Proposed Permanent Rules Relating to the Minnesota Labor Relations Act and the Public Employment Labor Relations Act

AGENCY: Bureau of Mediation Services

REVISOR ID: R-4677

MINNESOTA RULES: Chapters 5500, 5505, 5510, 5530, and 7315; OAH Docket No. 82-9047-37318

COMMENTS AND PROPOSED AMENDMENTS

Stephen D. Swanson

Amendment Number 1

Line 15.22, after “must” insert “after consultation with the parties.”

Line 15.23, after the period insert “The parties must consult with the panel and select a date for the hearing that is no longer than 90 days following the date of appointment of the panel. If a hearing is postponed by the parties, the parties must promptly consult with the panel and select a new timely date for the hearing.”

Explanatory Comment

Under present law, the parties have full control over the initial scheduling of a labor grievance arbitration hearing, and the postponement of the scheduled hearing by agreement of the parties. The arbitrator has no authority to deny a joint request for a postponement even though the parties decline to consult with the arbitrator to select a new date. The guiding Bureau of Mediation Services (Bureau) rule states as follows:

**Administration and cancellation fees.** Arbitrators may charge an administrative fee for establishing a case file and cancellation fees for hearings that are canceled or rescheduled by one or both parties with less than 21 calendar days’ notice, provided the fees and policies are clearly noted on the biographic sketch for that arbitrator that is on file with the bureau.¹

This rule provides that the parties have the discretion to postpone a scheduled arbitration hearing, subject only to the possible imposition of a postponement fee, and concomitantly, that an arbitrator has no authority to deny a joint request for a postponement.²

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¹ Part 5530.0800, subp. 7. The Bureau proposes to amend this rule to increase the time that authorizes the imposition of the postponement fee from 21 to 28 days (line 102.3). In practice, the imposition of the postponement fee has not proven to be a disincentive to untimely joint requests for postponement of the hearing. One example from this arbitrator’s peace officer grievance arbitration caseload will suffice to support this point. I was assigned an arbitration in December 2020. Following a scheduling conference with counsel for the parties, I scheduled the matter for a one-day hearing in May 2021. In April, less than 21 days before the scheduled hearing date, counsel jointly requested a postponement of the hearing and requested my available dates in August. I advised counsel that I was available any Thursday in August and requested that counsel select one of the Thursday dates. I imposed the $1000 late postponement fee. Counsel failed to select a date and I advised counsel that I would set the case for hearing on August 12, 2021, unless counsel advised me that that date was not acceptable. Receiving no response from counsel, I scheduled the hearing for August 12th. By message dated July 21st, counsel advised me that due to witness unavailability the scheduled hearing could not go forward and requested additional
The Bureau’s proposed amendments charge the arbitrator with the responsibility to “ensure that a fair and timely hearing is conducted”\(^3\) and to “immediately fix a time and place for the hearing.”\(^4\) This mandate is consistent with the public policy underlying the adoption of § 626.892 that the prompt resolution of peace officer labor grievances is essential to restoring public trust and confidence in the binding arbitration process. Peace officer grievance arbitrators will be evaluated for compliance with this mandate, and yet are given no tools by the Bureau to accomplish compliance.\(^5\) This result is neither reasonable nor fair.

The SONAR offers little guidance:

> While the first three parts of chapter 5500 govern rules on the Minnesota Labor Relations Act, part 4 applies solely to arbitration proceedings under the act and PELRA. For example, when a labor dispute under PELRA is referred to arbitration, an arbitrator or arbitrator panel from the bureau’s arbitration roster conducts an arbitration hearing.\(^6\)

This statement in the SONAR that Chapter 5500 is divided into four parts is better understood by reference to the proposed rules. Parts 1 to 3 of the statement refer to parts 5500.0100 to .2100 (lines 1.4 to 14.15), and Part 4 of the statement refers to parts 5500.2200 to .2850 (lines 14.16 to 23.4). Both regular labor grievance arbitrations and peace office grievance arbitrations are covered under parts 5500.2200 to .2850 by virtue of the definition of the term, “arbitrator,” at proposed part 5500.2210, subp. 2.C (lines 15.1 to 15.4).\(^7\) The SONAR does not address the scheduling difficulties presented by the requirement in proposed part 5500.220, subp. 1, that a “timely” hearing must be scheduled.\(^8\)

