

ALASKA LABOR RELATIONS AGENCY
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EDUCATION SUPPORT STAFF)
ASSOCIATION, NEA-ALASKA, NEA,)
)
Petitioner,)
)
v.)
)
FAIRBANKS NORTH STAR BOROUGH)
SCHOOL DISTRICT,)
)
Respondent.)
_____)

CASE NO. 09-1553-OTH.

DECISION AND ORDER NO. 289

This matter was decided based upon the record from *Education Support Staff Association v. Fairbanks North Star Borough School District*, Decision and Order No. 287 (September 16, 2008), and documents filed by the parties regarding this petition.¹ The record closed on April 28, 2009, when the board finished deliberations in this matter.

Digest: The petition by the Education Support Staff Association for reconsideration or clarification is denied. The request to order the Fairbanks North Star Borough School District to pay a six percent loss of opportunity premium was filed after the time to request reconsideration of Decision and Order No. 287 had expired. The request was also filed after the time to appeal Decision and Order No. 287 expired on October 16, 2008.

¹ Because the record related to Decision and Order No. 287 was closed when this petition was filed, we created a new case number in this case, for procedural purposes only.

Appearances: Justin "Buck" George, Uniserve Director for Education Support Staff Association; Clarence Bolden, Executive Director of Human Resources, for Fairbanks North Star Borough School District.

Board Panel: Aaron T. Isaacs, Jr., Vice Chair; Matthew R. McSorley and Will Askren, Members.

DECISION

Statement of the Case

On September 16, 2008, we issued a decision and order finding that the Fairbanks North Star Borough School District (the District) committed an unfair labor practice by making a unilateral change to the parties' expired collective bargaining agreement without bargaining to impasse. We ordered the District to make whole the bargaining unit members affected by the unilateral change. The Education Support Staff Association (the Association) now requests a six percent loss of opportunity payment as part of the make whole order.

Issues

1. Did the Association file a timely request for reconsideration of Decision and Order No. 287?
2. If the Association did file a timely request for reconsideration, should we grant its request for a six percent loss of opportunity payment in addition to the retroactive payment already ordered previously?

Findings of Fact

1. The Association² represents a bargaining unit of non-certificated employees of the District.
2. The District employs members of the Association's bargaining unit.
3. On September 16, 2008, we issued *Education Support Staff Association v. Fairbanks North Star Borough School District*, Decision and Order No. 287 (September 16, 2008)

² The parties also refer to the Association as ESSA.

(D&O 287). In D&O 287 we concluded that the District had committed an unfair labor practice violation by unilaterally changing a mandatory term of the parties' expired collective bargaining agreement without bargaining to impasse. We order the District to "make whole all employees affected by this decision and order, specifically those employees in the bargaining unit who did not receive an entry-to-base level increment in accordance with Article 14.1 of the parties' 2003 - 2006 collective bargaining agreement." (D&O 287 at 21).

4. Following the issuance of D&O 287, the parties exchanged communications regarding payment. On October 8, 2008, the Association emailed Gayle Pierce, the District's Labor Relations Director, and inquired about the payment pursuant to the board order. (Association Exhibit 1).

5. On October 17, 2008, the Association wrote to Dr. Nancy Wagner of the District. (Association Exhibit 2). In the memorandum, Uniserv Director George noted that he had spoken to Pierce on September 26, 2008, and emailed her on October 8, 2008, but he still had not received a "response as to the District's intent or timeline to comply with this decision and order."

6. The Association copied the October 17, 2008, memorandum to agency Hearing Examiner Mark Torgerson. The memorandum was received at the Agency on October 24, 2008. Torgerson wrote the parties on November 4, 2008, noting that to the agency's knowledge, D&O 287 was not appealed to the courts, and noting the Agency had not received "any other communication from the District regarding execution of the Order. Please advise this Agency immediately regarding status of implementation of the September 16, 2008 Order." (Association Exhibit 3).

7. On November 4, 2008, Bolden notified 18 employees regarding issuance of D&O 287. He also attached a blank copy of the notice of decision and informed the employees that such notice was required to be posted.

