

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1157**

In the Matter of a Petition for Clarification of an Appropriate Unit Hibbing Police
Federation, Hibbing, Minnesota,
Relator,

vs.

City of Hibbing, Minnesota,
Respondent,

Minnesota Association of Professional Employees, Shoreview, Minnesota,
Respondent,

Bureau of Mediation Services,
Respondent.

**Filed June 8, 2020
Affirmed
Connolly, Judge**

Bureau of Mediation Services
File No. 19PCL0220

Robert J. Fowler, Fowler Ditsch, LLC, Little Canada, Minnesota (for relator)

Richard E. Prebich, Hannah N. Casey Forti, Prebich Law Office, P.C., Hibbing, Minnesota
(for respondent City of Hibbing)

Keith Ellison, Attorney General, Corinne Wright-MacLeod, Assistant Attorney General,
St. Paul, Minnesota (for respondent Bureau of Mediation Services)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Cochran, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Relator-union challenges a unit clarification order issued by respondent Bureau of Mediation Services (the BMS) that declined to remove police captains from a bargaining unit that included other police officers and transfer them to a proposed new unit, arguing that (1) the BMS failed to apply the correct legal standard, (2) the proposed unit should have been certified, and (3) alternatively, the BMS's finding that the captains were not supervisory was erroneous and arbitrary and capricious. Because the finding that the captains are not supervisory is not erroneous or arbitrary and capricious, and there is no basis to remove them from their current unit or to establish the proposed unit, we affirm.

FACTS

Relator Hibbing Police Federation (HPF) is a single bargaining unit that includes all Hibbing police officers except the chief of police, i.e., captains, patrol officers, and sergeants. Respondents are the City of Hibbing (Hibbing), which employs all Hibbing police officers, and the BMS, which, through its hearing officer (HO), was the decision-maker in the conflicts between HPF and Hibbing.

In September 2018, the members of HPF voted to have the captains removed from the single unit that then composed HPF and formed into another unit, known as the "Captains' Unit," which would have been a second unit in HPF, and not placed in the

Minnesota Association of Professional Employees (MAPE).¹ HPF filed a “petition for clarification or amendment of appropriate unit” with the BMS, stating that the four captains among the Hibbing police officers were essential, supervisory, and confidential; also, they had “no community of interest with [MAPE], as they are essential and licensed, and [MAPE] has no experience with police representation, such as officer-involved shootings.” Therefore, the captains sought to transfer to a new bargaining unit, called the Captains’ Unit, that HPF would represent as its second bargaining unit.

The BMS conducted a hearing on the petition between Hibbing and HPF; police captains testified at the hearing. The HO stated, “The issue, for the record, is: Is the position of Captain in the Hibbing Police Department a supervisory or confidential position, as the . . . terms are defined by [the Public Employment Labor Relations Act (PELRA)]; and [if so,] what, if any, is the appropriate unit for its inclusion?”

When asked for its opening statement, HPF replied:

[W]e submitted . . . the outline of what we believe the issues are. . . . [T]he position for the Captains in the Federation is that the Captains are supervisory or confidential and should be separated from the existing [HPF] all inclusive unit that exists now, and so they seek to be represented by the same union [i.e., HPF] but in a Unit 2 of just Captains.

So the broad issue that you stated into the record we believe is correct generally; but to break it down more specifically, . . . there is no Deputy Chief position above that of Captain. . . .

So the first way to become supervisory and confidential is to be the department head’s next in command . . . and we believe that the rank of Captain is that next in command as it exists today, the date of the hearing. . . .

¹ While MAPE is listed as a respondent, it takes no part in this appeal and did not submit a brief.

The second is that applying [Minn. Stat. § 179A.03, subd. 17 (2018)] under PELRA of the 10 part test, we believe the Captains easily meet more than half of those criteria[.] . . . [W]e're going to present evidence on those ten factors.

HPF went on to explain its view that the captains should have their own Captains' Unit rather than be placed in MAPE and concluded its opening statement with, "the key inquiry is going to really be whether these folks are truly supervisory."

Hibbing in its opening statement said its position was that "the Captains are not supervisory, and that has been sustained by 14 years of actual practice." The remainder of the 293-page transcript shows that the major issue of the hearing was whether captains were supervisory and the secondary issue was whether the captains, if supervisory, should join MAPE or form a separate Captains' Unit.

