

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

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

Court File No.: _____

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,

COMPLAINT

Defendants.

Plaintiffs, registered family child care providers in the State of Minnesota bring this suit to challenge Governor Mark Dayton's Executive Order 11-31, which directs the Bureau of Mediation Services to conduct a union election amongst subsidized family child care providers and for the Departments of Education and Human Services to take certain actions if the unions are selected. Plaintiffs seek declaratory relief that Defendants' actions violate Minnesota and federal law as well as the Minnesota and United States Constitutions. Plaintiffs also seek injunctive relief to prevent the Minnesota Bureau of Mediation Services from implementing the Executive Order in any manner.

Wherefore, for its Complaint against Defendants, Plaintiffs state and allege as follows:

PARTIES

1. Plaintiffs Becky Swanson, Holle Saville, Linda Christiansen, Julie Halverson, Renee Holz, Tammy Larson, Erin Rheault, Kelly Romano, and Janet Krutzig are taxpayers, residents and citizens of the State of Minnesota who are also registered child care providers, but

who have not received subsidies through the Minnesota Child Care Assistance Programs (CCAP) under Chapter 119B of the Minnesota Statutes within the past year.

2. Plaintiffs Jean Lang and Tammy Drewes are taxpayers, residents and citizens of the State of Minnesota who received subsidies for providing family child care services through the Minnesota Child Care Assistance Programs (CCAP) under Chapter 119B of the Minnesota Statutes within the past year.

3. Defendant Mark Dayton is sued in his official capacity as the Minnesota Governor.

4. Defendant Minnesota Bureau of Mediation Services (“BMS”) is a department in the State of Minnesota government’s executive branch. The BMS administers programs in Minnesota relating to labor relations including mediation, representation, arbitrator referral, labor-management cooperation, and labor relations training.

5. Defendant Josh Tilsen (“Commissioner”) is sued in his official capacity as the Commissioner of the BMS.

JURISDICTION AND VENUE

6. This action is brought in challenge to Governor Mark Dayton’s Executive Order 11-31, as well as to challenge various unlawful actions taken pursuant to that Executive Order by State officials acting under the color of State law.

7. Plaintiffs seek declaratory and injunctive relief: (a) for deprivation of plaintiffs’ rights arising under and secured by the Constitution and laws of the United States, including the National Labor Relations Act as amended, 29 U.S.C. § 151, et. seq., and the Supremacy Clause of the United State Constitution; and (b) under State law for violation of the State Constitution and other laws of the State of Minnesota.

8. Plaintiffs bring this action pursuant to Article I, Section 8 of the Minnesota Constitution.

9. Plaintiffs also bring this action for declaratory judgment pursuant to Minn. § 555.01, et. seq.

10. Venue is appropriate under Minn. Stat. §542.18.

FACTS IN SUPPORT OF CLAIMS FOR RELIEF

11. On November 15, 2011, Governor Dayton signed Executive Order 11-31 (hereinafter “the Executive Order”(attached hereto as Exhibit A).

12. The Executive Order requires the BMS to conduct an election to determine whether the SEIU and AFSCME, two labor unions, will represent licensed family child care providers who: (1) were registered with the State of Minnesota as of September 30, 2011; and (2) have received at least one subsidy payment from the state-funded CCAP within the past year.

13. There are approximately 11,000 licensed family child care providers in Minnesota. The Executive Order limits voting rights to only those providers who accepted state subsidies within the past year, which accounts for approximately 4,300 providers.

14. The Executive Order also declares if a majority of voting family child care providers select representation, the Commissioner of the BMS will certify the SEIU and AFSCME (collectively “the Unions”) as the exclusive representatives for all licensed family child care providers who receive CCAP subsidies.

15. Registered licensed family care providers, who are also registered for CCAP funding, but who have not received CCAP subsidies in the past year, are not eligible to vote in the election being scheduled by the BMS. Plaintiffs Becky Swanson and Erin Rheault are two such registered CCAP providers.

16. Employees of registered licensed family care providers who have received CCAP funding in the past year are not eligible to vote in the election being scheduled by the BMS.

17. The Executive Order further declares that if Commissioner of the BMS certifies the Unions as the exclusive representatives for the licensed family child care providers who receive CCAP subsidies, the Commissioners of Human Services and Education shall meet and confer with the Unions on issues of mutual concern and memorialize agreements on those issue in writings.

18. The Executive Order envisions the Unions bargaining with the Commissioners of Human Services and Education over quality standards, quality rating systems, the availability of training opportunities and funding, reimbursement rates, access to benefits, changes to the state system of providing early childhood education services, the monitoring and evaluating of family child care provides, licensing issues, training and education, quality standards, rating systems, reimbursement rates, and other standards impacting child care providers.