The above proposed amendment addresses these scheduling difficulties by requiring the cooperation of the parties in the scheduling and re-scheduling of a hearing and by requiring that the hearing be initially scheduled within 90 days following the date of the assignment of a case to the arbitrator. Ninety days provides ample time for preparation and settlement discussions.\(^9\)

The Bureau has the authority to adopt the proposed amendment. Simply stated, if the Bureau has the authority to prescribe that an arbitrator schedule a “timely” hearing, it has the authority to require the parties’ cooperation and to define the term, “timely.” The proposed amendment is necessary and reasonable.

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\(^3\) Part 5520.2220, subp. 1 (lines 15.13 and 15.14).
\(^4\) Part 5500.2300, subp. 1.A (lines 15.22 and 15.23).
\(^5\) Minn. Stat. § 626.892, subd. 8; part 5530.1200, subps. 1, 3, 5, and 7 (lines 110.15 to 111.24).
\(^6\) SONAR at 25.
\(^7\) SONAR at 30.
\(^8\) SONAR at 30, 31.
\(^9\) The 90-day period coincides with the scheduling performance standard set forth in proposed part 5530.1200, subp. 3 (lines 111.8 to 111.12).
Amendment Number 2

Line 14.19, after the period insert “Parts 5500.2500, items B and C, 5500.2600, and 5500.2800 do not apply to grievance arbitrations conducted by panels assigned from rosters maintained by the commissioner under Minnesota Statutes, sections 179A.04, subdivision 3, paragraph (a), clause (13), and 626.892, subdivision 4.”

Line 19.23, after “and” insert “, if applicable under part 5500.2500, items B and C, an”

Explanatory Comment

The Bureau proposes to repeal part 5530.1000 (line 123.27), and to incorporate the provisions of that rule into the provisions of parts 5500.2200 -.2850. Parts 5500.2200 to .2850, however, were never designed to apply to labor grievance binding arbitrations, whereas part 5530.1000 was specifically designed to do so. Under the Minnesota Uniform Arbitration Act10 and the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, incorporated by reference in proposed part 5530.800, subp. 2 (lines 99.21 to 100.3),11 labor grievance arbitrators must issue their awards based upon the evidence introduced at the hearing and have no authority to do any investigation or require the parties to submit any evidence.12 Therefore, the provisions of proposed part 5500.2500, items B and C (lines 18.19 to 19.7), which empower a panel to conduct an investigation, cannot be made applicable to regular or peace officer labor grievance arbitrators, and are neither necessary nor reasonable.

Labor grievance arbitrations do not involve statements of dispute. Therefore, the provisions of part 5500.2600 (lines 19.15 to 19.20) are inapplicable, and neither necessary nor reasonable.

By statute, labor grievance and peace officer grievance arbitration awards are final and binding.13 There can be no procedure for a party to request reconsideration of an award, as provided in proposed part 5500.2800 (lines 20.14 to 22.6).14 Creating a reconsideration process is neither necessary nor reasonable.

The SONAR does not address these issues.15

The above proposed amendments clarify that these proposed parts addressing investigations, statements of dispute, and requests for reconsideration will not apply in labor grievance arbitrations. The proposed amendments are necessary and reasonable.

