

BMS

BUREAU OF MEDIATION SERVICES
State of Minnesota

**IN THE MATTER OF A PETITION FOR
DETERMINATION OF AN APPROPRIATE UNIT
AND CERTIFICATION AS EXCLUSIVE
REPRESENTATIVE**

August 6, 2014

Itasca County, Grand Rapids, Minnesota
- and -

Minnesota Teamsters Public and Law Enforcement Employees' Union, Local No. 320,
Minneapolis, Minnesota

BMS Case No. 14PCE0605

CERTIFICATION UNIT DETERMINATION ORDER

INTRODUCTION

On December 17, 2013 the State of Minnesota, Bureau of Mediation Services (Bureau) received a Petition from Minnesota Teamsters Public and Law Enforcement Employees' Union, Local No. 320, Minneapolis, Minnesota ((Union). The petition requested determination of an appropriate unit and certification as exclusive representative for certain employees of Itasca County, Grand Rapids, Minnesota (County). A pre-hearing conference was held on February 7, 2014. At the pre-hearing conference the parties agreed to submit written briefs regarding the issue of who is the employer for the employees in question. Timely briefs were received as of April 14, 2014 at which time the record was closed.

APPEARANCES

At the pre-hearing conference Scott Lepak, Attorney, appeared on behalf of the County; and Paula Johnston, Attorney, appeared on behalf of the Union.

ISSUES

1. Who is the public employer, under Minnesota Statute §179A.03, Subd. 15 (2013), for Probation Officers in Itasca County?
2. What is the description of the appropriate bargaining unit?
3. Which employees fall within the appropriate bargaining unit?
4. Has the Union submitted the required showing of interest to warrant the conduct of an election?

AGREEMENT OF THE PARTIES

The Parties agreed, first, that the “economic realities test” used by the U.S. Department of Labor for purposes of the Fair Labor Standards Act, and the “right to control test” used by the U. S. Internal Revenue Service to determine employment relationship and obligation to withhold income taxes, Social Security, Medicare and employment taxes on wages paid to an employee do not apply to this case. The Parties’ second agreement is employee Jim Sweeney is supervisory and thus, not included within this group of employees.

POSITIONS OF THE PARTIES

The Union’s took the position that Itasca County is the employer despite the fact that the Probation Officers are appointed by the Chief Judge. The fact that the County provides services under the Department of Corrections/County Probation Officer System does not change the fact that the County is the employer. The Union further stated that the Bureau has already certified, another county, using the DOC/CPO system. Wabasha County and AFSCME, Council 65, BMS Case No. 13 PCE-0050 (2012) (Union Exhibit I). It should do the same in this case and certify Itasca County as the employer of these Probation Officers.

The County believes that it does not meet the definition of a “public employer” with regard to the Probation Officers because it does not have the final budgetary approval authority required by Minn. Stat. §179A.03, Subd. 15(a) (6). Counsel for the County cited two cases which indicate that “final budgetary approval authority” means the ability to raise the funds for the budget and to set the budget itself, rather than simply deciding how the money should be spent once it is in the budget. The County did not state explicitly who it believes is the “public employer” of the employees in question.

RELEVANT STATUTES

Minn. Stat. §179A.03, subd.15 (a) (2013) "Public employer" or "employer" means:

(1) the state of Minnesota for employees of the state not otherwise provided for in this subdivision or section 179A.10 for executive branch employees; ...

(3) the state court administrator for court employees;...

(6) notwithstanding any other law to the contrary, the governing body of a political subdivision or its agency or instrumentality which has final budgetary approval authority for its employees. However, the views of elected appointing authorities who have standing to initiate interest arbitration, and who are responsible for the selection, direction, discipline, and discharge of individual employees shall be considered by the employer in the course of the discharge or rights and duties under sections 179A.01 to 179A.25.

(b) When two or more units of government subject to sections 179A.01 to 179A.25 undertake a project or form a new agency under law authorizing common or joint action, the employer is the governing person or board of the created agency. The governing official or body of the cooperating governmental units shall be bound by an agreement entered into by the created agency according to sections 179A.01 to 179A.25.

