EMPLOYMENT LAW REPORT

Hot Public Sector Employment Issues Amidst The Great Recession

By Justin D. Cummins and Brendan D. Cummins

I. THE DUTY TO BARGAIN VERSUS MANAGEMENT RIGHTS[1]

The Public Employment Labor Relations Act ("PELRA")[2] requires covered public employers in Minnesota to meet and negotiate with the exclusive representative of their employees about "terms and conditions of employment."[3] The PELRA exempts public employers, however, from bargaining about certain matters of "inherent managerial policy."[4] Public employers must navigate the sometimes murky boundary line between the duty to bargain and management rights as they attempt to cut costs by reducing hours, requiring furloughs, subcontracting work, or restructuring. In interpreting provisions of the PELRA, decisions applying the National Labor Relations Act ("NLRA")[5] are considered persuasive authority.[6]

A. The Duty to Bargain

The Minnesota Supreme Court has explained, "we believe that the legislature intended the scope of the mandatory bargaining area to be broadly construed so that the purpose of resolving labor disputes through negotiation could best be served."[7] The PELRA contains the following definition of terms and conditions of employment that are subject to mandatory bargaining:

> "Terms and conditions of employment" means the hours of employment, the compensation therefor including fringe benefits except retirement contributions or benefits other than employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay, and the employer's personnel policies affecting the working conditions of the employees. In the case of professional employees the term does not mean educational policies of a school district. "Terms and conditions of employment" is subject to section 179A.07.[8]

This definition is open-ended as it refers broadly to the employer's personnel policies "affecting the working conditions of the employees." When there is room for debate, then, the scope of mandatory bargaining should be determined by reference to case law under the PELRA and the NLRA, including the precedent delineating the boundary between the duty to bargain and management rights.

The well established test for determining whether a subject is a "term and condition of employment" and, therefore, a mandatory subject of bargaining, is whether the subject affects the working conditions of employees.[9] This is a case-by-case test that requires fact-based analysis.[10]

Accordingly, a unilateral change by an employer in the terms and conditions of

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employment is a prima facie violation of the employees' collective-bargaining rights under the PELRA.[11] A unilateral change, however, is not per se an unfair labor practice.[12] "The crucial inquiry in such situations is whether the employer's unilateral action deprived the union of its right to negotiate a subject of mandatory bargaining."[13] If the employer gave the union the opportunity to bargain, or if the collective bargaining agreement ("CBA") authorized the change, there is no bad faith refusal to bargain by the employer.[14] "[E]ven in the absence of subjective bad faith, an employer's unilateral change of a term and condition of employment circumvents the statutory obligation to bargain collectively . . . in much the same manner as a flat refusal to bargain."[15] Consequently, an employer violates the duty to bargain if it changes a term and condition in an existing collective bargaining agreement even as it continues to bargain for a future contract.[16]

Importantly, Minnesota courts have recognized that "in order to waive a statutory right to negotiate on a mandatory subject of bargaining, a union must express its intention to waive in 'clear and unmistakable language.'"[17]

The crux of the analysis is whether the topic at issue affects the "terms and conditions of employment. Discipline, such as written reprimands and suspensions, is a mandatory subject of bargaining since it affects the terms and conditions of employment.[18] The establishment and implementation of a ride-share program for police officer trainees is within the purview of management rights. However, a similar program for explorer scouts was subject to bargaining because the policy affected safety, a term and condition of the police officers' employment.[19] A school district's unilateral reduction of group health benefits negotiated under the CBA violates duty to bargain under the PELRA since health benefits are a mandatory subject of bargaining.[20] A school district's unilateral freeze of wages and benefits violated the duty to bargain under the PELRA because wages and benefits are a mandatory subject of bargaining.[21] Other examples of mandatory subjects of bargaining include