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10 Minn. Stat. Ch. 572B. The Act is applicable to labor grievance arbitrations. Minn. Stat. §§ 572B.01 (1), (2) (the Bureau is an “arbitration organization” and assigns “arbitrators”); 626.892, subd. 11.
11 See, Minn. Stat. § 572B.15(c).
12 The proposed rule proscribes ex parte contact by arbitrators. Part 5530.0800, subp. 4.B (lines 100.22 to 101.2). See also, Code of Professional Responsibility, Rule 2.C.1.b.
13 Minn. Stat. §§ 179A.20, subd. 4, 179A.21, subd. 2, and 626.892, subsd. 1(e), 11.
14 The Minnesota Uniform Arbitration Act allows for post-award motions to correct or clarify an award under very limited circumstances but does not allow for motions to reconsider the merits of an award. Minn. Stat. § 572B.20. Rule 2.I.1.a of the Code of Professional Responsibility permits an arbitrator to request additional information from the parties, but only within the context of a request from the parties to include in the award specified consent items agreed to by the parties.
15 SONAR at 31-33.
Amendment Number 3
Line 20.12, after the period delete the new language and strike the existing language on lines 20.12 and 20.13

Explanatory Comment
Labor grievances submitted to binding arbitration can be settled by the parties after an arbitrator has been assigned and before the hearing, during the hearing, or after the hearing before an award is issued. If the arbitration is settled before an award is issued the arbitrator loses jurisdiction and has no authority to review or approve the settlement. Therefore, any records maintained by the arbitrator, including exhibits and testimony received at a hearing, are irrelevant and not public. There is no reason for them to be filed with the commissioner. The above amendment simply deletes the last sentence of part 5500.2700, subp. 3 (lines 20.12 and 20.13) as being neither necessary nor reasonable. The SONAR does not address this issue.¹⁶

Amendment Number 4
Line 89.21, delete “except as otherwise”
Line 89.21, after “provided” insert “that the following parts and subparts are applicable to the roster of arbitrators”
Line 89.22, after “12” insert “;

(a) part 5530.0200;
(b) part 5530.0300, subparts 1, 1a, 2a, 3, 3a, and 4 to 6;
(c) part 5530.0400;
(d) part 5530.0410;
(e) part 5530.0500;
(f) part 5530.0600, subparts 2, except item E, and 5;
(g) part 5530.0610;
(h) part 5530.0800;
(i) part 5530.0810;
(j) part 5530.1200, subparts 1, 3, 5, and 7; and
(k) part 5530.1300”

Explanatory Comment:
Minnesota Statutes § 626.892 created the peace officer grievance arbitration roster and governs the appointment by the commissioner of six arbitrators to the roster, the training of those arbitrators, and the assignment of arbitrators to peace officer grievance binding arbitrations statewide. The roster is separate from the general labor grievance roster of arbitrators maintained by the Bureau.

¹⁶ SONAR at 32.
At the time of the adoption of § 626.892 the Legislature recognized that the general labor grievance arbitrator roster was governed by Minnesota Rules, Chapter 5530, and attempted to clarify those provision of Chapter 5530 that would be applicable to the new peace officer grievance arbitration roster. However, that attempt was not wholly successful.

Section 626.892, subdivision 4, provides that in appointing applicants to the roster, “the commissioner may consider the factors set forth in Minnesota Rules, parts 5530.0600 and 5530.0700, subpart 6 . . . .” This authorization is permissive and not mandatory and does not make the substantive provisions of those parts applicable to the peace officer grievance arbitration roster or to the arbitrators appointed to the roster.

However, the Legislature did consider the applicability of some parts of Chapter 5530 to the peace officer grievance arbitration roster. Section 626.892, subdivision 7, provides as follows:

Subd. 7. Applicability of Minnesota Rules, chapter 5530.
To the extent consistent with this section, the following provisions of Minnesota Rules apply to arbitrators on the roster of arbitrators established under this section:
(1) Minnesota Rules, part 5530.0500 (status of arbitrators);
(2) Minnesota Rules, part 5530.0800 (arbitrator conduct and standards); and
(3) Minnesota Rules, part 5530.1000 (arbitration proceedings).

Therefore, the Legislature has expressly identified parts of Chapter 5530 that are applicable to the peace officer grievance arbitration roster.

The Bureau proposes to amend part 5530.0100, subpart A, to except from the application of Chapter 5530 the peace officer grievance arbitration roster (lines 89.16 and 89.20 to 89.22):

(2) the roster of arbitrators under Minnesota Statutes, section 626.892, subdivision 4, except as otherwise provided under Minnesota Statutes, section 626.892, subdivision 12.