19. The subjects bargained for by the Unions for subsidized family child care providers and the agreements reached with the Commissioners of Human Services and Education will impact all family child care providers within the State of Minnesota.

20. The Executive Order further permits the family child care providers to make payment of union dues to the SEIU and AFSCME.

21. Although the Executive Order does not take effect until November 30, 2011, the BMS has already acted on the Executive Order by announcing that, pursuant to the Order, it will send out ballots to eligible home-based child care providers on or about December 6, 2011.

COUNT I: VIOLATION OF THE MINNESOTA CONSTITUTION:
SEPARATION OF POWERS

22. Plaintiffs reallege and incorporate herein as if fully restated, the allegations contained in paragraphs 1 through 21.

23. 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.

24. 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 governor for approval or veto. Legislative bills become law if signed by the governor.

25. Pursuant to Article V, Section 3 of the Constitution of the State of Minnesota, the governor has a constitutional duty to take care that the laws of Minnesota are faithfully executed. The Governor's power with respect to passage of laws of the state is limited to the power granted him in Article IV to either sign or veto laws passed by the legislature.

26. The Minnesota Labor Relations Act, Minn. Stat. 179.01, et. seq. and the Minnesota Public Employment Labor Relations Act set forth the State of Minnesota's public policy on labor relations.

27. The Bureau of Mediation Services was established by the legislature under Minn. Stat. 179.02 and operates at the direction of the legislature.

28. Minnesota law does not grant employers the right to form, join or assist labor organizations, and does not give the BMS any authority to conduct an election to form a labor organization on behalf of private employers.

29. By directing the Bureau of Mediation Services, an agency created by the legislature, to conduct an election that violates Minnesota law, including Minn. Stat. 179.10 and

Minn. Stat. 179A.04, defendant Governor Dayton improperly superseded the legislature's authority and violated the separation of powers clause as set forth in the Minnesota Constitution.

**COUNT II: VIOLATION OF THE EQUAL PROTECTION CLAUSES OF THE
UNITED STATES AND MINNESOTA CONSTITUTION**

30. Plaintiffs reallege and incorporate herein as if fully restated, the allegations contained in paragraphs 1 through 29.

31. The Equal Protection Clauses found in Article 1, Section 2 of the Constitution of the State of Minnesota, and in the Fourteenth Amendment of the United States Constitution, require the state to treat similarly situated individuals alike.

32. Executive Order 11-31 affords licensed registered subsidized family child care providers who have receiving subsidies in the past year the right to engage in collective action, and directs two mail-ballot elections to determine whether AFSCME Council 5 and SEIU shall represent licensed registered subsidized family child care providers.

33. Executive Order 11-31 does not afford certain registered family care providers and non-subsidized family child care providers with the right to engage in collective action or to vote in the election directed by the order.

34. Executive Order 11-31 further provides that if majority exclusive representatives are certified by the vote, those representatives shall meet and confer with the Commissioners of Human Services and Education or their designees regarding "quality standards and quality rating systems; the availability of training opportunities and funding; reimbursement rates; access to benefits; changes to the state system of providing early childhood education services; the monitoring and evaluating of family child care providers; and any other matters that the parties agree would improve recruitment and retention of qualified licensed registered family child care providers and the quality of the programs they provide."

35. By excluding certain Plaintiffs who are registered and non-subsidized child care providers from the ability to participate in the vote, from being as equally represented as the subsidized child care providers, and from having an equal say in the issues of mutual concern set forth in the Executive Order, and nonetheless subjecting them to whatever determinations are negotiated by the representatives of the subsidized child care providers, the Executive Order violates the Equal Protection Clauses of the Constitutions of the State of Minnesota and the United States .

COUNT III: THE EXECUTIVE ORDER IS PREEMPTED BY FEDERAL LABOR LAW

36. Plaintiffs reallege and incorporate herein as if fully restated, the allegations contained in paragraphs 1 through 35.

37. The operation of the family child care services impacts interstate commerce and family child care providers are subject to the National Labor Relations Act (NLRA), as amended, 29 U.S.C. § 151, et. seq.

38. Under the NLRA, employers and independent contractors are prohibited from voting in representation elections as set forth in Section 9(a) of the NLRA.

39. Under Section 8(a)(2) of the NLRA, employers are prohibited from dominating or interfering with the formation or administration of any labor organization or contributing financial or other support to it.”

40. Under the NLRA, employers are prohibited from agreeing to pre-hire agreements with labor organizations unless they fall within the construction industry proviso set forth in Section 8(f) of the NLRA.

