

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Becky Swanson, Hollee Saville, Linda
Christiansen, Julie Halverson, Renee Holz,
Jean Lang, Tammy Larson, Erin Rheault, Kelly
Romano, Tammy Drewes and Janet Krutzig,

Court File No.: 62-CV-11-9535

Plaintiffs,

v.

Minnesota Governor Mark Dayton, in his
official capacity as the Governor of the State of
Minnesota; Minnesota Bureau of Mediation
Services; and Josh Tilsen, in his official
capacity as Commissioner of the Bureau of
Mediation Services,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER FOR JUDGMENT**

Defendants,
and

American Federation of State, County and
Municipal Employees, Council 5 (AFSCME)
and Service Employees International Union
(SEIU),

Defendant-Intervenors.

The above-entitled matter came before the Honorable Dale B. Lindman, Judge of District Court, at the Ramsey County District Court, Second Judicial District, in the State of Minnesota, on the 22nd of February 2012 pursuant to Plaintiff's motion for summary judgment on Count I of Plaintiff's Complaint.

Attorneys Thomas R. Revnew and Douglas P. Seaton of Seaton, Peters & Revnew, P.A. appeared for Plaintiffs. Attorneys Alan Gilbert and Kristyn Anderson from the Minnesota Attorney General's Office appeared on behalf of Defendants. Attorney Gregg M. Corwin of

Gregg M. Corwin and Associate Law Office, P.C. appeared on behalf of Defendant-intervenor American Federation of State, County and Municipal Employees (“AFSCME”) Council 5.

Based upon the submissions of the parties and all the files, records, and proceedings herein, and having heard the arguments of counsel, the Court hereby makes the following:

FINDINGS OF FACT

1. The Plaintiffs in this matter are Becky Swanson, Hollee Saville, Linda Christiansen, Julie Halverson, Renee Holz, Jean Lang, Tammy Larson, Erin Rheault, Kelly Romano, Tammy Drewes and Janet Krutzig. Complaint, ¶¶ 1-2.
2. The Defendants in this matter are Minnesota Governor Mark Dayton and the Minnesota Bureau of Mediation Services (“BMS”) Commissioner Josh Tilsen. Complaint, ¶¶ 3-5.
3. AFSCME Council 5 and SEIU were granted permission to intervene in this lawsuit. Transcript of December 5, 2011 hearing, p. 5, ln. 25. SEIU successfully withdrew from this case pursuant to the Order dated February 22, 2012.
4. On November 15, 2011, Governor Mark Dayton signed Executive Order 11-31, which had an effective date of November 30, 2011. Complaint ¶ 11; Revnew Aff., Ex. A-1 (Executive Order 11-31).
5. Executive Order 11-31 directs the BMS to conduct mail-ballot elections to determine whether the two labor unions, AFSCME Council 5 and SEIU, shall represent certain licensed, registered, subsidized, child care providers. Revnew Aff., Ex. A-1, ¶ 1.
6. The Executive Order authorizes BMS Commissioner Josh Tilsen to designate the American Arbitration Association (“AAA”) to conduct all proceedings related to the elections,

with any costs incurred by the BMS or AAA to be borne entirely by AFSCME Council 5 and SEIU. Revnew Aff., Ex. A-1, ¶ 1.

7. Executive Order 11-31 does not specify how the elections are to be conducted, leaving the BMS to independently decide the specific procedure for conducting the elections.

8. Commissioner Tilsen has interpreted the Executive Order 11-31 to restrict eligible voters to those providers who have received at least one subsidy payment from the state-funded Child Care Assistance Programs (“CCAP”) under Chapter 119B of the Minnesota Statutes within the past year. Revnew Aff., Ex. A-2 at p. 19.

9. Based upon Commissioner Tilsen’s interpretation, the elections mandated in Executive Order 11-31 would limit voting rights to approximately 4,300 child care providers, or roughly 40% of all child care providers in Minnesota. Revnew Aff., Ex. A-2 at pp. 18-19.