An express exception in Chapter 5530 is necessary and reasonable, but the exception proposed by the Bureau only serves to perpetuate the confusion in the statute created by subdivision 12.

Subdivision 12, clauses (a) and (b) are clear and provide that the arbitrator assignment procedure applicable to regular labor grievance arbitrations will not apply to the assignment of peace officer grievance arbitrators, and that peace officer labor representatives cannot negotiate with employers for the inclusion of a different assignment procedure in a collective bargaining agreement. These provisions are necessary to implement the assignment process prescribed in § 626.892, subdivision 11, i.e., assignment by the commissioner of an arbitrator from the roster in alphabetical order with no participation by the parties and no right of the parties to object to an assignment.

The problem results from the wording of clause (c):

(c) The arbitrator selection procedure for peace officer grievance arbitrations established under this section supersedes any inconsistent provisions in chapter 179A or 572B or in Minnesota Rules, chapters 5500 to 5530 and 7315 to 7325. Other arbitration requirements in those chapters remain in full force and effect for peace
The first sentence of clause (c) clarifies that the prescribed selection procedure supersedes any inconsistent provisions of statute or in Chapters 5500 to 5530 and 7315 to 7325. The second sentence is problematic in that it states that other requirements of those chapters remain in full force and effect for peace officer grievance arbitrations unless inconsistent with §626.892.

Two questions are presented. Read together, do subdivisions 7 and 12 preclude the application to peace officer grievance arbitrators and arbitrations of any parts of Chapter 5530 other than those specified in subdivision 7? If this question is answered in the negative, the second question presented is what parts of Chapters 5500 to 5530 and 7315 to 7325 apply to peace officer grievance arbitrators and arbitrations because they are not inconsistent with the statute?

The first question likely should be answered in the negative because subdivision 7 does not state that the parts listed are intended to be exclusive and to preclude the application of other parts and subparts of Chapter 5530. Therefore, subdivisions 7 and 12 are not in conflict and the full intent of the Legislature can be vindicated by the application of both subdivisions.

Acceptance of this interpretation of the statute compels the identification under subdivision 12 of the parts of Chapters 5500 to 5530 and 7315 to 7325 that apply to peace officer grievance arbitrators and arbitrations. By simply referring to subdivision 12 in its proposed rule (line 89.22), the Bureau does not identify the applicable parts of these chapters and does nothing more than perpetuate the ambiguity presented in subdivision 12.

If the proposed rule is adopted, the task of determining the applicability of the provisions of Chapters 5500 to 5530 and 7315 to 7325 will fall to the arbitrators on the peace officer grievance arbitration roster and members of the public. This result is neither necessary nor reasonable.

To clarify the provisions of subdivisions 7 and 12, the Bureau should be required in this rule making proceeding to identify and specifically list the parts of Chapters 5500 to 5530 and 7315 to 7325 that apply to peace officer grievance arbitrators and arbitrations. The SONAR does not address this issue. The above proposed amendment is an attempt to accomplish this task. It is necessary and reasonable.

**Amendment No. 5**

Lines 101.11, reinstate “and”
Lines 101.12 to 101.22, delete the new language and reinstate the stricken language

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17 SONAR at 49.
18 The proposed amendment is limited to the provisions of Chapter 5530 and cannot address the applicability of Chapters 5500 to 5520 and 7315 to 7325, as referenced in §626.892, subd. 12. A review of those Chapters reveals that, with the exception of parts 5500.2200 to .2850 (lines 14.16 to 23.4), none of them are relevant to peace officer grievance arbitrations.
Explanatory Comment

The apparent purpose of the proposed amendments at lines 101.11 to 101.22 is to make the 30-day time limit for issuing an award following the close of a hearing record prescribed in Minn. Stat. § 179A.16, subd. 7, applicable to labor grievance arbitrations. That section applies to interest arbitrations and not to labor grievance arbitrations. In labor grievance arbitrations, the arbitrator’s jurisdiction is strictly limited to the application of the provisions of the parties’ CBA. Public employee CBAs typically contain a provision prescribing the time in which an arbitrator must issue an award following the close of the arbitration hearing record. While this time limit is sometimes 30 days, it may not be in all cases. The commissioner has no authority to modify this provision of a CBA through rule making. And there appears to be no compelling reason to do so. The proposed amendment is not necessary. The SONAR does not address this issue.¹⁹ The above amendment simply retains the language of the current rule.