(d) 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 to 179A.25.

DISCUSSION

An issue before the Bureau is whether Itasca County is the public employer of Probation Officers. If Itasca County is not the public employer as defined under PELRA, the Petition must be dismissed.

Counties in the state operate under three primary correctional delivery systems. Itasca County operates under what is referred to as a DOC/CPO system in which the State Corrections Department provides services for adult felons and the County provides services for juveniles/adult non-felons. Twenty-six (26) other counties operate using this system. There is also a Community Corrections Act (CCA) system that thirty-two (32) counties use. Finally there is the State Corrections department (DOC) system where the state provides all supervision services that 28 counties use.

The public employer issue of who is the employer of Probation Officers in DOC/CPO

systems has not been addressed in a contested case by the Bureau. The only case of record is a stipulation in Wabasha County and AFSCME Council 65, BMS Case No. 13 PCE-0050 (2012). That case provides no guidance in this matter.

The County argues that it does not have final approval over the entire budget. This assertion is based on the fact that it is comprised of County levy, reimbursement from the state pursuant to §244.19, and other sources. The County also believes that the state has control over the amount because reimbursement is limited to the estimate or actual expenses.

The statute states that reimbursement shall be made “on the basis of the estimate or actual expenditures incurred, whichever is less.” Minn. Stat. §244.19, subd. 6. The estimate of expenses must be provided to the state by the county seeking reimbursement. *Id.* In other words, the County determines what the expenses will be and provides the state with that information. The state then reimburses the County the lesser of its estimate of costs or the actual costs. This provision does not limit the amount that the County can budget for probation services. It simply defines how much of that budget will be reimbursed by the state.

The Itasca County board approved the 2014 budget on December 10, 2013. (Union Exhibit 1.) Within that budget, it adopted expenditures for the Probation Department in the amount of \$1,094,285. *Id.* at p. E-1. The portion of this amount that covers the salary and fringe benefits of the Probation Officers is what the County would submit to the state for reimbursement under §244.19.

The Union asserts, that at the pre-hearing conference, the County stated the State has not been reimbursing it at the rate required by the statute. Rather, it has reimbursed the County for approximately 30% of its Probation Officer salary and fringe benefit expenses. In February of 2013 the Board adopted a resolution strongly requesting the Minnesota Legislature “to appropriate sufficient funds to reimburse the 55 participating counties¹ for the full 50% of the cost of their probation officer salaries.” (Union Exhibit 2.) The state has reimbursed less of these costs each year from the full 50% in 1996 to just 31% in 2012. *Id.* Given the steady decline in appropriations by the state, the County has been forced to absorb the missing reimbursement in its budget. This suggests that the state exerts far less control over the County’s probation department budget than the County has argued.

Perhaps the most important factor here is that the state *reimburses* the County. The County must spend its own money, which it must raise whether it be by levy or other means, to pay the salary and benefits of the probation officers. That there are limitations on what amount will be reimbursed is simply a factor that the County must consider when determining the department budget.

Finally, the County, rather than the Chief Judge decides the actual expenditures of the department. As indicated above, the County Board adopted expenditures for the Probation Department in the amount of \$1,094,285 in its 2014 budget. (Union Exhibit 1, p. E-1.) While the judge does set the

¹I.e., those counties participating in the CPO delivery system.

salary for the probation officers, he does so within the salary grid approved by the County Board. (Exhibit A².) The salary is recommended to the judge by the Probation Director, who uses the state scale as a guide. As for fringe benefits, “the judge plays no role in determining fringe benefit levels.” (Union Exhibit 3 unnumbered p. 3). The probation officers receive the same fringe benefits as the members of the AFSCME Local 1626 contract, which is negotiated by AFSCME and the County. *Id.* The Chief Judge has some control over expenditures, but only to the extent that the salary be commensurate with the state scale as required by §244.19 and within the salary grid that is approved by the County Board.

