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Hennepin County, MN

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

David Bicking, Michelle Gross, Janet Nye, and Jill Waite,

Petitioners,

v.

City of Minneapolis, Minneapolis City Council

and,

Casey Joe Carl, in his official capacity as City Clerk, City of Minneapolis; Grace Wachlarowicz, in her official capacity as Director of Elections, City of Minneapolis; and Ginny Gelms, in her official capacity as Elections Manager, Hennepin County;

Respondents,

and

Police Officers Federation of Minneapolis,

Respondent-Intervenor.

ORDER DISMISSING PETITION

Court File No. 27-CV-16-11839

This matter came duly on before the Honorable Susan M. Robiner by petition on August 12, 2016. Petitioners are represented by Tim M. Phillips, Esq.; Respondents are represented by Tracey N. Fussy, Esq. and Lindsey E. Middlecamp, Esq. Respondent-Intervenor is represented by Erik Bal, Esq. and James P. Michaels, Esq. Based upon the argument of counsel and all the files, records, and proceedings herein, the Court makes the following:

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ORDER

1. Respondent-Intervenor Police Officers Federation of Minneapolis Motion to Intervene is hereby GRANTED.
2. Petitioners' Petition for Correction of Ballot Error and For Declaratory Judgment is hereby DISMISSED.
3. The attached memorandum is incorporated herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: August 22, 2016

Susan M. Robiner
Judge of District Court

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MEMORANDUM

Procedural Posture

The "Committee for Professional Policing" prepared a proposed charter amendment to provide that all police officers employed by the City of Minneapolis be required to provide proof of professional liability insurance as follows:

> Each appointed police officer must provide proof of professional liability insurance in the amount consistent with current limits under the statutory immunity provision of state law and must maintain continuous coverage throughout the course of employment as a police officer within the city. Such insurance must be primary insurance for the officer and must include coverage for willful and malicious acts and acts outside the scope of the officer's employment by the city. If the City Council desires, the city may reimburse officers for the base rate of this coverage but officers must be responsible for any additional costs due to personal or claims history. The city may not indemnify police officers against liability in any amount greater than required by State Statute unless the officer's insurance is exhausted. This amendment shall take effect one year after passage.

The Committee obtained the requisite number of signatures to place the proposed amendment on the ballot. The proposal was submitted to the Minneapolis Charter Commission, properly transmitted to the City Clerk and delivered to the City Council. The Council met on August 5, 2016 but voted to not place the proposed amendment on the ballot.

Petitioners have brought this action pursuant to Minn. Stat. § 204B.44 (a) which provides that individuals may petition district court to correct an error with regard to the preparation of a ballot.

Analysis

I. Creation and Amendment of Home Rule Charters

The Minnesota Constitution vests the state with power to create, organize, consolidate, divide and dissolve local units of government. Minn. Const., art. XII, § 3. It further states that "[a]ny local government unit when authorized by law may adopt a home rule charter for its

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government." Minn. Const. art. XII, § 4. The state legislature, through Minn. Stat. Ch. 410, has provided further guidance regarding the adoption and amendment of home rule charters. Minneapolis is a home rule city.

The state constitution mandates that home rule charters provide for amendments proposed by "a petition of five percent of the voters of the local government unit as determined by law." Minn. Const. art. XII, § 5. The state constitution does not identify what matters may be included in a charter amendment. The only express guidance found in either the constitution or statutes on the proper content of a charter is set forth at Minn. Stat. § 410.07 which states:

> . . . . Subject to the limitations in this chapter provided, it [the Charter] may provide for any scheme of municipal government not inconsistent with the constitution, and may provide for the establishment and administration of all departments of a city government, and for the regulation of all local municipal functions, as fully as the legislature might have done before home rule charters for cities were authorized by constitutional amendment in 1896. . . . The state constitution mandates that home rule charters must provide for amendments proposed by "a petition of five percent of the voters of the local government unit as determined by law." Minn. Const. Art. XII, § 5.

The proposed amendment is supported by the requisite number of signatures.

