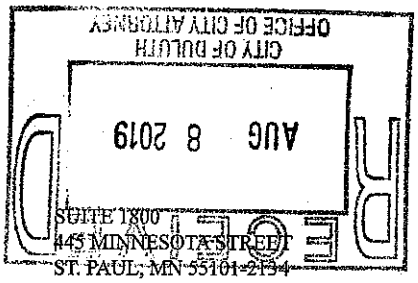
KEITH ELLISON
ATTORNEY GENERAL

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL



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TELEPHONE: (651) 297-2040

August 6, 2019

Steven B. Hanke
Deputy City Attorney
411 West First Street, Room 410
Duluth, MN 55802-1198

Dear Mr. Hanke:

I thank you for your June 26, 2019 letter requesting an opinion from the Attorney General's Office on behalf of the Duluth Civil Service Board regarding the application of the Public Employment Labor Relations Act (PERLA) to several of the City of Duluth's current job descriptions.

You state that the Board has raised concerns that some recent job descriptions for non-supervisory positions effectively include five or more of the ten supervisory functions under Minn. Stat. § 179A.03, subd. 17 (2018). You ask, on behalf of the Board, when, or if, an employee who exercises, or effectively recommends, supervisory functions may be included in a nonsupervisory collective bargaining group, or whether such positions must be reclassified with the supervisory unit under PERLA.

To answer your question, a more fact-specific inquiry regarding the form and substance of the delegation of supervisory authority appears to be required. For the reasons noted in Op. Atty. Gen. 629-a (May 9, 1975) (enclosed), this Office does not generally render opinions upon fact-dependent or hypothetical questions.

In addition, your question raises issues that may affect the duties of not only the Duluth Civil Service Board but also the City of Duluth. It is the understanding of this Office that although the Duluth City Charter delegates to the Board the power to provide "for the classification of all employees," it does so subject to "the approval of the council." City of Duluth, City Charter ch. V, § 36. Attorney General opinions are generally issued only at the request of the government agency whose authority or duties are at issue. *See* Op. Atty. Gen. 629a (July 1, 1935) ("[T]he Attorney General is permitted to render official opinions on matters of city administration only upon request of the city attorney and on matters relating to county administration only upon request of the county attorney.") (enclosed). Because your request is submitted on behalf of the Board and not the City, this Office cannot render a formal opinion that purports to definitively answer the question you pose.

That having been said, I can provide you with the following information, which I hope you will find helpful.

As you recognize in your letter, it is generally improper for an organization to be the exclusive representative for both supervisory and nonsupervisory employees of the same public employer. *See Am. Fed'n of State, Cty. and Mun. Emps., Council No. 65, Nashwauk v. City of Buhl*, 541 N.W.2d 12, 13 (Minn. Ct. App. 1995) (enclosed); Minn. Stat. § 179A.06, subd. 2 (2018).

As you state in your letter, Minn. Stat. § 179A.03, subd. 17 (2018) defines "supervisory employee." Under the statute, a "supervisory employee" is "a person who has the authority to undertake a majority of the following supervisory functions in the interest of the employer: hiring, transfer, suspension, promotion, discharge, assignment, reward, or discipline of other employees, direction of the work of other employees, or adjustment of other employees' grievances on behalf of the employer." To be considered a supervisory function, the employee's exercise of authority "must require the use of independent judgment." For nonessential employees, an employee "who has authority to effectively recommend a supervisory function, is deemed to have authority to undertake that supervisory function."

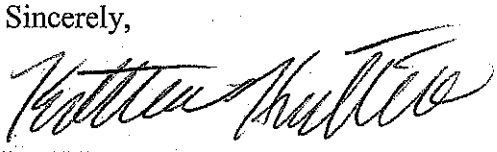
In determining whether the requisite delegation of supervisory authority has occurred under PERLA, the Bureau of Mediation Services (BMS) has looked to the following standards: (1) whether the employee is aware of and knowledgeable of the delegation; (2) whether the authority has been accepted and would be exercised; and (3) whether the employee understands how to execute the authority. *In re Petition for Clarification of Appropriate Unit City of Cannon Falls, Minn. and Int'l Union of Operating Eng'rs, Local No. 49, Minneapolis, Minn.*, BMS Case No. 07-PCL-0451, 2007 WL 5037104 at *3 (July 12, 2007) (enclosed); *Sch. Serv. Emps. Local 284 v. Indep. Sch. Dist. No. 281*, No. 01-2219, 2002 WL 1013767 at *4 (Minn. Ct. App. May 21, 2002) (recognizing these standards) (enclosed). Although the BMS generally gives significant weight to job descriptions when determining the supervisory status of employees, it has emphasized that job descriptions are not determinative and "the Statute requires the delegation of supervisory authority to employees must be a matter both of form and substance." *City of Cannon Falls*, 2007 WL 503104 at *4.

The BMS standard appears to require a more fact-specific inquiry regarding the form and substance of the delegation of supervisory authority to determine whether an employee is a "supervisory employee" under PERLA. As stated above, the Attorney General's Office does not generally render opinions upon hypothetical or fact-dependent questions and is not equipped to investigate and evaluate questions of fact. Op. Atty. Gen. 629a (May 9, 1975). As attorney for the Civil Service Board, you may be in a position to make the appropriate factual determinations and provide relevant legal analysis to the Board.

Other resources may also be available to you: The League of Minnesota Cities has published guidance on the definition of supervisory employees under PERLA. *See* League of Minnesota Cities Human Resources Reference Manual, ch. 6 at 21-23 (July 8, 2019) (excerpt

enclosed). The manual is available in its entirety at *https://www.lmc.org/media/document/1/laborrelationschapter.pdf?inline=true*. You may also wish to contact the BMS, which has the authority to resolve labor disputes involving public employees.