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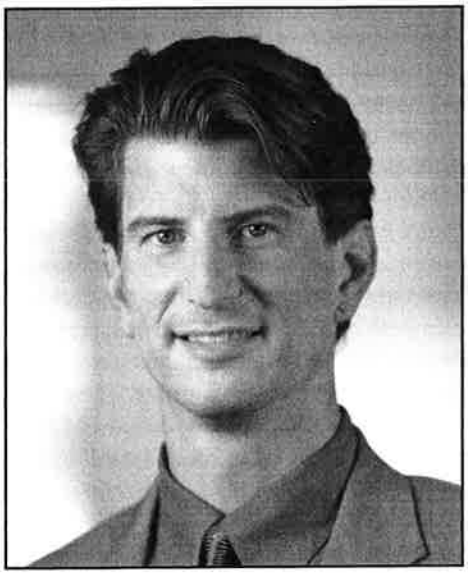

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without limitation hours, wages, benefits, seniority, layoffs, promotional procedures, schedules, vacations, holidays, sick leave and other leaves, discipline, grievance procedures, physical exams, and transfer procedures.

B. Management Rights

The PELRA provides that "[a] public employer is not required to meet and negotiate on matters of inherent managerial policy."[22] The statute defines the scope of management rights as follows:

> Matters of inherent managerial policy include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure, selection of personnel, and direction and the number of personnel.[23]

Notably, a public employer can waive its inherent managerial rights through "clear and unmistakable" language.[24]

In any case, the touchstone is whether the topic at issue is a matter of "inherent managerial policy." While an employer must bargain over the criteria that it uses to determine which employees are subject to transfer, the employer is not required to bargain over the decision that a transfer is required.[25] Although an employer must bargain over aspects of a training program that affect working conditions, the employer is not required to bargain over the decision to establish a training program.[26] An employer's decision to reorganize administrative functions for budgetary reasons is a matter of inherent managerial policy.[27] A school district has the inherent managerial right to reorganize administrative staff for financial reasons, including eliminating the principal's position, making the superintendent a full-time position, and transferring duties of the principal position to the superintendent.[28]

C. Areas of Overlap

The Minnesota Supreme Court has recognized that "areas of 'inherent managerial policy' and 'terms and conditions of employment' oftentimes overlap."[29] If a particular policy does "impinge upon negotiable terms and conditions of employment," then courts will determine whether the policy and terms and conditions are so "inextricably interwoven" that negotiation of the issue involves negotiation of the policy.[30] If the policy and its implementation are distinct or "separable," then negotiation is mandatory with respect to issues relating to the implementation of the policy.[31]

In sum, the decision whether to adopt a particular policy often falls within management rights. However, the implementation of a policy is usually a mandatory subject of bargaining.[32]

II. SELECTING THE PROPER FORUM

Three different legal forums are available for resolution of disputes about the boundary line between the duty to bargain and management rights: arbitration, the Minnesota Bureau of Mediation Services ("BMS"), and the Minnesota courts.

A. Arbitration

The PELRA recognizes that "[u]nresolved disputes between the public employer and its employees are injurious to the public as well as to the parties. Adequate means must be established for minimizing them and providing for their resolution."[33] For this reason, the PELRA provides that "[a]ll contracts must include a grievance procedure providing for compulsory binding arbitration of grievances including all written disciplinary actions."[34] "If the parties cannot agree on the grievance procedure, they are subject to the grievance procedure promulgated by the commissioner under section 179A.04, subdivision 3, clause (h)."[35]

The contractual grievance and arbitration process is the typical procedure for resolving disputes over cost-cutting measures, such as reducing hours, requiring furloughs, subcontracting work, or restructuring. The contract will usually require that all disputes about the interpretation and application of the agreement be resolved through the grievance and arbitration procedure. Thus, a neutral arbitrator is granted the authority to decide whether the employer's actions constitute matters of inherent managerial policy or whether instead they violate the collective bargaining agreement.

Claims of statutory unfair labor practices, such as unilateral changes by the employer, can be heard in the arbitration forum if

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contract interpretation issues are also involved and the applicable contract requires arbitration.[36] The arbitrator's decision must not conflict with the laws of Minnesota or rules promulgated under law, or municipal charters, ordinances, or resolutions (as long as those municipal provisions are consistent with the PELRA).[37]

B. Bureau Of Mediation Services

The primary functions of the BMS are to conduct elections and unit determination proceedings as well as to mediate contract negotiations.[38] However, the BMS can sometimes be drawn into disputes regarding restructuring by employers. For example, if an employer attempts to transfer bargaining unit work to non-bargaining unit employees (such as via a new classification of employees created to avoid the exclusive representative) a unit-clarification petition may be filed to determine whether the exclusive representative should also represent that new classification of employees who are now performing bargaining unit work. This maneuver is sometimes used by employers in an attempt to get a ruling that the exclusive representative does not represent the previously unrepresented employees who are now doing bargaining unit work.

