

BMS

BUREAU OF MEDIATION SERVICES

State of Minnesota

**IN THE MATTER OF PETITIONS FOR
INVESTIGATION AND DETERMINATION OF
APPROPRIATE UNITS AND CERTIFICATION AS
EXCLUSIVE REPRESENTATIVE**

VIA EMAIL AND U.S. MAIL

October 8, 2012

City of Bloomington, Minnesota

- and -

American Federation of State, County and Municipal Employees, Minnesota Council 5,
South St. Paul, Minnesota

BMS Case Nos. 12PCE1115 and 12PCE1116

RULING ON RECONSIDERATION

INTRODUCTION

On September 6, 2012, the State of Minnesota, Bureau of Mediation Services (Bureau), issued a Certification Unit Determination Order (Order) and Mail Ballot Election Order in the above captioned matter. The Order determined two appropriate units of employees of the City of Bloomington, Minnesota (City) and directed elections to determine whether affected employees desired to be exclusively represented by the American Federation of State, County and Municipal Employees, Minnesota Council 5, South St. Paul, Minnesota (Council 5). On September 17, 2012, the City filed a Request for Reconsideration (Request) of the Order in accordance with Minn. R. 5510.2012, and on September 25, 2012, Council 5 filed a response to the Request.

ISSUE

Shall the Bureau Reconsider the Order?

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APPLICABLE STANDARDS

Minn. R. 5510.2210 provides procedures for parties to request the Commissioner of the Bureau to reconsider a determination. It is the policy of the Bureau to grant timely requests for reconsideration if we find that such request is based upon a claimed error of fact or law which was not adequately developed or articulated during the hearing or in the agency's order.

POSITIONS OF THE PARTIES

The City asserts the Order ignores clear statutory language in its application of Minn. Stat. § 179A.09, subd. 1 (2012), by holding that the statute requires the Commissioner to determine "an appropriate unit" rather than "the most appropriate unit." The City further contends that the City Public Works Department employees share a community of interest that supports a wall-to-wall unit, and that the Bureau's conclusion that several of the statutory factors did not favor either party's position or favored the union's position was inconsistent with the record.

Council 5 responds by asserting that although the Order presented a flawed analysis, it reached the proper conclusion. The flaw Council 5 finds in the Bureau's analysis is that the Order compares the two proposed units to each other directly, without first determining whether the Union's proposed bargaining unit is appropriate under the statute. Council 5 contends that the Union's proposed unit is appropriate under the statute, and thus the Bureau should not have considered the City's proposal. Council 5 argues that employees in the bargaining units proposed by the Union (and approved by the Order) share a community of interest under Minn. Stat. § 179A.09 (2012) and therefore are appropriate units.

DISCUSSION

Appropriate Unit Standard

The City argues:

The standard relied upon by the Bureau in reaching its decision ignores clear statutory language and therefore is contrary to law: The Bureau stated:

The standard to be applied is whether Council 5's proposed bargaining group is "an" appropriate unit not "the" most appropriate unit. Therefore, in addressing such questions the

Bureau first determines if the Union's proposal is "an" appropriate unit before considering alternate proposals.

The statute, however, requires determination of "the" appropriate unit:

In determining the appropriate unit, the commissioner shall consider the principles and the coverage of uniform comprehensive position classification and compensation plans of the employees, professions and skilled crafts, and other occupation classifications, relevant administrative and supervisory levels of authority, geographical location, history, extent of organization, the recommendation of the parties, and other relevant factors. The commissioner shall place particular importance upon the history and extent of organization, and the desires of the petitioning employee representatives. Minn. Stat. § 179A.09, subd. 1 (emphasis added).

