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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0798**

In the Matter of a Petition for Decertification
of an Exclusive Representative for Certain Employees
of the State of Minnesota.

**Filed January 16, 2018
Affirmed; motion to strike denied
Johnson, Judge**

Bureau of Mediation Services
File No. 17PDE0404

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Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Since 2014, personal-care assistants who provide home-based health-care services to Medicaid recipients have been represented by a union. In 2016, seven personal-care assistants petitioned the bureau of mediation services to decertify the union. The bureau gathered information from the petitioning personal-care assistants and the union and

ultimately denied the decertification petition on the ground that the petitioners had not made a sufficient showing of interest in decertification. On appeal, the petitioning personal-care assistants argue that the bureau erred by not further investigating the facts relevant to their petition and by not conducting a hearing on the petition. We conclude that the bureau did not err and, therefore, affirm.

FACTS

In 2013, the legislature and the governor enacted into law the Individual Providers of Direct Support Services Representation Act. *See* 2013 Minn. Laws ch. 128, art. 2, at 2173-78. The act provides that personal-care attendants (PCAs) who perform home-based health-care services for Medicaid recipients throughout the state may elect to be represented by a union for purposes of the Public Employment Labor Relations Act (PELRA), Minn. Stat. ch. 179A. *See* Minn. Stat. § 179A.54 (2016). Under PELRA, one or more persons in a bargaining unit “may obtain a decertification election upon petition to the commissioner [of the bureau of mediation services] stating the certified representative no longer represents the majority of the employees in an established unit and that at least 30 percent of the employees wish to be unrepresented.” Minn. Stat. § 179A.12, subd. 3 (2016); *see also* Minn. R. 5510.0710, subp. 2. But a decertification petition must be filed within a 60-day period that is between 270 and 210 days before the expiration of a collective bargaining agreement. Minn. Stat. § 179A.12, subd. 4; Minn. R. 5510.0510.

In 2014, a certification election was held for the bargaining unit. A majority of the 5,849 voting PCAs chose to be represented by the Service Employees International Union Healthcare Minnesota (SEIU). Accordingly, the bureau of mediation services (BMS)

certified SEIU as the exclusive representative of the state-wide bargaining unit. SEIU and the PCAs in the bargaining unit entered into a collective bargaining agreement for the period of July 1, 2015, to June 30, 2017.

The relators in this appeal are seven PCAs who are members of the bargaining unit but wish not to be represented by SEIU. They filed a decertification petition with BMS in early December 2016. Before doing so, they attempted to contact other PCAs in the bargaining unit to solicit support for their decertification effort. In May 2016, they asked both BMS and the department of human services (DHS) for a list of PCAs in the bargaining unit, which would allow them to contact PCAs and obtain signatures on authorization cards to indicate support for decertification. BMS provided relators with a list that had been created for purposes of the certification election in 2014. That list was outdated and, according to relators, had numerous other data-quality problems that impeded relators' ability to contact PCAs in the bargaining unit. In September 2016, DHS provided relators with a revised list, but the revised list was over-inclusive in that it included many PCAs who were not in the bargaining unit because they did not provide the type of services described in the statute. *See* Minn. Stat. § 179A.54, subd. 1(b) (defining "individual provider" as defined in Minn. Stat. § 256B.0711, subd. 1(d) (2016)).

In October 2016, the petitioning PCAs commenced a lawsuit against BMS and DHS in the Ramsey County District Court. Their claim against DHS was based on its statutory obligation to compile and maintain a list of PCAs who have provided personal-care services to Medicaid recipients and received payment for such services within the previous six months. *See* Minn. Stat. § 256B.0711, subd. 4(f) (2016). Their claim against BMS was

based on its statutory obligation to make DHS's list publicly available if the list is available to unions. See Minn. Stat. § 179A.54, subd. 9 (2016). Ten days later, the district court ordered DHS to give relators a current list of PCAs in the bargaining unit. See *Greene v. Bureau of Mediation Servs.*, A16-1863, 2017 WL 3122343 (Minn. App. July 24, 2017). DHS subsequently provided relators with a series of three revised lists, but each was deficient in some respect: the third list was incomplete, and the fourth and fifth lists did not include home addresses or telephone numbers, as required by the district court's order. On November 29, 2016, DHS provided relators with a sixth list, which included 27,361 PCAs whom DHS deemed to be members of the bargaining unit. Relators then began making telephone calls to persons on the list.

