This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).

STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1829
A12-2016

City of Bloomington, Minnesota,
Relator,

vs.

American Federation of State, County and Municipal Employees,
Minnesota Council 5, South St. Paul, Minnesota,
Respondent,

Bureau of Mediation Services,
Respondent.

Filed July 15, 2013
Affirmed
Rodenberg, Judge

Bureau of Mediation Services
File Nos. 12PCE1115, 12PCE1116

Frank J. Madden, Pamela R. Galanter, Susan K. Hansen, Madden, Galanter, Hansen, LLP, Plymouth, Minnesota (for relator)

Gregg M. Corwin, St. Louis Park, Minnesota (for respondent American Federation of State, County and Municipal Employees, Minnesota Council 5, South St. Paul, Minnesota)

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

Nicole M. Blissenbach, Margaret A. Luger-Nikolai, Education Minnesota, St. Paul, Minnesota (for Amicus Education Minnesota)

Brendan D. Cummins, Minneapolis, Minnesota (for Amicus Service Employees International Union, Local 284)

Richard L. Kaspari, Metcalf, Kaspari, Engdahl & Lazarus, P.A., St. Paul, Minnesota (for Amicus Minnesota AFL-CIO)

Teresa L. Joppa, Moorhead, Minnesota (for Amicus AFSCME Council 65)

Phillip I. Finkelstein, Minnesota Nurses Association, St. Paul, Minnesota (for Amicus Minnesota Nurses Association)

Karin E. Peterson, Rice, Michels & Walther, LLP, Minneapolis, Minnesota (for Amicus Minnesota Professional Fire Fighters Association)

Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Relator City of Bloomington appeals from a unit-determination order issued by respondent Bureau of Mediation Services (BMS) pursuant to Minn. Stat. § 179A.09 (2012), arguing that BMS erred by (1) determining "an" appropriate unit instead of "the" appropriate unit and stating on reconsideration that BMS must first consider the union's proposed bargaining unit and address alternative proposals only after determining the union's proposed units to be inappropriate; and (2) failing to properly apply the standard of nonproliferation to recognize a wall-to-wall bargaining unit. We affirm.

FACTS

In 2012, respondent-union American Federation of State, County, and Municipal Employees, Minnesota Council 5 (AFSCME), filed petitions with BMS seeking the determination of two appropriate units of the city of Bloomington's employees. The proposed units were respectively composed of employees in the city's park maintenance

division and employees in the city's water-operating division. The city objected to proposed units, noting that both divisions were part of the public works department, and proposed a "wall-to-wall" unit of public works department employees.

BMS conducted a hearing on the appropriate-unit question and issued a certification unit determination order on September 6, 2012. The order conducted a side-by-side comparison of the competing proposals under the criteria established in Minn. Stat. § 179A.09, subd. 1. In analyzing the "extent of organization" factor, the hearing officer noted that "[t]he standard to be applied is whether [respondent]'s proposed bargaining group is 'an' appropriate unit not 'the' most appropriate unit. Therefore, in addressing such questions the Bureau first determines if the Union's proposal is 'an' appropriate unit before considering alternative proposals."

The hearing officer concluded that a number of the factors under Minn. Stat. § 179A.09, subd. 1, favored the city's proposed unit and a number of the factors favored AFSCME's proposed units. The hearing officer concluded that "[o]n balance" the union's proposed units were the appropriate units and that there was "strong evidence that the bargaining unit proposed by the city is not appropriate and would not lead to stable and constructive labor relations."

The city requested reconsideration. The commissioner of the BMS affirmed on reconsideration that BMS is not required to determine the "most" appropriate unit, but only that the proposed unit is "an" appropriate unit. But the commissioner's order also stated that the hearing officer's analysis was "flawed" because the officer had conducted a side-by-side comparison of the two proposals when "[a]lternate proposals of the

Employer are to be considered only after a finding that the bargaining unit structure sought by the Union is not appropriate." This certiorari appeal followed.

D E C I S I O N

I.