However, the power of the BMS in this area is limited to addressing representational issues, and the BMS lacks the authority to address the contract interpretation issue regarding whether the transfer of bargaining unit duties outside of the unit violated the contract.[39] The BMS has stated that "[T]he PELRA does not confer upon the Bureau the authority to determine which employees or which classifications will perform any particular work."[40] The BMS does not have the authority to assign work to one bargaining unit or one job classification over another.[41] Therefore, the contract interpretation issue regarding removal of bargaining unit work is appropriately addressed in arbitration.

C. Courts

Parties aggrieved by unfair labor practices may pursue an unfair labor practice lawsuit in Minnesota District Court in the county where the conduct occurred.[42] If a union contends that the employer has made a unilateral change in a mandatory subject of bargaining, it may proceed to court without delay.[43] When a union files an unfair labor practice lawsuit, the employer may move to compel arbitration of the dispute if contract interpretation issues are involved and the applicable contract requires arbitration.[44]

Courts also have jurisdiction to hear actions to confirm, vacate, or modify arbitration decisions.[45] The PELRA provides that it is an unfair labor practice to "refus[e] to comply with a valid decision of a binding arbitration panel or arbitrator."[46] In addition, courts can be brought in as "tiebreakers" to clarify the limits on the authority of arguably competing forums. This may occur, for example, if a workforce restructuring results in a unit clarification petition filed with the BMS by the employer and a grievance filed under a contractual work preservation clause by the union. In such cases, the court may decide the scope of authority of the BMS and the arbitrator in the particular case.

III. THE CHALLENGES IN TODAY'S ENVIRONMENT

A. Furloughs

An involuntary furlough is a forced, temporary leave of absence for which employees are not paid. This cost-cutting measure is sometimes seen as an alternative to the more drastic step of layoffs. Involuntary furloughs can be

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short-term or long-term. Employers sometimes institute voluntary furloughs, although this may be a less reliable means of cutting costs.

It is well established that the use of involuntary furloughs or days off without pay is a mandatory subject of bargaining.[47] The National Labor Relations Board ("NLRB") has recognized that an economic emergency can sometimes justify unilateral action by an employer.[48] This exception is very narrow and only applies when "extraordinary" and "unforeseen" events occur causing a "dire financial emergency."[49]

In claiming the unilateral right to require furloughs, the employer may rely on the language of the PELRA, which provides that "selection of personnel, and direction and the number of personnel" is a matter of inherent managerial policy.[50] The employer will also likely cite the management rights clause of the contract, which typically includes the statutory language. The employer may try to link furloughs to programmatic or policy decisions, such as the decision to reduce the duration of a program from 12 months to 10 months in a school district.

The union may respond that furloughs do not deal with either the "selection" or "number" of personnel but rather deal with the terms and conditions of employment of employees such that the employer has a duty to bargain under the PELRA. The union may cite, among other things, the provisions on layoffs, seniority, leave, days off, work schedules, hours of work, accrual of benefits, and union recognition.

If there is contract language that may apply, then the outcome of whether the employer may institute furloughs will likely depend on the arbitrator's interpretation of the applicable language, past practice, and bargaining history.[51]

In the absence of contract language that directly or indirectly restricts the employer's power to implement furloughs, the essential issue is whether involuntary furloughs are a matter of inherent managerial policy or whether they are a mandatory subject of bargaining. The better argument is that furloughs are a mandatory subject of bargaining because they directly affect hours of work, wages, and benefits, which are explicitly defined as terms and conditions of employment for which an employer must bargain.[52] If so, the employer must provide notice and an opportunity to bargain to the union before instituting furloughs.[53]

B. Reduction of Hours

Employers may also attempt to reduce

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working hours to cut costs and "spread the pain" among employees by , for example, reducing the work week from five days to four. It is well settled that changes in the working hours of employees are a mandatory bargaining subject.[54] A unilateral reduction in work hours violates the duty to bargain because it directly impacts not only the hours of work but also compensation.[55]