Sincerely,



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Enclosures: Op. Atty. Gen. 629a (May 9, 1975)
Op. Atty. Gen. 629a (July 1, 1935)
Am. Fed'n of State, Cty. and Mun. Emps., Council No. 65, Nashwauk v. City of Buhl, 541 N.W.2d 12 (Minn. Ct. App. 1995)
In re Petition for Clarification of Appropriate Unit City of Cannon Falls, Minn. and Int'l Union of Operating Eng'rs, Local No. 49, Minneapolis, Minn., BMS Case No. 07-PCL-0451, 2007 WL 5037104 (July 12, 2007)
Sch. Serv. Emps. Local 284 v. Indep. Sch. Dist. No. 281, No. 01-2219, 2002 WL 1013767 (Minn. Ct. App. May 21, 2002)
League of Minnesota Cities Human Resources Reference Manual, ch. 6 (July 8, 2019) (excerpt)

|#4525266-v1

Opinions of the Attorney General

Hon. WARREN SPANNAUS

ATTORNEY GENERAL: OPINIONS OF: Proper subjects for opinions of Attorney General discussed.

Thomas M. Sweeney, Esq. May 9, 1975
Blaine City Attorney 629-a
2200 American National Bank Building (Cr. Ref. 13)
St. Paul, Minnesota 55101

In your letter to Attorney General Warren Spannaus, you state substantially the following

FACTS

At the general election in November 1974 a proposal to amend the city charter of Blaine was submitted to the city's voters and was approved. The amendment provides for the division of the city into three election districts and for the election of two council members from each district. It also provides that the population of each district shall not be more than 5 percent over or under the average population per district, which is calculated by dividing the total city population by three. The amendment also states that if there is a population difference from district to district of more than 5 percent of the average population, the charter commission must submit a redistricting proposal to the city council.

The Blaine Charter Commission in its preparation and drafting of this amendment intended that the difference in population between election districts would not be more than 5 percent over or under the average population for a district. Therefore, the maximum allowable difference in population between election districts could be as great as 10 percent of the average population.

You then ask substantially the following

QUESTION

Does the Blaine City Charter, as amended, permit a maximum population difference between election districts of 10 percent of the average population per district?

OPINION

The answer to this question depends entirely upon a construction of the Blaine City Charter. No question is presented concerning the authority to adopt this provision or involving the application or interpretation of state statutory provisions. Moreover, it does not appear that the provision is commonly found in municipal charters so as to be of significance to home rule charter cities generally. See Minn. Stat. § 8.07 (1974), providing for the issuance of opinions on questions of "public importance."*

IN THIS ISSUE

In construing a charter provision, the rules of statutory construction are generally applicable. See 2 McQuillin, Municipal Corporations § 9.22 (3rd ed. 1966). The declared object of statutory construction is to ascertain and effectuate the intention of the legislature. Minn. Stat. § 645.16 (1974). When the words of a statute are not explicit, the legislature's intent may be ascertained by considering, among other things, the occasion and necessity for the law, the circumstances under which it was enacted, the mischief to be remedied, and the object to be attained. Id.

Thus, an interpretation of a charter provision such as that referred to in the facts would require an examination of a number of factors, many of which are of a peculiarly local nature. Local officials rather than state officials are thus in the most advantageous position to recognize and evaluate the factors which have to be considered in construing such a provision. For these reasons, the city attorney is the appropriate official to analyze questions of the type presented and provide his or her opinion to the municipal council or other municipal agency. The same is true with respect to questions concerning the meaning of other local legal provisions such as ordinances and resolutions. Similar considerations dictate that provisions of federal law generally be construed by the appropriate federal authority.

For purposes of summarizing the rules discussed in this and prior opinions, we note that rulings of the Attorney General do not ordinarily undertake to:

(1) Determine the constitutionality of state statutes since this office may deem it appropriate to intervene and defend challenges to the constitutionality of statutes. See Minn. Stat. § 555.11 (1974); Minn. R. Civ. App. P. 144; Minn. Dist Ct. (Civ.) R 24.04; Op. Atty. Gen. 733G, July 23, 1945.

(2) Make factual determinations since this office is not equipped to investigate and evaluate questions of fact. See, e.g., Ops. Atty. Gen. 63a-11, May 10, 1955 and 121a-6, April 12, 1948.

(3) Interpret the meaning of terms in contracts and other agreements since the terms are generally adopted for the purpose of preserving the intent of the parties and construing their meaning often involves factual determinations as to such intent. See. Op. Atty. Gen. 629-a, July 25, 1973.

(4) Decide questions which are likely to arise in litigation which is underway or is imminent, since our opinions are advisory and we must defer to the judiciary in

---

* Minn. Stat. § 8.07 (1974) lists those officials to whom opinions may be issued. That section provides as follows:

> The attorney general on application shall give his opinion, in writing, to county, city, town attorneys, or the attorneys for the board of a school district or unorganized territory on questions of public importance; and on application of the commissioner of education he shall give his opinion, in writing, upon any question arising under the laws relating to public schools. On all school matters such opinion shall be decisive until the question involved be decided otherwise by a court of competent jurisdiction.

See also Minn. Stat. §§ 8.05 (regarding opinions to the legislature and legislative committees and commissions and to state officials and agencies) and 270.09 (regarding opinions to the Commissioner of Revenue).

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such cases. See Ops. Atty. Gen. 519M, Oct. 18, 1956, and 196n, March 30, 1951.

(5) Decide hypothetical or moot questions. See Op. Atty. Gen. 519M, May 8, 1951.

(6) Make a general review of a local ordinance, regulation, resolution or contract to determine the validity thereof or to ascertain possible legal problems, since the task of making such a review is, of course, the responsibility of local officials. See Op. Atty. Gen. 477b-14, Oct. 9, 1973.

(7) Construe provisions of federal law. See textual discussion **supra.**

(8) Construe the meaning of terms in city charters and local ordinances and resolutions. See textual discussion **supra.**

We trust that the foregoing general statement on the nature of opinions will prove to be informative and of guidance to those requesting opinions.

WARREN SPANNAUS, Attorney General
Thomas G. Mattson, Assist. Atty. Gen.

unofficial

ATTORNEY GENERAL OPINIONS — Rendered only upon request of county attorney on county matters, city attorney on city matters. § 115, M.M.St., 1927.

July 1, 1935.

Dr. E. W. Rimer
Breckenridge, Minnesota

Dear Sir:

Your letter to Attorney General Harry H. Peterson under date of June 28th, together with enclosures, have been referred to the undersigned for attention.

It appears from the statements accompanying your letter that you have filed certain claims against the city of Breckenridge and the county of Wilkin for medical services rendered in certain cases. It also appears from a letter of the county attorney, E. H. Elwin, under date of April 25, 1935, that after he investigated your claims he found "that this service was never authorized from the county's side of the claim, and accordingly I made a memorandum thereon of 'Disapproved'."

