

From: [Nilsson, Erik A.](#)
To: [Clegg, Barry \(Public Contact\)](#)
Cc: [Bachun, Caroline M.](#)
Subject: Re: [EXTERNAL] RE: Charter amendment proposal
Date: Wednesday, July 22, 2020 8:54:31 AM

Barry - I appreciate your read of the situation/communication and agree. Feel free to share.

Thank you-
Erik

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From: barry@bfclegg.com <barry@bfclegg.com>
Sent: Wednesday, July 22, 2020 8:22:06 AM
To: Nilsson, Erik A. <Erik.Nilsson@minneapolismn.gov>
Cc: Bachun, Caroline M. <Caroline.Bachun@minneapolismn.gov>
Subject: [EXTERNAL] RE: Charter amendment proposal

Erik and Carol – Thanks for this, very helpful. I note this is designated as attorney – client privileged. I don't think this covers anything confidential or related to threatened or pending litigation and I think this would be a valuable part of our public record. Do you have any objections or concerns if we waive the privilege and make it part of our record? Thanks.

Barry

From: Nilsson, Erik A. <Erik.Nilsson@minneapolismn.gov>
Sent: Tuesday, July 21, 2020 3:49 PM
To: Clegg, Barry (Public Contact) <barry@bfclegg.com>
Cc: Bachun, Caroline M. <Caroline.Bachun@minneapolismn.gov>
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.

From: Nilsson, Erik A. <Erik.Nilsson@minneapolismn.gov>

Sent: Tuesday, July 14, 2020 3:58 PM

To: Clegg, Barry (Public Contact) <barry@bfclegg.com>

Cc: Bachun, Caroline M. <Caroline.Bachun@minneapolismn.gov>; Rubenstein, Andrea (Public Contact) <ajrrubens@aol.com>

Subject: FW: Charter amendment proposal

Importance: High

Hi Barry –

Wanted to get back to you before today's meeting. This information was furnished by the City's HR attorneys, Trina Chernos and Valerie Darling, along with Charter Commission liaison attorney Carol Bachun.

Eliminating the police department would affect sworn and civilian positions. This reply focuses on labor law implications for sworn/peace officer positions and presumes that any functions that by state or federal law can only be performed by licensed peace officers, would still be performed by City employees in the new department.

State law, labor agreements, Civil Service Rules, ordinances and case law are invoked when abolishing positions. For example, if sworn positions in the police department were eliminated, layoff rights are triggered. By case law, eligible military veterans removed from a position have a right to a hearing to assert that the layoff was a "subterfuge to oust a veteran." Layoff rights also include displacing/bumping less senior workers in other City departments if that police department employee previously held other civil service job titles. Layoffs occur in reverse seniority order.

For those who do not have rights to displace/bump a different City employee, they may have rights under the Job Bank pursuant to City ordinance in Chapter 20, Article XI and pursuant to the labor agreement (attached). The Job Bank requires the City to pay displaced workers at their current rate of pay for a set time period while that worker pursues other employment. Thereafter, unemployed former employees would be eligible for unemployment compensation.

Labor agreements and Civil Service Rules establish a priority order for hiring, particularly the hiring of personnel from the Job Bank. Seniority does not determine priority of recall from layoff or placement into a new position. See Civil Service Rules 6, 7, 8 and 12. Discipline is not an automatic barrier to re-employment or reassignment with the City.

Regarding unclassified appointed ranks, pursuant to M.C.O. §20.1030, only City Council may eliminate appointed positions. Generally, sworn employees serving in unclassified/appointed positions return to their classified civil service rank if their appointed positions are abolished. They,

too, would have layoff and Job Bank rights. Even if there were no applicable labor agreement, the City still has obligations to employees whose positions are abolished.

Regarding union representation, Minnesota's Public Employment Labor Relations Act (PELRA) identifies limited groups of workers that are prohibited from unionizing. *See, e.g.* Minn. Stat. §179A.06 subd. 2. Regarding which labor organization represents a group of workers that may unionize, those determinations are generally made by the workers themselves. Any debates regarding which union, if any, should represent a group of workers are resolved by Minnesota's Bureau of Mediation Services.

Please note that the City has reorganized its functions successfully in the past within existing parameters. Our office remains available to provide legal services in this regard.

From: Barry Clegg <barry@bfclegg.com>
Sent: Thursday, July 09, 2020 2:34 PM
To: Nilsson, Erik A. <Erik.Nilsson@minneapolismn.gov>
Cc: Bachun, Caroline M. <Caroline.Bachun@minneapolismn.gov>; Carl, Casey J. <Casey.Carl@minneapolismn.gov>; Rubenstein, Andrea (Public Contact) <ajrrubens@aol.com>
Subject: [EXTERNAL] Re: Charter amendment proposal

Thank you Erik.

Assuming the amendment were to be on the ballot and pass, and after fine tuning the details and coming up with a definitive plan, the Council decided to eliminate the police department (which as you note, they could do, since it would then be a non-Charter department) and replace it with a Division of Law Enforcement Services under the Department of Public Safety and Violence Prevention. Presumably, this would be done by opening applications for positions in the Division of Law Enforcement Services, and permitting new applicants and existing police officers to apply. The Division would presumably want the right to hire some, but not all, police officers (and perhaps exclude certain officers based on past reprimands or discipline they had received) and some new applicants. Certainly fewer than all existing members of the police department would be hired and some who are not current members of the police department would be hired, or at least that's what the Division would want.