The city argues that Minn. Stat. § 179A.09 requires BMS to determine "the" appropriate bargaining unit and not "an" appropriate unit. Appellant also challenges BMS precedent requiring the agency to first consider a union's proposed unit and then only consider alternative units if that unit is not appropriate.

We will affirm a decision of the BMS unless the decision is "unsupported by substantial evidence, [is] based upon errors of law, or [is] arbitrary and capricious." *Hennepin Cnty. Court Emp. Grp. v. Pub. Emp't Relations Bd.*, 274 N.W.2d 492, 494 (Minn. 1979). The present challenge is to BMS's interpretation of the statute. Statutory interpretation is a question of law, which we review de novo. *Harms v. Oak Meadows*, 619 N.W.2d 201, 202 (Minn. 2000).

The objective of statutory interpretation is to "ascertain and effectuate the intent of the legislature." *Martin v. Dicklich*, 823 N.W.2d 336, 342 (Minn. 2012) (quotation omitted). If a statute is unambiguous, then this court applies the plain meaning of the statute. *Id.* But if the statute is ambiguous, then the ambiguity is resolved "by looking to legislative intent, agency interpretation, and principles of continuity which include consistency with laws on the same or similar subjects." *Occhino v. Grover*, 640 N.W.2d 357, 360 (Minn. App. 2002), *review denied* (Minn. May 28, 2002). A statute is

ambiguous when "the statutory language has more than one reasonable interpretation." *Id.* (quotation omitted).

A. Ambiguity and grammatical construction

Section 179A.09, subdivision 1, states:

> 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.

(Emphasis added.)

"The definite article 'the' is a word of limitation that indicates a reference to a specific object." *State v. Hohenwald*, 815 N.W.2d 823, 830 (Minn. 2012). The use of "the" in a statutory reference is interpreted as a reference to the same item if mentioned earlier in the same statute. *See Rose v. SAIF Corp.*, 116 P.3d 913, 918 (Or. Ct. App. 2005), *cited in Clark v. Ritchie*, 787 N.W.2d 142, 149 (Minn. 2010).

Clark interpreted Minn. Const. art. 6, § 8. 787 N.W.2d at 149. The constitutional provision at issue in that case provides:

> Whenever there is a vacancy in the office of judge the governor shall appoint in the manner provided by law a qualified person to fill the vacancy until a successor is elected and qualified. The successor shall be elected for a six year term at the next general election occurring more than one year after *the* appointment.

Minn. Const. art. 6, § 8 (emphasis added).

In interpreting this provision, the supreme court stated that the use of the definite article "the" in the second sentence was a reference to the content of the preceding sentence, meaning that "when a person is appointed to fill a vacancy under the first sentence of Section 8, the second sentence of Section 8 provides that a successor is to be elected at the next general election occurring more than one year after *that* appointment." *Clark*, 787 N.W.2d at 149.

Here, the definite article in section 179A.09, subd. 1, introduces "appropriate unit" in the first sentence of the section. Therefore, while the use of a definite article must be understood as limiting the reference, a plain reading of the statute does not illuminate what limitation was intended by the drafter. *Cf. Clark*, 787 N.W.2d at 149. The language is therefore subject to more than one meaning and is ambiguous. *See Occhino*, 640 N.W.2d at 360.

The city offers no suggestion as to how the ambiguity should be resolved, merely arguing that "the" does not mean "an." It offers no proposed explanation why such a limitation was intended by the legislature.[1] Such a distinction, without more, is meaningless. As this court has already stated, "[e]ven if the statute required the [agency] to determine 'the' appropriate unit [rather than 'an' appropriate unit], the [agency] would still be obligated to follow the statutory directive in section 179A.09 in making its decision." *School Serv. Emps. Local No. 284 v. Indep. School. Dist. No. 270*, 499

[1] The city largely retreated from this argument on oral argument. However, we address it as it was raised in the briefs.

N.W.2d 828, 831 (Minn. App. 1993). Here, even though BMS determined that it needed to identify "an" appropriate unit, BMS in fact considered each of the statutory factors in section 179A.09.