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January 21, 2022

¹⁹ SONAR at 54.
I, Stephen D. Swanson, hereby request a public hearing in the above-referenced matter. I make this request to participate in the public hearing by asking questions of the Bureau of Mediation Services regarding my comments and proposed amendments to the proposed rules. My comments and proposed amendments have been filed with the Minnesota Office of Administrative Hearings.

Stephen D. Swanson
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I. Background.

The terms and conditions of employment for a small percentage of employees in the State's workforce are set forth in unbargained-for and legislatively-approved compensation plans, such as the Managerial and Commissioner's Plans, prepared by the Commissioner of Minnesota Management and Budget (“the Plans”). See Minn. Stat. § 43A.18, subd. 2 (commissioner’s plan for employees not covered by collective bargaining agreement), subd. 3 (managerial plan). The employees are not part of any bargaining unit and are not covered by any collective bargaining agreement. See Minn. Stat. § 179A.10, subd. 1 (exclusions from bargaining units), subd. 3 (severed groups not covered by bargaining units).
A subset of those employees who are not covered by a collective bargaining agreement and are subject to the Plans – permanent employees in the classified service – have the statutorily-created right to “appeal” their discharge, suspension without pay, or demotion “to the Bureau of Mediation Services” (“BMS”) under Minnesota Statutes section 43A.33, subdivision 3. Id., subd. 3(b). The statute provides that the commissioner of BMS “shall provide both parties with a list of potential arbitrators according to the rules of the Bureau of Mediation Services to hear the appeal.” Id., subd. 3(d). Hearings must be “conducted pursuant to the rules of the Bureau of Mediation Services.” Id. The appointing authority must bear the costs of the arbitrator for hearings conducted under section 43A.33. Minnesota Management and Budget (“MMB”) represents the appointing authority when an employee appeals the appointing authority’s discipline to BMS under section 43A.33.

MMB submits this public comment in response to BMS’s proposed amendments to Minnesota Rules chapter 5500.

II. MMB Comments Concerning the Proposed Amendments to Parts 5500.2200, 5500.2210, and 5500.2850.

BMS’ Statement of Need and Reasonableness (“SONAR”) states that it proposes amendments to Part 5500.2200, in part, “to reflect that Minnesota Statutes, chapter 179A [the Public Employment Labor Relations Act], is not the only statute that the bureau’s arbitration rules apply to.” (SONAR at 30.) In a footnote, the SONAR references Minnesota Statutes section 43A.33 as one of the statutory provisions that refers parties to have a hearing subject to BMS rules. (Id. at 30, n. 33.) Consistent with the statutory requirement that hearings on appeals to BMS under Minnesota Statutes section 43A.33 be “conducted pursuant to the rules of the Bureau of Mediation Services,” MMB supports
amendments that clarify which rules apply to such hearings. However, the proposed amendments contain language inconsistent with Chapter 43A that must be modified before the amendments are adopted.

**A. Part 5500.2200, Applicability.**

BMS’ proposed amendment to Part 5500.2200 establishes the scope of Parts 5500.2200 through 5500.2850, as “all arbitration proceedings under bureau rules as provided under Minnesota Statutes, chapter 179A, subject to all applicable provisions of law.” (See Proposed Permanent Rules at 14.16-14.19.)1 Hearings under Minnesota Statutes section 43A.33 arise under statute, not under an agreement to arbitrate, and are not arbitrations. See Minn. Stat. § 572B.03 (applying the Uniform Arbitration Act only to matters arising under an agreement to arbitrate). Section 43A.33 repeatedly and consistently refers to the proceedings under that section as an “appeal,” not an arbitration. Finally, the employees eligible for section 43A.33 appeals are not covered by any exclusive representative or collective bargaining agreement and are excluded from PELRA. As result, this is not grievance arbitration as described in Minn. Stat. § 179A.21 as the plans are not contracts required by section 179A.20. In order to clarify that the proposed amendment applies to hearings on appeals to BMS under Minn. Stat. § 43A.33, which are not arbitrations, MMB suggests the following addition to BMS’ proposed amendment:2