It also appears from a letter written to you under date of April 27, 1935, by your attorney, Mr. Lewis E. Jones, that "having filed your claim and let the time go by within which to appeal, we are simply helpless."

We also direct your attention to Mason's Minnesota Statutes of 1927, Section 115, whereby the Attorney General is permitted to render official opinions on matters of city administration only upon request of the city attorney and on matters relating to county administration only upon request of the county attorney.

If the city council of Breckenridge desires an opinion on any of the matters referred to by you, it may have its attorney submit a request for the same. It will then become our duty and we will be glad to render an official opinion on matters so submitted by the city attorney. The same rule holds true with reference to requests for opinions on county matters. The county attorney is the legal adviser of the county board, as well as other county officials with reference to administrative affairs of the county. As appears from the letters accompanying your communication the county attorney has disallowed your claims and your attorney has advised you that you let the time go by within which to file an appeal from the disallowance of your claims. It is apparent, therefore, that an opinion from this office would be of no avail.

Moreover, as a professional man, you will readily understand the impropriety of the attorney general in giving any such opinion in the absence of any request therefor from the proper authorities. It has long been the established practice of this office to give such opinions only when requested in writing by the city attorney with reference to city matters and the county attorney with reference to county matters. Confusion could only result from any other course of procedure.

Trusting that you will understand our position in the matters, we are

Yours very truly,

HARRY H. PETERSON
Attorney General

By DAVID J. ERICKSON
Assistant Attorney General

DJE:LL

541 N.W.2d 12
Court of Appeals of Minnesota.

In the Matter of a Petition for Investigation and Determination of Public Employees' Appropriate Unit and Exclusive Representative.
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL NO. 65, NASHWAUK, Minnesota, Respondent,
v.
CITY OF BUHL, Minnesota, Relator,
Commissioner of Bureau of Mediation Services, Respondent.

No. C5–95–1617.
|
Dec. 12, 1995.
|
Review Denied Jan. 25, 1996.

Synopsis
The Commissioner of the Bureau of Mediation Services certified union as exclusive representative of all supervisory employees of city police department. City sought judicial review. The Court of Appeals, Schumacher, J., held that union could be certified as exclusive representative for both supervisory and nonsupervisory employees of police department.

Affirmed.

*12 *Syllabus by the Court*

Under Minn.Stat. § 179A.06 (1994), a labor organization may be the exclusive representative of both supervisory/confidential and nonsupervisory/nonconfidential employees of the same public employer if the employees are "peace officers subject to licensure under sections 626.84 to 626.855."

Attorneys and Law Firms

Don L. Bye and Timothy W. Andrew, Halverson Watters Downs Reyelts & Bateman, Ltd., Duluth, for American Federation of State, County and Mun. Employees, Council No. 65.

Rodney G. Otterness, Kent E. Nyberg Law Office, Ltd., Grand Rapids, for City of Buhl.

Considered and decided by HARTEN, P.J., and SCHUMACHER and FORSBERG *, JJ.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

OPINION

SCHUMACHER, Judge.

Relator City of Buhl seeks review of the decision of the Commissioner of the Bureau of Mediation Services certifying respondent American Federation of State, County and Municipal Employees, Council No. 65 as the exclusive representative of all supervisory employees of the city's police department. The city argues that AFSCME No. 65 may not be certified as the exclusive representative of the city's police department's supervisory employees because AFSCME No. 65 is the exclusive representative for a unit of nonsupervisory employees of the city's police department. We affirm.

FACTS

AFSCME Council No. 65 is a labor organization that is certified as the exclusive representative *13 of the nonsupervisory employees of the Buhl Police Department. On February 9, 1995, the union petitioned the Bureau of Mediation Services for a determination of appropriate unit and certification as the exclusive representative for a unit of supervisory employees within the police department. The unit the union seeks to represent includes two employees.

Following a hearing, the Commissioner certified the union as the exclusive representative for the following unit:

> All supervisory employees of the Police Department of the City of Buhl, Minnesota, who are public employees within the meaning of Minn.Stat. 179A.03, Subd. 14, excluding all other employees.

This appeal followed.

ISSUE

May the Bureau of Mediation Services certify as the exclusive representative of supervisors in a police department a union that already is the exclusive representative of nonsupervisors in that same police department?

ANALYSIS

The city argues that, under Minn.Stat. § 179A.06, subd. 2 (1994), AFSCME No. 65 may not be certified as the exclusive representative of the police department's unit of supervisory employees because AFSCME No. 65 is already the exclusive representative for a unit of nonsupervisory employees of the police department.

An appellate court is not bound by an agency's decision when statutory interpretation is involved. *Arvig Tel. Co. v. Northwestern Bell Tel. Co.*, 270 N.W.2d 111, 114 (Minn.1978). The Public Employment Labor Relations Act gives public employees the right to form and join labor organizations. Minn.Stat. § 179A.06, subd. 2. Public employees "in an appropriate unit" have the right to designate an exclusive representative to negotiate with the employer. *Id.* PELRA addresses which units are "appropriate":

> Supervisory or confidential employee organizations shall not participate in any capacity in any negotiations which involve units of employees other than supervisory or confidential employees. Except for organizations which represent supervisors who are: (1) firefighters, peace officers subject to licensure under sections 626.84 to 626.855, guards at correctional facilities, or employees at hospitals other than state hospitals; and (2) not state or University of Minnesota employees, a supervisory or confidential employee organization which is affiliated with another employee organization which is the exclusive representative of nonsupervisory or nonconfidential employees of the same public employer shall not be certified, or act as, an exclusive representative for the supervisory or confidential employees. For the purposes of this subdivision, affiliation means either direct or indirect and includes affiliation through a federation or joint body of employee organizations.

Id.

Under PELRA it is generally improper to certify a union as the exclusive representative for both supervisory and nonsupervisory employees of the same public employer. The statute, however, creates an exception to this general rule for firefighters, peace officers, guards at correctional facilities, employees at hospitals other than state hospitals, and state and University of Minnesota employees. Because the unit that AFSCME No. 65 seeks to represent is composed of "peace officers subject to licensure under sections 626.84 to 626.855," the exception applies and AFSCME No. 65 may represent both the supervisory and nonsupervisory employees.

