STATE OF MINNESOTA

SUPREME COURT

NO. A18-0398

Firefighters Union Local 4725 and
Mark Turner, Its President,

Respondents,

vs.

City of Brainerd,

Appellant.

BRIEF AND ADDENDUM OF RESPONDENTS

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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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STATEMENT OF THE ISSUE

Did the City of Brainerd commit an Unfair Labor Practice under the Public Employees Labor Relations Act (PELRA), Minn. Stat. § 179A.01, *et seq.* when it eliminated its full time career fire department in the midst of a three year collective bargaining agreement with the labor union representing these firefighters, terminated all of the full time firefighters, and caused elimination of the Union?

The Court of Appeals, reversing the Trial court, held in the affirmative.

Apposite Authorities:

Minn. Stat. § 179A.13, subd. 2(1), 2(2), and 2(3);

Indep. Sch. Dist. No. 88, New Ulm, Minn. v. Sch. Serv. Employees Union Local 284, 490 N.W.2d 431 (Minn. Ct. App. 1992), *aff'd sub nom. Indep. Sch. Dist. No. 88, New Ulm v. Sch. Serv. Employees Union Local 284*, 503 N.W.2d 104 (Minn. 1993);

Foley Educ. Ass'n v. Indep. Sch. Dist. No. 51, 353 N.W.2d 917 (Minn. 1984);

Gen. Drivers Union Local 346 v. Indep. Sch. Dist. No. 704, Proctor Sch. Bd., 283 N.W.2d 524 (Minn. 1979).

STATEMENT OF THE CASE

This lawsuit was brought in Crow Wing County District Court by the labor union representing the paid full time employees of the City of Brainerd Fire Department and its President after the City Council passed a Resolution in September, 2015 eliminating their jobs and their Union in the midst of a three-year collective bargaining agreement with the Union. They alleged violations of various provisions of the Minnesota Public Employees Labor Relations Act (PELRA), Minn. Stat. § 179A.01, et. seq. including interference with the administration or existence of the Union under § 179A.13, subd. 2(2); that the Resolution failed to follow the requirements for amending a city charter under Minn. Stat. § 410.12; and that the action violated the Federal and State Constitutional freedom of expression provisions by retaliating against the Union and its President for speaking out publicly against elimination of all of the Union positions.

The Trial Court, the Honorable Earl Maus, granted Summary Judgment to the City on the charter amendment and freedom of speech claims and on one prong of the PELRA claim, but held that fact disputes existed on two other PELRA issues and remanded them for trial. He subsequently granted the City's Motion for Reconsideration and dismissed those claims as well, which prompted an appeal to the Court of Appeals.

The Court of Appeals reversed on the PELRA claim. It held that the City's abrogation of the contract and elimination of the Union and the jobs of its members constituted an Unfair Labor Practice (ULP) under Minn. Stat. Ann. § 179A.13, subd. 2(2), and remanded for determination of damages, did not rule on the additional PERLA matters, while affirming dismissal of the other claims.

This Court granted the City's Petition for Review of the PELRA claim and denied a Cross-Petition by Appellants for review of the Charter Amendment and Freedom of Speech claims.

STATEMENT OF THE FACTS

A. The Parties

Appellant Firefighters Union Local 4725 (the "Union"), is a labor union representing all five full-time Fire Equipment Operators, known as FEO's, of the City of Brainerd. The unionized FEO's all lost their jobs after the City adopted a Resolution on September 21, 2015, eliminating the "paid," full-time fire department effective at the end of October, 2015, resulting in elimination of the Union. Appellant's Add. 33-35 (hereinafter "Add.").

Respondent City of Brainerd, a home-rule charter city of the third class, was their employer. Add. 33; Resp. Add. 2 (hereinafter "Resp. Add.").

B. The Fire Department

In addition to a Chief, the department consisted of five full-time employees, all union members, as well as approximately three dozen on-call personnel, generally referred to as "volunteers," and known as POC's (Paid On Call). Add. 34; Resp. Add. 3, ¶¶ 7-9. The POCs are not full-time personnel, but are summoned for emergency calls. Resp. Add. 3, ¶¶ 8-9.

The full-time union fire fighters were permanent career employees, paid hourly wages, and received full employment benefits. *Id.*, ¶ 7. The POCs were paid a nominal sum sporadically when actually engaged in fire fighting or training activities. *Id.*, ¶¶ 8-9; Add. 33.

The Brainerd Fire Department is codified in the City Charter, and the City has had a "paid fire department" in one form or another, since the City's birth in the 1870's. Resp. Add. 2, ¶ 3-4.

The term "paid fire department" is a term of art in fire fighting, referring to fire suppression employees working on a full time basis with 24 hour coverage. Resp. Add., pp. 2-3, ¶¶ 5-6, Resp. Add. 11, ¶¶ 12-13. The "volunteers" or POC personnel, although compensated when they show up for fire calls, are not considered to be part of a "paid" department and are not members of the union. Resp. Add. p. 3, ¶ 8-9; Resp. Add. p. 11, ¶ 12.

Of the approximately 750 fire departments in Minnesota, there are about 40 communities that have "combination" departments, including Brainerd, consisting of both paid, full-time firefighters and volunteers or POCs. Resp. Add. 10-11, ¶ 8. The President of the State Firefighters Association explains:

> The term "*paid fire department*" as used in the Brainerd Charter is commonly understood in the fire fighting field as meaning professional firefighters, who have *full time jobs as fire fighters,* are employed by the city, and receive full employment benefits. This connotes that this is their *full time livelihood,* although they may, of course, have other part time work on the side.

Resp. Add. 11, ¶ 9 (emphasis supplied).

Brainerd is one of nine communities in Crow Wing County that are part of a joint Fire Advisory Board, a tax-supported organization overseeing fire prevention and suppression in the area. Resp. Add. p. 4, ¶ 12*; Doc. 34, pp. 81-83 (Hillman Deposition, ¶¶ 27-29).* As the largest of the members, Brainerd contributes about 50% of the funds

for the organization, and the other half comes from the other, smaller members. Resp. Add., p. 4, ¶ 12.

C. The Curtailment Concept

The Brainerd City Council initially conceived of curtailing the Union by eliminating the full-time "paid" firefighters and their union in 2010. Resp. Add. 4, ¶ 10-11. But in response to an outpouring of opposition in the community and recognition of the paucity of any real financial savings, that decision was reconsidered and rescinded by the City Council. *Id.*

After the 2010 elimination failed, the Fire Department went into a growth pattern. In late 2014, it added a new full-time FEO, augmenting the staff of "paid" personnel to five, all Union members. *Id.*, ¶ 14. A "Shared Services Study" by Crow Wing County in 2015 recognized "need for" an additional two or three more FEOs in Brainerd. Resp. Add. 4-5, ¶15; Resp. Add. 39.[1] The study noted that, at $10 - $68 per resident, the cost of fire protection was below the "national" average of $104 per resident for similarly-situated communities with a "combination" of paid and volunteer firefighters. Resp. Add. 40.

Meanwhile, in March 2015, the City and Union entered into a new collective bargaining agreement, retroactive to January 2015. Resp. Add. 14. It had 3-year duration, running from January, 2015 through December, 2017. Resp. Add. 17.

But, as continuity and growth occurred, the discredited proposal to eliminate the fire department union was resurrected in 2015 by some City officials, supported by the

[1] A full copy of the Shared Services Study is at Doc. 37, pp. 175-228.

newly appointed Fire Chief Timothy Holmes and new City Administrator James Thoreen, who both joined the City in the middle of that year. It was characterized as a "possible restructuring of the Fire Department to eliminate the full time [FEO's]" and replace them with "solely paid on-call firefighters," which was justified as a "cost-saving measure." Add. 34, Doc. 46, p. 121 (Hillman Aff. Ex. P).[2]

Speaking as President of the Union, Turner vigorously advocated resistance to the proposed elimination of the full-time department and was critical of the City and its administrators. He was quoted to that effect in a number of media articles and was very vocal in social media postings. Doc. 34, pp. 11, 25, 26, 28, 31-39, 45-50, 54-56; (Homes Depo. p. 54 and Exs. 16- 20; and Turner Depo. pp. 74-76); Doc. 57, pp. 183-184 (Thoreen Depo. pp. 21-22).