Relators filed a decertification petition with BMS three days later, on December 2, 2016, the last day on which relators could do so within the statutorily required 60-day period. See Minn. Stat. § 179A.12, subd. 4. With their petition, relators submitted 2,596 authorization cards signed by PCAs who indicated that they favored decertification. In their petition, relators alleged that the bargaining unit consisted of approximately 8,000 PCAs. If there were 8,000 PCAs in the bargaining unit, the 2,596 PCAs who signed authorization cards would constitute 32.5 percent of the unit, thereby satisfying the 30-percent threshold.

On December 6, 2016, BMS issued an order stating that relators' petition was timely and that they had made a sufficient showing of interest to warrant a decertification election. The following day, SEIU asked BMS to reconsider the matter. SEIU asserted that relators had understated the number of PCAs in the bargaining unit and that the actual number was

27,361, which is the number of PCAs included in DHS's sixth list. If there were 27,361 PCAs in the bargaining unit, the 2,596 PCAs who signed authorization cards would constitute only 9.5 percent of the unit, thereby falling below the 30-percent threshold.

On December 9, 2016, relators responded to SEIU's motion for reconsideration. Relators submitted five affidavits executed by persons who attempted to contact persons included in the first list of PCAs, which had been compiled in 2014 and was provided to relators in May 2016. Those five affidavits identify certain addresses that could not be found, certain addresses that did not contain residences, and certain addresses for residences that were not occupied. Relators also submitted an affidavit executed by an attorney that summarizes efforts to contact persons included in the sixth list of PCAs, which was provided to relators in November 2016. That affidavit states, among other things, that 9,579 telephone calls had been made after relators received DHS's sixth list and that callers had connected with 480 of the persons called. The attorney's affidavit also states that 17.08 percent of the persons reached stated that they were not a PCA and that 11.46 percent of the persons reached stated that they performed home-based health-care services that excluded them from the bargaining unit. The attorney's affidavit further states that only 1,955 names were on both the first list from May 2016 and the sixth list from November 2016, and that 10,958 names were on both the second list from September 2016 and the sixth list from November 2016. The attorney's affidavit concludes by stating the affiant's conclusion that the bargaining unit consists of approximately 8,000 to 8,500 persons.

On December 13, 2016, BMS's commissioner issued a six-page order granting SEIU's request for reconsideration. The order states, "For the purpose of determining a

showing of interest in this matter, the relevant list shall be the November 29, 2016 list provided by DHS.” The order required DHS to submit, within six days, “a summary explaining how [DHS] determined who is included in the bargaining unit” and required relators to submit, within 14 days, “substantial evidence demonstrating that its estimate of approximately 8,000 eligible bargaining employees is accurate.”

DHS responded with a four-page letter describing the process by which it prepared the sixth list. Relators also responded with a four-page letter, which noted that the sixth list was not current because it included active PCAs as of October 2016, not November 2016, as required by statute in light of relators’ filing of a decertification petition in early December 2016. *See* Minn. Stat. § 256B.0711, subd. 4(f). In response to BMS’s request for substantial evidence, relators primarily relied on their previous submissions. With their response, relators submitted 289 additional authorization cards signed by PCAs who support the decertification petition. Relators concluded by asking BMS “to conduct a thorough and complete investigation and hearing” and to allow them six additional months to supplement their showing of interest. In January 2017, relators submitted 1,642 additional authorization cards signed by PCAs who support the decertification petition.

On February 7, 2017, BMS ordered DHS to submit a list of PCAs as of November 30, 2016. DHS did so on February 8, 2017, by submitting a seventh and final list that includes 28,144 PCAs. On February 10, 2017, BMS’s commissioner issued a three-page order, which states that, based on the seventh list, relators “failed to submit the requisite 30 percent showing of interest” and that the decertification petition is dismissed.