DECISION

The Commissioner properly certified AFSCME No. 65 as the exclusive representative for the unit made up of supervisors of the Buhl Police Department.

Affirmed.

All Citations

541 N.W.2d 12

End of Document

2007 WL 5037104 (MN BMS)

Bureau of Mediation Services

State of Minnesota

IN THE MATTER OF A PETITION FOR CLARIFICATION OF AN
APPROPRIATE UNIT CITY OF CANNON FALLS, MINNESOTA
AND
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 49, MINNEAPOLIS, MINNESOTA

BMS Case No. 07-PCL-0451
July 12, 2007

UNIT CLARIFICATION ORDER

INTRODUCTION

*1 On November 6, 2006, the State of Minnesota, Bureau of Mediation Services (Bureau), received a petition from the International Union of Operating Engineers, Local No. 49, Minneapolis, Minnesota (Local 49), requesting clarification of an appropriate unit for certain employees of the City of Cannon Falls, Minnesota (City). On April 20, 2007, the Bureau conducted a hearing at the City's office and the record was closed upon completion of the hearing. Shortly before the hearing was scheduled to begin at 1:00 p.m., the hearing officer discovered his tape recorder was malfunctioning. He informed the parties they had a right to a recording of the hearing pursuant to Minn. R. 5510.0710 Subp.10 (E) (2006), and asked if they would like to postpone the hearing until the tape recorder could be repaired. The parties informed the hearing officer they wanted to waive their right to a recording and go forward with the hearing. We approved the request because we found waiving the recording requirement would not likely harm the interests of the public or impair or frustrate the intent or purposes of the Public Employment Labor Relations Act, §§ 179A.01-.25 (2006) (PELRA) and Minn. R. 5510.0210 (2006).

APPEARANCES

Kathleen Miller, City Administrator, appeared on behalf of the City; and Todd Doncavage, Area Business Representative, appeared on behalf of Local 49.

ISSUE

Are the positions of Utilities Supervisor and Streets/Parks Supervisor supervisory within the meaning of Minn. Stat. §179A.03, subd. 17 (2006)?

DEFNITION OF THE APPROPRIATE UNIT

On June 1, 1979, the Bureau certified Local 49 as the exclusive representative for:
All employees of the Public Works Department of the City of Cannon Falls whose employment service exceeds the lesser of 14 hours per week or 35 percent of the normal work week and more than 100 work days per year, excluding supervisory and confidential employees. BMS Case No. 79-PR-765-A.

BACKGROUND

The case arises out the City's reorganization of its Public Works Department (Department) during the spring of 2006. The Department continued its historical structure of separate divisions for the Utilities and Streets/Parks functions and Local 49 still represents two employees in the General Maintenance Worker II classification in Utilities and three employees in the General Maintenance Worker I classification in Streets/Parks. However, the City created two new positions, Utilities Supervisor and Streets/Park Supervisor, because it determined the Department was understaffed. The City was particularly concerned about problems in the Utilities division which it primarily attributed to inadequate supervision. Before the Department was reorganized the only person in the Department with supervisory authority since 2002 was the Department Director, Barry Underdahl. Underdahl had been the Assistant Director of the Department between 1999 and 2002, but the City eliminated that position when it promoted him to Director in 2002.

*2 The City promoted Mark Albert, a General Maintenance Worker II, to Utilities Supervisor in May 2006 and he continues to occupy that position. The City hired an outside candidate to fill the Streets/Park Supervisor position shortly thereafter, but the City terminated his employment last December and the position was vacant at the time of the hearing. On November 6, 2006, Local 49 filed a petition with the Bureau in which it disputed the City's contention the positions were supervisory and requested the Bureau conduct a hearing to determine an appropriate unit for the positions.

POSITIONS OF THE PARTIES

The City maintains the positions of Streets/Parks Supervisor and Utilities Supervisor (subject positions or positions) have been delegated authority to perform or effectively recommend a majority of the functions in Minn. Stat. § 179A.03, subd. 17 (2006) and therefore, they are supervisory within the meaning of PELRA. Alternatively, the City argues even if the positions do not satisfy the supervisory test they are presumed to be supervisory because they are assistant(s) to the administrative head of the Department. Since supervisory employees are essential under PELRA they must be excluded from Local 49's non-essential unit.

Local 49 maintains the City removed the positions from its unit in violation of Minn. Stat. § 179A.03, subd. 17. It also contends the City has not delegated authority to the positions to perform a majority of the supervisory responsibilities. Finally, it asserts 85% to 90% of the work performed in the subject positions is the same as that performed by bargaining unit members. Therefore, the positions should be included in its unit because they are not supervisory and/or share a community of interest.

DISCUSSION

I. APPLICABLE STANDARDS.

Minn. Stat. §179A.09, subd. 2 (2006), provides, "[t]he commissioner shall not designate an appropriate unit which includes essential employees with other employees." Minn. Stat. §179A.03, subd. 7 (2006), includes supervisory employees among those defined as essential. Therefore, if we determine the subject positions are supervisory they may not be included within the appropriate unit of other-than-essential employees represented by Local 49. Minnesota Statutes §179A.03, subd. 17 (2006), provides:

Supervisory employee. "Supervisory employee" means a person who has the authority to undertake a majority of the following supervisory functions in the interests of the employer: hiring, transfer, suspension, promotion, discharge, assignment, reward, or discipline of other employees, direction of the work of other employees, or adjustment of other employees' grievances on behalf of the employer. To be included as a supervisory function which the person has authority to undertake, the exercise of the authority by the person may not be merely routine or clerical in nature but must require the use of independent judgment. An employee, other than an essential employee, who has authority to effectively recommend a supervisory function, is deemed to have authority to undertake that supervisory function for the purposes of this subdivision. The Administrative head of a ... municipal utility...and the administrative head's assistant, are always considered supervisory employees.

*3 The removal of employees by the employer from a nonsupervisory appropriate unit for purposes of designating the employees as "supervisory" shall require either the prior written agreement of the exclusive representative and the written approval of the commissioner or a separate determination by the commissioner before the redesignation is effective.