The courts have reversed Bureau decisions that are contrary to the clear language of the Public Employment Labor Relations Act (PELRA). AFSCME Council No. 14 v. City of Plymouth, 563 N.W.2d 79 (Minn. Ct. App. 1997) ("The Bureau erred in determining that the employees were not confidential employees . . ." because they did not "use" labor relations information, a requirement not found in statute.); AFSCME Council 14 v. County of Scott, 530 N.W.2d 218 (Minn. Ct. App. 1995), review denied (May 16, 1995 and June 14, 1995) ("The BMS erroneously interpreted Minn. Stat. § 179.03, subd. 4 by adding restrictions not found in PELRA to both the type of access and the type of information required to make an employee a confidential employee . . ."); Teamsters Local No. 320 v. County of McLeod, 509 N.W.2d 554 (Minn. Ct. App. 1993) (BMS exceeded its authority by concluding employee was not a supervisory employee because of no "operational need," but operational need was not criteria of statute).

The Bureau's decision in City of Bloomington (hereafter "Bureau's Order") is grounded in the notion that the Union is correct in asserting that the Bureau's duty is to determine "an" appropriate unit, not "the" most appropriate unit. This disregards the plain language of the statute. Minn. Stat. 179A.09, subd. 1. Accordingly, the Bureau incorrectly gave first consideration to the Union's proposed bargaining units. The Bureau exceeded its authority by substituting the word "an" for the word "the" in

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the statute and rendering a decision that is not based on the statutory language. (City Request for Reconsideration pp 1-2)

The City's position is apparently that the statute permits the Bureau to determine only "the most" appropriate bargaining unit. This stance ignores the frequent case where there may be more than one appropriate unit. Longstanding Bureau precedent holds that in such cases the goal of the bargaining unit determination process is to find "an" appropriate unit not "the most" appropriate unit. The statute is void of a mandate to determine "the most" appropriate unit.

The Minnesota Public Employment Labor Relations Act (PELRA) was first adopted in 1971 by the 1st Special Session Laws Chapter 33. The question of whether the Bureau was to determine "the most" appropriate of possible bargaining units or "an" appropriate unit arose soon thereafter.^{1/} In 1977, the Public Employment Labor Relations Board (PERB) wrote:

Pursuant to Minn. Stat. § 179.71, subd. 3, (1976), the role of the Board as well as that of the Director is to determine if the unit petitioned for (emphasis added) is "an" appropriate bargaining unit. No provision of the Public Employment Labor Relations Act mandates that collective bargaining in a proposed unit which is otherwise appropriate is to be denied simply because another unit may be conceptually "most" appropriate.^{2/}

This view was reaffirmed by the Bureau in Anoka County.^{3/} In that case the Commissioner stated:

The make-up of the bargaining unit is the bedrock of the collective bargaining process because the composition of a particular bargaining unit will determine the issues to be bargained and to a great extent the relative strength of the parties at the bargaining table.

Bureau precedent does not hold that a bargaining unit must be the 'most' appropriate, instead, we have stated it must be 'an' appropriate unit.

^{1/} (see University of Minnesota Board of Regents, et al. , PERB Case Nos. 73-PR-571-A, 74-PR-59-A, 74-PR-66-A, 74PR-93-A) (November 26, 1975) affirmed sub nom. Regents of the University of Minnesota v. Public Employment Relations Board, No. 408812 Ramsey County District Court, (September 26, 1977).

^{2/} ISD 480 Onamia and AFSCME 65, Hibbing, MN, BMS Case No 77-PR-802-A, November 10, 1977.

^{3/} County of Anoka, Anoka, Minnesota and AFSCME Minnesota Council 5, South St. Paul, Minnesota BMS Case No.09-PCE-0159.

Therefore, one proposed bargaining unit will not be denied "simply because another may be conceptually the 'most' appropriate.^{4/} This is a principle adopted by the National Labor Relations Board (NLRB) in administration of the National Labor Relations Act (NLRA).^{5/} The same view was reflected by the Minnesota Legislature in the Minn. Stat. §179A.09, Subd.1. (2008) unit criteria, with the direction to pay particular importance to the desires of the petitioning employee organization.