10. Plaintiffs Lang and Drewes are registered, licensed child care providers in the State of Minnesota who receive state subsidies for providing subsidized child care services pursuant to CCAP under Chapter 119B of the Minnesota Statutes. As such, they would be eligible to vote in the proposed elections. Drewes Aff., ¶¶ 1, 5-7; Lang Aff., ¶¶ 1, 6-8; Complaint, ¶ 2.

11. In Contrast, Plaintiffs Swanson, Saville, Christiansen, Halverson, Holz, Larson, Rheault, Romano, and Krutzig are also registered, licensed child care providers, but have not received subsidies through CCAP within the past year. As such, they would be ineligible to vote in the proposed elections, which are for the purpose of unionizing child care providers. Swanson Aff., ¶¶ 1, 7-9; Saville Aff., ¶ 6; Halverson Aff., ¶ 6; Holz Aff., ¶ 7; Larson Aff., ¶ 6; Rheault Aff., ¶ 8; Romano Aff., ¶ 6; Krutzig Aff., ¶ 6; Complaint, ¶ 1.

12. Plaintiffs would not be eligible to vote even though they are independent owners of their respective daycare businesses, and even though they have full authority to employ other individuals in their businesses. Drewes Aff., ¶ 3; Lang Aff., ¶ 3; Swanson Aff., ¶ 3; Saville Aff., ¶ 3; Halverson Aff., ¶ 3; Holz Aff., ¶ 3; Larson Aff., ¶ 3; Rheault Aff., ¶ 3; Romano Aff., ¶ 3; Krutzig Aff., ¶ 3.

14. Plaintiffs Lang and Rheault currently employ one employee other than themselves at their home-based child care facilities. Lang Aff., ¶ 4; Rheault Aff., ¶ 4. Plaintiff Saville does not currently employ any other employees, but in the past has employed four different employees to work at her home-based child care facility. Saville Aff., ¶ 4.

15. Plaintiffs Lang, Rheault, Saville, Drewes, Swanson, and Holz have all hired independent contractors to work in their home-based child care facilities. Lang Aff., ¶ 5; Rheault Aff., ¶ 5; Saville Aff., ¶ 5; Drewes Aff., ¶ 4; Swanson Aff., ¶ 4; Holz Aff., ¶ 4.

16. Under Executive Order 11-31, if the unions prevail in the elections, the BMS Commissioner is required to certify them in legislative fashion as the exclusive representatives and bargaining units for child care providers. Revnew Aff., Ex. A-1, ¶¶ 3-4. The Governor's Executive Order would in effect sanction the election result even though less than 40% of child care providers were allowed to vote. Revnew Aff., Ex. A-2 at pp. 18-19.

17. According to Executive Order 11-31, the unions would then meet and confer with the Commissioners of Human Services and Education regarding issues of mutual concern, including: quality standards and quality rating systems; access to benefits; changes to the state system of providing early childhood education services; the monitoring and evaluating of child care providers; and any other matters that the Defendant's believe would improve recruitment and retention of qualified licensed, registered, child care providers and the quality of the

programs they provide; all without the matter ever being submitted to Minnesota's law making body, i.e. the Legislature, for vetting. Revnew Aff., Ex. A-1, ¶ 4.

18. Commissioner Tilsen announced an intent to send out mail ballots to eligible child care providers on or about December 7, 2011. On December 5, 2011, this Court issued a temporary restraining order enjoining Defendants from proceeding with the execution of Executive Order 11-31.

19. Plaintiffs now move this Court to issue an order declaring Executive Order 11-31 null and void and permanently enjoining Defendants and all those acting in concert with them from taking any action of any character or nature, whether intentional or unintentional, having the purpose or effect of implementing or enforcing the Executive Order 11-31, including permanently enjoining the proposed elections from taking place.

CONCLUSIONS OF LAW

1. This Court's venue is appropriate under Minn. Stat. § 542.18.
2. This Court has appropriate subject matter jurisdiction over this case.
3. Pursuant to Article III, Section 1 of the Constitution of the State of Minnesota, no branch of government can exercise powers belonging to another branch of government.
4. Pursuant to Article IV of the Constitution of the State of Minnesota, the Legislature is granted the power to pass bills which create or amend the laws of the state and forward them to the Governor for approval or veto. Legislative bills become law if signed by the Governor.
5. The Governor has the power to issue executive orders pursuant to constitutional or statutory authority. Minn. Stat. § 4.035 subd. 1.

