

# STATE OF MINNESOTA

## OFFICE OF THE ATTORNEY GENERAL

LORI SWANSON  
ATTORNEY GENERAL

February 21, 2008

102 STATE CAPITOL  
ST. PAUL, MN 55155  
TELEPHONE: (651) 296-6196

Daniel S. Goldberg  
900 Bremer Tower

Susan E. Damon  
1400 Bremer Tower

Amy R. Lawler  
1400 Bremer Tower

Dear Dan, Susan, and Amy:

On Tuesday, Deputy Attorney General Karen Olson and Solicitor General Al Gilbert met with Ms. Lawler and Mr. Goldberg. At the meeting, Mr. Goldberg and Ms. Lawler indicated that they published your February 13 letter to me on your blogsite because I had not gotten back to you by 6:00 p.m. on Friday. I reviewed your letter and cannot find a deadline in it.

You indicated that you represent the staff and want a "meet and confer" meeting. Last spring, when this issue first arose, I retained outside counsel to review and advise me as to the law in this area. I was advised not to have such a "meet and confer" meeting, as it affected the rights of all other lawyers in the office. A copy of the opinion is attached. Thereafter, I implemented a series of "quality circle" lunches with the staff, meeting in groups of about ten, to supplement our regular division meetings as a means of direct and informal communication with the staff. I believe I have had about twenty meetings to date. I note that two of you have participated in these meetings. I am told that your blogsite has sharply ridiculed me for having the meetings. I should also note that I find the meetings very constructive and plan to continue them. I am very proud of this Office and the work it does. The "quality circle" lunches give me constructive feedback on how we can make it even better.

During your meeting with the deputies on Tuesday, you declined to describe the breadth of your representation. The deputies did not ask for names, but simply wanted to know approximately what percentage of the staff was represented by your letter. As a result, I wanted to get a better sense of the staff concerning whether the organizing committee described in your letter represented them. To that end, I asked retired United States District Court Chief Judge Miles Lord and retired United States District Court Magistrate Jonathon Lebedoff to assist in getting the views of the staff. The survey undertaken yesterday did not support such a conclusion.

Your personal and public attacks on this Office and the good work we are doing are not constructive in furthering the mission of this Office. The publication of your letter, without



Daniel S. Goldberg  
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giving me adequate time to respond, created a public spectacle with the media, the legislature, and the public and brought embarrassment to this Office. Your letter proclaimed that you represent the "will" of the staff, and you used this claim to give you the moral authority upon which to launch public criticisms of the Office. It was this action that forced me to immediately get my own sense of the staff.

Finally, the Attorney General serves a unique role as Minnesota's chief legal officer. The law provides that the Attorney General represents his or her fellow citizens in a *parens patriae* capacity. The law makes it very clear that the Attorney General has a responsibility to the people of Minnesota for deciding and effectuating our State's legal policy. The Attorney General fulfills this duty in part by appointing assistant attorneys to implement these decisions. This has been the law for 150 years.

Sincerely,

A handwritten signature in black ink, appearing to read "Lori Swanson", with a stylized flourish at the end.

LORI SWANSON  
Attorney General

Enclosure

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**John J. McDonald, Jr.**

*Licensed in Minnesota and Wisconsin*

*Licensed in the United States Supreme Court and all Federal Courts in the First, Seventh and Eighth Circuits*

*Licensed in all Federal Courts in North Dakota*

May 23, 2007

The Honorable Lori Swanson  
Attorney General  
STATE OF MINNESOTA  
OFFICE OF THE ATTORNEY GENERAL  
102 State Capitol  
St. Paul, MN 55155

Re: Applicability of PELRA to attorneys and legal assistants  
employed by the Office of Attorney General

Dear Attorney General Swanson:

You have asked for our opinion about the applicability of the Public Employee Labor Relations Act ("PELRA") to the Attorney General's Office and the attorneys employed by that office. For the primary reason<sup>1</sup> that the statute expressly mandates exclusion, we conclude that PELRA has no application to the Attorney General's Office and its attorneys.<sup>2</sup> We further conclude that the Attorney General's Office, and its attorneys, have no authority to engage in any of the PELRA activities, including meet and negotiate (i.e., collective bargaining) and meet and confer. Indeed, such activity would be ultra vires and unauthorized by the law. The authority to engage in such activity would first require the legislature to repeal the PELRA exclusion to bring the Attorney General's Office, and the unclassified attorneys who are appointed by the Attorney General, within its purview.

PELRA is found in Minnesota Statutes Sections 179A.01 to 179A.25. The starting point for any understanding of the act is the statutory definitions. Minn. Stat. § 179A.03, subd. 1 provides that "[f]or purposes of sections 179A.01 to 179A.25, the terms defined in this section have the meanings given them unless otherwise stated."

The threshold requirement for application of PELRA is the involvement of a "public employer" and "public employees." The statute defines and limits those terms, thereby limiting the statute's scope of application. If a "public employer" and "public

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<sup>1</sup> This opinion addresses only some of the principal reasons why the Attorney General and the unclassified employees appointed by the Attorney General are not subject to PELRA.