In summary, it is well settled that in determining the appropriate unit, the Bureau first examines the Union's proposed unit. Alternate proposals of the Employer are to be considered only after a finding that the bargaining unit structure sought by the Union is not appropriate. In this respect, the Bureau's analysis set forth in the Order was flawed. As noted by Council 5, the Order directly compared the Union proposal with the City proposal. Instead the proposal of the Union should have been examined first to determine if the units proposed by the Union were appropriate. Thus, while the City correctly observes that the Public Works Department employees share a community of interest that supports a wall-to-wall unit; the Park Maintenance Division employees and Water Operating Division employees of the Public Works Department each share a sufficiently distinct community of interest to comprise separate appropriate units.

Statutory Factors

The Request also asserts the Bureau erred because its analysis of several of the statutory factors was inconsistent with the hearing record.

With respect to geographical location, the City argues that the Order incorrectly found this factor supported neither party. As noted above, we should have initially examined the question of whether or not this factor supports the Council 5 proposal for two bargaining units. The Water Operating Division employees are based at the water treatment plant, and may carry out duties in dispersed locations where water infrastructure is located. Parks Department employees begin and

^{4/} AFSCME 65 and City of Virginia, BMS Case No. 86-PR-126, (January 10, 1986.)

^{5/} Friendly Ice Cream Corp., 262 NLRB 950, (1982), enforced 705 F.2d 570 (1st Cir. 1983); NLRB v. C & D Foods, Inc., 626 F.2d 578 (7th Cir. 1980); University of Minnesota Board of Regents v. University Federation of Teachers Local 2408 et.al. PERB Case No. 73-PR-571-A, 74-PR-59-A, 74-PR-66-A and 74-PR-93-A, pp. 18,19. November 26, 1975; see also NATIONAL LABOR RELATIONS BOARD, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 12. APPROPRIATE UNIT: GENERAL PRINCIPLES 12-100 (2005) http://www.nlr.gov/nlr/legal/manuals/outline_chap12.html.

end the day at the Public Works Department facility located at 1700 West 98th Street in Bloomington. Thus some of the employees at issue share a common geographic location some of the time. Thus this factor is neutral and we accord it no weight in determining whether Council 5's proposed bargaining units are appropriate.

With respect to the factor of history, the Request raises no issues appropriate for reconsideration. The City seeks to reargue the weight the Bureau placed upon the a previously determined, bargaining unit of Public Works Department employees and the existing appropriate unit of professional employees. The Bureau does not normally grant reconsideration for the purpose of re-argument.

Concerning extent of organization, here too, the City seeks to reargue the weight given to the previously determined appropriate unit of Public Works Department employees. As noted above such is not a proper basis for reconsideration. The City also asserts that the Bureau's interpretation of the meaning "extent of organization" is incorrect. Extent of organization is a term included in Minn. Stat. §179A.09 and drawn originally from case law of the National Labor Relations Board (NLRB). Charles Morris writes in The Developing Labor Law,

One of the touchstones of community of interest is like-mindedness with respect to adherence to the union movement. This factor is now treated separately in the Act and is referred to as *extent of organization*.

Prior to 1947, the Board found the extent of organization to be an especially significant factor in determining the appropriateness of a unit on the theory that it is often desirable in the determination of an appropriate unit to render collective bargaining for the employees involved as reasonably early possibility, lest prolonged delay expose the organized employee to the temptation of striking to obtain recognition. The weight given this factor by the Board aroused considerable criticism.

The critics of the Board persuaded Congress in 1947 to enact Section 9(c) (5) which provides that:

In determining whether a unit is appropriate...the extent to which the employees have organized shall not be controlling.^{6/}

^{6/} Charles Morris, The Developing Labor Law, (1971) pp-219 (internal citations omitted).