Ten days later, relators requested reconsideration of the dismissal. They argued, among other things, that they had been prejudiced by not receiving an accurate list of members of the bargaining unit on a timely basis and that BMS had not conducted an investigation or a hearing as required by law. On April 21, 2017, BMS's acting commissioner issued a seven-page order that denied relators' request for reconsideration.

Relators seek judicial review of BMS's decision pursuant to a writ of certiorari. Both BMS and SEIU have appeared in this court as respondents.

D E C I S I O N

Relators argue that BMS erred by dismissing their decertification petition and denying their request for reconsideration. Their argument has two parts. First, they argue that BMS erred by not conducting an appropriate investigation and by not conducting a hearing. Second, they argue that BMS erred by not timely providing them with an accurate list of bargaining-unit members and not ordering DHS to do so. They ask this court to remand the matter to BMS for further investigation or a hearing or both.

“An appellate court may reverse an agency decision if the decision reflects an error of law, if it is arbitrary, or if its findings are unsupported” by substantial evidence. *In re Decertification of an Exclusive Representative of Certain Emps. of the University of Minnesota, Unit 9*, 730 N.W.2d 300, 303 (Minn. App. 2007). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Patzwald v. Public Emp't Relations Bd.*, 306 N.W.2d 118, 120 (Minn. 1981) (internal alterations and quotation omitted). The burden of establishing a lack of substantial

evidence is on the party challenging the agency decision. *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977).

A ruling is arbitrary and capricious if an agency: (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise.

In re Review of 2005 Annual Adjustment of Charges for all Elec. & Gas Utils., 768 N.W.2d 112, 118 (Minn. 2009) (quotation omitted). “The agency decision will be presumed correct and an appellate court will defer ‘to the agency’s expertise and special knowledge in the field of its technical training, education, and experience.’” *In re Petition for Clarification of an Appropriate Unit*, 660 N.W.2d 467, 469-70 (Minn. App. 2003), review denied (Minn. July 15, 2003).

A.

Relators first argue that BMS’s decision to dismiss their petition without further investigation and without a hearing “is unsupported by substantial evidence, based upon errors of law, and is arbitrary and capricious.”

As stated above, a prerequisite to a decertification election is a showing that “at least 30 percent of the employees wish to be unrepresented.” Minn. Stat. § 179A.12, subd. 3. “Evidence of a showing of interest in the form of authorization signatures must accompany all petitions.” Minn. R. 5510.0710, subp. 2. If a decertification petition is filed, “the commissioner shall hold hearings or conduct an investigation as required.” Minn. R. 5510.1910, subp. 4. If BMS conducts a hearing, “Evidence of a showing of interest may

continue to be submitted up to the close of the hearing.” Minn. R. 5510.0710, subp. 2. At a hearing, all parties “shall have the right to present evidence, rebuttal testimony and argument on the issues, and to cross-examine witnesses.” Minn. R. 5510.1910, subp. 8.

In its order denying relators’ request for reconsideration, BMS initially noted that relators had submitted additional authorization cards on three occasions after filing their petition and that BMS had accepted those additional cards. The total number of cards submitted by relators before BMS’s February 10, 2017 dismissal was 4,527. BMS’s April 21, 2017 order also states that BMS “conducted an appropriate investigation . . . by requiring the parties to submit written arguments concerning the showing of interest” and by “carefully consider[ing] the arguments of both parties.” The order states that BMS “obtained a list of eligible voters from DHS and asked DHS to submit a detailed explanation of the methods used to create the list” and that BMS counted the authorization cards and “determined that the Petitioners’ showing of interest was inadequate.” The order concludes by stating that BMS “used its discretion appropriately to decide that the list was reasonably reliable for purposes of establishing the showing of interest, and a hearing was not necessary.”

