

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-966**

UBAH Medical Academy District No. 4121, Hopkins, Minnesota,
Relator,

vs.

Education Minnesota UBAH Medical Academy, Hopkins, Minnesota,
Respondent,

Bureau of Mediation Services,
Respondent.

**Filed April 16, 2012
Affirmed
Bjorkman, Judge**

Bureau of Mediation Services
File No. 11PCE0488

Susan E. Torgerson, Charles E. Long, Kennedy & Graven, Chtd., Minneapolis,
Minnesota (for relator)

Margaret A. Luger-Nikolai, Education Minnesota, St. Paul, Minnesota (for respondent
Education Minnesota)

Lori Swanson, Attorney General, St. Paul, Minnesota (for respondent Bureau of
Mediation Services)

Considered and decided by Schellhas, Presiding Judge; Bjorkman, Judge; and
Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

BJORKMAN, Judge

Relator challenges the Bureau of Mediation Services' decision that (1) charter-school teachers who serve on the school's board of directors are ineligible to participate in the teachers' bargaining unit, and (2) five teachers who served on the board did not effectively resign from the board and were therefore ineligible to participate in the teachers' bargaining unit. We affirm.

FACTS

Relator UBAH Medical Academy (the academy) is a charter high school, organized pursuant to Minn. Stat. § 124D.10 (2010). The school is governed by a board of directors, as required by law. *See* Minn. Stat. § 124D.10, subd. 4(d). Pursuant to the academy's sponsor agreement and bylaws, the academy's nine-member board must include five academy teachers (teacher/board members).¹

On December 1, 2010, respondent Education Minnesota (the union) submitted a petition to determine the appropriate teachers' bargaining unit at the academy. The union and the academy agreed that the appropriate unit was

[a]ll teachers as defined by Minn. Stat. § 179A.03, Subd. 18, who are employed by the UBAH Medical Academy No. 4121, Hopkins, Minnesota, excluding supervisory employees, confidential employees, principals, and assistant principals

¹ When the academy was organized, the charter-school law required a majority of the board to be teachers by the third year of school operation. Minn. Stat. § 124D.10, subd. 4(c) (2006). The statute has since been amended to require only one teacher/board member. *Id.*, subd. 4(g) (2010). Nevertheless, the academy is required to maintain five teacher/board members because it has not performed the necessary procedures to change its bylaws and sponsor agreement. *See id.*, subd. 4 (2010).

and other employees excluded by the Public Employment Labor Relations Act.

But the parties disagreed over which of the academy's 17 teachers fell within this description. Specifically, the academy claimed that the five teacher/board members were eligible for inclusion in the bargaining unit, whereas the union claimed that they were ineligible. The parties submitted their dispute to the Bureau of Mediation Services (the BMS), which scheduled a hearing for March 2, 2011.

Between 3:54 p.m. on the day before the hearing and 7:12 a.m. on the morning of the hearing, all five teacher/board members e-mailed the board chair, announcing their resignations from the board. The academy's bylaws allow a board member to resign in writing at any time, effective immediately and without acceptance by the board. Based on these resignations, the academy argued that the issue of teacher/board member participation in the bargaining unit was moot.

The BMS disagreed, finding that the issue was not moot because it was capable of repetition yet evading review. The BMS ruled that (1) teacher/board members are ineligible to participate in the teachers' bargaining unit and (2) the five teachers did not effectively resign from the board and were therefore ineligible. Accordingly, only 12 teachers were eligible to participate in the bargaining unit as of the eligibility cutoff date of March 2, 2011. The eligible teachers voted 8-4 to certify the bargaining unit, but the BMS stayed certification pending this appeal.

DECISION

On appeal, we “will affirm the BMS Commissioner’s decision unless, upon independent evaluation, the decision is shown to be unsupported by substantial evidence, based upon errors of law, or arbitrary and capricious.” *Minn. Teamsters Pub. & Law Enforcement Emp.’s Union, Local No. 320, Minneapolis v. Cnty. of McLeod*, 509 N.W.2d 554, 556 (Minn. App. 1993).