8. On November 12, 2008, Buck George emailed Clarence Bolden. (Association Exhibit 4). As part of his email, George also included an email from district employee Valerie Stilipec to Annie Baker. In the November 11, 2008, email, Stilipec stated that "[t]his request cannot be done anytime real soon. I am working on teacher retros and other changes in the system that need to be done ASAP. Is this for some grievance?" In his email to Bolden, George asserted that the district's response "is becoming unacceptable. I know we agreed to postpone until Valerie returned but this issue needs to come to closure."

9. On November 14, 2008, Labor Relations Director Pierce responded to the Agency's request for status. Pierce stated that the "District's Human Resources Department has written to each affected employee regarding Decision and Order No. 287. Pierce noted that the parties met on November 14 and would meet again the following week. Pierce added, "The District will execute payment to the affected employees as soon as possible after the meeting next week." (Association Exhibit 5).
10. On December 24, Bolden wrote district employee Brandy Brice and told her that the District expected to provide her retroactive pay "by the end of January 2009." (Association Exhibit 6).
11. On February 5, 2009, Bolden wrote employee Brice that the retroactive check would be issued by February 13, 2009. (Association Exhibit 7).
12. On February 23, 2009, the Agency received the Association's February 12, 2009, letter requesting clarification of the "make whole" order in D&O 287. The Agency instructed the parties to submit arguments on the request by March 16, 2009.

Analysis

1. Did the Association file a timely request for reconsideration of Decision and Order No. 287?

AS 44.62.520 provides in part:

- (a) A decision becomes effective 30 days after it is delivered or mailed to the respondent unless
 - (1) a reconsideration is ordered within that time;
 - (2) the agency itself orders that the decision become effective sooner, or
 - (3) a stay of execution is granted for a particular purpose and not to postpone judicial review.

AS 44.62.540(a) provides for reconsideration of administrative decisions such as Decision and Order No. 287:

- (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order

reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If not action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

The Association asks us to clarify our decision. However, unless we retain jurisdiction over a decision and its related order, we have no authority to review or reconsider the decision unless a party requests reconsideration or unless an appellate court remands the decision back to us. Decision and Order No. 287 has not been appealed, so we will deem the Association's request for clarification of the make whole remedy a request for reconsideration.

We deny the Association's request for reconsideration of D&O 287. The Association is essentially asking us to reconsider the "make whole" remedy we announced in D&O 287. As the above statute indicates, a petition to reconsider a decision must be filed within 15 days after delivery or mailing of the decision. The Association's request occurred long after this 15-day period expired. Further, the Association has not pointed to any other means by which we may review or modify D&O 287.

Even if we had jurisdiction to reconsider the make whole remedy, we would deny the Association's request. We reviewed the record, and we could find no request by the Association that we order the District to pay a six percent loss of opportunity.³ Therefore, we deem the Association's request as a new request that it failed to ask for during the adjudication of this matter. The Association did ask us to retain jurisdiction in the event disputes arose over the make whole remedy, but we did not retain any jurisdiction after issuance of D&O 287.

2. If the Association did file a timely request for reconsideration, should we grant its request for a six percent loss of opportunity payment in addition to the retroactive payment already ordered previously?

We have already determined that the Association did not file a timely request for reconsideration. We therefore have no jurisdictional authority to further adjudicate the issues decided in Decision and Order No. 287. However, we cannot close this matter without noting our disappointment over the District's apparent failure to act promptly to our September 16, 2008, order that it make the 18 or so affected employees whole. This failure to act is reflected in both the District's seeming failure to timely post the

³ Some record documents indicate there were discussions between the parties, but the Association made no request to the Board during the hearing process.

notice of this decision and order, as required by agency regulations, and in its multi-month delay in paying the affected employees their due.

In accordance with our regulation 8 AAC 97.460(a), agency staff served the parties with a copy of the D&O 287 and also a notice of the decision. Agency regulation 8 AAC 97.460(b) then requires the employer (the District in this case), "[n]o later than 10 days following service of the notice of the final decision and order" to "post conspicuously for 10 days a copy of the notice at all work sites where members of the bargaining unit affected by the decision and order are employed."

This Agency requests that the employer return an affidavit certifying that it made the required posting. There is no returned affidavit in the record. If the posting was completed timely, there is no record of the timeliness. The only documents in the record that relate to the posting are a November 4, 2008, letter to affected employees and an attached copy of a blank notice of posting form.