Arbitrators have ruled that hours of work protections are among the most fundamental in the collective bargaining relationship and are not considered the provenance of management prerogative.[56] Accordingly, arbitrators have held that an employer may not unilaterally reduce the hours of work.[57]

Arbitrators have recently sustained grievances alleging that a unilateral change from a five-day/ 40-hour work week to four-day/ 32-hour work week violated the collective bargaining agreement.[58] Arbitrators also have held that work-hour guarantees must be expressly stated and cannot be implied or inferred.[59] One arbitrator held that a collective bargaining provision that stated "the basic work week shall be (40) forty hours…" expressly guaranteed forty hours of work per week.[60]

C. Contracting Out

The Minnesota Supreme Court has set forth the following analysis regarding this increasingly common tactic among employers:

> In the absence of contractual language relating to contracting out of work, the general arbitration rule is that management has the right to contract out work as long as the action is performed in good faith, it represents a reasonable business decision, it does not result in subversion of the labor agreement, and it does not have the effect of seriously weakening the bargaining unit or important parts of it.[61]

Consequently, Minnesota courts have held that a school district violated the collective bargaining agreement where its contracting out effectively eliminated the entire bargaining unit while the contract remained in effect.[62] The Court reasoned that the school district's actions amounted to a "subversion of the labor agreement" in violation of the "recognition" and "contract in effect" clauses.[63] The Court noted that "[a]lthough the decision to contract out may be an inherent managerial right, the effects of that decision may still be subject to negotiation and arbitration."[64] Thus, the Court upheld the arbitrator's decision that the employer violated the collective bargaining agreement by contracting out its food service work.

In City of South St. Paul,[65] the arbitrator explained that "[i]t is a well-recognized doctrine in labor arbitration that absent clear and unambiguous contract language prohibiting subcontracting, management retains this right if based upon a good faith and reasonable business decision which does not subvert the collective bargaining agreement or seriously weaken the bargaining unit." The arbitrator noted that arbitrators look to various factors to determine whether a decision to subcontract was reasonable, including the following: (1) the type of work involved; (2) the duration of the subcontracted work; (3) the parties' history of negotiations on subcontracting; (4) the existence of special business reasons or emergency situations; (5) the parties' past practice; and (6) the effect of the subcontracting on bargaining unit employees, including whether employees were laid off or lost work hours.[66] The arbitrator in City of South St. Paul upheld the City's power to subcontract, noting that the type of work was not exclusively performed by bargaining unit employees and had been contracted out in the past, the subcontract was of limited duration and had no impact on the bargaining unit, and the subcontracting supported the legitimate business reasons of better using bargaining unit employees' skills elsewhere as well as dealing with spikes in workload.[67]

D. Restructuring and Work Preservation

The PELRA grants public employers inherent managerial authority over "organizational structure, selection of personnel, and direction and the number of personnel."[68] Nonetheless, this inherent managerial power must be exercised consistent with the provisions of the CBA and the duty to bargain.

1. Creating, Eliminating, and Combining Positions

The employer's right to create, eliminate, and combine positions is limited by

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contractual restrictions on transfer of bargaining unit duties outside of the unit. A change in the definition of bargaining-unit work affects the terms and conditions of employment.[69]

In Int'l Union of Operating Eng'rs, Local Union No. 70 and Indep. Sch. Dist. No. 656 of Faribault, Minn.,[70] the arbitrator ruled that the school district violated the CBA when it unilaterally removed duties from the bargaining unit by combining the duties of the Curriculum and Instruction Secretary with the duties of the Assistant to the Superintendent, a confidential position. The arbitrator noted that no "material and substantial" changes in the employer's operations justified the unilateral removal of the duties from the unit. The arbitrator also rejected the argument that the employer had an inherent managerial right to combine the duties.