We begin our analysis by considering BMS’s and SEIU’s responsive arguments that no further investigation or hearing was required because DHS’s list is, as a matter of law, conclusive such that BMS was required to accept it. Respondents rely on a statute that states, “The individual providers eligible to vote in any such election shall be those individual providers on the monthly list of individual providers compiled . . . most recently preceding the filing of the election petition.” Minn. Stat. § 179A.54, subd. 10. But the

statute requiring a 30-percent showing of interest does not refer to the DHS list and does not refer to PCAs who are eligible to vote in a decertification election. Rather, the statute requires a showing of interest of 30 percent of “employees” in the established unit. Minn. Stat. § 179A.12, subd. 3. In this particular context, the employees in the established unit are the PCAs who provide services to participants of the relevant programs. Minn. Stat. § 179A.54, subd. 2; *see also id.*, subd. 1 (referring to Minn. Stat. § 256B.0711, subd. 1(d)). The list that DHS is required to compile and maintain consists of PCAs “who have been paid for providing direct support services to participants within the previous six months.” Minn. Stat. § 256B.0711, subd. 4(f). A PCA may be included in a list maintained pursuant to section 256B.0711, subdivision 4(f), even if he or she has ceased performing services, in which event he or she no longer would be an “employee.” Furthermore, BMS’s actions demonstrate that BMS did not consider the DHS list to be determinative. BMS required DHS to submit information concerning the process by which DHS had prepared the list. Thereafter, BMS considered DHS’s explanations and determined that the list is “reasonably reliable.”

Relators’ argument is based on an administrative rule that states, “Upon receipt of a petition, the commissioner shall hold hearings or conduct an investigation as required.” Minn. R. 5510.1910, subp. 4. No precedential opinion specifies when an investigation or hearing is “required.”¹ Common sense suggests that an investigation or a hearing would

¹Likewise, no non-precedential opinion specifies when an investigation or hearing is “required.” In *Minnesota Teamsters Pub. & Law Enf’t Emps., Local No. 320 v. City of Coon Rapids*, No. A12-1349, 2013 WL 1500975 (Minn. App. 2013), this court considered an argument based on rule 5510.1910, subpart 4, and concluded that the rule does not

be required if there were a reasonable possibility that further investigation or a hearing might result in a conclusion that the 30-percent threshold for a showing of interest has been satisfied. At oral argument, relators' attorney agreed that BMS need not go so far as to determine whether *every* person included in a list of PCAs actually is an employee if such a determination would not affect the ultimate conclusion as to whether a sufficient showing of interest has been made. Rather, relators' attorney agreed that BMS may deny a decertification petition without determining the precise number of PCAs in the bargaining unit if there is not a reasonable possibility that further investigation or a hearing might result in a conclusion that the 30-percent threshold for a showing of interest has been satisfied.

With that practical standard in mind, we turn to the facts in the agency record to determine whether they suggest a reasonable possibility that further investigation or a hearing might have resulted in a conclusion that the 30-percent threshold for a showing of interest was satisfied. At the time of BMS's February 10, 2017 decision, relators had submitted a total of 4,527 authorization cards supporting decertification. That number of cards would satisfy the 30-percent threshold only if the number of employees were 15,090 or fewer. To establish that the bargaining unit consisted of 15,090 or fewer PCAs, relators would have needed to convince BMS that at least 13,054 (or 46.38 percent) of the 28,144 PCAs on DHS's seventh list actually were not employees when the petition was filed.

impose any particular standard on an investigation. *Id.* at *1; see also *In re Petition for Clarification of Appropriate Unit*, No. A03-421, 2003 WL 22999129, at *2 (Minn. App. Dec. 23, 2003).

In reviewing relators' evidence, we set to one side the affidavits that challenged a substantial number of addresses that were included in the first list, which was prepared in 2014. As all parties acknowledge, that list was outdated. Accordingly, it would not be reasonable to assume that the degree of inaccuracy inherent in the first list is present in the sixth list or the seventh list, which were current as of September 2016 and November 2016, respectively.

In reviewing relators' evidence concerning the number of employees in the bargaining unit, we focus on the evidence that tends to show that fewer than all 28,144 persons on DHS's seventh list are PCAs within the bargaining unit. Relators' attorney's affidavit states that 28.54 percent of the persons who were contacted responded by indicating that they were not a member of the bargaining unit. Assuming that statement to be representative of all PCAs would imply that the size of the bargaining unit is 28.54 percent smaller than represented by the seventh list, *i.e.*, that the bargaining unit consists of 20,112 PCAs. If that were so, the 4,527 authorization cards submitted by relators as of February 10, 2017, would reflect a showing of interest of 22.51 percent, which still would be below the 30-percent threshold.