D. Public Opposition

The Union's opposition was reflected in the community. An informal survey taken by *The Brainerd Dispatch* reflected as follows:

Should Brainerd change the format of its Fire Department? (Poll Closed)	
Should be all full-time staff:	***24.25%*** (284 votes)
Should be all paid volunteer:	12.3% (144 votes)
Should remain combination of full and part-time:	***59.95%*** (702 votes)
No opinion or don't know:	2.65% (31 votes)
Other:	0.85% (10 votes)

[2] Although promoted as a "cost saving measure," eliminating the Union and its members and dispensing with their salaries and benefits, the actual economic effect of the action was questionable. Resp. Add. 6, ¶ 21.

Resp. Add. 5-6, ¶ 20; Resp. Add. 43 (format altered).

The Fire Chief, a prime advocate of wiping out the Union, urged the City Council to proceed with the proposal, lamenting that the "union president [Turner] is throwing mud around on FB [Facebook] now." Resp. Add. 29; Doc. 34, p. 11 (*Holmes Depo.* p. 54).

The Chief further expressed his concern that "[y]ou know they [city council] are hearing from the negative side," in an effort to deflect the Union's public protestations to the proposed elimination of their full-time "paid" positions. Resp. Add. 30; Doc. 34, p. 12 *(Holmes Depo. p. 63).*

Informed about the potential elimination by City Administrator Thoreen in August, 2015, the joint Fire Advisory Board asked for additional information before taking a "recommendation vote." Resp. Add. 18-19. After being furnished some limited information, Board members expressed a desire to bring information to their respective township boards for input before taking any action or making any recommendation. Resp. Add. 27-28; Doc. 34, p. 4 (*Holmes Depo. p. 35).*

While the Fire Advisory Board was pondering the issue, the Brainerd City Council bypassed it and took unilateral action, eliminating the "paid" FEO's, without any input from the Board. Although the Advisory Board wanted to ponder the proposed elimination, Administrator Thoreen circumvented the Board. After admitting that the Board wanted more data, he testified:

"Q. And they didn't get it, did they?

A. They did not."

Doc. 34, p. 67-68 (*Thoreen Depo.* pp. 46-47).

E. Dubious Data

The financial information provided to the City Council as a basis for its determination was dubious at best.

- City Finance Director Connie Hillman, responsible for informing the Council, secretly told administrators that it "makes me *very nervous* putting a cost saving number out there." Resp. Add. 24. *See also* Resp. Add. 21, 25.
- She acknowledged that she was never provided with any other data that made her *"less nervous."* Resp. Add. 22, 25 (emphasis supplied).
- She expressed concern about the assumption that all non-emergency calls would last only one hour or less, contrasting with the Shared Services Study estimate of 1.5 hours per call. *Compare* Resp. Add. 24 and 41.
- Hillman also expressed concern about her assumption that 110 calls "will be handled by the duty officer," another mistaken estimation. Resp. Add. 24.
- The City further understated the expenses it would save based on a 2014 figure of 508 calls when it was aware that "call volume has increased" in 2015, and in the years between 2010 and 2014 the number of calls averaged 729 and were as high as 1253 in 2013 according to the "Shared Services

Study." *See* Resp. Add. 40. In addition, Finance Director Hillman acknowledged that certain costs were not included in her estimates, including the cost of "duty crews." Resp. Add. 24-25.

- The financial concerns she had were not resolved. Resp. Add. 23-25.
- The Finance Director also questioned "how much detail do we need to give" the joint Fire Advisory Board. Resp. Add. 24.
- She subsequently reiterated that she was "*concerned with our calculation.…" Id.* (emphasis supplied).

Based on this flawed and dubious data and bypassing the joint Fire Advisory Board, the five-member City Council eliminated the full-time fire department and jobs of the Union members by a Resolution, 45:15, which it unanimously approved on September 21, 2015, which went into effect a month later. Resp. Add. 31-34. At that time, the 3-year Collective Bargaining Agreement with the Union, which went into effect the prior January, still had 27 months to run. Resp. Add. 17.

The Council's swift, covert, clandestine conduct represented a deliberate effort to suppress input from the union, the Fire Advisory Board, and the community at large. As City Administrator Thoreen strategized to fellow City officials and the Council: there "is merit" to proceed with the elimination "on a reasonably swift timetable" because the Union "will campaign heavily to the public on an emotional basis." Resp. Add. 26; Doc. 34, p. 60-61 (*Thoreen Depo., pp. 28-29).*

Although adding a fire marshal/deputy fire chief, a non-union position, to the Fire Chief's staff, the goal and effect of the Resolution was eliminating all five full-time

Union firefighters, leaving only the non-union volunteer POCs to staff the department. Add. 35; Resp. Add. 34.[3]

Abolishing the full-time Department in the fall of 2015 not only went against the solid segment of public sentiment, it also was counter to the pattern of expansion rather than constriction of the professional fire fighting personnel in the community, the addition of a new firefighter, the recommendation of the Shared Services Study to add more full-time firefighting personnel; and the approval a few months earlier of a new 3-year collective bargaining agreement running 27 more months through the end of 2017. Add. 40; Resp. Add. 17, 39, 43.

F. The Ensuing Lawsuit

The Council's elimination of the paid firefighters resulting in the loss of the jobs of the five full-time union employees and disbandment of the Union, replaced by non-union POC "volunteers," spurred this lawsuit. The Union and its President Turner made four different claims.

The main claim arose under several prongs of the Public Employees Labor Relations Act (PELRA), Minn. Stat. Ch. 179A, *et seq.*, which regulates management-labor relations in the public sector. It alleged that the City committed three Unfair Labor Practices (ULPs) by violating those provisions of the Act.

[3] The duties of the Fire Marshal were not new; they previously were performed by a FEO in the Union.

- Subdivision 2(1) barring an employer from taking action that has the effect of "interfering" with the exercise by employees of their rights to participate in union activities.
- Subdivision 2(2) proscribing action that interferes with "the formation, ***existence,*** or administration" of a union (*emphasis supplied*); and
- Subdivision 2(3) prohibiting discrimination in "the hire or tenure" of union members.

They also asserted that the action violated the state requirement of a referendum to amend the City Charter, Minn. Stat. Ann. § 410.12, and that the action was retaliatory for the exercise by Turner and the Union of freedom of expression in violation of the First Amendment to the U.S. Constitution and its counterpart, Minn. Const. art. I, § 3. Both of those claims have been dismissed and are not made in this appeal.

G. The Rulings Below

1. The Trial Court

Both sides moved for Summary Judgment. The City sought dismissal of the entire case; the Union and Turner requested Partial Summary Judgment of liability on the PELRA (Count I) and opposed the City's Motion for Summary Judgment.

The Trial Court, the Honorable Earl Maus, initially held that, on the PELRA claim, the City had the "interest managerial right" to "contract out" the firefighting work. *Add.* 9. But the Judge denied Summary Judgment on two portions of the PELRA claim,

holding that the City was required to negotiate the "effects" of or impact of its decision, including future wage loss, benefits, and pension diminution, Add. 11-15, and that "Plaintiffs have raised material issues of fact as to 'work jurisdiction' and violation of PELRA", Add. 17, referring to the claims of "interference" with the "existence" of the union and rights of its members" under § 179A.13, subd. 2(1) & (2), and discrimination in the tenure of union members under subd. 2(3), a pair of issues that were asserted in the pleadings, addressed in the voluminous briefing, and brought up at oral argument. Doc. 1, pp. 4-7; Doc. 31, PP. 103-105; Doc. 56, pp. 113-122; Doc. 63, pp. 4-7; Tr. 29-30, 61-63, 71-73.

That ruling left the case poised for trial on the two remaining PELRA issues: interference with the Union and discrimination against its members by not negotiating over the "effects and impact" of eliminating the Union in the midst of its contract and abrogation of the Union's "work jurisdiction."

But that trial never occurred because the City sought reconsideration, which the Judge granted and then dismissed the remaining PELRA claim because the Union and Turner "did not promptly raise the issue of 'work jurisdiction' and also did not raise arguments in response to Plaintiff's [sic] motion for summary judgment, but instead raised the issue in the reply to their own motion for summary judgment…." Add. 29.

2. The Appellate Court Proceeding

The Court of Appeals reversed on the PELRA issue; it affirmed dismissal of the charter-referendum and First Amendment issues, which are not at issue here. Add. 31-50.

It reasoned that the "unilateral charge" in the contractual relationship, eliminating the Union and the jobs of its members with 27 months still remaining on the agreement constituted a "prima facie violation of the employees' collective bargaining rights." Add. 39. Noting the "plain language" of § 179A.13, subd. 2(2) of PELRA barring action interfering with "formation, existence, or administration of any employment organization," the Panel unanimously determined the "unilateral" abrogation of the contract, "dissolution" of the Union and elimination of the jobs its members "during the midst of an operating collective bargaining agreement" violated that provision and was an ULP." Add. 39-40.