There is no penalty for failure to timely post the notice as 8 AAC 97.460(b) requires, but we are nevertheless concerned that posting may not have been done in accordance with the required time lines. Prompt posting provides bargaining unit members with notice that the agency Board has determined the issues affecting them. It can also alert employees to the fact that an employer has been ordered (as in this case) to take certain actions concerning them. If the action required of the employer has not occurred (as happened here), the employees will be able to discuss the issue with their bargaining representative in a timely matter. Posting also serves to notify employees of their rights that may have been violated under the Public Employment Relations Act.

In addition to showing an apparent lack of timely posting, the documents provided by the parties in their briefing suggest that the District responded very slowly to the board Order to make whole the affected employees. The record indicates that the District only began to act on the make whole order when pushed by the Association to do so. There appeared to be no sense of urgency to pay the 18 affected employees as required by D&O 287.

D&O 287 was issued on September 16, 2008. The Association's Uniserve Director, Justin "Buck" George had inquired about getting the payment calculation process underway as early as September 26, 2008, in a discussion with Gayle Pierce, the District's Labor Relations Director. After getting no response to an October 7, 2008, email he sent to Pierce, George wrote the District on October 17, 2008, and expressed frustration that there had been no posting of notice of D&O 287 and no response from the District regarding compliance with the decision.

The Agency received a copy of George's October 17 letter on October 24 and wrote Pierce and George on November 4, asking the parties to "advise the agency immediately regarding status of implementation of the September 16, 2008 Order." Pierce responded on November 14 that the parties met that day to "begin discussions regarding the amount due each employee." (Association Exhibit 5). She added, "[t]he District will execute payment to the affected employees as soon as possible after the meeting next week." Unfortunately for the 18 affected employees, payment did not occur for almost three more months.

The record indicates that payment to these wronged employees was slow in coming and low in priority. Nonetheless, under the specific facts of this case, we find we must deny the Association's request to compensate these employees in the form of interest or "loss of opportunity" for the lengthy period they went without the proper salary payment. Under the current statutes, we must trust that employers will act promptly to compensate employees in accordance with the orders we issue, and not just make the payment due when they get around to it. The affected employees deserve no less.

CONCLUSIONS OF LAW

1. The Education Support Staff Association, NEA-Alaska is an organization under AS 23.40.250(5). The Fairbanks North Star Borough School District is a public employer under AS 23.40.250(7).

2. This Agency has jurisdiction to determine whether to grant the Association's petition for reconsideration or modification.

3. As petitioner, the Education Support Staff Association has the burden to prove each element of its claim by a preponderance of the evidence. 8 AAC 97.350.

4. The Education Support Staff Association failed to prove each element of its claim by a preponderance of the evidence.

5. The Education Support Staff Association failed to request reconsideration within 15 days of issuance of Decision and Order No. 287 as required by AS 44.62.540.

ORDER

1. The petition of the Education Support Staff Association, NEA-Alaska in Case No. 07-1553 – OTH is denied and dismissed.

2. The Fairbanks North Star Borough School District shall post a notice of this decision and order at all work sites where members of the bargaining unit affected by this decision and order are employed, or alternatively, serve each employee affected personally. Posting shall occur within the time limits provided in 8 AAC 97.460(b). The District shall provide the Agency and the Education Support Staff Association with an affidavit of posting.

ALASKA LABOR RELATIONS AGENCY

Aaron Isaacs, Jr., Vice Chair

Matthew McSorley, Board Member

Will Askren, Board Member

APPEAL PROCEDURES

This order is the final decision of this Agency. Judicial review may be obtained by filing an appeal under Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of mailing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the order in the matter of Education Support Staff Association, NEA-Alaska, NEA vs. Fairbanks North Star Borough School District, Case No. 09-1553-OTH, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 9th day of July, 2009.

Margie Yadlosky
Human Resource Specialist

This is to certify that on the 9th day of July, 2009,
a true and correct copy of the foregoing was mailed,
postage prepaid, to:

Justin "Buck" George, ESSA
Clarence Bolden, FNSBSD

Signature