Given the evidence in the agency record, there is not a reasonable possibility that, if all 28,144 persons on DHS's seventh list had been contacted, a sufficient number of them would have been determined to not actually be in the bargaining unit. As stated above, 46.38 percent of the persons on the seventh list would need to be struck before the bargaining unit would be small enough to allow relators to satisfy the 30-percent threshold with 4,527 authorization cards. There is no indication in the record that relators' sample

of 480 persons was so unrepresentative of the entirety of the seventh list. Likewise, there is no evidence in the record as to the probability that, despite the 28.54 percent reduction suggested by relators' sample of 480 persons, the bargaining unit could, after further investigation or a hearing, be reduced by 46.38 percent or more to achieve an accurate count of members of the bargaining unit. In the absence of statistical evidence, BMS had no basis from which to determine, even by rough approximation or extrapolation, that the bargaining unit actually is as small as 20,112, which would be necessary for relators to prevail in their showing of interest.

In addition, we are aware that BMS was operating under practical time constraints. If a union is decertified, the decertification is effective at the conclusion of the term of the then-current collective-bargaining agreement. Minn. R. 5510.2310, subp. 2. In this matter, the collective-bargaining agreement between SEIU and the bargaining unit was due to expire on June 30, 2017. It would have been preferable for BMS to determine the need for a decertification election early enough that an election could be conducted in the first half of 2017. If BMS were to make such a determination that would cause an election to be held in the second half of the year, and if the eligible voters were to approve decertification, a decertified union would continue to represent non-consenting members for nearly two years. Although BMS did not so state in any of its orders, we presume that BMS sought to resolve relators' petition well before the expiration of the 2015-2017 contract and before the usual time for contract negotiations.

Furthermore, we are mindful of the special deference that is owed to administrative agencies when they engage in discretionary decisions that implement their own

administrative rules. *See Resident v. Noot*, 305 N.W.2d 311, 312 (Minn. 1981). The rule on which relators' argument is based provides that "the commissioner shall hold hearings or conduct an investigation *as required*." Minn. R. 5510.1910, subp. 4 (emphasis added). Given the evidence in the agency record, we cannot say that BMS acted arbitrarily or capriciously by concluding that further investigation or a hearing was not required.

Relators also rely on a statute that provides as follows:

The commissioner shall, upon receipt of *an employee organization's petition* to the commissioner under subdivision 3, investigate to determine if sufficient evidence of a question of representation exists and hold hearings necessary to determine the appropriate unit and other matters necessary to determine the representation rights of the affected employees and employer.

Minn. Stat. § 179A.12, subd. 5 (emphasis added). Relators' reliance on this statute is misplaced because the statute does not apply to a *decertification* petition. By its plain language, the statute applies only to a certification petition filed by an employee organization, *i.e.*, a union. *See* Minn. Stat. § 179A.03, subd. 6 (defining "employee organization" to mean "any union or organization of public employees whose purpose is . . . to deal with public employers concerning grievances and terms and conditions of employment").

Thus, we conclude that BMS did not err by dismissing relators' petition without further investigation and without a hearing.

B.

Relators also argue that BMS erred by not providing them with an accurate list of bargaining-unit members in a timely manner and by not ordering DHS to do so. They

contend that BMS's decision "failed to account for the fact that Relators were illegally denied access to a timely, updated, and accurate list of PCAs within the bargaining unit."