In particular, it rejected the City's claim that elimination of the Union and all of its members constituted "reorganization of [the] department" and was a permissible exercise of "inherent managerial policy" under § 179A.07, subd. 1. Referring to cases involving small-scale internal reorganization, it explained that the case law relied upon by the City was inapposite because the administration or existence of the union in those cases "was not impacted." Add. 40-41. In contrast, in this case, the City of Brainerd "acknowledged that its [action] resulted in the elimination of the entire union," which the Court concluded did not constitute "inherent managerial policy" under the Act but

impermissibly "interferes with the existence and administration of [the] union." Add. 41. Thus, it remanded for determination of damages.[4]

SUMMARY OF ARGUMENT

The decision of the Court of Appeals holding that a PELRA violation occurred was correct and should be affirmed.

The City's action transgressed three provisions of the law, Minn. Stat. § 179A.13, subds. 2(1), 2(2) and 2(3). The City's elimination of its long-standing paid, full–time department, dating back more than a century, in the early stages of a three-year collective bargaining agreement with 27 months to run, interfered with the rights of the members of the Union, who lost their jobs as a result of it; impaired the "existence, or administration" of the union by disbanding it; and discriminated in the "hire or tenure" of union members by replacing them with non-union "volunteers."

The Court below correctly determined that the City's "unilateral" abrogation of its contract with the Union did not constitute a permissible exercise of "inherent managerial policy" as a reorganization of the fire department but, rather constituted "interference" with the administration and existence of the Union and was an Unfair Labor Practice in violation of § 179A.13, subd. 2(2).

The City does not have the "inherent" authority to eviscerate the Union. The case law condemns a governmental unit from taking such action under the rubric of

[4] Because it determined a violation of the "interference clause," § 179A.13, subd. 2(2), the Court did not pass upon the two other PELRA claims of interference with rights of individual union members under subd. 2(1) or the prohibition in subd. 2(3) of discrimination in "the hire or tenure" of union members. Add. 41, n. 3.

"reorganization" or whatever other euphemism is used for breaching a contract or, more bluntly, union-busting.

To the contrary, allowing unilateral abrogation of the contract with the Union would create a pernicious precedent in both the public and private sectors. Accordingly, the ruling below should be affirmed and remanded for determination of damages for the Union and its members.

STANDARD OF REVIEW

The ruling by the Court of Appeals was decided as a matter of law. This determination is subject to *de novo* review. *Commerce Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015); *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003).

ARGUMENT

I. ELIMINATING THE 'PAID' FULL TIME UNION POSITIONS VIOLATED PELRA

A. "Interfering" With Employees and Their Union

The Trial Court erred in dismissing the three-pronged PELRA claims in this case, and the Court of Appeals correctly rectified that mistake. All of the full-time "paid" firefighters were members of the Union. The City's Resolution eliminated the department's full-time "paid" firefighters, depriving them of their jobs, replacing them with non-union members and disbanding the Union. Add. 40; Resp. Add. 34. All of the members of the Union, which has become defunct, lost their jobs as the City is now using non-Union part-time labor to perform the work formerly performed by the full-time

professional Union firefighters. Resp. Add. 3, ¶8-9; Resp. Add. 6-7, ¶ 22. This violates Minn. Stat. § 179A.13, subd. 2 (2) because it had the intended – and actual – effect of "interfering with the … existence, or administration" of the Union.

Brainerd officials acknowledge that the Resolution had this impact. Fire Chief Holmes agreed that the City's action did "eliminate *the union*" … [which] "no longer exist(s)," and its members "*no longer have a job*." Doc. 34, *pp. 5-6* (*Holmes Depo*., pp. 40-41) (emphasis added). He recognized this was unprecedented: the first and only time that a city has eliminated its full-time fire department and substituted paid-on-call (POC) personnel. Doc. 34, *pp. 6-7* (*Holmes Depo*., pp. 41-42). Chief Holmes also stated that the City did not consider any alternatives other than elimination of the Union. Doc. 34, *p. 3 (Holmes Depo*. p. 23).

City Administrator Thoreen concurred that the "logic[al]" effect of the Resolution was "***eliminating the existence of the union***." Doc. 34, *pp. 64-65 (Thoreen Depo.,* pp. 35-36) (emphasis added).

The abolition of the full-time department struck a mortal blow to the Union. It had the effect of "interfering" with its "existence, or administration" in violation of the proscription of subd. 2 (2) because it made the union a non-entity without "existence" or any ability to engage in "administration" at all.[5]

[5] Elimination of the fire fighter's jobs and the disbandment of their Union also violated two other unfair labor practices prongs of Minn. Stat. § 179A.13, subd. 2. It interfered with the rights of individual Union workers in deregulation of subd. 2(1) and discriminated in the "hire or tenure" of them contrary to subd. 2(3). Although raised, these issues were not addressed by the Court of Appeals below. Add. 11, n. 3.

B. No "Inherent Right" to Terminate the Union Contract

While the collective bargaining agreement between the City and the firefighters' Union gave the City the "inherent" right to make certain management decisions, the contract also contains a "Recognition" clause running for the duration of the contract, which began in January, 2015 through the end of 2017, a three year span, and from year to year after that, unless notice of intention to change, modify or terminate was given at least 60 days prior to January 1 of the year in which the modification, change or termination would take place. Resp. Add. 15-17. Since the City never provided notice to modify, change or terminate the contract, it remained in effect. *See Gen. Drivers Union Local 346 v. Indep. Sch. Dist. No. 704, Proctor Sch. Bd.*, 283 N.W.2d 524, 528 (Minn. 1979). The City lacks the lawful authority under the rubric of "inherent managerial policy" to abrogate its binding 3-year agreement with 27 months left on it and to give the jobs of Union members to other, non-union POCs.

This case is similar to *Foley Educ. Ass'n v. Indep. Sch. Dist. No. 51*, 353 N.W.2d 917, 923 (Minn. 1984), in which a school district displaced union teachers by hiring non-teachers to supervise study hall, which the union teachers previously supervised. The gravamen there was that "the district avoided reinstating at least two of the [unionized] teachers who had been placed on unrequested leave of absence." The decision had a direct adverse impact on the employment opportunities for these members of the bargaining unit." *Id.* at 923. Because non-Union personnel were assigned duties contractually assigned to members of the bargaining unit, the action in *Foley Educ. Ass'n*

interfered with the Union's "work jurisdiction" which could not be done without "mandatory negotiation." 353 N.W.2d at 924. As the Court stated:

> "the school district's unilateral action in assigning to persons who were not licensed teachers and, hence, not within the unit description study hall supervisory duties traditionally assigned to teacher members *changed the unit work jurisdiction and, therefore, constituted an unfair labor practice*."

Foley Educ. Ass'n, 353 N.W.2d at 924 (emphasis added).

General Drivers Union Local 346, 283 N.W.2d 524, is apposite, too. In that case, a school district assigned all of its unionized bus driving jobs to a third party employer, transferring out all of the union jobs. The court held that this topic was a mandatory subject of bargaining, unless the union waived the right to negotiate, which it did not do there or in Brainerd, either.

The Brainerd Union did not clearly waive the right to negotiate, or waive it at all. The firefighting jobs were not "contracted out," but were transferred to non-union employees. Thus, the City was required to negotiate with the Union before transferring their duties to other employees, and had the matter reached impasse, to bargain about the effects of its determination. *Id.* at 528.

Thus, while the Bargaining Agreement may give the City authority under Art. 1, § 1 to "contract out" work, it did not do so. Rather, it violated the Union's "exclusive" recognition right under Art. 1, § 2, is liable for not negotiating the "impact or effects" of doing so and abrogating the "work jurisdiction" of the Union. *See also Fibreboard Paper Prod. Corp. v. N. L. R. B.*, 379 U.S. 203, 224, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964) (Stewart, J. concurring):

> Analytically, this case is not far from that which would be presented if the employer had merely discharged all of its employees and replaced them with other workers willing to work on the same job in the same plant without the various fringe benefits so costly to the company.

That rationale led to the conclusion in the *New Ulm* case that the employer's action "effectively eliminated the entire bargaining unit *while the contract remained in effect*," which constituted "violation of the 'recognition'" clause of the collective bargaining agreement. *Indep. Sch. Dist. No. 88, New Ulm v. Sch. Serv. Employees Union Local 284*, 503 N.W.2d 104, 110 (Minn. 1993) (emphasis supplied).