There is copious case law establishing that a proposed charter amendment may be enjoined by a district court where it is unconstitutional or directly conflicts with state law. *See, e.g.*, *Minneapolis Term Limits Coal. v. Keefe*, 535 N.W.2d 306, 308 (Minn. 1995); *Davies v. City of Minneapolis*, 316 N.W.2d 498 (Minn. 1982); *Housing and Redevelopment Auth. of Minneapolis v. City of Minneapolis*, 198 N.W.2d 531 (Minn. 1972); *State ex rel. Andrews v. Beach*, 191 N.W. 1012 (Minn. 1923); *Haumant v. Griffin*, 699 N.W.2d 774, 777 (Minn. Ct. App. 2005); *Nordmarken v. City of Richfield*, 641 N.W.2d 343, 347 (Minn. Ct. App. 2002). The City is not arguing that the proposed amendment is unconstitutional; instead, it argues that it conflicts with state law. The City and Police Federation assert that the proposed charter amendment is thereby preempted and

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should not be permitted to be placed on the ballot. Petitioners argue that the proposed amendment does not conflict with any existing state law and therefore is not preempted.

II. Preemption

a. Field and Express Preemption

There are three types of preemption: "field preemption," "express preemption," and "conflict preemption." *Hous. & Redevelopment Auth. of Duluth v. Lee*, 852 N.W.2d 683, 687 (Minn. 2014). Field preemption, in the municipal context, is "premised on the right of the state to so extensively and intensively occupy a particular field or subject with state laws that there is no reason for municipal regulation." *Haumant v. Griffin*, 699 N.W.2d at 778 citing *Mangold Midwest Co. v. Vill. of Richfield*, 143 N.W.2d 813, 819 (Minn. 1966). Where there is field preemption, a local law will be voided "even if the law is not directly in conflict with the state law." *Id.*

Whether state law has preempted a field "depends on the facts and circumstances of each case." *Nordmarken v. City of Richfield*, 641 N.W.2d at 348 (citation omitted). There are four factors that Minnesota courts consider to decide whether preemption has occurred: (1) the subject matter regulated; (2) whether the subject matter is so fully covered by state law that it has become solely a matter of state concern; (3) whether any partial legislation reflects an intent to treat the subject matter as solely a state concern; and (4) whether the subject matter is such that local regulation would adversely affect the general state population. *Mangold*, 143 N.W.2d at 820.

Here, there is a strong argument for field preemption. The subject matter, i.e. who shall be financially responsible for claims made against city police officers, is the subject of extensive regulation. Minn. Stat. Ch. 466 addresses municipal tort liability exhaustively. It addresses liability limits, prohibits punitive damages, creates mandatory notice provisions, regulates municipal

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purchases of liability insurance, mandates indemnification, and regulates settlement procedures and the payment of judgments.

Second, the legislature expressed a clear intent to occupy the field. Minn. Stat. § 466.11 states "Sections 466.01 to 466.15 are exclusive of and supersede all home rule charter provisions and special laws *on the same subject* heretofore and hereafter adopted." Minn. Stat. § 466.11 (2015)(emphasis added). The phrase "on the same subject" communicates that the legislature intended the act to preempt the subject matter field entirely. This fact supports not only a finding of field preemption but express preemption, as the legislature has expressly stated that it intends to occupy the field. *See In re Gillette Children's Specialty Healthcare*, 867 N.W.2d 513, 517 (Minn. Ct. App. 2015), *review granted* (Sept. 29, 2015), *aff'd*, (Minn. Aug. 17, 2016) (express preemption where legislature has expressly so stated).

This Court concludes that field preemption and express preemption prevent the proposal from advancing to the ballot.

b. Conflict Preemption

Even if field or express preemption did not operate to void the proposal, conflict preemption would. And for the reasons set forth below, the Court alternatively holds that conflict preemption operates to void the proposed charter amendment.