As stated above, DHS is obligated by statute to "compile and maintain a list of the names and addresses of all individual providers who have been paid for providing direct support services to participants within the previous six months." Minn. Stat. § 256B.0711, subd. 4(f). DHS also is obligated by statute to "share the lists with others as needed for the state to meet its obligations under [PELRA] and made applicable to individual providers under section 179A.54, and to facilitate the representational processes under section 179A.54, subdivisions 9 and 10." *Id.* DHS's obligation to share the lists with BMS allows BMS to satisfy its obligation to "provide lists compiled under section 256B.0711, subdivision 4, paragraph (f), upon request, to any exclusive representative of individual providers." *See* Minn. Stat. § 179A.54, subd. 9. Indeed, the statute expressly requires DHS to share the lists with BMS: "To facilitate operation of this section, the commissioner of human services shall provide all lists to the commissioner of the Bureau of Mediation Services, upon the request of the commissioner of the Bureau of Mediation Services." *Id.* Furthermore, if BMS has made the list "available to an employee organization under this subdivision, the list must be made publicly available," which means that PCAs such as relators have a right to the list. *Id.*

In its order denying relators' request for reconsideration, BMS acknowledged relators' difficulties in contacting members of the bargaining unit. BMS commented, "It is well recognized that the workforce of individual providers is different from that of a typical workforce" because they generally "do not report to a common workplace or

maintain a traditional business address” and because they “often come in and out of the bargaining unit as they work multiple jobs.” Accordingly, BMS stated that the “most reasonable explanation for Petitioners’ difficulties in contacting individual providers is the very nature of the ever-changing workforce, not that the DHS lists misstated the number of individual providers by a magnitude so great that Petitioners’ showing of interest reached the required 30 percent.” BMS also stated that relators were given an opportunity to supplement their showing of interest after they filed their petition. BMS noted that relators submitted additional authorization cards on three occasions and that such cards were considered by BMS.

To be sure, mistakes were made with respect to the list, and those mistakes undoubtedly impeded relators’ attempts to garner support for their decertification effort before the applicable statutory deadline. Relators ultimately received a proper list, albeit long after their first request. It appears that relators received a proper list only because they diligently sought relief in the Ramsey County District Court, which promptly granted the relief sought. *See Greene*, A16-1863, 2017 WL 3122343. Relators’ brief appropriately notes that “this issue has already been decided by the district court in *Greene*.” Even so, relators had very little time to work with the sixth list before the statutory deadline for filing their decertification petition, and practically no time to work with the seventh list before BMS issued its February 10, 2017 order.

We are mindful that BMS was not primarily responsible for relators’ inability to obtain a proper list when they first requested it. DHS was and is the entity within state government with the statutory obligation to “compile and maintain” a list of eligible voters.

See Minn. Stat. § 256B.0711, subd. 4(f). BMS was and is obligated to share the list with unions and the general public, but BMS cannot do so unless and until it has received the list from DHS. See Minn. Stat. § 179A.54, subd. 9. We understand that this bargaining unit is unusual in nature and that the list had not previously been compiled since the statutory obligation was imposed in 2013. Yet the need for such a list was foreseeable. We trust that, now that a list has been compiled, DHS will continue to maintain it in a manner that ensures that any future requests will be satisfied promptly.

Relators contend that BMS “failed to account for the fact that Relators were illegally denied access to a timely, updated, and accurate list of PCAs within the bargaining unit.” We disagree. BMS’s orders frequently expressed an awareness of the delays in providing relators with the lists to which they were due. BMS allowed relators to supplement their initial showing of interest on three occasions over a period of more than two months, and the additional authorization cards that they submitted were considered and counted before BMS made its final agency decision.

Relators’ second argument appears to be based on an implicit premise that any prejudice to their ability to make a showing of interest must result in a judicial remedy. Relators have not cited caselaw to support such a premise. Furthermore, relators’ second argument is complicated by practical realities. It is difficult to conceive of a remedy that is not unduly prejudicial to the interests of those PCAs who prefer to remain members of SEIU and to SEIU itself.

Thus, we conclude that BMS did not commit reversible err by not providing relators with an accurate list of bargaining-unit members in a timely manner or by not ordering DHS to do so.

C.

BMS filed a motion to strike before oral argument. BMS seeks to strike pages 12-27 and pages 49-69 from relators' addendum on the ground that those documents are not in the agency record. Because our analysis of the issues and our resolution of the appeal is not affected by these documents, we deny the motion as moot.

Affirmed; motion to strike denied.