OTHER RELEVANT CASES

Three separate Minnesota counties, Pope, Cass and Aitkin were consolidated in General Drivers IBT 346 vs. Aitkin County Board, 320 N.W.2d 695, 701 (Minn. 1982). In all three cases the Sheriff of the respective county had terminated their Chief Deputy Sheriff, with the Sheriff claiming the employer status and not the County Board pursuant to Minn. Stat. §387.14 (1980) (the “Sheriff statute”). The Minnesota Supreme Court, weighing the Sheriff statute versus PELRA’s final budget authority language held the County Boards, not the Sheriffs, have final budget authority and therefore the County Boards are the public employer for PELRA purposes. The Court specifically noted this was so despite limits of authority in setting Sheriff salaries, where under some circumstances, the Courts exercise the authority to set Sheriff salaries. The Court also specifically rejected the Sheriffs’ arguments of at least a “co-employer” status with regard to PELRA. The Court stated, “Any remedy for this situation therefor lies with the legislature and not with this court.” The Court further held, in interpreting the first sentence of Minn. Stat. §179.63, subd. 4 (1980) the Sheriffs held a “residuum” of power stating:

“In this regard, we note that Minn. Stat. 179.63, subd. 4 (1980) preserves that residuum of power held by the sheriff under Minn. Stat. 387.14 (1980), to the extent it is consistent with any CBA negotiated under PELRA, and recognizes the interest of the sheriff in the discipline and discharge of his deputies.

In Minnesota Council 65 AFSCME and City of Hibbing and Hibbing Library Board, BMS Case. 84PR299A (1984, and PERB affirming on 1-10-1985) we held that while the Library Board had statutory control over the expenditure of the Library fund. We further concluded that because the City of Hibbing alone had the authority to levy the taxes to fund the library, the City of Hibbing had final budgetary approval authority over the budget of the Library Board, and thus was the public employer for PELRA purposes. Specific factors in this determination included: the City of Hibbing levies annual tax for the library; City gives Library supplemental monies from its general fund; and neither party argued the Library Board was a “new agency of government” covered by the exception delineated in Minn. Stat. §179.63, subd. 4. Additionally, as part of the library fund were monies “the Library itself may generate” did not mean they were the public employer of these employees.

The PERB held the City was the public employer despite Minn. Stat. §134.11 which provided

²Exhibit A was submitted with the Union’s initial brief.

numerous duties and authorities to the library board, including “exclusive control of the expenditures of all monies collected for or placed to the credit of the library fund.”³

In City of Luverne and AFSCME Council No. 65, BMS Case Nos. 88-PR-334 and 89PR2119 (1989) the Bureau held that a library board was not the public employer of library employees where the “City and County share joint and equal accountability for the funding of the budget.” The case cited the legislative history of PELRA as derived from Minn. Stat. § 179.63, subd. 4 (1978) “makes it clear that the intent of the final budgetary approval language was to establish the county as the employer.”

In 1995 AFSCME Council No. 14 v. Washington County Board, 527 N.W.2d 127 (1995) was decided by the Minnesota Court of Appeals with another dispute involving a library board. Here, the County argued the Washington County Library Board was the public employer of certain individuals, citing that the Library Board has acted as the sole employer of the library employees since 1986, having negotiated four collective bargaining agreements with AFSCME, with the agreements signed only by AFSCME and the Library Board; the County Board playing no role. However, when the Library Board would not comply with the Pay Equity Act in 1990, AFSCME informed both the Library Board and the County Board that it considered the County Board to be the employer. The relevant portion of this decision dealt with the argued conflict between the County Personnel Act and PELRA.