In Am. Cement Corp.,[71] the arbitrator explained the governing analysis as follows:

> Where arbitrators have upheld management's right to eliminate jobs or classifications and relocate residual job duties, they have stressed that such changes must be made in good faith, based upon factors such as a change in operations, technological improvements, substantially diminished production requirements, established past practice, etc.[72]

In ISD 112 (Chaska) and Int'l Union of Operating Eng'rs, Local 70,[73] the arbitrator considered whether the school district violated the CBA by laying off Head Engineers, a bargaining unit position, and transferring their work to a new position, Building Operations Coordinators, outside of the bargaining unit. The arbitrator ruled that the District violated the contract because it simply re-labeled all the Head Engineers as non-bargaining unit employees with a different job title, thereby effectively eliminating 25% of the bargaining unit.

By contrast, the Minnesota Supreme Court held that a school district's decision to divest a bargaining unit of supervisory employees of their administrative functions to address a reduced budget and declining enrollment was a matter of inherent managerial policy.[74] Similarly, a school district had the inherent managerial right to eliminate a principal's position, make the superintendent a full-time position, and transfer duties of the principal position to the superintendent.[75] Moreover, in ATU, Local 1005 v. Metro. Council, Office of Transit Operators,[76] the

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arbitrator held that the employer did not violate the agreement when it eliminated a position, placed the grievant on layoff, and consolidated essential functions into a newly created bargaining unit position, and the arbitrator further found that organizational restructuring and resulting elimination of jobs and the creation of a new job classification was a matter of inherent managerial discretion.

2. Work Preservation Clauses

Arbitrators will enforce work preservation clauses that prohibit work from being transferred to non-bargaining unit employees even if the removal of duties is part of an overall restructuring process.[77] However, work preservation clauses do not cover work that is not considered unit work.[78]

E. Viable Alternatives To Arbitration

1. Negotiation

The PELRA is based on the central policy that collective bargaining between the employer and the exclusive representative of employees is an effective way to promote orderly, constructive, and cooperative labor relations in the public sector and avoid unresolved disputes that are "injurious to the public."[79] Giving the union a meaningful opportunity to negotiate about often painful cost-cutting measures can alleviate a good deal of conflict and save time and money spent on litigation.

If the parties are able to reach agreement on the appropriate steps to take, it is much less likely that the matter will end up in arbitration or in court. Moreover, if employees are able to have a voice in the process and obtain accurate information about the budgetary challenges, the decision and its implementation are much more likely to have legitimacy and acceptance in the eyes of the workforce.

2. Mediation

The employer and the union may wish to enlist the services of a third-party mediator trained to facilitate agreement in negotiations. The BMS is authorized to "provide mediation services as requested by the parties until the parties reach agreement."

A mediator can engage in shuttle diplomacy and defuse the tensions that sometimes arise in negotiations as a result of deeply held convictions, personality conflicts, or other sources of friction. An effective mediator can identify potential areas of agreement that the parties may be reluctant to disclose to each other and can map out the potential contours of a deal based on private conversations with each of the parties.[80]

3. Court Action

Court action is a last resort when negotiations fail and there is no arbitration remedy available or the employer refuses to pursue arbitration. In those circumstances, the union has no choice but to go to court to enforce the law or the contract.

4. Legislative Measures

Some issues may be appropriate for decision or involvement by elected officials if they are not covered by the contract and as long as the legislation does not conflict with the PELRA.

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[1] A version of this article also appears in the 2010 Public Sector Labor & Employment Law Conference manual.
[2] Minn. Stat. §§ 179A.01, et seq.
[3] Minn. Stat. § 179A.07, Subd. 2; see also Int'l Bhd. of Teamsters, Local 320 v. Minneapolis, 225 N.W.2d 254 (Minn. 1975).
[4] Minn. Stat. § 179A.07, Subd. 1.
[5] 29 U.S.C. §§ 151, et seq.
[6] Education Minnesota-Greenway, Local 1330 v. Indep. Sch. Dist. No. 316, 673 N.W.2d 843, 849 n.3 (Minn. Ct. App. 2004) (citing Int'l Union of Operating Eng'rs, Local No. 49 v. City of Minneapolis, 233 N.W.2d 748, 752 (1975)); Teamsters Local 320, 225N.W.2d at 257 (ruling that the NLRB decisions are "instructive" but not controlling on the scope of the duty to bargain).
[7] Teamsters, Local 320, 225 N.W.2d at 257; see also Ford Motor Co. v. NLRB, 441 U.S. 488, 498-99 (1979) ("The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement.").
[8] Minn. Stat. §. 179A.03, Subd. 19.
[9] Teamsters, Local 320, 225 N.W.2d at 257; see also Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) (adopting the NLRB's test of whether a subject "vitally affects" terms and conditions of employment).
[10] Ford Motor Co., 441 U.S. at 495.
[11] W. St. Paul Fed. of Teachers v. Indep. Sch. Dist. 197, 713 N.W.2d 366, 375 (Minn. Ct. App. 2006); Greenway, 673 N.W.2d at 849.
[12] Id.
[13] Foley Educ. Ass'n v. Indep. Sch. Dist. No. 51, 353 N.W.2d 917, 921 (Minn. 1984).
[14] Id.
[15] Id.