The Brainerd Firefighters Union, like the teachers in *Foley*, lost "work assigned to members of the bargaining unit…." *Foley Educ. Ass'n*, 353 N.W.2d at 924. The jobs of the firefighters in Brainerd, similar to the teaching jobs in *Foley*, belonged to union workers and the alteration of that traditional arrangement warrants mandatory negotiation, which the City did not do.

At a minimum, under the case law, the City was required to negotiate with the union before terminating the jobs and transferring the duties to other employees, including bargaining about the effects or impact of its action. *General Drivers Union Local 346*, 283 N.W.2d at 528. But even beyond that, the action constitutes a *per se* violation of the provision of PELRA proscribing "interference" with the Union and, for that matter, its members, too.[6]

[6] The elimination of the fire fighter's jobs and the disbandment of their Union also violated two other unfair labor practices prongs of Minn. Stat. § 179A.13, subd. 2. It interfered with the rights of individual Union workers in derogation of subd. 2(1) and discriminated in the "hire or tenure" of them contrary to subd. 2(3). These issues were addressed, but not decided by the Court of Appeals. Add. 41, n. 3.

More than 27 months remained on the 3-year, January 1, 2015 – December 31, 2017 contract between the City and the Union when the City abrogated the arrangement in September, 2015. The contract evokes "an implied covenant of 'good faith and fair dealing' and a 'covenant that neither party shall do anything which will have the effect of destroying * * * the right * * * to receive the fruits of the contract." *Indep. Sch. Dist. No. 88, New Ulm, Minn. v. Sch. Serv. Employees Union Local 284*, 490 N.W.2d 431 (Minn. Ct. App. 1992), *aff'd sub nom. Indep. Sch. Dist. No. 88, New Ulm v. Sch. Serv. Employees Union Local 284*, 503 N.W.2d 104 (Minn. 1993) (citation omitted). The Union members here were deprived of the fruits of their contract when their work was given to other non-Union employees of the City and the Union members were all sacked.

II. THE CITY DISTORTS ITS DECISION DECIMATING THE UNION

A. The "Restructure" is a Euphemism for Union Busting

A number of distortions permeate the City's position. In listing the differences between the Union firefighters, FEOs and the paid-on-call (POC) "volunteers" who took their jobs, the City overlooks three important features. City's Brief, p. 4. Unlike the FEOs, who were members of Local 4725, the POCs are paid on an hourly basis, receive no employment benefits, other than participation in a state statutory retirement plan, and are not members of a collective bargaining unit. These are important differences that, understandably, the City chose to disregard in describing its decision.

Additionally, the City's explanation that, along with elimination of the Union, it created a full time position of fire marshal/deputy chief, while eliminating the five Union

FEO's, overlooks that the fire marshal duties previously had been performed by a FEO who was a Union member.

While the City claims that it addressed the decrease in annual revenue resulting from grant funds from reducing the number of FEO's from 7 to 5, *Id.*, p. 7, the reality is that the fire department was viewed as understaffed and wanting in personnel. The City tentatively approved the addition one more FEO in late 2014, shortly before the Collective Bargaining Agreement went into effect. Additionally, the Crow Wing County study urged the hiring of 2 or 3 additional firefighters for those communities. Resp. Add. 4-5, ¶¶ 14-15; Resp. Add. 39.

The City compounds its distortion through linguistic legerdemain. Trying to mask what it did to the Union and the jobs of its members, it refers to its action variously as a "reorganization;" a "restructuring;" and an "organizational" change, "eliminating" the union and resulting in its members being "laid off." *City's Brief*, pp. 1; 4; 4, n. 1; 9; 21.[7] But this innocuous terminology consists of euphemisms for abrogating a 3-year contract in its midst with 27 months left to run, constituting a violation of the "interference"

[7] The Union firefighters were not "laid off," their jobs were terminated and they were replaced by non-Union volunteers. If they were indeed laid off, they would have been entitled to call-back or return to their jobs on a seniority basis. The Brainerd Civil Service Commission establishes regulations regarding "lay-off" of City personnel. Resp. Add. 7-8, ¶ 26; Doc. 38, p. 65-66 (Ex. 21, § VIII). Under Section VIII, "permanent" employees, like the Union FEOs, are given protection against lay-off. It mandates that "[t]emporary, provisional and probationary employees shall be laid-off prior to permanent employees in the reverse order hired." But the City never engaged in that process, presumably because it did not want to take the position that the union members were laid-off as part of the extinction of the union until the coast was clear 3-1/2 years later, before this tribunal.

provision of PELRA, § 179A.01, subd. 2(2) and, for that matter, other provisions of the statute, as well. More bluntly, the City's phraseology cannot obscure its real effect: union-busting.[8]

The City's rhetoric is reminiscent of the observation of a no lesser authority than Humpty Dumpty, who professed that "When I use a word, it means just what I choose it to mean – nothing more nor less," leaving Alice to wonder how "you can make words mean so many different things." L. Carroll, *Alice in Wonderland*, Grosset & Dunlap ed. 1983, p. 238. The City's argument makes good fiction but, like the rotund one in *Wonderland*, upon analysis, it shatters and cannot be put back together again.

B. The Claimed Cost Savings is a Shibboleth

The City's attempt to do away with the Union and its members in 2010 was short lived, lasting a few weeks and then was reversed because substantial evidence showed that the projected cost savings would not be realized. Resp. Add. 4, ¶11. The City raised the same specter again in 2015 when it undertook a second shot at the Union and this one was fatal. The City's contention that its staff expected cost savings of $275,000 is wildly exaggerated. *City's Brief*, pp. 6-10.

Not only did the City distort the claimed cost savings, but it also manipulated the decision-making process to the detriment of the Union. The City's time table for decision-making was deliberately accelerated in order to cause the joint Fire Advisory

[8] Amicus League of Minnesota Cities ("League") engages in similar semantic sophistry, mildly referencing the elimination of the Union and its members as an "organizational structure" or a "structural reorganization." *League's Brief*, p. 4.

Board, which had been promised input, to be shut out of the process. Resp. Add. 18-19, 26, 27-28; Doc. 34, pp. 4, 60-61, 67-68 (*Holmes Depo.* p. 35 and *Thoreen Depo.* pp. 28-29, 46-47). Additionally the City Council rushed its resolution eliminating the union in order to fend off the ability to mobilize support for its survival. Resp. Add. 26. *See* pp. 8-10, *supra.*

The City also accelerated the vote even though City Finance Director Connie Hillman told administrators she was unsure of the data and assumptions she had made and said it "makes me *very nervous* putting a cost saving number out there." Resp. Add. 20-25.

These distortions and undue dispatch in decision making were contrivances in order to interfere with the ability of the Union in protecting its interests and they succeeded in doing so, in violation of the interference clause of PELRA.

III. THE CITY'S "INHERENT" MANAGERIAL CLAIM IS WRONG

A. The City Lacks "Inherent Authority" to Abrogate the Contract

The City's main argument, that it had "inherent managerial authority" under PELRA to rescind the contract with the Union and destroy it is not only fallacious, but contrary to law, logic, and public policy, as well. *City's Brief*, pp. 14-20.

The City rests its claim that the elimination of the Union falls within the statutory authorization for government units to make decisions regarding organizational structure, personnel and budgetary matters. *City's Brief*, p. 16. But that gambit constitutes a guise that cannot be justified here. Under the City's construction of the statute, any

government unit would be above reproach if it were to, for instance, decide to eliminate all or some employees of a particular race, because that would be a matter of "personnel," covered by the "inherent managerial policy" clause. By the same token, under the City's argument, elimination of personnel who have disabilities or are of a particular race, gender, or age, may be viewed as a budgetary matter, with accompanying "cost savings."

"Public policy" allows that the City and, for that matter, all government bodies, take appropriate unilateral actions to save money. But in this case, the City of Brainerd entered into a contract with the Union for a period of three years. It has an obligation for the duration of that contract. The argument espoused by the City would allow it and any government entity to bust unions at any time for the express purpose of saving money, whether accurate or pretextual.

The City's contention that that Legislature did not "intend" the union "interference" prohibition under the Unfair Labor Practice (ULP) provision to constitute an exception to a government unit's inherent managerial policy is untenable. *City's Brief*, p. 17. There is no support in the record for the claimed legislative intent. Moreover, the ULP provision, under PELRA, is not an "exception" at all. It is a free standing and important right extended to the Union and its members. It constitutes a significant part of the statute, which must be read as a whole. *Eclipse Architectural Grp., Inc. v. Lam*, 814 N.W.2d 692, 701 (Minn. 2012) (citation and internal quotation marks omitted) ("when interpreting a statute we read and construe the statute as a whole, giving effect wherever possible to all of its provisions, and interpreting each section in light of the surrounding sections to avoid conflicting interpretations"); *City of W. St.*

Paul v. Krengel, 768 N.W.2d 352, 356 (Minn. 2009) (accord); *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (accord).