The County Personnel Act provides that:

“[f]or purposes of negotiating collective bargaining agreements and resolving grievances involving them pursuant to sections 179A.01 to 179A.25, the appointing authority and the county board shall be deemed the joint employer for positions within the jurisdiction of a personnel department established pursuant to sections 375.56 to 375.71. Both shall be signatories to negotiated agreements or grievance settlements.” Minn. Stat. §375.64, Subd.1 (1992)

Also, the Library Board argued it was the public employer for PELRA purposes given Minn. Stat. §134.11, subd. 2 (1992), which provides:

“[Library boards have] exclusive control of the expenditure of all money collected for or placed to the credit of the library fund, of interest earned.”

The Court resolved the Washington County matter citing, with approval, the City of Hibbing decision, holding the county board was the PELRA public employer, not the library board.

³ “The Director made his determination pursuant to the definition of public employer found in Minn. Stat. §179.63, subd. 4 (1982), which was repealed and recodified, effective August 1, 1984, as Minn. Stat. §179A.03, subd. 15 (1984). FN 1 Hibbing PERB dec.

ITASCA COUNTY BUDGET

In application of the cases to this matter, the Bureau notes the Union's Ex.2, Itasca County Resolution RES-2013-7 adopted February 12, 2013 titled State Reimbursement for Probation Officer Salaries. The Department cited was Probation/Parole and the first WHEREAS clause states:

WHEREAS, Minnesota Statutes 244.19, subd. 6 outlines a process for state reimbursement to participating counties of 50% of the previous year's expenditure for their probation officer salaries, and

...

NOW, THEREFORE BE IT RESOLVED, that the Itasca County Board of Commissioners strongly requests the 2013 Minnesota Legislature to appropriate sufficient funds to reimburse the 55 participating counties for the full 50% of the cost of their probation officer salaries.

Of note is the County's use of the possessive "their" in reference to the probation officers. This indicates clear ownership and establishment of an employment status with these individuals. The Resolution notes the County Board adopted this under Consent, by unanimous agreement, with no indication of any disagreement among the Board as to this employment status.

Secondly, is the repeated usage of the word "reimbursement." This contemplates a prior, approved budget expenditure, as noted in the whereas clause. It logically follows that if the County Board is seeking reimbursement they had the authority to and did, indeed, approve the expenditure. The County certainly would not claim a reimbursement if the expense was some other entity's.

Additionally, even if the request for reimbursement implied an indication of joint or shared expenditure control, under City of Luverne this would not make the State the public employer. A "request for reimbursement" also indicates no written agreement with the State so as to qualify under Minn. Stat. §179A.03, Subd. 15 (1) (b) (2013) as a "common or joint action" between "two or more units of government" making that new entity the public employer.

There is no distinction in how the Itasca County Board established its expenditure budget for the Probation Services Department (\$1,094,285) (Union Ex. I, pg. E-1) in comparison to the rest of its \$121,085,446.00 total expenditure budget. State payments to the County equaled 31% of its Revenue budget or \$37,065,905.00 and in all areas of the budget, whether as reimbursements or pass through monies, as in the other 86 Minnesota counties. This has never been viewed as lessening or eradicating a County Board's "public employer" status with regard to PELRA. Finally, this was a full, unanimous County Board resolution made to the State of Minnesota Legislature, a serious event in any circumstances. These probation officers were certainly viewed by the County to be "their" probation officers when "reimbursement" was claimed, in an official

communication to the State of Minnesota Legislature.

As stated above, the standard to be used in resolving a question of which governmental unit is the public employer for purposes of PELRA is specified. Minn. Stat. §179A.03, Subd. 15 (a) (6) (2013). However there are circumstances when PELRA has specifically provided that Counties are not the public employer for employees who might appear to be county employees. Those situations include: court employees, elected public officials, election officers, emergency employees, part-time employees, temporary or seasonal employees, charitable hospital employees, managerial, supervisory and confidential employees of Hennepin Healthcare System, Inc. (Minn. Stat. §§ 179A. 03, Subd. 5(a) and Subd. 14 (a) (1), (2), (4), (5), (6), (8), 12, and (13) (2013) respectively).