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[16] Greenway, 673 N.W.2d at 851-52.
[17] Law Enforcement Labor Servs., Inc. v. Sherburne County, 695 N.W.2d 630, 638 (Minn. Ct. App. 2005).
[18] Teamsters, Local 320, 225 N.W.2d at 254.
[19] W. St. Paul v. Law Enforcement Labor Servs., 481 N.W.2d 31 (Minn. 1992).
[20] W. St. Paul Fed. of Teachers, 713 N.W.2d at 375.
[21] Greenway, 673 N.W.2d at 851-52.
[22] Minn. Stat. § 179A.07, Subd. 1.
[23] Minn. Stat. § 179A.07, Subd. 1.
[24] Independent School Dist. #182, Crosby-Ironton v. Education Minnesota Crosby Ironton, AFL-CIO, Local 1325, 2008 WL 933495 *5 (Minn. Ct. App. April 8, 2008).
[25] Minneapolis Federation of Teachers, Local 59 v. Minneapolis Special School District No. 1, 258 N.W.2d 802 (Minn. 1977).
[26] St. Paul Fire Fighters, Local 21 v. City of St. Paul, 336 N.W.2d 301, 302 (Minn. 1983).

In January, 2010 the MNAJ conducted a fundraising drive for donations to be given to the American Red Cross for earthquake relief for Haiti. Members responded generously and on February 4th MNAJ President Michael Bryant presented a representative of the Red Cross with 26 checks totalling nearly $5,000. Thank you to all of those members who reached out to those Haitians in need.

