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Sent: Tuesday, July 21, 2020 3:49 PM
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Subject: FW: Charter amendment proposal
Importance: High

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Good afternoon, Barry –

The City's HR attorneys have prepared answers to the questions you posed regarding the Brainerd firefighters case. Let us know if you have any follow-up and we'll do our best to help in a timely fashion.

You asked the following questions:

1. **What is the applicability of *Firefighters Union Local 4725, et al. v. City of Brainerd*, 934 N.W.2d 101 (Minn. 2019) to the City Council's proposed charter amendment?**
    a. **How does the City's situation differ from that of Brainerd?**
    b. **If the City eliminates the police department, would that be an unfair labor practice?**

2. **If the City eliminates the police department but keeps peace officers in a new division, would that be an unfair labor practice?**

3. **If peace officers are transferred into the Division of Law Enforcement Services, what is the probability that those hired peace officers would be:**
    a. **Covered under the terms set forth in the labor agreement between the City of Minneapolis and the Police Officers' Federation of Minneapolis ("POFM")?**
    b. **Represented by the same labor union as their current representative, the POFM?**

4. **If the effect of a charter amendment involved laying off peace officers (due to abolished positions, or layoff becomes necessary because of lack of funds, lack of work, or reorganization to reduce the number of employees), are there any additional legal considerations?**

Below is the legal analysis for each question.

1. What is the applicability of *Firefighters Union Local 4725, et al. v. City of Brainerd*, 934 N.W.2d 101 (Minn. 2019) to the City Council's proposed charter amendment?
    a. **How does the City's situation differ from that of Brainerd?**
    b. **If the City eliminates the police department, would that be an unfair labor practice?**

a. How does the City's situation differ from that of Brainerd?

There are differences between the *Brainerd* case and the City Council's proposed charter amendment. One potential difference is that the City's labor agreement with the Police Officers' Federation of Minneapolis ("POFM contract") expired December 31, 2019 whereas Brainerd entered into a new contract then attempted to abolish the Brainerd Fire Department early into that 3-year contract.

The POFM contract expired on December 31, 2019, however, the labor agreement contains a "contract in effect" clause. Article 33 of the POFM contract states:

> **Section 33.01 – Term of Agreement and Renewal**
> This Agreement shall be effective as of January 1, 2017 and shall remain in full force and effect to and including December 31, 2019 subject to the right on the part of the City or the Federation to open this Agreement by written notice to the other Party not later than June 30, 2019. Failure to give such notice shall cause this Agreement to be renewed automatically for a period of twelve (12) months from year to year.
>
> **Section 33.02 – Post-Expiration Life of Agreement**
> In the event such written notice is given and a new Agreement is not signed by the expiration date of the old Agreement, then this Agreement shall continue in force until a new Agreement is signed. It is mutually agreed that the first meeting will be held no later than twenty (20) calendar days after the City or Federation receives such notification.

According to the City's labor negotiator, the parties to the above POFM contract are currently negotiating terms of the parties' successor agreement with the assistance of a mediator provided by Minnesota's Bureau of Mediation of Services ("BMS"), a state agency.

Brainerd conceded that it "interfered with the existence of an employee organization." The court then analyzed Brainerd's argument that it was excused from interfering because Brainerd did not have an unlawful motive, such as antiunion animus.

The court in *Brainerd* determined that unless and until the state legislature rewrote the Public Employment Labor Relations Act ("PELRA"), antiunion animus was not required for the court to determine that Brainerd committed an unfair labor practice.

Another potential difference between the *Brainerd* case and the City's situation is that in *Brainerd* the City eliminated all permanent firefighter positions, and as a consequence, all of the union positions. The proposed Charter Amendment does not necessarily provide that the entire Police Department, or all peace officer positions, will be eliminated.

A final difference between the *Brainerd* case and the City's situation relates to process. Effective July 1, 2020, allegations of an unfair labor practice must be filed with the Public Employment Labor Relations Board ("PERB") for investigation first before a party may file an ULP in state district court.

b. If the City eliminates the police department, would that be an unfair labor practice?

The *Brainerd* decision is very new and its impact is not yet known. Its holding could be read very narrowly or could be read broadly. If the holding is read broadly, then potentially any kind of restructuring or reorganization could "interfere" with a labor union, and effectively leave the management rights provision of PELRA, Minn. Stat. §179A.07, subd.1, meaningless. PELRA states in pertinent part: "A public employer is not required to meet and negotiate on matters of inherent managerial policy. 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."

Minn. Stat. §179A.13, subd. 2 provides a list of actions that employers are prohibited from taking that constitute unfair labor practices. A few examples include: (1) interfering, restraining, or coercing employees in the exercise of the rights guaranteed under [Minn. Stat. Ch. 179A]; (2) dominating or interfering with the formation, existence, or administration of any employee organization or contributing other support to it; and (3) discriminating in regard to hire or tenure to encourage or discourage membership in an employee organization. Generally, actions taken by an employer that retaliate against union activity or chill the ability of employees to unionize will be argued to be unfair labor practices.

Even if the entire police department is not eliminated, the union could still assert that the City engaged in an unfair labor practice on the basis that the reorganization "interfered" with the union because City actions resulted in fewer union-represented positions, which in turn equals fewer union members paying union dues.

2. If the City eliminates the police department but keeps peace officers in a new division, would that be an unfair labor practice?

