

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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**John Klug and Bob Barnard, individually,  
and John Klug and Bob Barnard, on  
behalf of the and as Members of the Local  
Membership of the International Police  
Association (IUPA), Police Members and  
Pensioners,**

**Plaintiffs/Appellants,**

**v.**

**City of Minot,**

**Defendant/Appellee.**

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**SUPREME COURT NO. 20100217**

**FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT**

**NOV 05 2010**

**STATE OF NORTH DAKOTA**

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**APPEAL FROM THE DISTRICT COURT  
WARD COUNTY, NORTH DAKOTA  
NORTH WEST JUDICIAL DISTRICT  
CIVIL NO. 51-8-C-1990-1  
THE HONORABLE M. RICHARD GEIGER, PRESIDING**

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**APPELLANTS' REPLY BRIEF**

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## LAW AND ARGUMENT

### **I. MINOT'S POWERS UNDER ITS HOME RULE CHARTER DO NOT SUPERSEDE THE PROCEDURAL PROTECTIONS AFFORDED TO MINOT POLICE OFFICERS AND PENSIONERS UNDER N.D.C.C. CHAPTER 40-45.**

#### **A. The City of Minot Discontinued the Police Pension.**

In its Brief of Appellee, Minot claims it “merged” its non-police municipal employees pension with its police pension, without discontinuing the police pension. (Brief of Appellee at ¶ 25.) A “merger” is the “fusion or absorption of one thing or right into another.” Black’s Law Dictionary, 5<sup>th</sup> Edition (1979). Accordingly, Minot must be contending it absorbed its non-police municipal employees into its police pension. Such a fusion, however, is not allowed under N.D.C.C. Chapters 40-45 or 40-46 because those two chapters do not allow police officers to be members of a municipal employees’ pension and do not allow non-police employees to be members of the police pension.

Minot notes that when a police pension is discontinued, the pension fund is to be returned to the members. It contends that since the fund was not distributed to the members, the pension was not discontinued. This argument, however, begs the question. The fact that Minot did not properly follow the law when it illegally discontinued the police pension is not evidence the pension was not discontinued.

As to the police pension, there is only one legal conclusion: Minot illegally discontinued the police pension and created a new pension.

#### **B. Minot Ignores the Limits of Authority in N.D.C.C. § 40-05-01(69) Concerning Pensions.**

N.D.C.C. § 40-05-01(69) provides:

The governing body of a municipality shall have the power:

\* \* \*

69. Employee pension system. To adopt, by ordinance, a city employee pension system that may provide all rules and regulations governing its operation and discontinuance, **provided other pension systems allowed by statute are not in effect**, excepting firefighters relief associations and federal social security, or in order to consolidate existing pension plans. In addition to all other rules and regulations deemed necessary and proper by the governing body, it may provide as to matters pertaining to membership, tax levies in an amount not exceeding the total levies authorized by chapters 40-45 and 40-46, membership fees and assessments, management, investments, acceptance of money and property, retirement conditions and payment amount, continuance of system and discontinuance procedures, discontinuance payments, entrance into contracts with an insurance firm or firms for coverage of the employee pension system. (emphasis added).

This section specifically limits Minot’s power to do what it attempted in this case – to “merge” two pensions created by statute into one pension created under Minot’s charter.

**C. The Plaintiffs Have Standing to Demand Minot Follow the Law.**

In the Complaint, Plaintiffs allege Minot “failed to comply with applicable rules, regulations, standard and the laws of the State of North Dakota” when it discontinued the police pension. (A at 7; Complaint at ¶ XVII.) Plaintiffs request that the Court require Minot to “return to the separate nature and identity of the Police pension package and a full return of all amounts taken . . . .” (A at 9.)

The declaratory judgment act, N.D.C.C. Ch. 32-23, is remedial and is to be liberally construed to settle uncertainty concerning rights, statuses, and other legal relations. N.D.C.C. § 32-23-12; In Interest of McMullen, 470 N.W.2d 196 (N.D.1991). Under N.D.C.C. § 32-23-02, “[a]ny person ... whose rights, status, or

other legal relations are affected by a statute ... may have determined any question of construction ... arising under the ... statute ... and may obtain a declaration of rights, status, or other legal relations thereunder.”

In McMullen, 470 N.W.2d at 198-99, this Court outlined the basic framework from for assessing the suitability of declaratory relief:

The requisite precedent facts or conditions which the courts generally hold must exist in order that declaratory relief may be obtained may be summarized as follows: (1) there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

All of the McMullen elements exist in this case. There is a real controversy concerning whether Minot followed the requirements of North Dakota law when it discontinued the police pension. That controversy is between the Plaintiffs and Minot and their interests are adverse. The Plaintiffs have a legal interest in the controversy – they are among the class of police officers who are granted procedural rights by N.D.C.C. Ch. 40-45. Finally, the issues are ripe for determination.


Accordingly, Plaintiffs have standing to challenge Minot’s illegal acts and they have standing to require Minot to reinstitute the police pension under Chapter 40-45.

### **CONCLUSION**

Because Minot’s Charter does not Supersede Chapter 40-45, this Court should reverse and remand with instructions that the District Court declare Ordinance Number 4131 illegal as a matter of law.

Respectfully submitted November 5, 2010.

**VOGEL LAW FIRM**

By: 

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**AFFIDAVIT OF SERVICE**

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STATE OF NORTH DAKOTA    )  
                                              )   SS  
COUNTY OF BURLEIGH     )

Jamie A. Orstad, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter.

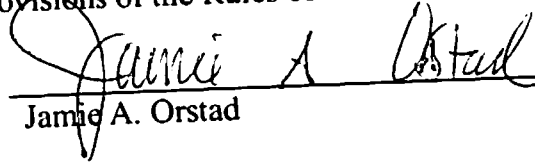
On November 5, 2010, Affiant deposited in the United States Post Office at Bismarck, North Dakota, a true and correct copy of the following document:

**Appellants' Reply Brief**

A copy of the foregoing was securely enclosed in an envelope with postage duly prepaid and addressed as follows:

Mr. Scott K. Porsborg  
116 N. 2<sup>nd</sup> St.  
P.O. Box 460  
Bismarck, ND 58502

The best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above document was duly mailed in accordance with the provisions of the Rules of Civil Procedure.

  
\_\_\_\_\_  
Jamie A. Orstad

Subscribed and sworn to before me this 5<sup>th</sup> day of November, 2010.

  
\_\_\_\_\_  
Notary Public, Burleigh County, North Dakota