[27] Minneapolis Ass'n of Adm'rs and Consultants v. Minneapolis Special Sch. Dist. No. 1, 311 N.W.2d 474, 476-77 (Minn. 1981).
[28] State ex rel. Quiring v. Bd. Of Educ. Of Indep. Sch. Dist. No. 173, 623 N.W.2d 634, 639 (Minn. Ct. App. 2001).
[29] St. Paul Fire Fighters, 336 N.W.2d at 302; Univ. Educ. Ass'n v. Regents of Univ. of Minn., 353 N.W.2d 534, 539 (Minn. 1984); see also Minn. Stat. §. 179A.03, Subd. 19 (clarifying that terms and conditions of employment must be interpreted consistent with section 179A.07).
[30] St. Paul Fire Fighters, 336 N.W.2d at 302.
[31] Minneapolis Federation of Teachers, 258 N.W.2d at 805-06.
[32] Univ. Educ. Ass'n., 353 N.W.2d at 539.
[33] Minn. Stat. § 179.A.01(c).
[34] Minn. Stat. § 179.A.20, Subd. 4.
[35] Id.
[36] Int'l Ass'n of Fire Fighters Local 82 v. City of Minneapolis, 1996 WL 453589 (Minn. Ct. App. Aug. 13, 1996); see also West St. Paul Federation of Teachers, 713 N.W.2d at 377.
[37] Minn. Stat. § 179.A.21, Subd. 3.
[38] Minn. Stat. § 179A.04.
[39] Minn. Stat. § 179A.04 (listing powers of the BMS).
[40] County of Hennepin and AFSCME Council 14 and Teamsters Local 320, BMS Case No. 96-PCL-2128 (July 9, 1996).
[41] Teamsters Local 320 and ISD No. 535 (Rochester) and MSEA, BMS Case No. 00-PCL-744 (May 23, 2000).
[42] Minn. Stat. § 179A.13, Subd. 1.
[43] Greenway, 673 N.W.2d at 843.
[44] Int'l Ass'n of Fire Fighters Local 82 v. City of Minneapolis, 1996 WL 453589 (Minn. Ct. App. Aug. 13, 1996); see also West St. Paul Federation of Teachers, 713 N.W.2d at 377.
[45] Minn. Stat. §§ 572.18, 572.19, 572.20; Law Enforcement Labor Servs., Inc. v. Johnson, 2009 WL 1586810 (Minn. Ct. App. 2009) (holding that it was an unfair labor practice for the employer to refuse to comply with reinstatement of public employee).
[46] Minn. Stat. § 179A.13, Subd. 2(9).
[47] Rocky Mountain Hosp., 289 NLRB 1370, 1371 (1988) (ruling that forced leaves are a mandatory subject of bargaining because they cause a decline in working hours); PCA Indus., Inc., 1995 WL 1918057 (NLRB Div. of Judges, Aug. 18, 1995) (deciding that the employer violated its duty to bargain by reducing unit employees from a five-day work week to a four-day work week without affording the union notice and an opportunity to bargain).
[48] RBE Electronics of S.D., 320 NLRB 80 (1985).
[49] Id.; see also Rocky Mountain Hosp., 289 NLRB at 1371 (rejecting the economic-exigency defense by the employer as means of justifying furloughs).
[50] Minn. Stat. § 179A.07, Subd. 1.
[51] In the matter or arbitration between St. Catherine University and International Union of Operating Engineers, Local 70, FMCS Case No. 09-03705 (Miller, Nov. 19, 2009) (interpreting contract language to find that mandatory days off violated work-hour guarantee and provisions on layoffs, seniority, overtime, and scheduling).
[52] Minn. Stat. § 179A.03, Subd. 19.
[53] In re School District, 2009 AAA Lexis 424 (Buchheit, April 8, 2009) (holding that the school district violated the duty to bargain in the recognition clause by unilaterally mandating unpaid days off).
[54] J.L.M., Inc., d/b/a Sheraton Hotel Waterbury, 312 NLRB 304 (1993) (modified on other grounds); Akron General Medical Center, 232 NLRB 920 (1977).
[55] Korns Bakery, 326 NLRB 1083 (1998) (reduction in hours); Illiana Transit Warehouse Corp., 323 NLRB 111 (1997) (change and reduction in hours); Dickerson-Chapman, Inc., 313 NLRB 907 (1994) (reduction in hours); Equitable Resources Exploration Div., Equitable Resources Energy Co., 307 NLRB 730 (1992) (change of overtime policy), enf'd, 989 F.2d 492 (4th Cir. 1993).
[56] In re School District, American Arbitration Association, 2009 AAA Lexis 424 (Buchheit, April 8, 2009); JM Mfg. Co., 84 LA 679 (holding that an employer cannot unilaterally change the hours of work and rates of pay because changes in duration of shifts impinge directly on the union's right to bargain over rates of pay, wages, hours of work, and other conditions of employment).
[57] In re School District, 2009 AAA Lexis 424 (Buchheit, April 8, 2009) (deciding that the school district violated duty to bargain codified in the recognition clause of the CBA as well as seniority provisions by reducing the work week for twelve-month employees from five days to four days).
[58] In the matter or arbitration between St. Catherine University and International Union of Operating Engineers, Local 70, FMCS Case No. 09-03705 (Miller, Nov. 19, 2009); In re School District, 2009 AAA Lexis 424 (Buchheit, April 8, 2009).
[59] Ampco-Pittsburg Corp., 80 LA 476-77 (1982).