Respondent argues that the use of the definite article in section 179A.09 should be construed in conjunction with Minn. Stat. § 179A.04, subd. 2 (2012), which states, "[t]he commissioner shall determine appropriate units, under the criteria of section 179A.09." The commissioner exercises this authority in the context of petitions seeking elections to certify exclusive representatives for proposed appropriate units. *See* Minn. Stat. § 179A.12, subd. 3, 5 (2012). This argument is persuasive.

In ascertaining the intention of the legislature, this court may consider "the former law, if any, including other laws upon the same or similar subjects." Minn. Stat. § 645.16(5). Prior to recodification in 1984, the language in sections 179A.04, subd. 2, and 179A.09, subd. 1, were part of the same statutory provision, which read:

> The director shall determine appropriate units, except where appropriate units are defined by section 179.741. In determining the appropriate unit he shall take into consideration, along with other relevant factors, the principles and the coverage of uniform comprehensive position classification and compensation plans of the employees, involvement of professions and skilled crafts and other occupational classifications, relevant administrative and supervisory levels of authority, geographical location, and the recommendation of the parties, and shall place particular importance upon the history and extent of organization and the desires of the petitioning employee representatives.

Minn. Stat. § 179.71, subd. 3 (1982).

Since the language of section 179.71 (1982) was largely carried over into the modern statute, the relationship between sections 179A.04, subdivision 2, and 179A.09, subdivision 1, may be understood to continue in the present statute. *See* Minn. Stat. § 645.16 (stating that prior versions of a statute may be used to interpret a present statute); *see also* Minn. Stat. § 179A.04, subd. 2 (referencing section 179A.09). Reading section 179.71 (1982) in accordance with *Clark*, the definite article preceding "appropriate unit" in the second sentence is appropriately read as restricting the phrase to the "appropriate units" introduced in the first sentence. *Cf.* 787 N.W.2d at 149. The phrase "the appropriate unit" in the present section 179A.09, subdivision 1, is properly understood to mean the appropriate unit that the director determines will stand for a certification election. *Cf. id.*; *see also* Minn. Stat. § 179A.12, subds. 3, 5.

In this case, BMS determined the appropriate units pursuant to the authority delegated to it by section 179A.04, subdivision 2, to make such determinations. The agency's determination was consistent with the interpretation of the statute recited above.

B. History of agency interpretation

In interpreting an ambiguous statute, this court may also look to prior interpretations by the agency tasked with executing the statute. *Occhino*, 640 N.W.2d at 360. While this court is not bound by the agency interpretation, it "is entitled to some deference when '(1) the statutory language is technical in nature, and (2) the agency's interpretation is one of long standing application.'" *In re Clarification of an Appropriate Unit*, 555 N.W.2d 552, 553 (Minn. App. 1996).

Longstanding agency precedent holds that

> the role of [an agency] is to determine if the unit petitioned for is "an" appropriate bargaining unit. No provision of the Public Employment Labor Relations Act mandates that collective bargaining in a proposed unit which is otherwise appropriate is to be denied simply because another unit may be conceptually "most" appropriate.

AFSCME 65 & ISD no. 480, BMS Case No. 77-PR-802-A, at 4 (Nov. 10, 1977).

This position is not inconsistent with our interpretation of the statute. The statute does not require BMS to determine the "most appropriate unit," and the city has offered no basis upon which we could properly insert the word "most" into the statute. This agency interpretation has been applied in Minnesota for decades and the legislature has taken no action in response to the agency's interpretation. We take this as strong evidence that the agency's interpretation is correct. *See In re Clarification of an Appropriate Unit*, 555 N.W.2d at 553.