6. In addition, the Governor has a constitutional duty to take care that the laws of Minnesota are faithfully executed. In doing so, the Governor has the power to appoint commissioners to conduct hearings or direct appointees in the exercise of their duties. *See* Minn. Const. Art. V, § 3; Minn. Stat. §§ 179.01 subd. 10, 179.02 subd. 1.

7. Commissioners appointed by the Governor supervise and control the Bureau of Mediation Services (“BMS”), an agency created by the Legislature. Minn. Stat. § 179.01 subd. 1. The BMS has the authority to render assistance in settling **labor disputes**. A labor dispute is defined in Minn. Stat. § 179.01, subd. 7 and in § 185.18, subd. 4:

The term “labor dispute” includes any controversy concerning terms or conditions of employment, or concerning association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

The Minnesota Supreme Court has interpreted a labor dispute as involving employer and employee relations. *Minnesota Council of State Employees, No. 19 v. American Federation of State, County and Municipal Employees, et al.*, 19 N.W.2d 414, 421 (Minn. 1945) (quoting *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 146 (1942)).

8. Here, Governor Dayton has issued Executive Order 11-31 based on AFSCME and SEIU’s claim that a majority of licensed child care providers desire to be represented for the purpose of negotiating their relationship with the State. However, no employer-employee relationship exists between child care providers and the State. Although the direct language of Minn. Stat. § 179.01 subd. 7 does not require an employee-employer relationship to exist between the disputants, the definition of labor dispute has not been expanded to include controversies upon which the employer-employee relationship has no bearing. *Minnesota*

Council of State Employees, No. 19, 19 N.W.2d at 421 (quoting *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 146 (1942)).

9. Because employer-employee relations are not involved in this dispute, this is not a labor dispute, and the BMS does not have authority under Chapter 179 to intervene.

10. Here, the Governor's action in directing the BMS to conduct elections of the licensed, registered, subsidized, child care providers is not an election sanctioned by the law making body because no labor dispute exists.

11. To comply with Minnesota Law, and more specifically the separation of powers clause of the Minnesota Constitution, the proper method to proceed is for the matter to be brought to the Legislature. Then, if the Legislature sees fit, it may advance a bill through the legislative process allowing elections of the child care providers. By Executive Order 11-31, the Governor is attempting to circumvent the legislative process and unionize child care providers by executive order, rather than by adhering to a valid legislative process. In doing so, the Governor has improperly superseded the Legislature's authority and violated the separation of powers clause as set forth in the Minnesota Constitution.

12. Based on this Court's dispositive conclusion that the Governor has exceeded his authority by attempting to implement Executive Order 11-31, this Court need not address the Equal Protection, the Federal Preemption, or the Antitrust issues otherwise raised in this case.

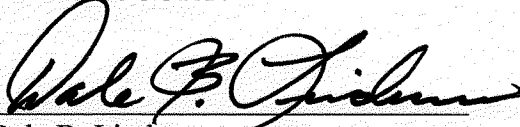
ORDER FOR JUDGMENT

Pursuant to Rule 56 of the Minnesota Rules of Civil Procedure and based upon the pleadings, legal memoranda, arguments of counsel, and affidavits that have been filed with the Court, together with the record herein, the Court enters the following Order:

1. Plaintiffs' motion for summary judgment is granted.
2. Declaratory judgment is hereby entered as follows:
 - a. Executive Order 11-31 is null and void because it is an unconstitutional usurpation of the Legislature's constitutional right to create and or amend laws and as such is a violation of the Separation of Powers doctrine;
 - b. Defendants and any party working in concert with Defendants are hereby permanently enjoined from taking action of any character or nature, whether intentional or unintentional, having the purpose or effect of implementing or enforcing the Governor's Executive Order 11-31.
 - c. The elections directed by Executive Order 11-31 are hereby permanently enjoined.
3. Attorneys fees and reasonable costs are awarded to Plaintiffs in an amount to be determined.

Dated: 4/6/12

BY THE COURT:


Dale B. Lindman
Judge of District Court