Nor does the "interference" provision of PELRA, the gravamen of this case, "conflict" with the "inherent managerial policy" provision, as the City contends. *Compare* Minn. Stat. § 179A.07, subd. 1 and Minn. Stat. § 179A.13, subd. 2(1), (2) and (3); *City's Brief*, p. 19. The two can exist peaceably, and have done so for years. They address different concerns. The "inherent managerial policy" permits a governing unit to manage its affairs; the "interference" provision constitutes a limitation on its authority in order to serve the interest of labor peace and harmony. *See* Minn. Stat. § 179A.01(a) ("It is the public policy of this state and the purpose of sections 179A.01 to 179A.25 to promote orderly and constructive relationships between all public employers and their employees"). The two do not conflict, but complement each other.

The City's claim that the "specific provision" prevails over the general provision does not help its cause. *City's Brief*, p. 19. Its argument presumes that the "inherent managerial policy" provision is the "specific" one and the "interference" provision under PELRA is more "general." But that is not so. While it is not necessary to parse which one is more "specific" than the other, the "interference" clause is, for whatever it is worth, more "specific" because it addresses a particular matter, union organization and rights and administration, compared to the more "general" provision regarding "managerial policy." Thus, if forced to choose between the two, an unnecessary option, the ULP clause would prevail under the City's "specific" v. "general" analytical

framework. *City of West St. Paul*, 768 N.W.2d at 356; *American Family Ins. Group*, 616 N.W.2d at 277.

The City's lamentation that the Court of Appeals did not "specify" what the City could have done to "reorganize the fire department" is lame. *City's Brief*, p. 20. It is not the province of the Court of Appeals or, for that matter, this Court, to tell the City of Brainerd or any other government entity, what, when, or how to re-organize its internal units. In addressing a claimed ULP, as here, the role of the judiciary is to determine whether the contested action conforms to the law or not, not to engage in some legislative directive as to what a government body should do. *Binkley v. Allina Health Sys.*, 877 N.W.2d 547, 554 n.7 (Minn. 2016) (if a party "disagrees with [the] policy choices" of the legislature "her argument is better directed to the executive and legislative branches" not the court); *Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 438 (Minn. 2009) ("We cannot rewrite a statute under the guise of statutory interpretation."); *Genin v. 1996 Mercury Marquis, VIN No. 2MEBP95F9CX644211, License No. MN 225 NSG*, 622 N.W.2d 114, 119 (Minn. 2001) ("rules governing statutory construction forbid" "add[ing] words to the statute").

The City's assertion that the appellate court decision leaves it with only two untenable alternatives, negotiate with the Union or refrain from eliminating it is specious. *City's Brief*, p. 21. The City conjures this dual dilemma on the basis of its contention that it cannot negotiate with the Union because the topic of the Union's existence does not constitute "terms and conditions" of employment, subject to mandatory bargaining under PELRA. *Id.*, p. 21. *See* Minn. Stat. § 179A.03, subd. 14; Minn. Stat. § 179A.07, subd. 2.

But that argument is doubly fallacious. First, the City or any government unit may, in its own discretion, decide to negotiate over any terms and conditions of employment, whether mandatory or not. *Arrowhead Pub. Serv. Union v. City of Duluth*, 336 N.W.2d 68, 71 (Minn. 1983) (a public employer "is not required to negotiate matters of inherent managerial policy although it may do so voluntarily"); *Gallagher v. City of Minneapolis*, 364 N.W.2d 467, 470 (Minn. Ct. App. 1985) ("the employer has the option to negotiate regarding matters of inherent managerial policy").

More importantly, the notion that the continued existence of the Union is not a "term and condition of employment" is ludicrous. If anything is a term and condition, it is the continued "employment" of employees.

The City's argument would delete from the requirement of negotiating "terms and conditions of employment" the core phrase "employment." Eliminating that core would lead to a rotten result, that a government unit need not negotiate anything relating to an individual's employment status because that does not constitute a "term and condition" of employment.

The City's claim that because public unions cannot strike, the only other alternative is binding arbitration, does not justify the unilateral extinction of the Union. *City's Brief*, p. 21. If the City were so inclined, it could negotiate with the Union whether or not the Union's existence is a mandatory subject of bargaining, which it is. If the matter were to go to arbitration, an arbitrator could decide that issue, although the City never got around to doing so.

At any rate, the City is not so constrained as it maintains. There are other available alternatives to the City, if it were truly concerned about "cost savings." For one, it could do what many government entities do when faced with a "financial stress," raise taxes. While this is, to be sure, not politically appealing, raising taxes for capital expenditures, which the City maintains was the reason for eliminating the career fire department, is frequently done. Another alternative would be to issue bonds for capital expenditures, another common occurrence at all levels of government.

While the Union is not advocating these measures, these devices illustrate that the City's claim that it had no viable alternative but to fire the fire fighters is fallacious.

B. The Case Law Does Not Support the City's Position

The City's attempt to bolster its positon by case law is equally fallacious. Its contention that that the cases it cites involving lay-offs are only a "distinction without a difference" from this case, is specious. *City's Brief,* p. 26. In fact, there is one rather large difference here, among others. In this case, the Union and the City were in the midst of a 3-year contract, with 27 months left to run, when the City took its unilateral meat cleaver to carve up the union and dispose of it. None of the cases it cites involved such a dramatic, draconian, and disturbing development.

The cases relied upon by the City are inapposite. *Minneapolis Ass'n of Administrators & Consultants v. Minneapolis Special Sch. Dist. No. 1*, 311 N.W.2d 474 (Minn. 1981) and *State ex rel. Quiring v. Bd. of Educ. of Indep. Sch. Dist. No. 173, Mountain Lake, Minn.*, 623 N.W.2d 634 (Minn. Ct. App. 2001). *City's Brief,* pp. 26-27. In the former, because an employer's action removing employees from a bargaining unit

was deemed a permissible exercise of 'inherent managerial policy" the employee was not required to "meet and negotiate." In the latter, the elimination of a principal's position was held to be a matter of "inherent managerial policy."

But the appellate court in this case determined them to be inapposite because in neither of them did the employer's unilateral action "result in the dissolution of the union." Add. 41. In *Minneapolis Ass'n of Administrators and Consultants*, 311 N.W.2d 474, where several employers were removed from the bargaining unit due to a reorganization, the union remained intact and "the administration and existence of the union was not impacted." Add. 41, citing *Minneapolis Ass'n of Administrators and Consultants*, 311 N.W.2d at 474–77. Likewise in *Quiring*, only a single union member was "eliminated," she was given another job with the employer, and the union's "administration and existence was not impacted." Add. 41, citing *State ex rel. Quiring*, 623 N.W.2d at 637–639.

Those innocuous features sharply differ from what happened to the firefighters in Brainerd: they all lost their jobs, they were not given other ones; and their Union was eviscerated. This was not a "reorganization," it was a massacre.[9]

Other cases relied upon by the City and amicus League of Minnesota Cities do not justify unilaterally extinguishing the Union contract and terminating the jobs of all of its members.

[9] Phrasing the decimation of the Union and the ouster of its members from the jobs a "reorganization" is like terming the razing of a building and replacing it with another edifice as architectural redesign, or calling the dismembering of an individual cosmetic surgery.

Arrowhead Public Service Union, 336 N.W.2d 68 involved a proceeding to vacate an arbitration award. The issue was the propriety of layoffs, following collective bargaining negotiations with the union, of three of many employees in two unions for budgetary reasons. Although the Court held that the issue of financial necessity for the lay-offs was not arbitrable because it was not a matter set forth in the collective bargaining agreements, whether the employer followed the procedures for lay-off under the agreement was arbitrable. This case differs in three salient ways: 1) *Arrowhead* involved the lay-off of one worker from one union and two from another and there was no attempt in to disembowel the Unions, as here; and 2) *Arrowhead* concerned arbitration, not a claim for violation of PELRA; 3) there were collective bargaining negotiations there, but none here.