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1 Unless otherwise noted, underlining and strikethrough formatting in this public comment is retained from and is the same as that found in BMS’ proposed amendments.
2 MMB’s proposals are denoted in red, bolded font.
Parts 5500.2200 to 5500.2800 shall apply to all arbitration proceedings under bureau rules as provided under Minnesota Statutes, chapter 179A, as well as all appeal hearings under Minnesota Statutes, section 43A.33, subject to all applicable provisions of the law.

Consistent with the SONAR, the addition of the red underlined language expands the scope of the rule so that it unambiguously includes the non-arbitration appeal hearings under Minn. Stat. § 43A.33.

B. Part 5500.2210, Definitions.

MMB suggests language also be added to BMS’ proposed amendment to Part 5500.2210, which defines the terms “arbitrator” and “award.” The plain language of the proposed amendment refers to a chapter of BMS rules and two statutes, and none apply to hearings under Minn. Stat. § 43A.33. MMB proposes the following additional modifications in red to the definitions of “arbitrator” and “award” so that they are applicable to hearings under Minn. Stat. § 43A.33:

Subp. 2 Arbitrator. “Arbitrator” means an arbitrator from the arbitration roster under:

A. chapter 5530;
B. Minnesota Statutes, section 179A.04, subdivision 3, paragraph (b); and
C. Minnesota Statutes, section 626.892, subdivision 4; and
D. Minnesota Statutes, section 43A.33.

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Subp. 3 Award. “Award” has the meaning given in part 5530.0300, subpart 3a and, for purposes of parts 5500.2200 to 5500.2850, also means a hearing decision in an appeal under Minnesota Statutes, section 43A.33.
C. Part 5500.2850, Arbitrator Fees and Costs.

BMS’ proposed amendments include the creation of Part 5500.2850, which states that “the parties must equally pay the arbitrator’s fees and costs.” Cost splitting for Plan appeals violates Minn. Stat. § 43A.33, subd. 3(d), which states that “[t]he appointing authority shall bear the costs of the arbitrator for hearings provided for in this section.” To harmonize Part 5500.2850 with the requirements of Minn. Stat. § 43A.33, subd. 3(d), MMB proposes that the proposed amendment be modified by adding the following language in red:

Subpart 1. Paying arbitrator fees and costs.

A. Except as otherwise provided by the express terms of the arbitration agreement, or except as provided by Minnesota Statutes, section 43A.33, the parties must equally pay the arbitrator’s fees and costs.

III. Conclusion.

MMB appreciates the opportunity to comment on BMS’ rules as they apply to appeal hearings handled by MMB. MMB’s proposed modifications to BMS’ proposed amendments are consistent with and supportive of the general goals of BMS’ SONAR. MMB respectfully requests that the proposed modifications be implemented to make clear that the rules at issue apply to appeal hearings under Minn. Stat. § 43A.33, not just to arbitrations arising under an arbitration agreement.

Dated: January 21, 2022

Respectfully submitted,

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I. CGMC Background

The Coalition of Greater Minnesota Cities (CGMC) is a nonprofit, nonpartisan advocacy organization representing over 85 cities outside of the Twin Cities metropolitan area. CGMC cities are dedicated to a strong Greater Minnesota. CGMC’s mission is to develop viable, progressive communities for businesses and families through strong economic growth and good local government. One of the primary purposes of CGMC’s Labor & Employee Relations Committee is to develop a coordinated effort among greater Minnesota cities on managing labor and employee relations and negotiating labor contracts through researching and developing databases, advocating positive changes to labor processes, and by providing a forum for networking, discussing and implementing uniform labor policies and negotiating strategies.