What are the labor law implications of all this? Some more senior officers, who might be the last to go under the current contract, might not get hired. Other, less senior officers, might be hired in their stead because they have the kind of experience the Division prefers. New applicants might be hired as well, in preference to former police officers. Could the City take the position that the Division is a newly established force - so the old contract does not apply? I don't think so, whether it's police officer or law enforcement services employee, potato, potahto, I'm pretty sure labor law would recognize it as a successor group. Would the law and the existing contract compel the City to hire applicants who had been police officers in seniority order in preference to other applicants? So we end up with the same force in different colored uniforms (and the same Union reps)? I would appreciate the views of your office on these issues.

Andrea - given your background, perhaps you could comment as well.

Thank you.

Barry

Barry

On Wednesday, July 8, 2020, 06:50:03 PM CDT, Nilsson, Erik A. <erik.nilsson@minneapolismn.gov> wrote:

Hello Barry-

I was not able to watch this evening's Charter Commission meeting, so Carol will have to fill me in. I trust it was enjoyable. Casey Carl informed me that a Commissioner (or a couple Commissioners) wanted a legal analysis of the Charter amendment proposal. I am not inclined to do that because, frankly, I don't know that it would be anything other than a plain language recitation of what it says at this point and probably wouldn't go beyond a page in length. It's also not typical protocol to prepare a legal memo at the behest of individual Commissioners. However, I would welcome specific legal questions that these Commissioners would like to ask and Carol and I will endeavor to respond as best we can in a timely fashion.

Regarding the current Charter arrangement and the last City Council proposal to change the Mayor's "complete power" dynamic over the police, the City Attorney's Office memo from 2018 can be provided (attached). I think it's pretty self-explanatory. As you know, the Charter Commission also conducted its own extensive research into best practices and peer city arrangements in arriving at its recommendation to reject the 2018 proposal. That information can be accessed on the City's LIMS system and still seems instructive.

I would assume all understand at this point that approval of the Charter amendment would not effectuate the elimination or abolishment of the Police Department. If adopted, the "police department" would be removed from the Charter. I'd note that not all departments are included in the Charter today. Plus, only three departments (City Attorney, Police, Fire) have any sort of detail whatsoever in the Charter. The thorny and perhaps vexing questions of what to do with the existing Police Department would be left to the legislative and policy-making discretion of the City Council.

Plus, even though the current proposal provides for discretionary language regarding the establishment ("may establish") of a law enforcement services division, the provision of some indeterminate capacity of licensed law enforcement personnel would be mandatory in practice. Depending on the conception of public safety services that is yet to be determined, there are certain areas of activity/enforcement that can only be done by a licensed peace officer pursuant to state law. Unlicensed employees are generally prohibited from enforcing the general criminal laws of the state and do not have the full powers of arrest or authorization to carry a firearm on duty. In addition, only licensed peace officers can practically effectuate an expedited response (assuming a need to use flashing lights, siren, or marked patrol vehicle), execute a search warrant, take a person into custody after execution of a warrant, conduct a traffic stop or otherwise stop a motor vehicle, etc. Unlicensed employees can be subject to criminal penalties for exceeding their limited authority (which is essentially the same as the citizen's arrest authority generally). Minn. Stat. 626.863 states that it is a misdemeanor offense for any non-peace officer to perform any "act, duty, or responsibility reserved by law for licensed peace officers and part-time peace officers." There may also be liability concerns for 911 regarding negligent dispatch such as sending alternate responders to a situation that should have been handled by a licensed peace officer. This could

include responding to an incident where firearms are present.

In that same vein, the City Council directed staff last year as follows:

Directing the City Coordinator's Office to convene a workgroup comprised of internal City staff as well as community members to analyze dispatch call categories and determine whether there are opportunities to expand the City's ability to respond to those calls beyond the Minneapolis Police Department. This review shall include, without limitation: • Whether there are financial, time, and/or personnel efficiencies to be gained in responding to those calls by individuals other than Minneapolis police officers. • What types of de-escalation training mechanisms are in place or could be in place in responding to calls for emergency assistance, and whether responding to certain calls by non-police personnel will decrease likelihood of escalation. • What the stakeholder and resident experience is for those on the receiving end of emergency call interventions, whether by police officers or non-police personnel. • Whether certain calls must, by state law or other legal requirements, be responded to by POST Board-certified law enforcement officers. • Whether a new alternative emergency number for more specialized triage related but not limited to mental health crises, domestic violence, and substance abuse could improve outcomes. • What resources, if any, would be required if any portion of the calls currently dispatched to the Police Department were diverted elsewhere, including the cost of hardware and software required to integrate dispatch functionality into other departments. The work group should be comprised of a representative from the Minneapolis Police Department, 911, Minneapolis Fire Department, Office of Violence Prevention, and the City Attorney's Office. The workgroup shall be supported by other departments as needed. Additionally, the workgroup shall include six (6) community members to be appointed half by the City Council and half by the Mayor through the open appointment process.

The work of this group commenced in May of last year and is ostensibly still ongoing, although they are questioning their "charge" from the Council in light of the current Charter amendment discussion (or at least my attorney members on this group are). Similarly, the City Council gave a staff direction to do a staffing study of the police department. I don't have the language of that staff direction at hand, but it's my understanding that an RFP was done and an outside consultant may have been retained (or was on the verge of being retained). These efforts and perhaps more are called into question at the moment.

Thank you-

Erik Nilsson | Interim Minneapolis City Attorney | Phone: 612.673.2192

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