Likewise, *Laird v. Indep. Sch. Dist. No. 317, Deer River, Minn.*, 346 N.W.2d 153 (Minn. 1984), involved a single teacher lay-off due to declining enrollment, but no mass lay-off of all union employees and demolition of their union. Another public sector case, *Minneapolis Fed'n of Teachers Local 59 v. Minneapolis Special Sch. Dist. No. 1*, 258 N.W.2d 802 (Minn. 1977), similarly involved internal transfer procedures, subject to arbitration, not the kind of mass lay-off and union extinction as in Brainerd. Along the same lines, *Minneapolis Ass'n of Administrators and Consultants*, 311 N.W.2d 474 concerning assignment of certain duties to school personnel, not an objection to the transfer of all work to non-union personnel and elimination of all union jobs, as here.

Similarly, *St. Paul Fire Fighters, Local 21 v. City of St. Paul*, 336 N.W.2d 301 (Minn. 1983) also involved transfer of positions and duties, not elimination of a Union and the jobs of its members.

State ex rel. Quiring, 623 N.W.2d 634 also involved the reassignment of a school principal to a teaching position for financial reasons, but did not pertain to the elimination of the Union and all members of the bargaining unit in the midst of a contract. Rather, the school district "honored [the] continuing contract rights" of the reassigned employee, unlike the present case. *State ex rel. Quiring*, 623 N.W.2d at 638.

The case of *Independent School Dist. No. 88, New Ulm*, 503 N.W.2d 104 also is not supportive of the City's position. In that case, the contracting out of work assigned to a union was held subject to mandatory negotiations, a matter that the City of Brainerd erroneously did not do with Local 4725.[10]

The Court's conclusion there, upholding the arbitral ruling, is applicable here:

> Because the school district's actions effectively eliminated the entire bargaining unit while the contact remained in effect, the district's actions amounted to a "subversion of the labor agreement" in violation of the "recognition" and "contract in effect" clauses.

Independent School Dist. No. 88, New Ulm, 503 N.W.2d at 110.

[10] The arbitrator in *New Ulm* ruled in favor of the Union and ordered reinstatement and back pay to the all of its members. *Independent School Dist. No. 88, New Ulm*, 503 N.W.2d at 106. The same analysis applies to the parallel federal statute, the National Labor Relations Act 29 U.S.C. § 160(b), governing management-labor relations in the private sector. *See Nat'l Labor Relations Bd. v. Westrum*, 753 F. App'x 421 (8th Cir. 2019) (challenge to finding of unlawful practice by alter ego businesses in their relationships with union employees and holding union's claim not time-barred.)

The same "subversion" occurred in Brainerd and warrants affirmance of the Appellate Court ruling.[11]

Similar to the present case, the union contract in *New Ulm* contained a clause stating that contracting out was an inherent management right. Affirming the provision allowed contracting out, the court held the school district was required nonetheless "to negotiate over the effects of the decision…." *Independent School Dist. No. 88, New Ulm*, 503 N.W.2d at 105.

Further, the Court in the *New Ulm* case pointed out that the contracting out occurred while the contract was still "in effect," as here. That action blatantly "violated the (union) recognition clause" in the contract, as in this case. *Independent School Dist. No. 88, New Ulm*, 503 N.W.2d at 109. *See also* Resp. Add. 15.

The Supreme Court's conclusion in the *New Ulm* case is on all fours with this case. As the Court there stated:

> "The school district therefore could not unilaterally contract out the work in violation of a continuing agreement."

Independent School Dist. No. 88, New Ulm, 503 N.W.2d at 109.

It is inescapable, therefore, that regardless of whether the City could "contract out" the firefighting jobs under the rubric of "inherent marginal rights," it still is obligated to negotiate over the consequences of doing so. As stated in *General Drivers*:

[11] The two U.S. Supreme Court cases under Federal law cited by the City also are not controlling here. *Am. Ship Bldg. Co. v. N. L. R. B.*, 380 U.S. 300, 85 S. Ct. 955, 13 L. Ed. 2d 855 (1965) holding a temporary lay-off and plant closing was permissible *after* bargaining to an impasse was permissible, a status never reached here. *Metro. Edison Co. v. N.L.R.B.*, 460 U.S. 693, 103 S. Ct. 1467, 75 L. Ed. 2d 387 (1983), which involved sanctions for unlawful strikers is wholly inapplicable to this case.

> "Even if the [employer] decides to abide by its decision to contract out, the *effects* of that decision, *including such topics as severance pay and pension,* may well be proper subjects for negotiations."

General Drivers Union Local 346, 283 N.W.2d at 528 (emphasis supplied).

Thus, the City's Resolution terminating the full-time firefighters, their Union, and the Collective Bargaining Agreement constitutes an impermissible ULP in violation of PELRA as a matter of law or, at a minimum, evoked an obligation to negotiate with the Union, which it, too, failed to do, constituting a PELRA transgression as a matter of law.

IV. "PUBLIC POLICY" SUPPORTS THE UNION HERE

A. The "Public" is Ill-Served by Abrogating the Union Contract

The City's concluding salvo attacks the Appellate Court decision on "public policy" grounds, claiming that its decision "places the interests of employees and their unions over those of the public." *City's Brief,* p. 27. That position is manifestly misguided for several reasons.

First, it presumes that the only interest worthy of cognition is "cost savings" claimed by the City. If that were so, than any action by a government entity that purportedly saves money would be beyond judicial scrutiny, which would effectively negate a multitude of laws, ranging from the Human Rights Act, Minn. Stat. § 363A.01, *et seq.*, to the PELRA provisions at issue here. The City's argument overlooks the importance of collective bargaining, which is a primary reason for enactment of PELRA.

The statute itself trumpets the importance and significance of the balance that the legislature sought to achieve. It declares, in its preamble that it is the "public policy of this state and the purpose of [the statute] to promote orderly and constructive

relationships between all public employees and their employers." Minn. Stat. § 179A.01(a). It further emphasizes the paramount right of Minnesotans to band together to protect their interests in labor unions. To achieve these objectives, elected officials of the legislature determine how these policies are best accomplished by establishing and enforcing provisions against ULPs such as occurred here, including the interference with the administration or existence of labor unions. Thus, the legislature has made a determination to afford labor unions and their members the rights set forth in PELRA, which cannot be torn asunder by the type of action undertaken here by the City of Brainerd.[12]

The Court of Appeals properly struck the balance between the competing interests in the decision below. The City remains free to undertake inherent managerial policy decisions, provided it does not do so in a way that unduly infringes on the rights of labor unions and their members, who in this case had a binding 3 year contract with the City, which still had 27 months remaining at the time of its abrogation by the City.

The desired orderly and constructive relationships envisioned by PELRA, coupled with the need for stability and harmony in labor relations, militates against the City's actions and arguments. The City's position would allow newly appointed or elected government personnel to unilaterally abrogate or alter existing contractual relationships, as the City of Brainerd did here. That would create governmental and industrial chaos,

[12] The public in Brainerd seem to favor maintaining that status quo with Local 4725, rather than decimating it. An informal survey conducted by the Brained Dispatch showed that there was overwhelming support to maintain the FEOs, with more than 80% of the public supporting maintaining the status quo, with continued career FEOs and "volunteer" POCs; or eliminating the POCs, not the Union. Resp. Add. 43.

contrary to the desire to promote orderly and constructive relationships between public employers and their employees, as dictated by PELRA. *See* Minn. Stat. § 179A.01, subd. (a) and (c)(3).

The City's contention that a PELRA violation must be "motivated by anti-union animus" is unsupported and unsupportable. *City's Brief*, p. 29. While animus may be a factor in setting aside an anti-union decision, it is not necessary. If it were, then litigation would devolve into questioning legislative motivation which is generally deemed off limits to judicial scrutiny. *Binkley*, 877 N.W.2d at 554 n.7; *Laase*, 776 N.W.2d at 438; *Genin*, 622 N.W.2d at 119.

Finally, the City's fall back argument that all it needs to negotiate is the "implementation and effects" of elimination of the Union, is a half-hearted and half-baked attempt to justify an ULP. The City's contention that it only needs to negotiate the "order of layoffs or severance pay," would effectively give it and other government entities, as well, free rein in eliminating unions and discharge of personnel, whose only recourse would be to negotiate the "effects" of the carnage.[13]

[13] The Trial Court, prior to dismissing most of the lawsuit, initially held that there were material issues of fact whether the City must negotiate the implementation and effects of the elimination of the Union and the jobs of its members. Add. 15.