In American Federation of State, County, and Municipal Employees, Local No. 66, and Independent School District No. 700, Hermantown, BMS Case No. 85-PR-570-A (March 15, 1985), the Bureau set out the standards we apply to determine whether the requisite delegation of supervisory authority has occurred. First, the employer must establish the employee is aware of and knowledgeable of the delegation. Second, the employer can demonstrate authority has been accepted and would be exercised. Third, the employee understands how the authority would be executed. *See also*, Independent School District No. 727 and School Service Employees Local 284, BMS Case No. 06-PCL-915 (The Court of Appeals affirmed our use of this test in School Service Employees Local 284 v. I.S.D. No. 281, Robbinsdale, BMS File No. 01-PCL-1121 (Minn. App. 2002) (Unpublished). [1]

II. ANALYSIS

Local 49 maintains the positions should be included in its unit because the City violated the Statute in designating them supervisory. It also contends the positions belong in its unit because they do bargaining unit work and, therefore, share a community of interest. We reject these arguments for the reasons described below.

Local 49 argues the City violated Minn. Stat. § 179A.03, subd. 17, by removing the subject positions from its unit without, "either the prior written agreement of the exclusive representative and the written approval of the commissioner or a separate determination by the commissioner before the designation is effective." We disagree. This section bars employers from removing existing positions from a nonsupervisory unit. The City did not ""remove" or "redesignate" an existing position. Rather, it created two new positions. When an employer creates new positions or designates a vacant position supervisory we have consistently found the foregoing section to be inapt and do not believe it applies here. *See, e.g.*, Independent School District No. 727, *supra;* AFSCME, Local 49 and Virginia Public Utilities Commission and Minnesota Association of Professional Employees, BMS Case No. 05-PCL-1018 (August 2, 2005).

The City does not dispute Local 49's claim that 85% to 90% of the duties performed by the new positions is indistinguishable from bargaining unit work, but argues it is not relevant to our determination. We agree. Our authority in this matter is limited to determining whether the subject positions s are supervisory under PELRA. United Steelworkers of America and Housing and Redevelopment Authority of Virginia, BMS Case No. 84-PR-1191-A (August 15, 1984); IUOE, Local No. 49 and City of Minneapolis and City Employees Local No. 363, 93-PCL-25 (May 23, 1996) *Ruling on Request for Reconsideration.* The Bureau has no statutory authority to include supervisory or confidential employees in a bargaining unit because they are found to perform duties normally carried out by employees within the unit. Indeed, such a determination would explicitly be contrary to law. Accordingly, such an issue in not justiciable through unit clarification proceedings but, is reserved for the parties to resolve through the bargaining process." United Steelworkers, *supra* (footnote omitted).

*4 As with most cases that come before us concerning supervisory status, the ultimate authority to execute many, if not all, of the statutory duties rests with its governing body of the public employer. For example, even the City's administrator lacks authority to discharge an employee without the City Council's approval. Nevertheless, as the City notes, if we determine the subject employees have authority to "effectively recommend" a majority of the functions in Minn. Stat. § 179A.03, Subd. 17 (2006), they meet the definition of a "supervisory employee" and must be excluded from the appropriate unit of non-essential employees represented by Local 49. Accordingly, we will apply Hermantown to determine whether the City has established the positions are supervisory.

The City relies almost exclusively on the positions' job descriptions in support of its position. The descriptions were produced in the spring of 2006 when the positions were created. [Joint Exhibits 3, 4]. The supervisory responsibilities of the positions were described, in relevant part as:

> "Directly supervises employees in the Department. Carries out supervisory responsibilities in accordance with the City's policies and applicable laws ... planning and directing work; evaluating performance and ensuring adequate execution and completion of tasks assigned."

The City modified the job descriptions last December by adding an additional sentence at the end of this section: "Recommends hiring, transfer, suspension, promotion, demotion, discharge, reward, and discipline of ... Department employees." [Joint Exhibits 1, 2].

Other than the job descriptions, the only evidence the City submitted regarding the supervisory authority of the positions were some conversations between the Director, Barry Underdahl, and the Utilities Supervisor, Mark Albert, around the time he was promoted in May 2006. They discussed some of the problems at the wastewater treatment plant and how Albert would be expected to provide supervisory oversight in his new position, which had been lacking due to understaffing. The Director talked about the importance of keeping the employees busy and on task and suggested Albert set up a written schedule to ensure proper system maintenance. We find this testimony and the job descriptions support the City's position regarding the supervisory functions of assignment and the direction of the work of other employees.

The City apparently recognized the initial job descriptions did not strongly support its position because it changed them by granting additional authority to recommend eight (8) additional supervisory functions. The City argues this additional authority renders the positions supervisory because the modified job descriptions grant authority to recommend a majority of the supervisory functions under the Statute. Although we generally give significant weight to job descriptions when determining the supervisory status of employees, we have never treated them as determinative. Hermantown reflects our view that the Statute requires the delegation of supervisory authority to employees must be a matter both of form and substance and in that latter regard the City's position is unpersuasive.

*5 It is particularly significant that the City never communicated the change in supervisory authority to the Utilities Supervisor, Mark Albert, or the Streets/Parks Supervisor before he left the City. Consequently, the City cannot meet the threshold Hermantown standard that the employees be aware of and knowledgeable of their supervisory authority. Since the employees were unaware of the alleged delegation it follows the City could not meet the other Hermantown standards. That is, the employees accepted the additional authority, would exercise it, and understood how it would be applied. Albert's testimony indicated he knew he was responsible for assigning and directing work but beyond that he was unclear about the scope of his authority. It was clear from his testimony he would consult with the Director and defer to his judgment should a supervisory issue arise. The Director and the City Administrator stated they would not make supervisory decisions relating to an employee in Mark Albert's division without considering his opinion. We find this testimony credible but agree with Local 49 it undermines rather than supports the City' position, because it evinces a lack of independent judgment by Mark Albert. Thus, the facts do not support the requirement the positions, "effectively recommend", a majority of the supervisory functions. Minn. Stat. § 179A.03, subd. 17.

The City contends the Bureau does not consider the concerns of smaller public employers like Cannon Falls when it makes supervisory determinations. The City argues, unlike larger employers, smaller employers lack resources to comply with the Statute and requiring them to do so place an unfair burden on them. We disagree because we do not believe the statutory requirements are particularly burdensome even for a smaller employer such as the City. More importantly, the Bureau lacks authority under PELRA to create such an exception even if we believed the City's argument had merit.