Hibbing and HPF submitted post-hearing briefs. Hibbing reiterated the arguments made at the hearing on whether the captains were supervisory employees and, if so, whether they should be placed in MAPE or form a Captains' Unit. HPF, despite having said at the hearing that, "assuming that the Captains are, as we will allege, supervisory, then the question becomes is there a community of interest with MAPE," changed its theory of the case in its post-hearing brief and argued that the first and major issue was whether the Captains' Unit was "appropriate" within the meaning of Minn. Stat. § 179A.09, subd. 1 (2018) (concerning the determination of bargaining units).

The HO's order did not address the appropriateness of the proposed Captains' Unit under Minn. Stat. § 179A.09, subd. 1, perhaps because, throughout the lengthy hearing,

neither party had indicated that the appropriateness of that unit was an issue² and both parties had agreed with the HO's statement that the primary issue was whether the captains were supervisory employees within the meaning of Minn. Stat. § 179A.03, subd. 17. The HO determined that the captains were not supervisory within the meaning of the statute and should remain within the unit represented by HPF. HPF now argues that this decision was unreasonable.³

D E C I S I O N

“Decisions of the commissioner [of the Bureau of Mediation Services] relating to supervisory, confidential, essential, and professional employees . . . may be reviewed on certiorari by the court of appeals.” Minn. Stat. § 179A.051(a) (2018). “In a challenge to the decision of an administrative agency requiring this court to construe the words of a statute, we review the statutory interpretation *de novo* and then consider whether the agency's decision was reasonable in light of the proper meaning of the statute.” *In re Application of Hildebrandt for Duty-Related Corr. Plan Disability Benefits*, 701 N.W.2d 293, 298 (Minn. App. 2005).

² We note, however, that neither the captains' testimony nor any other evidence indicated that the present HPF is not an appropriate unit for captains within the meaning of Minn. Stat. § 179A.09, and there appears to be no history of problems with contract negotiations or employee morale.

³ Having determined that the captains were not supervisory and therefore had no reason to leave HPF, the HO did not address either (1) whether captains should go into MAPE or into a proposed Captains' Unit or (2) whether the proposed Captains Unit would be appropriate under Minn. Stat. § 179A.09, subd. 1.

It is clear from the opening pages of the hearing transcript, quoted above, that the HO and the parties agreed the issue was whether the captains in the Hibbing Police Department were supervisory employees within the meaning of Minn. Stat. § 179A.03, subd. 17. That statute provides:

“Supervisory employee” means a person who has the authority to undertake a majority of the following supervisory functions in the interest of the employer: [1] hiring, [2] transfer, [3] suspension, [4] promotion, [5] discharge, [6] assignment, [7] reward, or [8] discipline of other employees, [9] direction of the work of other employees, or [10] adjustment of other employees’ grievances on behalf of the employer. . . . [T]he exercise of the authority by the person may not be merely routine or clerical in nature but must require the use of independent judgment. The administrative head of a . . . police or fire department, and the administrative head’s assistant are always considered supervisory employees.

Minn. Stat. § 179A.03, subd. 17. There are ten supervisory functions listed; thus, to be considered supervisory, a position must entail at least six of those functions.

As to supervisory functions 1, 3, 4, and 5, i.e., hiring (or employment), suspension, promotion, and discharge, the HO relied on Minn. Stat. § 419.05 (2018), which establishes the relationship between the three-member unpaid police civil service commission and police officers in regard to those four functions. “The commission shall have absolute control and supervision over the employment, promotion, discharge, and suspension of all officers and employees of the police department of [Hibbing] and these powers shall extend to and include all members of the police department.” Minn. Stat. § 419.05. From this, the HO concluded that “the Commission maintains authority over these functions and therefore [they] are not delegated to the Captains.” In support, the HO cited the Rules and

Regulations of the Police Civil Service Commission, presented as an exhibit at the hearing, which details how the Commission is to handle these four functions.

As to function 8, discipline, the HO relied on the testimony of two captains. One testified that he did not know if he had the authority to issue oral or written discipline, but that anything he did issue would go into a separate file kept by the captains, not into the employee's personnel file. The other captain testified that anything in an employee's permanent personnel file would be referred to the chief of police, not to a captain. Neither captain testified that he had been delegated the authority to discipline, and there was no directive in the record delegating to captains the authority to discipline. From this, the HO concluded that captains did not perform supervisory function 8, discipline.