Under conflict preemption, a charter amendment, or ordinance, may address the same subject matter as a state statute, but will be void and invalid if it conflicts with state law. *State v. Kuhlman*, 729 N.W.2d 577, 580 (Minn. 2007). Moreover, "no conflict exists where the ordinance, though different, is merely additional and complementary to or in aid and furtherance of the statute." *State v. Kuhlman*, 729 N.W.2d at 580, citing *City of St. Paul v. Olson*, 220 N.W.2d 484, 485 (Minn. 1974) (quoting *Mangold*, 143 N.W.2d at 817).

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Here, despite Petitioners' claims otherwise, the proposal conflicts with several existing state statutes. First, Minn. Stat. § 466.07 requires that a municipality "defend and indemnify any of its officers and employees . . . for damages, including punitive damages . . . provided that the officer or employee: (1) was acting in the performance of the duties of the position; and (2) was not guilty of malfeasance in office, willful neglect of duty, or bad faith." Minn. Stat. § 466.07 (2015). Yet, under the proposed amendment, the police officer would be primarily responsible for defending him/herself through insurance that he/she is mandated to purchase. By mandating that the officer's insurance be "primary," the proposal assures that the injured party would look to the officer's professional liability coverage first for recovery. This result conflicts with the city's obligation to completely indemnify the officer.

Petitioners make much of the fact that the proposal would cover a risk not addressed by state law – i.e. the risk when an officer is acting willfully, maliciously, or outside the scope of employment. And the Court agrees that that aspect of the proposal would appear not to directly conflict with the language of Chapter 466 which addresses only acts within the scope of employment. However, this is a red herring. The proposed professional lability insurance will also cover conduct that is the subject of mandatory indemnification under Minn. Stat. § 466.07 – i.e. conduct within the scope of employment: "Each appointed police officer must provide proof of professional liability insurance . . . Such insurance must be primary . . . and must include coverage for willful and malicious acts and acts outside the scope of the officer's employment by the city." Minn. Stat. § 466.07 (2015). Professional liability insurance is errors and omissions coverage for "liability arising out of a special risk such as negligence, omissions, mistakes and errors inherent in the practice of the profession." *St. Paul Fire & Marine Ins. Co. v. Nat'l Real Estate Clearinghouse Inc.*, 957 F. Supp. 187, 189 (D. Minn. 1997), *aff'd sub nom. St Paul Fire & Marine*

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Ins. Co. v. National Real Estate Clearinghouse, Inc., 141 F.3d 1170 (8th Cir. 1998). The only logical way to interpret the proposed amendment language is that the coverage must include standard errors and omissions coverage typical of professional liability coverage and also must include coverage for willful, malicious and acts outside the scope of employment.

Second, the proposal conflicts with Minn. Stat. § 466.06 which regulates municipal purchases of insurance for tort liability. The statute allows a city to purchase insurance that covers "in excess of the limit of liability imposed by section 466.04." Minn. Stat. § 466.06 (2015). Yet, the charter amendment proposal forbids Minneapolis from purchasing insurance above the state statute's tort limits except in limited circumstances: "The city may not indemnify police officers against liability in any amount greater than *required by State Statute* unless the officer's insurance is exhausted" (emphasis added). This is a direct conflict.

Third, portions of the charter amendment proposal conflict with Minn. Stat. § 471.44 which requires cities to "furnish legal counsel to defend any . . . police officer . . . in all actions brought against such officer to recover damages for alleged false arrest or alleged injury to person, property or character, when such alleged false arrest or alleged injury to person, property or character was the result of an arrest made by such officer in good faith and in the performance of official duties and pay the reasonable costs and expenses of defending such suit, including witness fees and reasonable counsel fees, *notwithstanding any contrary provisions in the laws of this state or in the charter of any such governmental subdivision*." Minn. Stat. § 471.44 (2015) (emphasis added). Insurance covers costs of defense. More specifically, the costs of legal counsel are typically included in professional liability coverage.[1] If the officer must purchase the insurance, then he/she is taking on the cost of legal counsel in conflict with Minn. Stat. § 471.44.