We conclude the City has failed to establish the positions are supervisory. The evidence indicates the City has sufficiently delegated authority to the positions to undertake or effectively recommend only two (2) of the ten (10) supervisory functions on behalf of the City. In sum, the record indicates the positions are "lead workers" rather than supervisors with a broad range of authority.

Finally, the City argues in the alternative we must exclude the positions from Local 49's unit based on the section of the Statute which states, in relevant part, that "the Administrative head of a ... municipal utility...and the administrative head's assistant, are always considered supervisory employees." Minn. Stat. § 179.03, Subd. 17. If this section controlled we agree the positions would be presumptively supervisory. For example, the current Department Director, Barry Underdahl, was excluded from Local 49's unit when he was the Assistant Department Director before being promoted in 2002. Nevertheless, we reject this argument because this section no longer applies. The City did not reestablish Underdahl's old position as the sole assistant to the Public Works Director which had supervisory authority over rank and file employees in both Department divisions. Instead, it created two new positions with more limited authority whose job duties are determined and circumscribed by their respective division assignments.

CONCLUSIONS OF LAW AND ORDER.

*6 1. The Utilities Supervisor is not supervisory within the meaning of Minn. Stat. §179A.03, subd. 17 (2006), and is **included** in the appropriate unit represented by Local 49.

2. The Streets/Parks Supervisor, is not supervisory within the meaning of Minn. Stat. §179A.03, subd. 17 (2006) and is **included** in the appropriate unit of non-essential employees represented by Local 49.

3. The County shall post this Order at the work locations of the employees involved.

James A. Cunningham, Jr.
Commissioner
Neil Bowerman
Hearing Officer

Footnotes

1 The Court describes the factors somewhat differently but the test is not materially different. The Court stated it thusly; "When dealing with newly created job descriptions, the evidence must show that there has been an express delegation of supervisory functions to the employees, the employees have been trained regarding their new responsibilities, and the employees have the knowledge necessary to meet their new responsibilities and intend do so."

2007 WL 5037104 (MN BMS)

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Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

SCHOOL SERVICE EMPLOYEES LOCAL 284, Eden Prairie, Minnesota, Relator,
v.
INDEPENDENT SCHOOL DISTRICT NO. 281, Robbinsdale, Minnesota, and the State of Minnesota, Bureau of Mediation Services, Respondents.

No. C6-01-2219.
|
May 21, 2002.

Bureau of Mediation Services, File No. 01-PCL-1121.

Attorneys and Law Firms

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Frank J. Madden, Pamela R. Galanter, Frank Madden & Associates, Plymouth, MN, for respondent ISD No. 281.

Mike Hatch, Attorney General, Richard L. Varco, Jr., Assistant Attorney General, St. Paul, MN, for respondent Bureau of Mediation Services.

Considered and decided by KLAPHAKE, Presiding Judge, RANDALL, Judge, and FOLEY, Judge. *

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KLAPHAKE, Judge.

*1 Respondent Independent School District No. 281 filed a "Petition for Clarification or Amendment of Appropriate Unit" with respondent Bureau of Mediation Services (BMS), seeking to exclude six newly created positions, which are held by nine incumbent employees from an existing bargaining unit, on the basis of their supervisory status. Relator School Service Employees, Local No. 284, is the exclusive representative for the existing unit, described as:

> Service employees employed by the School District excluding the following: confidential employees, supervisory employees, essential employees, emergency employees, part-time employees whose service does not exceed 14 hours per week, employees who hold positions of a temporary or seasonal character for a period not in excess of 67 working days in any calendar year.

Based on testimony and evidence presented during a four-day hearing, the hearing officer found that the positions are supervisory within the meaning of Minn.Stat. § 179A.03, subd. 17 (2000), and thus excluded from the existing bargaining unit.

Relator seeks certiorari review of the clarification order. Because the commissioner's decision is supported by substantial evidence in the record and is not arbitrary or capricious or affected by other error of law, we affirm.

DECISION

In this certiorari review of a decision by the Commissioner of the Bureau of Mediation Services (BMS) relating to supervisory employees,

> [t]his court will affirm the BMS [c]ommissioner's decision unless, upon independent evaluation, the decision is shown to be unsupported by substantial evidence, based upon errors of law, or arbitrary and capricious. When reviewing questions of law, this court is not bound by the agency's decision and need not defer to the agency's expertise. Statutory

> construction is a question of law, subject to de novo review.

Minn. Teamsters Pub. & Law Enforcement Employee's Union, Local No. 320 v. County of McLeod, 509 N.W.2d 554, 556 (Minn.App.1993) (citations omitted); *see also* Minn.Stat. § 179A.051 (2000) ("Decisions of the commissioner relating to supervisory * * * employees * * * may be reviewed on certiorari by the court of appeals.").

I.

Relator argues that the hearing officer erred by refusing to consider whether respondent committed unfair labor practices by allegedly meeting and negotiating with the nine employees from the unit without giving relator notice of its intent to do so. The commissioner, however, has the authority to hear claims of unfair labor practices only when those claims affect the result of an election. *See* Minn.Stat. § 179A.12, subd. 11 (2000). Claims of unfair labor practices must be brought in district court under Minn.Stat. § 179A.13, subd. 1 (2000) ("Any employee, employer, employee or employer organization, exclusive representative, or any other person or organization aggrieved by an unfair labor practice * * * may bring an action * * * in the district court of the county in which the practice is alleged to have occurred."). Thus, district courts have original jurisdiction over claims of unfair labor practices that arise outside of an election. *See Am. Fed'n of State, County & Mun. Employees Local 66 v. St. Louis County Bd. of Commr's,* 281 N.W.2d 166, 170 (Minn.1979) ("district court has jurisdiction over an action alleging an unfair labor practice by a public employer").

*2 Because the district court has jurisdiction over claims of unfair labor practices, the hearing officer did not err in determining that the commissioner lacked authority to consider these claims. The parties' various arguments regarding whether respondent's actions constituted improper negotiations or involved inherent managerial policy, which may implicate unfair labor practices, are outside the scope of this appeal. *Cf. Minneapolis Ass'n of Adm'rs & Consultants v. Minneapolis Special Sch. Dist. No. 1,* 311 N.W.2d 474, 475 (Minn.1981) (rejecting union's claim that school district committed unfair labor practice when it altered several positions by divesting them of their administrative functions, without engaging in collective bargaining, and then petitioned to eliminate those petitions from bargaining unit that represented supervisory employees).