41. Under Section 302 of the Taft-Hartley Act, 29 U.S.C.A. § 186, employers, association of employers or any person who acts as a labor relations expert, adviser, or

consultant to an employer or who acts in the interest of an employer are prohibited from paying, lending, or delivering, or agreeing to pay, lend, or deliver, any money or other thing of value ... to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce”

42. By directing an election of family child care providers, Governor Dayton’s Executive Order is in direct conflict with the National Labor Relations Act (“NLRA”) and § 302 of the Taft-Harley Act (29 U.S.C.A. §186). As such, it is preempted by operation of these Acts as well as the Supremacy Clause of the United States Constitution (Article VI, Clause 2).

IRREPARABLE HARM

43. Plaintiffs are suffering or are in danger of suffering irreparable harm if the BMS conducts the elections as set forth by Executive Order 11-31. Plaintiffs’ ability to vote in an election, the result of which will directly impact the regulation of their livelihood, is at stake. Plaintiffs have no adequate remedy at law to prevent the infringement of their Constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court to:

1. Grant a temporary and permanent injunction that:
 - a. Enjoins any enforcement or implementation of Executive Order 11-31.
 - b. Enjoins the Commissioner of the Bureau of Mediation Services from conducting the elections directed by Executive Order 11-31 as issued by Governor Dayton.

2. Issue a declaratory judgment which provides that the Executive Order is void and unenforceable because:
 - a. Defendant Governor Dayton's Executive Order 11-31 that directs the Bureau of Mediation Services to hold an election not contemplated by statute is an unconstitutional usurpation of the legislature's constitutional right to create law and as such is a violation of the separation of powers doctrine.
 - b. The Bureau of Mediation Services does not have the authority to implement the terms set forth in Executive Order 11-31 because any authority it holds is that which was granted to it by the legislature.
 - c. Executive Order 11-31 violates the Equal Protection Clauses of the Constitutions of the United States and Minnesota.
 - d. The Executive Order is preempted by Federal law.
3. Award reasonable costs and attorneys' fees as the Court deems proper.
4. Grant all further relief in law or in equity to which it may show it is justly entitled.

Dated: November 28, 2011.

SEATON, PETERS & REVNEW, P.A.

By: 

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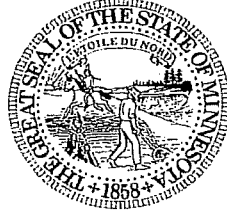
ACKNOWLEDGEMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.211, Subd. 1, to the party or parties against whom the allegations in this pleading are asserted.



Thomas R. Renew (#0295620)

STATE OF MINNESOTA
EXECUTIVE DEPARTMENT



MARK DAYTON
GOVERNOR

Executive Order 11-31

**Representation of Licensed Registered
Subsidized Family Child Care Providers**

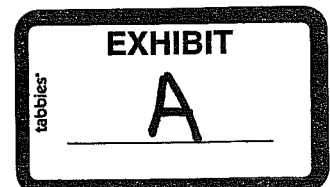
I, Mark Dayton, Governor of the State of Minnesota, by virtue of the authority vested in me by the Constitution and applicable statutes, do hereby issue this Executive Order:

Whereas, it has been well documented that the first five years of a child's life is a time of phenomenal growth and development, and access to high-quality early childhood education services prepares children for later learning in life, and ensures that they enter kindergarten ready and able to succeed; and

Whereas, licensed family child care providers provide invaluable services to working parents and guardians by providing high quality learning environments for their children while they are engaged in work or education opportunities, or both, and are particularly well-suited to meet families' needs, by providing care during flexible hours and schedules, including evenings, overnight, and weekends in a comforting home environment; and

Whereas, the State is committed to improving the quality, accessibility, and affordability of early childhood education services; and

Whereas, despite their important services to Minnesota's families, there has been a troubling decline in the number of licensed family child care providers operating in the State of Minnesota; and



Whereas, under Minnesota Statutes, Chapters 119B and 245A, the Minnesota Department of Human Services is the lead child care agency and its Commissioner sets the rules by which child care services are administered through the State-supervised and county-administered system; and

Whereas, under Minnesota Statutes, Section 119A.03, subdivision 2, the Commissioner of Education must develop linkages with other state departments to ensure coordination and consistent state policies promoting healthy development of children and families; must facilitate inclusive processes when designing or implementing guidelines and strategies to achieve agency goals for children and families; and must facilitate intergovernmental and public-private partnership strategies necessary to implement Minnesota Statutes, Chapter 119A: and

Whereas, unions AFSCME and SEIU have claimed in writing that a majority of licensed family child care providers desire to be represented for the purposes of negotiating their relationship with the State; and

Whereas, in light of the foregoing, a labor dispute exists concerning the right of family child care providers to organize for the purpose of representation in their dealings with the State; and

Whereas, under Minnesota laws and Statutes, including but not limited to, Section 179.02, the Commissioner of the Bureau of Mediation Services has broad authority to make rules, appointments, and to provide technical support in the area of labor relations, including the conduct of elections and the resolution of labor disputes in the State, regardless of whether there is an employer or employee relationship; and

Whereas, it is essential that a fair and transparent election among licensed family child care providers proceed before the State shall certify or conduct meetings with any representatives of family child care providers.