CGMC member cities, make up over 50% of the population of Greater Minnesota cities with CGMC cities ranging in size from 1,000 to 111,000.\(^1\) The CGMC member cities are, therefore, a reflection of Greater Minnesota cities.

- Greater Minnesota Cities Impact

Greater Minnesota cities are impactful statewide in local government. The most recent data from the State provides that Greater Minnesota local governments employed a majority of local government employees in the State.\(^2\) Greater Minnesota local governments paid over $5 billion

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\(^2\) \textit{Quarterly Census of Employment and Wages}, Minnesota Department of Employment and Economic Development (2\(^{nd}\) Qtrr., 2015), accessed on Jan. 29, 2016, available at [https://apps.deed.state.mn.us/lmi/qcew/ResultsDisp.aspx](https://apps.deed.state.mn.us/lmi/qcew/ResultsDisp.aspx)
in wages to employees in 2014.\footnote{Id.} Compared to Twin Cities metropolitan-area cities, Greater Minnesota cities must often provide and fund more services independently, such as water, wastewater treatment, libraries, and airports, with a substantially lower property tax base per capita to fund these services. As a result, many Greater Minnesota cities are unable to employ any or a sufficient number of human resource professional employees and/or outside legal counsel to advise and represent cities on labor and employment matters and related processes. And, the generally smaller population of Greater Minnesota cities and workforce size of Greater Minnesota city governments, make Greater Minnesota city governments more conducive to resolving workplace issues person-to-person in lieu of legal proceedings. For these reasons, it is critical that the rules adopted by BMS take into account Greater Minnesota cities unique finances, operations, and workplace culture and the impact the amendments to Minnesota Rules, Chapters 5500, 5505, 5510, 5520, and 5530 and new rules on grievance arbitration for peace officers would have on greater Minnesota cities.

II. **Important Points of Interest**

- **Investigator and Hearing Officer Qualifications**

Another concern CGMC has related to the rules is that the rules do not address required qualifications for those serving as hearing officers or investigators.

Individuals that have participated in labor relations matters are often predisposed to agree more with labor or management on such matters. Therefore, it is critical that the rules specify the qualifications for investigators and hearing officers.

The specific concerns CGMC has on the proposed rules related to investigator and hearing officer qualifications are as follows:

1. The rules do not, but should, specify that these individuals have knowledge and experience in labor law and administrative law and procedure; demonstrated skills in legal analysis and writing; and similar qualifications to arbitrator qualifications and standards for arbitrator appointment under BMS’ arbitrator roster rules, which includes the ability to hear and decide complex labor relations issues in a fair and objective manner.

2. Due to the fact that BMS mediators must maintain neutrality during mediation, the rules should specify that they cannot be investigators or hearing officers.

- **Determination of Arbitrability**

Labor relations rules should be changed to require that in the event that the arbitrability of an issue is raised, the determination of arbitrability by an arbitrator must be made at a hearing and...
determined in advance of the hearing on the merits of those issues certified for arbitration if requested by a party.

In the event that a certified issue is deterred after a pre-hearing by an arbitrator to be inarbitrable, such issues must be dismissed with prejudice. Then, the arbitrator must schedule a subsequent hearing on the substance of the remaining certified issues not dismissed where evidence and testimony would be brought before the arbitrator by the city and union for a decisions and award by the arbitrator.

Such procedure may be implemented through a rule that establishes motion practice in which cities and unions any bring a prehearing/dispositive motion to an arbitrator to rule issues for arbitration. Thus, a city would have the opportunity to dismiss issues prior to a hearing on the substance of the issue as is currently allowed in any other court or administrative proceeding.

- **Arbitration Selection**

Labor relations laws and rules could provide that arbitrators be appointed by a state agency and be paid by the agency as an agency employee. Instead of BMS, it would be a better approach to have an adjudicative agency employing the arbitrators so as to ensure neutral, independent decisions-makers that are not tied to BMS, its policies and prior decisions, or to BMS mediators. The OAH could employ arbitrators for such purposes.