State Executive Branch bargaining units for purposes of PELRA are defined by statute, the Bureau does not have authority to create a new bargaining unit of State employees. Minn. Stat. §179A.10, Subd. 1 (2013) states in relevant part “The units provided in this section are the only appropriate units for executive branch state employees.” Within the State Unit section of PELRA the Legislature has specifically defined eight categories of employees excluded from bargaining units and has defined appropriate bargaining units, which do not include the probation employees at issue here.

Court bargaining units for purposes of PELRA are, also, defined by statute. The Bureau does not have authority to create a new unit of Court employees. Minn. Stat. §179A.101, Subd. 1 (2013) states in relevant part “The units provided in this section are the only appropriate units for court employees.” Within the Courts Unit section of PELRA the Legislature has specifically defined five categories of employees excluded from an appropriate unit and has defined four appropriate bargaining units, which do not include the probation officers at issue here.

Also of note, within the Courts Unit section of PELRA, supporting the Union argument, is the Legislature certifying a Court Employees Court Reporter Unit despite paragraph (f) of Minn. Stat. §179A.101 (2013) which provides:

“Notwithstanding any provision of this chapter or any other law to the contrary, judges may appoint and remove court reporters at their pleasure.”

Court reporters had previously been county employees.

The State Courts took over County Court employees under a statewide modification of PELRA legislatively enacted in 1999 and 2001. Minn. Stat. §179A.102 and .103 (2013) Probation employees were not included in the new State court units. PELRA was also modified when the State took over the Public Defender function from the Counties. Minn. Stat. §179A.104 (2013)

In the present matter, the County argues:

“The budget is comprised in part through the County levy, in part through the reimbursement to the County by the State pursuant to Minn. Stat. Sec. 244.19 and in part through other

sources. Reference to the statute reveals that the State controls what this amount is in that reimbursement is limited to the estimate or actual expenditures. Minn. Stat. Sec. 244.19, Subd. 6. Within this expenditure control, the State requires that the salary range must be commensurate with the salaries paid to comparable positions in the classified service of the state civil service. *Id.* The State dictates that benefits not exceed those provided for state civil service employees. *Id.* Actual expenditures are dictated by the judges. *Id.* Accordingly, Itasca County is not the entity that has final approval over the entire budget.”

The litigated cases do not support either the County’s various individual premises of the argument or its cumulative conclusion.

“The budget is comprised in part through the County levy. . .” In City of Hibbing the ability to levy taxes for the funding of the work was a key factor in finding the City as the public employer. Here, the County has levied taxes for the provision of probation services, similar to and indistinct from all of its other countywide services’ budget appropriations.

“ . . . in part through reimbursement to the county by the state through Minn. Stat. 244.19 . . .” The original source of funds does not dictate which entity has final budget control and authority. Therefore the source of funds cannot determine which entity is a public employer under PELRA. Reimbursement means a prior approved expenditure has been established by an entity with budget authority. If, as the County argued, any time the state (or other revenue source) reimburses the county the county cannot be a public employer would lead to an absurd result and contrary to legislative intent generally and PELRA public policy specifically.

“ . . . and in part through other resources,” contemplates a lesser financial impact than the other two revenue sources, and, a necessarily lesser weight afforded this argument. Further, in City of Hibbing, the court found that even though the Library Board itself could raise funds for its uses did not mean they were the public employer instead of the County Board. And Washington County found, despite Minn. Stat. § 134.11, subd. 2 (1992) which gave library boards “exclusive control of the expenditures of all money collected for or placed to the credit of the library fund, of interest earned” did not create a public employer status for library boards.

“ . . . within this expenditure control, the State requires . . .” makes the argument that the State has placed restrictions on the “salary range”, and “benefits,” coupled with judges dictating “actual expenditures” and thus, the County, not having control of those aspects, cannot then be the public employer. The “salary range” and “benefits” are terms and conditions of employment left to the ultimate employer and certified exclusive representative to negotiate. The Aitkin County case rejected the argument because a county board might have limited authority with regard to a sheriff’s salary did not mean the county board was not the public employer. The Library cases rejected the library boards’ argument that their “expenditure control” meant they, the library boards, were the public employers. Other restrictions within PELRA or other statutes have not defeated the public employer definition application. See, also, Washington County case, where the County Personnel Act required joint efforts between the county boards and library boards to resolve disputes but did not transfer the public employer status from county boards to library boards. Further, the PELRA public employer definition does not contain this as a criterion.