II.

Relator argues that the hearing officer erred by refusing to allow it to introduce evidence on how respondent treated the employees. Relator claims that this evidence falls within the community-of-interest factors, which include "the history and extent of [the] organization" and "the desires of the petitioning employee representatives." Minn.Stat. § 179A.09, subd. 1 (2000). Relator argues that these factors must be considered whenever the commissioner exercises his power to determine appropriate units. *See* Minn.Stat. § 179A.04, subd. 2 (2000) (commissioner's powers, authority, and duties include "determin[ing] appropriate units, under the criteria of section 179A.09").

Respondent's petition, however, did not seek to determine the appropriateness of a unit; rather, it sought to clarify an existing unit by determining whether these nine employees should be excluded from the unit because, with their new job duties, they are now supervisory employees. *See* Minn.Stat. § 179A.03, subd. 17 (2000) (definition of supervisory employee). Despite dicta in several cases from this court that suggest otherwise, the community-of-interest factors set out in Minn.Stat. § 179A.09 are not relevant and do not apply to petitions seeking to clarify a unit by determining whether certain employees are supervisory. *See, e.g., In re Petition for Clarification of Appropriate Unit,* 555 N.W.2d 552, 554 (Minn.App.1996) (discussing community of interest criteria in certiorari appeal from commissioner's order prohibiting confidential supervisory employee from remaining in supervisory bargaining unit); *Local No. 320,* 509 N.W.2d at 556 (citing community of interest criteria on review of commissioner's order concluding that employee was supervisory and thus member of unit composed of supervisory employees).

Even if the community-of-interest factors were relevant to this proceeding, those factors do not involve unfair labor practices. As respondent aptly states:

> The factors [set out in Minn.Stat. § 179A.09, subd. 1] are intended to aid in determining whether the classifications proposed for inclusion in an appropriate unit have a sufficient community of

> interest so as to promote orderly and constructive collective bargaining, rather than divergent interests and goals that may result in turmoil and an inability of either the employer or the exclusive representative to meet the needs of all members.

*3 The evidence relator claims that it would offer on the community-of-interest factors appears identical to the evidence it cites in support of its unfair labor practices claim. We agree with respondent and BMS that relator's arguments on this issue are merely an attempt to "bootstrap" its claims of unfair labor practices onto the community-of-interest factors. The hearing officer's refusal to allow evidence on relator's claimed community-of-interest factors was thus appropriate.

III.

The process for excluding supervisory employees from a nonsupervisory bargaining unit is set forth as follows:

> The removal of employees by the employer from a nonsupervisory appropriate unit for the purpose of designating the employees as "supervisory employees" shall require either the prior written agreement of the exclusive representative and the written approval of the commissioner or a separate determination by the commissioner before the redesignation is effective.

Minn.Stat. § 179A.03, subd. 17. This statute further sets out the criteria to be considered when determining whether an employee is a supervisor:

> "Supervisory employee" means a person who has the authority to undertake a majority of the following supervisory functions in the interests of the employer: hiring, transfer, suspension, promotion, discharge, assignment, reward, or discipline of other employees, direction of the work of other employees, or adjustment of other employee's grievances on behalf of the employer. To be included as a supervisory function which the person has authority to undertake, the exercise of the authority by the person may not be merely routine or clerical in nature but must require the use of independent judgment. An employee, other than an essential employee, who has authority to effectively recommend a supervisory function, is deemed to have authority to undertake that supervisory function for the purpose of this subdivision.

Id.

At the beginning of the hearing, both parties agreed that these employees do not have the authority to transfer. And in this certiorari appeal, relator does not specifically challenge the hearing officer's findings that the employees have authority to assign, reward, discipline (oral and written reprimands), and direct the work of other employees. Thus, these five factors are not at issue here and will not be addressed.

Relator argues that because only the school board has the authority to hire, discharge, suspend, or promote employees and because the school board cannot delegate this authority to other individuals, these employees cannot be assigned these responsibilities. *See* Minn.Stat. § 123B.02, subd. 14 (2000) (school "[b]oard may employ and discharge necessary employees and may contract for other services"). Relator also argues that the evidence fails to establish that the employees have authority to exercise independent judgment in the adjustment of grievances. Relator finally argues that the testimony of the employees failed to establish that they have current actual authority or ability to perform these functions. *See County of McLeod v. Law Enforcement Labor Servs., Inc.*, 499 N.W.2d 518, 520 (Minn.App.1993) (employee must have current actual authority to exercise majority of supervisory functions).

*4 The statute requires only that the employees exercise independent judgment and have "authority to effectively

recommend a supervisory function." Minn.Stat. § 179A.03, subd. 17 (emphasis added).[1] When dealing with newly created job descriptions, the evidence must show that there has been an express delegation of supervisory functions to the employees, the employees have been trained regarding their new responsibilities, and the employees have the knowledge necessary to meet their new responsibilities and intend to do so.

1 Although this language does not appear to apply to essential employees, at oral arguments before this court, relator conceded that these employees are not "essential." Minn.Stat. § 179A.03, subd. 7 (2000) (definition of "essential" employee).

The employees here testified that they have accepted the responsibility for these supervisory functions and that they have the knowledge and training to exercise these functions. They further testified that they would make independent judgments in each of these areas and make their recommendations to their immediate supervisors. In turn, their immediate supervisors testified that they delegated these functions to these employees and that they would follow the recommendations made by these employees.

We conclude that this testimony was sufficient to support the conclusion that these employees will exercise their independent judgment and that they have the "current authority to undertake the function." The commissioner's decision that the nine employees are supervisory employees is therefore supported by substantial evidence in the record and is not arbitrary or capricious. *See County of McLeod*, 499 N.W.2d at 520-21 (affirming commissioner's decision that patrol and investigative sergeants are not supervisory employees, where they had authority to undertake only five of the ten supervisory functions and where sergeants, who are essential employees, only have power to effectively recommend suspension).