- **Types of Arbitration**

The rules should be changed to require either final-offer, total-package interest arbitration or final-offer, item-by-item arbitration for all essential employees. Final-offer item-by-item may be preferrable type of arbitration as a city may come in with one or more final positions the arbitrator finds unreasonable, but the arbitrator may still award the city’s positions on the other items instead of ruling in favor of a union’s entire package based on the one or two positions the arbitrator found unreasonable in the city’s positions. This approach, however, still requires both sides to come in with reasonable positions on each item and may deter unions from perusing frivolous arbitrations.

The rules should require arbitrators to issue grievance awards within 30 days following the conclusion of all arbitration proceedings (the close of the hearing record or submission of post-hearing briefs, whichever is later), which is the current requirement for awards in interest arbitration proceedings.

Additionally, the rules should be changed to have the party requesting arbitration pay all arbitration costs and fees.

- **Arbitrability of Discipline**

The rules should remove compulsory binding arbitration for discipline; or exclude from arbitration essential employees (i.e., firefighters, licensed peace officers, 911 system and police and fire department public safety dispatchers, guards at correctional facilities, confidential
employees, supervisory employees, assistant county attorneys, assistant city attorneys, principals, and assistant principals)\(^6\)

At least, the burden and standard of arbitration for discipline should be changed to:

1. Specify that certain employees are “at-will” (i.e., “terminated for any reason or no reason at all.”); or
2. For discipline to be overturned or modified, employee must prove by preponderance of evidence that employer had no legal or substantial basis for discipline; and
3. Based on standards established for judicial review of public employment discipline decisions, arbitrator must uphold discipline if employer "furnished any legal and substantial basis for the action taken”\(^8\) taking into account “questions affecting the jurisdiction of the [employer], the regularity of its proceedings, and, ... whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.”\(^9\)

Additionally, the rules should be changes to have review to court of appeals utilizing similar standards to appeals of civil service commission decisions in which the court may affirm the decision of the arbitrator or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the arbitrator’s decision is:\(^10\)

1. in violation of constitutional provisions;
2. in excess of the statutory authority or jurisdiction of the agency;
3. made upon unlawful procedure;
4. affected by other error of law;
5. unsupported by substantial evidence based on record; or
6. arbitrary or capricious.
7. Against public policy

Reasons for the foregoing proposed changes include:

A. Subjecting discipline to arbitration by a third party results in undermining, modifying, overturning, and inhibiting employer’s supervision, management, and discipline of public employees intended to rectify employee performance and conduct issues that adversely impact the employer, the public, and community
B. Arbitrators uphold public employers decisions only approximately 50% of the time
C. Arbitrators have a pecuniary interest to split the number of their decisions favorable to employers or unions or make middle-of-the road decisions in order to get selected

\(^6\) Minn. Stat. § 179A.03, subd. 7.
\(^7\) Randall v. N. Milk Prods., Inc., 519 N.W.2d 456, 459 (Minn. App. 1994)
\(^8\) Beck v. Council of St. Paul, 235 Minn. 56, 58, 50 N.W.2d 81, 82 (1951)
\(^9\) Dietz v. Dodge County, 487 N.W.2d 237, 239 (Minn.1992)
\(^10\) Minn. Stat. § 14.69
more often in arbitrator strike lists of 7 arbitrators that are provided by BMS for arbitration

D. Arbitrations are costly as cities must pay substantial arbitration hearing fees and expenses in addition to their own substantial time, expense (e.g., legal counsel), and effort to defend its decision in an arbitration or pay compensation to employees to avoid arbitration

E. Because the grounds to vacate arbitration awards are extremely narrow, arbitrators have very little accountability to make well-reasoned decisions based on the standards of reasonableness, public interest, and facts

F. The foregoing undermine public employees and employers being accountable for providing efficient, effective, safe, and impartial services to the public who pays public employee compensation and expects public entities to provide services to promote their health, safety, and welfare

Thank you for your consideration of our suggested comments.

Respectfully Submitted,

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/s/ Christina Petsoulis

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