Judges dictating “actual expenditures” first, is a reasonable, ordinary, ethical accounting practice; secondly, the precise phrase of “actual expenditures” it is not contained within the PELRA public employer definition. Further, the concept of “actual expenditures” equating to public employer status was rejected by the courts in the various library cases where the libraries controlled all the spending of the established budget, and, even when a “joint and equal accountability for the funding of the budget” was established between a library board and a county board, the County Board remained the public employer. City of Luverne, id.

There was no assertion by either party that any new project or formation of a new agency, within contemplation of Minn. Stat. §179A. 03, Subd. 15, (b) (2013), covered these employees. Even if there were an assertion, this provision of PELRA requires “an agreement entered into” and the record discloses no such agreement.

CONCLUSION

If Legislature intended that the County not be the public employer of the employees in question they could have accomplished such by PELRA amendments as was done in the case of other Court employees. The statutes cited by the County do not place these Probation Officers within the statutory bargaining units for State employees.

With regard to the Reimbursement Resolution, clearly the County could not claim the State reimburse the County if the employees were State employees. Were that the case, the employees in question would be directly paid by the State, and not a convoluted process of working for the County with the State reimbursing the County. The Resolution communicated to the State of Minnesota Legislature an Itasca County Board belief they wished to be reimbursed for the County Board approved expenditure of the County’s probation officers’ salaries. This is a combination of budget approval and employment status acknowledgement.

The Library board “expenditure” cases did not find library boards to be public employers even when some could create or control all of the funds pursuant to other statutes. In the instant case, we do not have a different entity with such claimed budgetary expenditure or budgetary establishment control. The library board cases established, that expenditure control does not negate public employer status of county boards when dealing with library boards so, too, it does not negate public employer status for county boards when dealing with probation officers.

The Sheriff cases also rejected arguments that various statutes (which may be deemed more managerial than budgetary) had transformed the sheriffs to the public employer status instead of the county boards. In the present case while judges or the courts may have some managerial control over these employees’ terms and conditions of employment this does not defeat the county board retaining the final budgetary approval authority over these probation officers.

PELRA sets forth the criterion for determining the identity of the public employer in these circumstances, it is “. . . the governing body of a political subdivision or its agency or instrumentality which has final budgetary approval authority for its employees.” Requirements or

restrictions on terms and conditions of employment whether imposed by law or otherwise are not a factor in determining which entity is the public employer under PELRA.

FINDINGS AND ORDERS

1. Itasca County exercises the “final budgetary approval authority” for these Probation Officers as contemplated in Minn. Stat. §179A.03, Subd. 15 (a) (6) (2013); and in the analysis of cases cited above.
2. Itasca County is the public employer under PELRA for the Probation Officers at issue in the instant case.
3. The appropriate unit description is:

All Probation Officers employed by Itasca County, Grand Rapids, Minnesota, who are public employees within the meaning of Minn. Stat. 179A.04, subd. 14, excluding supervisory, confidential, and all other employees.

4. The Union has submitted the required showing of interest through valid authorization cards to warrant the conduct of an election.
5. The Bureau shall conduct a mail ballot election among the eligible employees in accordance with the attached Mail Ballot Election Order.
6. The County shall post this Order at the work locations of all employees involved.

BUREAU OF MEDIATION SERVICES
STATE OF MINNESOTA

JOSH L. TILSEN
Commissioner



Steven G. Hoffmeyer
Hearing Officer

cc: Trish Klein (2)
(Includes Posting Copy)
Scott Lepak
Paula Johnston
Brian Aldes