By contrast, in adopting Minn. Stat. § 179A.09, subd. 1 (2012), the Minnesota Legislature directed that the Commissioner “shall place particular importance upon the history and extent of organization, and the desires of the petitioning employee representatives.” This we have done in the matter at hand.

In asserting error in the Order’s analysis of other relevant factors, the City raises again the 1973 Bureau Order in BMS Case No. 73-PR-401-A, favoring a wall-to-wall unit of City Public Works employees. The weight accorded the 1973 certification is discussed fully above. However, with respect to the case at hand, the City asserts the Bureau failed to give sufficient weight to certain aspects of this factor. On this point the City makes a telling argument. The Order lists the “other relevant factors” normally considered by the Bureau as follows:

1. Degree of functional integration;
2. Nature of employee skills and occupational functions;
3. Interchangeability and contact among employees;
4. General working conditions;
5. Hours of work;
6. The number of employees affected;
7. Work location;
8. The nature of their compensation, and
9. Common supervision.

The analysis of these factors presented in the Order states:

As to “degree of functional integration” the Public Works Department employees are regularly assigned between divisions, sections and various work groups to fill both long-term and short-term staffing needs.

As to the nature of the employee skills and occupational functions, there are similar minimum requirements for new hires, only one certified list of candidates is created from which employees are hired for openings in multiple work groups within the Utilities Division, staff are commonly reassigned from one work group to another, and promotional opportunities within are often posted for internal candidates only and they are provided to all Public Works Department staff and are not limited to only one work group or one job classification.

As to interchangeability and contact among employees cross-training provides the necessary interchangeability to meet the unexpected needs that arise throughout the year. Regular contact occurs among the employees when receiving the daily assignments, at lunch time and when materials and equipment are picked up.

As to hours of work, typical work hours are Monday through Friday from 7:00 a.m. to 3:00 or 3:30 p.m., the only exception being Water Treatment Plant operators and Water/Wastewater work group staff, where employees work shifts to cover the Water Plant 24 hours per day, 7 days a week.^{7/}

The Order then cites a number of other cases that stand for the proposition that bargaining unit structures similar to those proposed by Council 5 have been certified by the Bureau. Finally the Order concludes

Analysis: Other relevant factors are neutral.

This analysis is not consistent with preceding facts, and is in error. Clearly, the "other relevant factors" do not support the two separate bargaining units proposed by Council 5.

Conclusion

The error with respect to "other relevant factors" does not alter our original view that the two bargaining units proposed by Council 5 constitute an appropriate unit. We recognize the City's expressed concerns that separate bargaining units may cause problems when employees are utilized between divisions. However, these are problems that the parties may address at the bargaining table. History has shown that a wall-to-wall bargaining unit is not viable in the City Public Works Department. The Minn. Stat. §179A.09, Subd.1., standards are intended to permit public employees the right to choose collective bargaining in their preferred appropriate units if such meet the established standards. The two bargaining units proposed by Council 5 meet the statutory stand and are appropriate.

FINDINGS AND ORDERS

^{7/} Order pp-7-8.

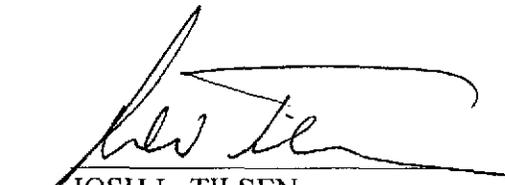
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1. The Request for Reconsideration is denied.
2. The Order impounding ballots is hereby lifted.
3. The impounded ballots that were timely received by 4:30 p.m., Monday, October 1, 2012, shall be opened, tabulated and the Results certified as follows:

Wednesday, October 17, 2012
9:00 a.m.
Office of the Bureau of Mediation Services

4. The City shall post this Order at the work locations of all affected employees.

STATE OF MINNESOTA
Bureau of Mediation Services



JOSH L. TILSEN
Commissioner

cc: Kay McAloney (2)
(Includes Posting Copy)
Frank Madden
Alan Kearney
Thom Boik