continued on next page

[60] St. Catherine University, id.
[61] Independent Sch. Dist. No. 88 v. School Serv. Employees Union, Local 284, 503 N.W.2d 104, 110 (Minn. 1993) (quoting Elkouri and Elkouri, How Arbitration Works 540 (4th ed. 1985)).
[62] Id.
[63] Id.
[64] Id. at 106-107.
[65] BMS Case No. 98-PA-263 (Miller, 1998).
[66] Id.
[67] Id.
[68] Minn. Stat. Sec. 179A.07, Subd. 1.
[69] Road Sprinkler Fitters Local 669 v. NLRB, 676 F.2d 826 (D.C. Cir. 1982); Almeida Bus Lines, 142 NLRB 445 (1963).
[70] BMS Case No. 09-PA-0214 (Paull, August 14, 2009).
[71] 48 LA 72, 76 (Block, 1967).
[72] Id. (citing Elkouri and Elkouri, How Arbitration Works 497 (4th ed. 1985)).
[73] BMS Case 07 PA 0893 (O'Toole, September 9, 2007).
[74] Minneapolis Ass'n of Adm'rs and Consultants v. Minneapolis Special Sch. Dist. No. 1, 311 N.W.2d 474, 476-77 (Minn. 1981).
[75] State ex rel. Quiring v. Bd. Of Educ. Of Indep. Sch. Dist. No. 173, 623 N.W.2d 634, 639 (Minn. Ct. App. 2001).
[76] BMS 96-PA-1461 (Boyer, Aug. 2, 1996).
[77] In re Met. Council/ Metro Transit, BMS Case No. 07-PA-726 (Miller, 2008) (finding that although management had the right to reorganize its payroll department and consolidate positions, it lacked the right to remove duties from the bargaining unit in the process in violation of the work preservation clause).
[78] Metro. Airports Comm'n v. Metro. Airports Police Fed'n, 443 N.W.2d 519, 525 (Minn. 1989) ("Assignment of work which is not unit work does not affect the terms and conditions of unit members' employment. The arbitrator's decision did not make the work preservation provision in the collective bargaining unit unenforceable; it simply found the work which was the subject of the grievance was not unit work.").
[79] Minn. Stat. § 179A.01.
[80] Minn. Stat. § 179A.04, Subd. 3(a)(1).

they have the right to be made whole before the no-fault carrier.

Intersection Photographs.

Good aerial photographs of intersections can be obtained from different sources, among which are county highway departments or city street departments. Another source is Aero-Metric at www.aerometric.com, based out of Maple Grove, MN, which often has contracts with the government units for doing these photographs. Google and other on-line sources can sometimes provide these views. However, it is always prudent to have the clients, eyewitnesses and the police involved verify the layout in the photos, as adjacent landmarks and even the roads and signage can change.

Billing In Excess of Medicare Payment?

A member recently inquired on one of the listserves whether a medical provider could accept the Medicare payment and then bill the client additionally for the service. Member and Dr. **David Ketroser** quickly provided the federal citation that prohibits this.

Financial Bias Information on Adverse Doctors.

Member **Tom Conlin** recently heard what other members have, that some of the biased adverse medical examiners may be refusing to do the medical examinations if they are forced to provide financial information. Tom agreed to a Rule 35 medical exam only if the defense provided specific adverse exam financial information for that doctor over the last two years. The defense refused and brought their motion for the Rule 35 examination. Judge Rancourt of Chisago County refused to order the financial information as a condition of the exam, but advised Tom that he could subpoena the same. Some members have reported good success with the subpoena being directed to the doctor's corporate medical clinic, instead of or in addition to the doctor. Member **Paul Otten** obtained a good district court order from Dakota County in *Ali v. Koch* that said if the adverse doctor doesn't provide the financial information, he cannot testify. This order is on file with MNAJ.

Unemployment and No-Fault Wage Loss.

MNAJ's current President **Mike Bryant** recently pointed out an aspect of no-fault income loss benefits that some members may be unaware of. Under M.S. 65B.44, Subd. 3, an injured person who was on unemployment and prevented from work by a vehicle accident is entitled to reimbursement of the full unemployment amount that he or she was receiving, or $250 per week, whichever is lesser. Clients, members or adjusters could easily assume that the amount due is 85% of the unemployment amount that had been paid. This is a very pertinent practice pointer with so many more of our citizens on unemployment benefits, and the legal reality that such benefits are terminated when a client becomes unable to work because of the vehicle accident. It is also worth reminding clients to be very careful to be accurate when filling out unemployment documents for the state office, to avoid being accused of fraud.

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* Cathedral of St. Mary: Built by my grandfather, c 1903