Now, Therefore, I hereby order that:

1. Within 60 days after the issuance of this Order, the Commissioner of the Bureau of Mediation Services shall conduct two mail-ballot elections to determine whether AFSCME Council 5 and SEIU shall represent licensed registered subsidized family child care providers in the appropriate units, requested by AFSCME Council 5 and SEIU in their letter dated November 8, 2011. For the purposes of the election, the Bureau of Mediation Services shall utilize the most recent list of licensed registered subsidized family child care providers in the appropriate units. The Commissioner of the Bureau of Mediation Services may designate the American Arbitration Association, subject to his oversight, to conduct all proceedings related to the elections in the appropriate units, in a fair and transparent manner. Any costs incurred by the Bureau of Mediation Services or the American Arbitration Association in carrying out this section shall be borne entirely by

AFSCME Council 5 and SEIU.

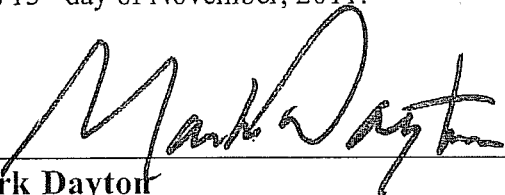
2. "Licensed registered subsidized family child care providers" shall include those family child care and group family child care providers subject to licensure under Minnesota Statutes, Chapter 245A; subject to various other requirements under Minnesota Statutes, Chapter 119B; governed by Minnesota Rules, Chapter 3400 and Chapter 9502; and who are registered as of September 30, 2011 to receive subsidies for providing subsidized child care services pursuant to the Minnesota Child Care Assistance Programs ("CCAP") under Chapter 119B.
3. If a majority of licensed registered subsidized family child care providers voting in the mail ballot election provided for herein, vote affirmatively for exclusive meet and confer representation, the Commissioner of the Bureau of Mediation Services shall certify the organization so designated.
4. If the Commissioner of the Bureau of Mediation Services certifies a majority exclusive representative in an appropriate unit, the Commissioners of Human Services and Education or their designees, shall meet and confer in good faith with the exclusive representatives of the licensed registered family child care provider units regarding issues of mutual concern, including quality standards and quality rating systems; the availability of training opportunities and funding; reimbursement rates; access to benefits; changes to the state system of providing early childhood education services; the monitoring and evaluating of family child care providers; and any other matters that the parties agree would improve recruitment and retention of qualified licensed registered family child care providers and the quality of the programs they provide.
5. All agreements on issues of mutual concern shall be memorialized in writing. If any provision of an agreement negotiated between the Commissioner of Human Services, the Commissioner of Education, and the exclusive representatives requires new legislation, the adoption or modification of administrative rules of any department or agency of State government to be effective, or the appropriation of money for their implementation, the parties will seek enactment of the legislation, adoption of the rules or both.
6. Nothing in this Order shall be construed to confer upon licensed family child care providers the right to strike.
7. In affording licensed registered subsidized family child care providers the right to engage in collective action, select a representative, and jointly engage in negotiations with the State under the terms of this Order, the State intends that the "State Action" exemption from federal antitrust laws be fully available to the State, based on the State's active supervision of licensed family child care providers to improve the quality,

accessibility, and affordability of early childhood education services in the State.

8. Nothing in this Order shall be construed to grant family child care providers status as employees for any purpose.
9. Nothing in this Order shall be construed to interfere with parental rights to select and deselect family child care providers, or the ability of family child care providers to establish the rates they charge to parents.
10. Nothing in this Order shall be construed to require participation, or the involuntary payment of dues by any family child care provider.
11. Nothing in this Order shall be construed to interfere with the right or obligation of any state agency to communicate or meet with any citizen or organization concerning family child care legislation, regulation, or policy.
12. Shall any part of this Order be declared to be invalid or unenforceable, or the enforcement or compliance with it is suspended, restrained or barred, either by the State or by the final judgment of a court of competent jurisdiction, the remainder of this Order shall remain in full force and effect.

Under Minnesota Statutes 2011 § 4.035, subdivision 2, this Executive Order is effective 15 days after publication in the State Register and filing with the Secretary of State and shall remain in effect until rescinded by proper authority or it expires in accordance with Minnesota Statutes 2011 § 4.035, subdivision 3.

In Testimony Whereof, I have set my hand this 15th day of November, 2011.



Mark Dayton
Governor

Filed According to Law:



Mark Ritchie
Secretary of State