<sup>2</sup> Because the same analysis and conclusions apply to unclassified legal assistants who are appointed by the Attorney General, this opinion does not separately discuss legal assistants.

employees” *within the meaning of PELRA* are not involved, the statute simply has no application.

The Attorney General's Office is not a “public employer” within the meaning of PELRA. Minn. Stat. § 179A.03, subd. 15 provides that “[p]ublic employer” or “employer” means: (a) the state of Minnesota for employees of the state not otherwise provided for in this subdivision **or section 179A.10 for executive branch employees.**” (Emphasis added). And §179A.10 not only otherwise provides for the executive-branch employees at issue here – i.e., assistant attorneys general – it expressly excludes them. Section 179A.10, subd. 1 provides:

The following employees **shall be excluded** from any appropriate unit:

\* \* \*

(4) positions of all unclassified employees appointed by a constitutional officer;

Minn. Stat. § 179A.10, subd. 1 (emphasis added). This mandate of exclusion applies to assistant attorneys general. First, the Attorney General is plainly a constitutional officer. See Minn. Const. Art. 5 § 1 (stating attorney general is constitutional officer). Second, the attorneys you appoint are unclassified employees. Minn. Stat. § 43A.08 (2006) (“Unclassified positions are held by employees who are \* \* \* attorneys \* \* \* appointed by the attorney general or employed with the attorney general’s authorization.”). See also *Finch v. Wernlinger*, 310 N.W.2d 66, 68 (Minn. 1980) (recognizing that employee would not be a “public employee” if he fit into a statutorily excluded category). Because the legislature otherwise provided for the executive-branch employees at issue here – indeed, expressly provided for their exclusion – for purposes of PELRA, assistant attorneys general are not “public employees”<sup>3</sup> and are not employed by a “public employer.” In our opinion, the Attorney General and the unclassified employees appointed by the Attorney General are not subject to PELRA.

Despite the statutory exclusion, it has been suggested that the Attorney General is statutorily required to “meet and confer” with assistant attorneys general pursuant to PELRA. We disagree. We conclude that the Attorney General and the unclassified employees appointed by her are not subject to PELRA for any purpose and that such activity would expose your office to liability by those assistant attorneys general who do not consent to such a process.

Nothing in the statute supports the notion that a given governmental unit can be a “public employer” for some purposes but not for others. When PELRA applies it does so across the board for a given public employer. The delineated statutory purposes apply universally to “public employers” and “public employees.” See Minn. Stat. § 179A.01 (setting forth in detail PELRA’s purposes and underlying public policy). The

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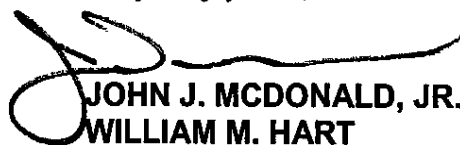
<sup>3</sup> For the same reason that assistant attorneys general have no “public employer” for purposes of PELRA, the assistant attorneys general are not “public employees” for purposes of PELRA. See Minn. Stat. § 179A.03, subd. 14 (providing that “[p]ublic employee” or “employee” means any person appointed or employed by a public employer \* \* \*”).

right and obligation to *meet and negotiate* applies only to “public employees” and “public employers.” Minn. Stat. §§ 179A.06, subd. 5; 179A.07, subd. 2. Similarly, the right and obligation to *meet and confer* applies only to “public employees” and “public employers.” Minn. Stat. §§ 179A.06, subd. 4; 179A.07, subd. 3. The statutory scheme does not permit the splitting of obligations between the same group of employees. Because the Attorney General’s Office is not a “public employer” for purposes of permitting the certification of an exclusive representative – something that has never been in question – it cannot be a “public employer” for purposes of requiring the Attorney General to meet and confer with assistant attorneys general.

Finally, the notion that the assistant attorneys general are subject to PELRA’s meet-and-confer provisions is contrary to more than two decades of practice under previous Attorneys General. We are unaware of a single instance of meet and confer between assistant attorneys general and the Attorney General at any time since the legislature added that provision to the statute. But if Minn. Stat. § 179A.08, subd. 2 actually applied, for example, it would have required such a meet and confer with assistant attorneys general every four months for more than 20 years. In our opinion, this is further support for the conclusion that the Attorney General’s Office and its attorneys have no obligation or authority under PELRA to meet and confer. See Minn. Stat. § 645.16 (providing that administrative interpretation of a statute evinces legislative intent).

In summary, it is our opinion that PELRA has no application to the Attorney General’s Office with respect to its attorneys. It is our further opinion that that the Attorney General’s Office and its attorneys have no authority to meet and confer or to engage in any other PELRA activities. In that regard, we advise you not to engage in so-called “voluntary” meet-and-confer activities. Such activities will only expose the Attorney General’s Office to potential liability to those assistant attorneys general who do not consent to such a process, and who could bring suit should their interests be affected by it. PELRA mandates the exclusion of the Attorney General’s Office from its purview, and we recommend against defiance of the statute.

Very truly yours,



JOHN J. MCDONALD, JR.  
WILLIAM M. HART