Not necessarily. Under a narrow reading of *Brainerd*, a court would likely find City interference with the union pursuant to Minn. Stat. §179A.13, subd. 2(2) and an unfair labor practice if all union positions were eliminated when the department was eliminated. However, restructuring, reorganizing, renaming and even eliminating the police department in and of itself is not an unfair labor practice. Employers can take unilateral action on matters of inherent managerial policy, unless a labor agreement in effect contains provisions that reduced management rights existing in statute.

There are ways to reorganize City of Minneapolis functions that do not constitute an unfair labor practice. Reorganization has successfully occurred in a variety of City functions. For example, the City has moved functions from one department to a different department, without eliminating positions (or incumbents holding those positions) and without changing the job descriptions of positions transferred to a different department. This involved fire inspections being moved from the Fire Department to the Regulatory Services Department.

Another example of a successful reorganization occurred in Public Works. There, Public Works collapsed the duties of four different job classifications represented by three different labor unions into two new job classifications. The process took approximately two years, allowing sufficient time for current employees to obtain licensure and other qualifications necessary to hold one of the two new positions. The three labor unions disputed amongst themselves which of the unions would represent the two new job classifications. Those unions ultimately reached agreement among themselves and notified the City and the Bureau of Mediation Services which two labor unions would represent the new job classifications. The City did not take a position as to union representation. Since an employee's failure to qualify for a position in one of the two new job classifications could result in job loss (i.e., affected a term and condition of existing employment), the City engaged the unions in many aspects of the restructuring, job abolishment, and placement of incumbents into new positions. Of the entire workforce of approximately 350 employees employed in the four job classifications prior to the restructuring, only two employees were unable to achieve the qualifications necessary to be placed in one of the two new job classifications. One of the reasons this restructuring was successful is that the

City did not "abolish" a position only to later recreate it with no difference in job duties, licensure or other factors used in determining appropriate bargaining unit.

While the reorganization in Public Works predated the *Brainerd* case, it could be argued that the Public Works example demonstrates a way to preserve statutory management rights despite the *Brainerd* case instead of rendering those rights meaningless.

3. If peace officers are transferred into the Division of Law Enforcement Services, what is the probability that those hired peace officers would be:

a. **Covered under the terms set forth in the labor agreement between the City of Minneapolis and the Police Officers' Federation of Minneapolis ("POFM")?**
b. **Represented by the same labor union as their current representative, the POFM?**

Those peace officers would remain represented by the Police Officers' Federation of Minneapolis unless the membership votes to decertify the POFM. Even if the POFM members voted to decertify the POFM, peace officers employed by the City of Minneapolis could still decide to be represented by a labor union. Procedures for decertification and the Bureau of Mediation Services' role in bargaining unit certification are governed by PELRA and by related Administrative Rules. *See* Minn. Stat. §§179A.06 subd. 2 and 179A.102; Minn. Admin. Rules Chapters 5505 and 5510.

4. If the effect of a charter amendment involved laying off peace officers (due to abolished positions, or layoff becomes necessary because of lack of funds, lack of work, or reorganization to reduce the number of employees), are there any additional legal considerations?

If layoffs may result, there are some special considerations. Terms and conditions of employment are mandatory subjects of bargaining. "Terms and conditions of employment" means "the hours of employment, the compensation therefor including fringe benefits except retirement contributions [*author's note*: effect, if any, of charter amendment on retirement contributions is outside the scope of this opinion] 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." Minn. Stat. §179A.03 subd. 19. Given that layoffs can result in job loss if placement does not occur via the City's Job Bank program, for example, there may be an obligation to negotiate the impact of layoffs.

Also, because many Minneapolis peace officers are military veterans, it is important to also consider the applicability of the Minnesota's Veterans Preference Act ("VPA") to the elimination of police officer jobs and layoff of police officers. The VPA provides that veterans shall only be removed from a public sector position or employment for "incompetency or misconduct shown after a hearing." *See* Minn. Stat. §197.46. Unlike removal for incompetency or misconduct, Minnesota case law has consistently held that the VPA does not apply to the good faith abolition of a position held by a veteran. Public employers are not prohibited from eliminating a position and laying off a veteran if the action was taken "in good faith for some legitimate purpose and is not a mere subterfuge to oust [the veteran] from his position." *State ex rel. Boyd v. Matson*, 155 Minn. 137, 141-142, 193 N.W. 30, 32 (1923). *See Young v. City of Duluth*, 386 N.W.2d 732, 738 (Minn. 1986) ("[W]e have consistently held that a veteran is entitled to a writ of mandamus ordering the public employer to reinstate the veteran to his or her former position with back pay when it is established, after a hearing, that the public employer, under the pretext of abolishing a veteran's position, actually continued it under some other name or reassigned the veteran's

duties to some other employee.") *See also Taylor v. City of New London*, 536 N.W.2d 901 (Minn. App. 1995) (upholding ALJ and Commissioner's finding that the elimination of entire city police department and contracting out with the county for law enforcement services was good faith abolition of position.)

A veteran may request a hearing to challenge the City's motives for layoffs. The City prevailed in the only hearing, since 2007, in which a veteran challenged a layoff notice. In that case, the City was able to demonstrate that layoffs (which occurred in reverse seniority order as required by the labor agreement) were necessary to address budget shortfalls and resulted in savings for the City.