B. The Brainerd Trend Should Not be Perpetuated

The abrogation of the Union contract in Brainerd is reflective of a pervasive and perverse pattern that is developing across the country, endangering the rights and opportunities of working men and women and the unions to which they belong.[14]

This is occurring in several different ways. One is outsourcing, which removes employees from the payroll, resulting in lower wages and reduced or minimal benefits. Dave Johnson, "The Privatization Scam: Five Government Outsourcing Horror Stories, (May 19, 2014) https://ourfuture.org/20140519/the-privatization-scam-5-horror-stories-of-govt-outsourcing-to-greedy (last accessed 3/21/2019). *See also* Steven Pearlstein, The Federal outsourcing boom and why it is failing Americans, The Washington Post, (January 31, 2014) https://www.washingtonpost.com/business/the-federal-outsourcing-boom-and-why-its-failing-americans/2014/01/31/21d03c40-8914-11e3-833c-33098f9e5267_story.html?utm_term=.8676d62e3e77 (last accessed 3/25/19).

Another related trend is simply to lay off a large number of employees, a trend particularly prevalent among firefighters – such as when there were 150 laid off in Cleveland (along with 263 police officers), although after union negotiations, the firefighter lay-offs were reduced to 70. *See* "Firehouse, Cleveland, Firefighters Union Reach Deal" (Dec. 19, 2003), https://www.firehouse.com/home/news/10529816/cleveland-firefighters-union-reach-deal

[14] About 15.2% (411,000 union members in 2017) of the Minnesota work force belong to labor unions, according to the United States Bureau of Labor Statistics, a figure about 25% higher than the national average, hovering around 12%. https://www.bls.gov/regions/midwest/news-release/unionmembership_minnesota.htm.

(last accessed 3/21/19); ABC7 Archive, "First round of laid off SJ firefighters turn in gear," https://abc7news.com/archive/7584305/ (last accessed 3/21/19); "Firehouse, Union: Half of IL City's Firefighters Laid Off," (April 11, 2018), https://www.firehouse.com/careers-education/news/21000408/union-half-of-harvey-il-citys-firefighters-laid-off (last accessed 3/21/19).

This pernicious practice has cropped up in Minnesota, too, evoking substantial expenditure of time, money, and resources by workers and their unions to fend off such cuts. *See* J. Olson, Union Lawsuit contests layoffs at Hennepin County Medical Center, StarTribune (Apr. 5, 2017), http://www.startribune.com/union-lawsuit-contests-layoffs-at-hennepin-county-medical-center/418433613/ (last accessed 3/21/2019); P. Pheifer, HCMC and workers reach settlement, but lawsuit continues, StarTribune (Apr. 19, 2017), http://www.startribune.com/hcmc-and-workers-reach-settlement-but-lawsuit-continues/419901733/, (last accessed 3/21/2019); *See also* W. Bornhoft, "Hostile Mob Present as Forest Lake Voted To Disband Police," Patch (May 9, 2017) https://patch.com/minnesota/stillwater/hostile-mob-present-forest-lake-voted-disband-police, (last accessed 3/21/19)); W. Bornhoft, "Forest Lake Police Department is 'Saved'," Patch (May 11, 2017), https://patch.com/minnesota/stillwater/forest-lake-police-department-saved (last accessed 3/25/19).

The Brainerd collective bargaining calumny is the manifestation of the worst of this troublesome trend. This case is even more problematic than the others, because the existing union contract has been abrogated, before it even reached its mid-point, with 27

months left to run on the 36-month term. If allowed to succeed, it will set a precedent encouraging acceleration of this anti-union animosity.

In all of these cases and others like them, "cost saving" has been the mantra. Naturally, when employees are laid off or union contracts breached, governing units will save money because there will be less wages and benefits. That is hardly surprising, but it is sinister. Under the rubric of cost savings any government entity (or private sector one, for that matter) could justify disposing of employees, slashing wages, cutting benefits, and the like, regardless of the existence, as here, of a contract or in other cases of civil service protections or other job security measures. Simply put, cost saving measures are almost always present when jobs are cut or contracts breached. While that may provide an explanation or excuse, it does not provide a justification for doing so when it deviates from contractual requirements and decimates a duly established union.

V. THE CITY'S UNTIMELINESS ARGUMENT WAS NOT PRESERVED

The City's argument that the issue of "work jurisdiction" was not properly raised below should be disregarded because the issue was not raised in its petition for review with this Court. The Court did not grant review on the issue, which was not addressed or decided by the Court of Appeals. Add. 41. n. 3.

Ordinarily, appellate courts "will not consider issues that have not been decided below." *Costilla v. State*, 571 N.W.2d 587, 592 (Minn. Ct. App. 1997) citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

In the event this Court decides to address the issue, it should be rejected. After finding that "Plaintiffs have raised issues of material fact" as to "work jurisdiction" and the "effects of the City's decision to contract out" in violation of PELRA, denying Summary Judgment, *Add. 15,* the Trial Court reversed course and dismissed the "remaining" PELRA claims even though no new "fact" issues emerged in the interim. The Trial Court reasoned that the PELRA issues had not been "properly" raised and dismissed them, along with the rest of the case. Add. 29.

The issue was properly raised in the Complaint. The Union and Turner asserted in the Complaint, that the way the City abolished their jobs transgressed their PELRA rights by interfering with the work jurisdiction rights of the Union members; interfering with the Union's "existence and administration" and by discriminating against hiring or tenure of Union members. Doc. 1 (Complaint, Count I, pp. 2-5). These all constitute elements of what the Court below referred to as "work jurisdiction."

The issues were raised and argued in the Memorandum of Law in Support of the Motion for Partial Summary Judgment brought below by Appellants, Doc. 31, pp. 103-105 (Memorandum pp. 14-16); were reiterated in both Plaintiffs' Responsive Memorandum of Law in Opposition to City's Motion for Summary Judgment, Doc. 55, p. 113-122 (Response pp. 1-10); and again in the Reply Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, Doc. 63, pp. 4-7 (Reply pp. 1-4); and in oral argument, Tr. 29-30, 61-63, 71-73.

A Complaint need not raise every factual bases or legal argument. Rather, under Minn. R. Civ. P. 8.01, a Complaint must "contain a short and plain statement of the claim

showing that the pleader is entitled to relief and a demand for judgment for the relief sought." Minn. R. Civ. P. 8.01. The Minnesota Supreme Court has rejected the enhanced federal pleading standard in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) reaffirming the state's "traditional pleading standard" and restated that Minnesota continues to follow the notice pleading rules. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 600, 603 (Minn. 2014). The Court there declined to enforce any heightened pleading standard greater than the "traditional interpretation of Minn. R. Civ. P. 8.01." *Id.*

As the Trial Court indicated in its initial ruling, the Union and Turner did plead Unfair Labor Practices (ULPs) in violation of PELRA in Counts I of their Complaint, putting the City on notice of those claims. Nothing more is needed under the "traditional" notice pleading provisions permissible, indeed, encouraged under Minnesota law.

Even if the Complaint were inadequate, ***which it is not***, Minnesota allows amendment of a Complaint at any time in the litigation process, including during or after trial, if there is no prejudice or any asserted prejudice can be ameliorated. *See* Minn. R. Civ. P. 15.02.

Any notion that the City was subjected to some type of unfair surprise is wrong. The issue of "work jurisdiction" was clearly present throughout the litigation, from beginning to end. The duration of the collective bargaining agreement, from 2015 – 2017, was repeatedly referenced in Plaintiffs Memorandum of Law in Support of Motion

for Summary Judgment, Doc. 31, pp. 94, 106, 113. In fact, the City cited *Independent School Dist. No. 88, New Ulm*, 503 N.W.2d at 105 for the proposition that an employer must negotiate the effects of its decision to contract out the work. City's Response to Plaintiff's Motion of Summary Judgment, Doc. 52, p. 55. That issue, and the corollary that the City did not negotiate the consequences or "impact" of abrogating the contract was in the forefront of the litigation, not snuck in at some belated time.

If the City truly thought the Complaint was vague or insufficient, it could have made a motion to dismiss based on the sufficiency of the pleadings under Minn. R. Civ. P. 12.02 or for a more definite statement under Rule 12.05. Rather, it made a Motion for Summary Judgment, allowing the Court to look beyond the Complaint.

Even if the City had made a Rule 12 Motion, and even if the Complaint did not adequately address the issues for which Summary Judgment was denied, *which it did*, the remedy for technical pleading issues is not to dismiss the matter on the merits, but to allow amendment of the Complaint. Minn. R. Civ. P. 15.02 allows amendments to the pleadings freely "as may be necessary to cause them to conform to the evidence" and such matters can be raised "at any time, even after judgment…."