We therefore affirm the decision of the commissioner.

Affirmed.

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RELEVANT LINKS:

Tyo v. Ilse, 380 N.W.2d 895 (Minn. App. 1986).
Minn. Stat. § 179A.03, subd. 15.

The definition of public employer also provides that "nothing in this subdivision diminishes the authority granted pursuant to law to an appointing authority with respect to the selection, direction, discipline, or discharge of an individual employee if this action is consistent with general procedures and standards relating to selection, direction, discipline, or discharge which are the subject of an agreement entered into under sections§§ 179A.01-179A.25 [MNPELRA]."

Minn. Stat. § 44.10.

MNPELRA does not provide any procedural or substantive protection to probationary employees. This means the union contract will determine whether a probationary employee has rights to contest a discharge during the probationary period or has access to other benefits provided by the contract. This is important for a city because failure to specifically indicate in the union contract that an employee on probation may not contest their discharge will generally mean the employee has access to the grievance procedure, including the right to binding arbitration to contest this decision. Cities covered by municipal civil service laws have a specific law governing probationary employees.

15. Strike

Minn. Stat. § 179A.18.

Minn. Stat. § 179A.19.

The term "strike" is the concerted action in failing to report for duty, the willful absence from one's position, the stoppage of work, slowdown, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment for the purposes of inducing, influencing, or coercing a change in the conditions, compensation, or the rights, privileges, or obligations of employment.

This definition is very broad and includes more actions than the traditional situation where an employee is outside a facility picketing rather than working. What is considered a strike is very important because essential employees may not strike and other employees may only strike in limited circumstances.

16. Supervisory employee

Minn. Stat. § 179A.03, subd. 17.

The phrase "supervisory employee" is defined to mean a person who has the authority to undertake at least six of the following supervisory functions in the interests of the city:

- Hiring.
- Transfer.
- Suspension.
- Promotion.
- Discharge.
- Assignment.

RELEVANT LINKS:

- Reward.
- Discipline of other employees.
- Direction of the work of other employees.
- Adjustment of other employees' grievances on behalf of the employer.

To be included as a supervisory employee, the individual must use independent judgment in exercising his or her authority. In other words, the individual may not exercise authority that is merely routine or clerical in nature. The statute also provides that an employee, other than an essential employee, who has authority to effectively recommend a supervisory function is deemed to have authority to undertake that supervisory function for the purposes of this subdivision. The administrative head of a municipality, municipal utility, or police or fire department, and the administrative head's assistant, are always considered supervisory employees.

County of McLeod v. Law Enforcement Labor Services, Inc., 499 N.W.2d 518 (Minn. App. 1993).

There are two methods to use when determining whether an individual is a supervisor. In the event the individual meets either test, he or she is considered a supervisor for purposes of the statute. The first test is to determine whether the individual has the authority to exercise six of the 10 listed factors. If one of the factors does not apply, it does not reduce the number of factors needed to qualify the individual as a supervisor.

Teamsters Local 320 v. County of McLeod, 509 N.W.2d 554 (Minn. App. 1993).

The Bureau of Mediation Services does not have the authority to look at any factors outside the 10 listed in the statute. The focus should be on the 10 factors and no other information is relevant in meeting this test.

County of McLeod v. Law Enforcement Labor Services, Inc., 499 N.W.2d 518 (Minn. App. 1993).

In the event the employee is not otherwise an essential employee, "authority" is more broadly defined to include instances where the employee has the authority to effectively recommend the supervisory function. In contrast, essential employees must have the actual authority--it is not sufficient if they merely have the authority to effectively recommend.

The employees must also have current authority to undertake the function. Prospective authority is not sufficient. An employee may have the authority to undertake a supervisory function without actually exercising that authority.

Minn. Stat. § 179A.06.

Minn. Stat. § 179A.03, subd. 7.

The second method to determine whether an individual is a supervisor does not rely on the 10 factors. Rather, the individual will be deemed a supervisor if he or she is the administrative head of a city, city utility, or police or fire department. In addition, the administrative head's assistant is also always included in the definition of a supervisor. This portion of the definition gives a city some significant control over this designation.

RELEVANT LINKS:

Minn. Stat. § 179A.03, subd. 17.
See Section III-B-1, *Defining the bargaining unit.*

Supervisory employees may not be in the same bargaining unit with the individuals they supervise, but may join a union of other supervisory employees.

Supervisory employees are also essential employees. Supervisory employees may not strike.

The definition of supervisory employee also provides a city may not designate an individual as supervisor and remove him or her from a nonsupervisory appropriate unit, unless the city obtains the prior written agreement of the exclusive representative and the written approval of the commissioner or a separate determination by the commissioner.

17. Terms and conditions of employment

Minn. Stat. § 179A.03, subd. 19.

Minn. Stat. § 179A.07.

The phrase "terms and conditions of employment" is defined to mean the hours of employment and the compensation, including fringe benefits. Terms and conditions of employment does not include retirement contributions or benefits, but does include employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay. Terms and conditions of employment also includes the employer's personnel policies affecting the working conditions of the employees. The phrase terms and conditions of employment is subject to the portion of MNPELRA on the rights and obligations of cities as employers.

Minn. Stat. § 179A.07.

Minn. Stat. § 179A.25.

This definition is extremely important because the portion of MNPELRA detailing the rights and obligations of employers provides that public employers have an obligation to meet and negotiate in good faith with the exclusive representative of public employees regarding grievance procedures and terms and conditions of employment (unless the terms and conditions are so intertwined with management rights that negotiation of one would by necessity include negotiation of the other).

Alexandria Housing and Redevelopment Auth. v. Rost, 756 N.W.2d 896 (Minn. App. 2008).

This definition is also important because an employee has a right to independent review of any grievance arising out of the interpretation or adherence to terms and conditions of employment. When a public employee is not covered by a union contact, his or her right to an independent review stems from any contractual protections that the employee has to not be terminated except for "cause." At-will employees do not have such contractual protections and, therefore, are not entitled to an independent review.

Teamsters Local 320 v. City of Minneapolis, 225 N.W.2d 254 (Minn. 1975).

Court decisions explaining which items are included in the phrase terms and conditions of employment frequently arise from disputes over an employer's obligation to negotiate with unions on mandatory subjects of bargaining.