As to function 2, transfer, one captain testified that he would be unable to move individuals to other departments and another captain testified that, while he had input as to who went on which crew, captains never made the decision to move someone. No captain claimed the ability to transfer an employee to another equal job classification. The HO concluded that captains did not perform supervisory function 2, transfer.

As to function 10, adjustment of employee grievances, the HO relied on the collective bargaining agreement, which in Step 1 of its grievance procedure refers to a grievance supervisor or representative designated by the employer. There was no evidence as to who, if anyone had been designated to perform this function. One captain testified that he had no authority over contract violations; two others did not address the issue. No evidence indicated that captains were trained in adjusting grievances or knew how to do

so, and the chief of police testified that Step 1 grievances went to the chief of police. The HO concluded that captains did not perform supervisory function 10, grievance adjustment.

The HO ultimately concluded that functions 1, 3, 4, and 5 were performed by the commission, not by captains; that functions 2, 8, and 10 had not been delegated to captains by their employer; and that only functions 6, 7, and 9 had been delegated to captains. Therefore, the HO concluded that captains do not perform the majority of supervisory functions required to be designated as supervisory personnel under Minn. Stat. § 179A.03, subd. 17. We agree.

The HO also addressed HPF's argument that the four captains were supervisory because, in the absence of a deputy chief of police, they were all second-in-command after hours and were therefore "administrative head's assistant[s]." *See* Minn. Stat. § 179A.03, subd. 17 (providing that administrative heads and their assistants are always designated as supervisory). The chief of police stated that she had been hoping to hire a deputy, that the process had begun, and that she herself had assumed the deputy's duties. One of the police commissioners testified that the commission intends to hire a deputy. The HO noted that the statute refers to "administrative head's assistant" in the singular and that the BMS had consistently held that the post is a single individual, not a group of individuals having the same rank. The argument that all four captains are equivalent to a deputy chief of police and are therefore supervisory is unpersuasive.

The HO's determination that, as nonsupervisory employees, the captains should remain in the HPF is supported by the statute and the record.

In any event, HPF's reliance on Minn. Stat. § 179A.09, subd. 1, is misplaced. That statute provides:

In determining the appropriate unit, the commissioner shall consider the principles and the coverage of uniform comprehensive position classification and compensation plans of the employees, professions and skilled crafts, and other occupational classifications, relevant administrative and supervisory levels of authority, geographical location, history, extent of organization, the recommendation of the parties, and other relevant factors. The commissioner shall place particular importance upon the history and extent of organization, and the desires of the petitioning employee representatives.

Minn. Stat. § 179A.09, subd. 1. But the issue here is not the determination of a bargaining unit: it is moving employees who are already in a unit to one of two other units, i.e., MAPE or the proposed Captains' Unit. As HPF said at the hearing, the issue of what unit the Captains should join arises only after the Captains are determined to be supervisory and therefore excluded from the current HPF unit.

HPF argues that “[o]bviously, [Minn. Stat. § 179A.09, subd. 1] is the statute that governs hearings for Unit Clarification such as this,” but HPF offers no support for that argument. Moreover, this court has rejected the argument, although in an unpublished and therefore nonprecedential opinion.

Despite dicta in several cases from this court that suggest otherwise, the community-of-interest factors set out in Minn. Stat. § 179A.09 are not relevant and do not apply to petitions seeking to clarify a unit by determining whether certain employees are supervisory. *See, e.g., In re Petition for Clarification of Appropriate Unit*, 555 N.W.2d 552, 554 (Minn. App. 1996) (discussing community of interest criteria in certiorari appeal from commissioner's order prohibiting confidential supervisory employee from remaining in supervisory bargaining unit); *Local No. 320 [v. County of*

McLeod, 509 N.W.2d 554, 556 (Minn. App. 1993)] (citing community of interest criteria on review of commissioner's order concluding that employee was supervisory and thus member of unit composed of supervisory employees).

Sch. Serv. Emps. Local 284 v. Indep. Sch. Dist. No. 281, No. C6-01-2219, 2002 WL 1013767 at *2 (Minn. App. May 21, 2002). We are persuaded by that analysis.

The HO correctly addressed whether the captains are supervisory, determined under the relevant statute that they are not, and ordered that they remain in the current HPF unit. This decision was reasonable.

Affirmed.