I. The BMS did not err by refusing to dismiss as moot the issue of teacher/board member eligibility.

A claim may be moot if the party making the claim no longer has a personal interest in its resolution. *In re Risk Level Determination of J.V.*, 741 N.W.2d 612, 614-15 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008). But a claim is not moot if it implicates issues that are capable of repetition but evade review because “(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.” *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005). Whether a claim is moot is a question of law, which we review de novo. *J.V.*, 741 N.W.2d at 614.

The academy argues that the teacher/board members’ resignation from the board rendered the question of their eligibility moot and that the issue is not capable of repetition because “[t]here will be only one certification process.” We disagree. If the bargaining unit was *not* immediately certified, another certification process could be reasonably expected to occur in the future. And if the bargaining unit *was* certified, the

matter of whether teacher/board members—whoever they may be—are members of the bargaining unit would implicitly arise every time the bargaining unit acted on behalf of its members. The BMS correctly concluded that the issue is not moot.²

II. The BMS did not err by determining that teacher/board members are not eligible for inclusion in the bargaining unit.

The academy argues that teacher/board members are eligible for inclusion in the teachers’ bargaining unit because they are not confidential employees and because the charter-school law permits them to engage in collective bargaining. This raises a question of statutory interpretation, which we review *de novo*. *Id.* at 615.

A. Teacher/board members are ineligible to participate in the teachers’ bargaining unit because they are confidential employees.

The Public Employment Labor Relations Act (PELRA), Minn. Stat. §§ 179A.01-.25 (2010), prohibits bargaining units from including both essential employees—including confidential employees—and non-essential employees—including non-confidential, non-managerial teachers. Minn. Stat. §§ 179A.03, subd. 7, .09, subd. 2. A “confidential employee” is “an employee who *as part of the employee’s job duties*: (1) has access to labor relations information . . . ; or (2) actively participates in the meeting and negotiating on behalf of the public employer.” Minn. Stat. § 179A.03, subd. 4 (emphasis added).

² The academy also asserts that the BMS erred by refusing to dismiss the issue as moot based on unsupported factual findings that (a) the five teachers were still board members at the time of the BMS hearing, and (b) the academy improperly pressured the five teachers to resign from the board. We note that the BMS did not base its mootness determination on either of these findings, nor do we rely on them in our mootness analysis.

The academy concedes that, if a teacher bargaining unit was certified, teacher/board members would have access to labor relations information and participate in labor negotiations when acting as board members. But the academy asserts that this access and role in negotiations is not part of their duties as teachers. We are not persuaded. Admittedly, the teacher/board members are not required by their contracts to serve on the board, nor are they compensated for their board service. Nevertheless, because the academy is required to maintain five teachers on the board, the teacher/board members' positions on the board are inseparable from their jobs as teachers. In a sense, five teachers are required to serve on the board to preserve the academy's governing body and, by extension, to preserve their jobs as teachers.

We reject the academy's contention that teacher/board members wear two separate hats: one in which they are non-confidential teachers who must participate in the teachers' bargaining unit and another in which they are board members who must participate in labor negotiations. The academy's proposition creates an untenable conflict of interest in which teacher/board members must sit on both sides of the bargaining table whenever the board negotiates with the teachers' bargaining unit.

The academy argues that the charter-school law expressly permits this conflict of interest, citing Minn. Stat. § 124D.10, subd. 4a(e). We disagree. This provision merely permits a teacher/board member to participate in the administration of his or her *own* compensation contract:

No member of the board of directors, employee, officer, or agent of a charter school shall participate in selecting, awarding, or administering a contract if a conflict

of interest exists. A conflict exists when [the board member, employee, officer, or agent, or his or her close relation] has a financial or other interest in the entity with which the charter school is contracting. A violation of this prohibition renders the contract void.

....

The conflict of interest provisions *under this subdivision* do not apply to compensation paid to *a* teacher employed by the charter school who also serves as a member of the board of directors.