The city also challenges BMS precedent holding that "[o]nly if" the union's proposed bargaining unit is not appropriate "should the agency turn to examine alternative proposals." *Anoka Cnty. & AFSCME Council 5*, BMS Case No. 09-PCE-0159, at 4 (Dec. 1, 2008). *Anoka Cnty*. appears to have been the first decision to adopt this principle in Minnesota.[2] The National Labor Relations Board (NLRB) has

[2] *Anoka Cnty.* cites an earlier BMS decision for the proposition. BMS Case No. 09-PCE-0159, at 4 n.4 (citing *Anoka Cnty. & AFSCME Council 14*, BMS Case No. 02-PCE-894, n.2 (May 8, 2002)). However, the citation is merely to a footnote reference to a treatise on labor law. *See Anoka Cnty.*, BMS Case No. 02-PCE-894, n.2 (May 8, 2002) (citing 1 *The Developing Labor Law* 593 (4th ed.). The present edition of the treatise does contain the proposition relied on by BMS, stating that "if a petitioning union seeks a unit that is

previously applied this principle. In *P.J. Dick Contracting, Inc.*, 290 N.L.R.B. 150, 152 (July 29, 1988), the NLRB stated that its "inquiry pursues not the most appropriate or comprehensive unit but simply *an* appropriate unit. . . . The inquiry first considers the petitioning union's proposals. If the union's proposed unit is inappropriate, the employer's proposals are then scrutinized." This standard is consistent with the procedures followed in determining an appropriate unit under Minnesota law, because the determination is made as part of the petition for obtaining an election to determine the exclusive representative of the unit, and it is the union seeking exclusive-representative status that files such petitions. *See* Minn. Stat. § 179A.12, subds. 3, 5 (2012). We observe that the proceedings below arose from two separate petitions brought by the union, each seeking the determination of its own appropriate unit.

We conclude that the challenged BMS precedent is not contrary to the statute. We also note the unique facts here, which include an initial determination in which the city received a side-by-side comparison of its proposal with the union's proposal. The city did not prevail. In fact, BMS determined that there was strong evidence to suggest that the city's proposal was not appropriate. BMS reached the same result on reconsideration by examining the union's proposal first. Were we to conclude that the agency precedent was erroneous, any error did not prejudice the city in this case, because the outcome would have been the same under the standard the city now advances.

---

found to be appropriate, the employer's alternative proposals will not be considered." 1 *The Developing Labor Law* 688 n.6 (6th ed. 2012).

II.

The city also argues that BMS violated the standard of nonproliferation[3] by certifying two appropriate bargaining units rather than one bargaining unit. BMS precedent indicates that this principle is one of the many factors considered by the agency in determining the appropriate unit. *E.g., Minn. Ass'n of Prof'l Emps. & Ramsey Cnty.*, BMS Case No. 03-PCE-955 (July 25, 2003).

On certiorari appeal from an agency determination, this court defers to the agency as factfinder. *State ex. Rel. Jenson v. Civil Serv. Comm'n*, 268 Minn. 536, 538, 130 N.W.2d 143, 146 (1964).

> Conflicts in the testimony and the weight to be given facts and circumstances as well as the inferences reasonably to be drawn therefrom are matters to be resolved by the agency, not the courts. The strictures of this type of judicial review require that . . . this court refrain from substituting [its] judgment concerning the inferences to be drawn from the evidence for that of the agency.

Id.

Here the agency carefully weighed each of the required statutory factors, noting that several factors supported the city's position, but ultimately adopting the union's proposed units as the appropriate units. The decision was supported by substantial evidence and was not arbitrary and capricious. Accordingly, this court will not disturb

[3] Although not a factor identified by Minn. Stat. § 179A.09, "undue proliferation of bargaining units" has been considered by BMS in cases where "[a]n unduly large number of bargaining units may either dilute the bargaining power of employees or subject the employer to 'whipsaw bargaining.'" *Minn. Ass'n of Prof'l Emps. & Ramsey Cnty.*, BMS Case No. 03-PCE-955 (July 25, 2003).

the weight given to each factor by the agency. *See Hennepin Cnty. Court Emp. Grp.*, 274 N.W.2d at 494.

In sum, the agency's interpretation of the statute is not erroneous and substantial evidence supports the agency decision. We discern no abuse of discretion by the agency and therefore affirm.

Affirmed.