The Supreme Court reminds that "amendment of pleadings is liberally allowed even after judgment has been entered." *Crum v. Anchor Cas. Co.*, 264 Minn. 378, 389, 119 N.W.2d 703, 710 (1963); *Willmar Gas Co. v. Duininck*, 239 Minn. 173, 176, 58 N.W.2d 197, 199 (1953) (amendment to answer allowed at the close of trial). Thus, if there was any lack of clarity below – and there was not – the proper remedy was to allow,

or require, Respondents to amend their complaint to clarify any claims alleged to be inadequate.

"The objective of the law [is] to decide cases on their merits." *Webster Grading, Inc. v. Niles Wiese Const. Co.*, No. A10-189, 2010 WL 3000705, at *2 (Minn. Ct. App. Aug. 3, 2010) (unpublished). *See also Firoved v. Gen. Motors Corp.*, 277 Minn. 278, 283, 152 N.W.2d 364, 368 (1967) ("An order of dismissal on procedural grounds runs counter to the primary objective of the law to dispose of cases on the merits.… [A] dismissal … is the most punitive sanction … [and] should therefore be granted only under exceptional circumstances"). Because there is no exceptional circumstance here, the Trial Court erred in dismissing the lawsuit on reconsideration.

In sum, the Trial Court's reversal of its own determination that material fact issues existed on the PELRA claims was incorrect. As the Court of Appeal correctly held, the Plaintiff was entitled to judgment of the merits as a matter of law, and the only remaining issue to be determined in this matter is damages.

VI. THE AMICUS POSITION IS UNTENABLE, TOO

The arguments of amicus League of Cities are equally untenable. Like the City, it premises its position on the "inherent managerial" authority of the municipality to do whatever it wants, notwithstanding the existence of the contract with the Union, in the name of financial frugality. *League's Brief*, pp. 4-5.

The League also relies on inapplicable case law, *Dietz v. Dodge Cty.*, 487 N.W.2d 237, 239 (Minn. 1992); *Willis v. Cty. of Sherburne*, 555 N.W.2d 277 (Minn. 1996); and *Tischer v. Hous. & Redevelopment Auth. of Cambridge*, 693 N.W.2d 426 (Minn. 2005),

for the proposition that "Minnesota courts have consistently deferred to elected local officials' administrative employment decisions." *Amicus Brief*, p. 11 and n. 24. But these cases dealt with non-union employees of government entities, not union workers. In those cases, the individual non-union employees were without recourse to contest their discharges in the courts, they only could pursue relief by means of a Writ of Certiorari.

However, as the Court in *Dietz* made clear, review by writ of certiorari is required "in the absence of an adequate method of review or legal remedy. …" *Dietz*, 487 N.W.2d at 239. Here, there is an "adequate method of review or legal remedy," as set forth under the PELRA.

The League erroneously castigates the Appellate Court for having a "new" limitation on a municipality's "structural reorganization" if a collective bargaining agreement exists. *Id.*, p. 4. But the Court of Appeals simply applied existing law under PELRA and the collective bargaining agreement in recognizing that a union contract has meaning – and value. It is the League (and the City) that would create "new" law by allowing government entities to blithely disregard existing workplace contracts under the rubric of "cost savings."

The amicus imploration for "flexibility" is a euphemism that ignores fidelity to contracts. *Id.*, pp. 5-6. Its contention that upholding the sanctity of contracts imperils "separation of powers" by allowing unions, arbitrators, and even judges to "second guess local officials" represents an unfettered imperial power to government bodies that would leave them above reproach, effectively negating laws, arbitrations, and courts. *Id.* p. 7.

This does not advance "separation of powers" but separates municipalities from any legal responsibility.

In essence, the City seeks sovereign immunity in labor contract matters whenever it deems it expedient to disregard the contract. However, "[g]enerally, sovereign immunity does not apply to contractual obligations." *McDonough v. City of Rosemount*, 503 N.W.2d 493, 497 (Minn. Ct. App. 1993), *rev. denied* (Minn. Sept. 10, 1993) (holding the City must abide by a contract to purchase land entered into by the city council, and the newly elected council members may not repudiate it); *Krause v. City of Elk River*, No. A14-1575, 2015 WL 3823093, at *4 (Minn. Ct. App. June 22, 2015) (city not entitled to immunity in breach of warranty claim because it was based in contract); *City of Minneapolis v. Ames & Fischer Co. II, LLP*, 724 N.W.2d 749, 756 (Minn. Ct. App. 2006) ("a municipality is never entitled to the defense of immunity on a pure contract action….") *See also* 10A Eugene McQuillan, "The Law of Municipal Corporations" § 29.119 (3d ed. rev. vol. 1990) ("A municipality must perform its valid contracts the same as an individual or private corporation").

Moreover, what the City and League identify as the public interest is simply weighing priorities between the level of taxation against the provision of services and capital expenditures. While revenues may vary from year to year with changes in the economy and decisions at the state level about funding local government, cities have the option to raise revenue through taxation when needed.

The League's claim that according majestic authority to municipalities like Brainerd is "easy to understand and apply" is correct, but contrary to law. League Brief,

p. 6. It is easy to understand: the City can do whatever it wants; it is easy to apply: any City decision cannot be questioned. It is the kind of "easy to understand and apply" philosophy that exists in dictatorial or lawless societies, but not Minnesota.

The League's justification that the City needs this kind of limitless authority in order to "act swiftly" to address "financial pressures" is equally tyrannical. League Brief, p. 12. The "financial pressures" have existed in Brainerd since 2010, when the City first fired, but failed to obliterate the Union and its FEOs. There was no emergency that propelled its action five years later. Further, the joint Fire Advisory Board had asked for – and been promised – input in the decision, which the City officials circumvented due to fear that the Union's "campaign" to prevent its extinction was gaining traction. *See* pp. 7-9, *supra*; Resp. Add. 18-19, 26, 28.

Nothing prevented the City from trying to negotiate with the Union. It chose not to do so, opting to destroy it, rather than dealing with it.

Finally, the League raises a "good faith" defense. *League Brief*, pp. 4, 13. But it cites no authority for a good-faith defense to a PELRA violation or, for that matter, any breach of contract matter. *See Helvetia Copper Co. v. Hart-Parr Co.*, 137 Minn. 321, 324, 163 N.W. 665, 667 (1917) ("good faith of defendant is no defense" to breach of a settlement agreement); *Schmidt v. Apple Valley Health Care Ctr., Inc.*, 460 N.W.2d 349, 354 (Minn. Ct. App. 1990) (the court refused to "read a good-faith defense" into statutory provision requiring equalization of rates charged to private paying nursing home patients).

The League's espousal of the unfettered right of a municipality to denigrate – and destroy – union contracts is not only bad policy and contrary to PELRA, but it also is bad precedent for the private sector. Individuals, businesses and other entities are likely to be reluctant to enter into contracts with cities if the municipalities can walk away from the arrangements on a whim. That whim does not constitute a win, but a lose-lose.

The Court of Appeals correctly rejected these arguments. Its decision was right and it should be affirmed to avoid the pernicious precedent a contrary ruling would create.

VII. IF REVERSED, REMAND IS APPROPRIATE

While Respondents maintain that the decision of the Court of Appeals was correct and should be affirmed, if it were to be reversed, that would not, and should not, end this litigation.

If affirmed, the case must be remanded for a determination of damages. *See* Add. 50.

But even if reversed, there are two remaining PELRA issues not addressed by the Court of Appeals. The complaint alleged violations of two other statutory provisions in addition to the "interference" prong: Minn. Stat. § 179A.13, subd. 2 (1), which forbids "interfering, restraining, or coercing employees in the exercise of" their PELRA rights; and Minn. Stat. § 179A.13, subd. 2(3), which prohibits discrimination in the "hire or tenure" of union members.

The Trial Court, framing those matters as "work jurisdiction" issues, initially declined to dismiss them on Summary Judgment and ordered trial on the "implementation

and effects" of the decision to abrogate the Union contract. Add. 10-17. But it then reversed itself on reconsideration and dismissed them, too, on grounds that they were untimely challenged below. Add. 29. *See* pp. 39-42, *supra.*

The Union appealed that determination, but the Court of Appeals did not address it because it ruled in favor of the Union on the PELRA "interference" claim under Minn. Stat. § 179A.13, subd. 2(2). Therefore, those issues remain unresolved and should be returned below for further adjudication in the event the appellate court ruling is overturned.

VIII. CONCLUSION

For the above reasons, the ruling of the Court of Appeals should be affirmed or, if reversed, remanded on the remaining unresolved issues.

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