Minn. Stat. § 124D.10, subd. 4a(b), (e) (2010) (emphasis added). It is one thing for a single board member to act as part of a nine-person board negotiating his or her contract. It is quite another for five board members (a majority) to act as part of a nine-person board negotiating their collective contract. The charter-school law allows the first but not the second. On this record, we conclude that for those teachers who serve on the board, their board responsibilities—which provide them access to labor-relations information and require their involvement in labor negotiations—are part of their job duties, making them confidential employees. Because they are confidential employees, they may not participate in the same bargaining unit as non-confidential teachers.³

³ The academy also asserts that anyone who holds a position that requires licensure by the board of teaching or the state board of education is a teacher, and teachers automatically are not confidential employees. But under Minn. Stat. § 179A.03, subd. 18, a confidential employee is excluded from PELRA’s definition of a teacher, regardless of whether his or her position requires a teaching license.

B. The charter-school law does not require teacher/board members to be included in the teachers' bargaining unit.

The academy asserts that the charter-school law mandates the inclusion of teacher/board members in the teachers' bargaining unit because "[c]harter school boards of directors must include teachers employed by the school, and teachers employed by the school have collective bargaining rights." We disagree. "Employees of the board . . . may, if otherwise eligible, organize under [PELRA] and comply with its provisions." Minn. Stat. § 124D.10, subd. 21 (2010). But neither PELRA nor the charter-school law mandates that teacher/board members participate in the *same* bargaining unit as other teachers. The academy's argument is therefore unavailing.

More generally, the academy urges this court that charter schools are different from other schools because their governing bodies must include teachers, and those teachers should not be prohibited from participating in a teachers' bargaining unit by virtue of their service on the board. We are not persuaded. The charter-school law gives charter-school teachers the unique opportunity to influence the governance and direction of their schools by serving on the board. As a board member, the teacher may participate in a bargaining unit, but not one involving non-confidential teachers. To the extent that the academy's argument is that this limitation is unreasonable or unfair, it is more appropriately directed to the legislature.

III. Substantial evidence supports the BMS's determination that the five teachers at issue were not eligible for inclusion in the bargaining unit.

The academy challenges the BMS's determination that the five teachers at issue had not effectively resigned from the board and were therefore still confidential

employees, ineligible to participate in the bargaining unit. Substantial evidence supports this finding. First, even though the union began the process of creating a teachers' bargaining unit in December 2010, all five teachers waited for three months to resign—until less than 24 hours before the hearing at which the unit would be determined. Second, one of the teachers testified that he began talking to other teacher/board members about resigning in mid-December 2010. This contradicted the testimony of the other teachers that they decided to resign on their own without consulting with other teacher/board members. Third, the academy's website listed the five teachers as board members as of April 26, 2011,⁴ indicating that the board considered the five teachers to be board members despite their e-mails purporting to resign. Together, this evidence supports the BMS's finding that the resignations were part of a concerted plan to manipulate the certification process, not a genuine attempt to leave the board. On this record, we conclude that substantial evidence supports the BMS's conclusion that the teachers' written resignations were ineffective.

In so concluding, we do not hold that a charter-school teacher who serves on the board of directors may never resign from the board and become a member of the teachers' bargaining unit. We merely hold that, based on this unique record, substantial evidence shows that the inauthentic efforts of these five teachers to resign from the board in order to join the bargaining unit were ineffective. Consequently, they remained board

⁴ The BMS properly took judicial notice of the contents of the academy's website, even though it did not give the parties notice thereof, because the content of the website is not disputed. Minn. R. 5510.1910, subp. 9 (2011) ("The [BMS] may take judicial notice of facts not in dispute."); *see* Minn. Stat. § 14.03, subd. 2 (2010) (stating that Minn. Stat. § 14.60 (2010), including its notice requirement, does not apply to the BMS).

members and were therefore confidential employees, ineligible to participate in the bargaining unit or vote on its certification.

Affirmed.