation of the parties, and other relevant factors” when he “exercises his power to determine appropriate units.” *Sch. Serv. Employees Local 284 v. Indep. Sch. Dist. No. 281 and the State of Minnesota, Bureau of Mediation Servs.*, 2002 WL 1013767, at *2 (Minn. Ct. App. 2002). As such, the University contends that the BMS Commissioner erred when it made no reference to this section or the listed criteria in making his determination. RL App. at 80-84. Ignoring the BMS oversight, Respondent UEA argues that the University erred by applying the community-of-interest factors of Minn. Stat. § 179A.09, subd. 1 to the facts in the instant case, because “the University units are pre-determined in Section 179A.11 . . . [and] are

not subject to [those] factors.” (Respondent’s Brief at 14 n.7.) Respondent, however, relegates its argument to a five-line footnote and offers no statutory authority or legal analysis for its claim that for purposes of decertification, the BMS Commissioner does not have to apply the factors outlined in Minn. Stat. § 179A.09, subd. 1 when determining whether or not UMC Faculty alone should be allowed to vote on decertifying the Crookston campus.⁵ (*Id.* at 14 n.7.) Respondent UEA has not and indeed cannot address these factors, because the logical conclusion after their proper application is that Outstate Instructional Unit, Unit 9 is not one, but two units, for the purpose of decertification. Because PELRA mandates the BMS Commissioner to consider the factors enumerated in Minn. Stat. § 179A.09, subd. 1, the BMS Commissioner unequivocally erred when he made his decision below.

I. The Facts Of The 1986 Duluth/Waseca Case Are Distinguishable From The Facts Of The Instant Case.

Respondent asserts that “the issue decided by the BMS and now on appeal before this Court has nothing to do with the status or history of bargaining, the existence of one or more contracts, or the obligation to bargain contracts.” (Respondent’s Brief at 18-19.) Respondent’s conclusory statement, however, fails to adequately address the University’s argument that because the facts of the 1986 Duluth/Waseca case are distinguishable from the facts here, the BMS Commissioner erred by relying on the 1986 Order as support for its decision in the April 12 Order. Respondent also fails to offer any supporting legal analysis for its conclusory statement that the issues presented in 1986 are irrelevant to the

⁵ As discussed above, the University does not contest that the appropriate bargaining unit for Outstate Instructional Unit, Unit 9 is one unit composed of both UMC Faculty and UMD Faculty and that Respondent UEA is the exclusive representative for that unit.

issue presented here: whether or not Outstate Instructional Unit, Unit 9 is two units for the purpose of decertification.

In fact, the issue decided by the BMS in 1986 dealt with the history of bargaining and negotiating between the University and the Duluth and Waseca campuses. Even though in the 1986 Duluth/Waseca case, the BMS Commissioner dismissed the Duluth-only decertification petition on the basis that Outstate Instructional Unit, Unit 9 consisted of both the Duluth and Waseca campuses at that time, he did so in part because in 1986, the University and Respondent UEA had a history of bargaining and negotiating with respect to the Duluth and Waseca campuses together. RL App. 34, 36-37. After UEA was first certified as the exclusive representative of the UMD Faculty, UEA was separately certified as the representative of the Waseca faculty, after which the faculty members of both the Duluth and Waseca campuses negotiated and entered into a single union contract. RL App. at 80. The BMS Commissioner relied in part on the single union contract in 1986 to find that Outstate Instructional Unit, Unit 9 is one unit for the purpose of decertification. RL App. at 86-87.

By contrast, there is no similar history of joint collective bargaining and negotiating by UMC and UMD Faculty here, affirming why the BMS Commissioner should have decided that UMC Faculty members have the right to decertify the Crookston campus on their own without interference from UMD Faculty. Respondent does not refute the University's arguments here, and accordingly, this Court should find that the 1986 Duluth/Waseca case is relevant to the pending appeal and provides support

for the University's position that Outstate Instructional Unit, Unit 9 is two units for the purpose of decertification.

CONCLUSION

As set forth above, the BMS' dismissal of the Petition for Decertification of Exclusive Representative should be reversed, because the dismissal and the findings on which it is based are contrary to law, arbitrary and capricious, unsupported by the evidence in the record, and contrary to controlling legal authority. Outstate Instructional Unit, Unit 9 has never been one single unit for all purposes and the statutory scheme established for Unit 9 by the Legislature clearly contemplates that under certain circumstances, the appropriate unit may not include all campuses. Further, PELRA's recognized purpose of the right of each campus to determine its own destiny should not be ignored. The legislature could not have intended a result where public employees have the right to freely choose representation, but not the symmetrical right to freely choose to have no representation.

Respondent cannot and does not provide any statutory authority for arguing that the BMS Commissioner should not apply the factors enumerated in Minn. Stat. § 179A.09, subd. 1, which PELRA unequivocally mandates the BMS Commissioner shall do. Application of these factors clearly supports the University's argument that Outstate Instructional Unit, Unit 9 is two units for purposes of decertification. Finally, Respondent UEA should not be allowed to profit and capitalize from its own false representations in inducing UMC Faculty members to vote alone for certification, and then now claim that both UMC and UMD Faculty must vote on decertifying the

Crookston campus. Relator University therefore respectfully requests that the BMS decision be overturned and a decertification election by UMC Faculty be ordered forthwith.

Dated: July 26, 2006

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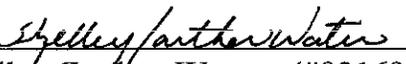
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CERTIFICATE OF COMPLIANCE

In compliance with Minn. R. Civ. App. 132.01, subds. 1 and 3(a), I hereby certify that this brief (exclusive of the Table of Contents, Table of Authorities and Certificate of Compliance) contains 5401 words as ascertained using the word count feature of the Word 2003 word-processing software and was prepared in a proportionally spaced typeface using Word 2003 in a 13-point Times New Roman font.

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