[1] Petitioners seek to distinguish between the proposed obligation to pay for insurance vested with the officer and the city's current statutory obligation to indemnify and to furnish legal counsel. This distinction fails. Insurance

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Finally, the Charter amendment proposal conflicts with PELRA, the Minnesota Public Employment Labor Relations Act, Minn. Stat. Ch. 179A. The City may not enforce a charter provision that conflicts with an existing labor agreement because doing so would conflict with the city's statutory obligation to bargain under PELRA. *Somers v. City of Minneapolis*, 245 F.3d 782, 787 (8th Cir. 2001).

Currently, and for at least the last thirty years, the collective bargaining agreement between Minneapolis and the Police Federation allows the city to maintain liability coverage on its officers and requires the city to pay any associated premiums. The proposed amendment does not prohibit the city from purchasing coverage but it does limit the circumstances in which the city can pay premiums. In so doing, it appears to conflict with the labor agreement provision that "The City shall pay all premiums for such coverage." The labor agreement can reasonably be read to require that premiums for liability insurance be borne by the city regardless of whether the officer or the city actually "maintains" the policy. Such an interpretation creates a conflict between the labor agreement, which would require a city to pay the premiums, and the proposal which does not require a city to pay the premiums and indeed forbids the city to pay the premium above base rates.

Petitioners argue that the proposed insurance requirement may not affect a term and condition of employment and therefore may not conflict with PELRA, which requires collective bargaining only regarding grievances and "terms and conditions of employment." This argument fails. Requiring insurance *as a condition of employment* is *ipso facto* a term and condition of employment.[2] Moreover, since the City has bargained in the past regarding this precise issue, i.e.

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premiums represent consideration for two duties: the duty to defend and the duty to indemnify – both of which are duties that the city is statutorily obligated to absorb. *St. Paul Fire & Marine Ins. Co. v. Nat'l Chiropractic Mut. Ins. Co.*, 496 N.W.2d 411, 415 (Minn. Ct. App. 1993).

[2] The Court also observes that the proposed insurance requirement can hardly be considered managerial policy when, as a charter provision, no manager would be free to ignore it or change it.

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insurance coverage for police officers, the subject is covered by PELRA regardless of whether it could be considered a managerial policy. *Gallagher v. City of Minneapolis*, 364 N.W.2d 467, 470 (Minn. Ct. App. 1985) (Minn. Stat. § 179.66, subd. 2, applies to both matters of inherent managerial policy and terms and conditions of employment where City has negotiated on the matter).

III. Intervention by Police Federation

The Police Federation has moved to intervene claiming associational standing. Minnesota Rule of Civil Procedure 24.01 states: "Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Minn. R. Civ. P. 24.01.

Motions to intervene are liberally granted because Rule 24.01 "is designed to protect nonparties from having their interests adversely affected by litigation conducted without their participation." *Gruman v. Hendrickson*, 416 N.W.2d 497 (Minn. Ct. App. 1987).

Additionally, an association has standing to sue on behalf of its members where "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (U.S. 1977); *see also State by Humphrey*, 551 N.W.2d at 498 (adopting *Hunt* associational standing analysis). The Police Federation is entitled to intervene pursuant to the standards identified above.

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That being said, the only additional argument presented by the Federation is a claim that Minn. Stat. § 626.843 occupies the field regarding qualifications of police officers and provides an additional basis for field preemption. This Court chooses not to address this argument in detail, given that it would not change the outcome and the need to issue a timely order. However, it observes that the Federation's argument appears to conflict with *Columbia Heights Police Relief Ass'n v. City of Columbia Heights*, 233 N.W.2d 760 (Minn. 1975). There, Columbia Heights proposed a charter amendment to require its police officers to join the Public Employees Retirement Association Police and Fire Fund (PERA) and to prohibit their membership in the Columbia Heights Police Relief Association. The district court invalidated the amendment but the Court of Appeals reversed. It concluded that there was no conflict with state law, particularly PERA. *Id.* at 761. It found no field preemption under any statutory scheme affecting police officers.

S.M.R.