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ALASKA LABOR RELATIONS AGENCY
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ALASKA PUBLIC EMPLOYEES)
ASSOCIATION (APEA),)
)
Petitioner,)
)
vs.)
)
CITY OF FAIRBANKS,)
)
Respondent.)
_____)

Case No. DOLLRA UCF 90-3

DECISION AND ORDER NO. 129

Heard before the Alaska Labor Relations Board with Chairman Robert M. Goldberg and members Barbara Huff and H.O. Williams and Hearing Examiner Jan Hart DeYoung on October 10, 1990, in Fairbanks, Alaska, and on October 31, 1990, in Anchorage, Alaska. The record closed on December 5, 1990.

Appearances:

Clarence Bolden for petitioner Alaska Public Employees Association; Deputy City Attorney Charlane Bigelow Stead for respondent City of Fairbanks; and Brett Wood for intervenor Fairbanks Fire Fighters Association.

Digest:

The police and fire chiefs of the City of Fairbanks are appointed officials and therefore are not employees under the Public Employment Relations Act with the right to bargain collectively under the Act.

DECISION

The Alaska Public Employees Association filed a Petition for Unit Clarification to amend the APEA police and fire supervisory bargaining unit to add the chief of police and the fire chief. The City filed an objection to the petition on the ground that the chiefs are appointed officials and not employees entitled to bargain collectively under the Public Employment Relations Act. The City argues in the alternative that the chiefs are confidential employees and may not be included in a unit with nonconfidential employees.

The Fairbanks Fire Fighters Association filed an objection to the petition on July 31, 1990, which the APEA opposed as untimely.

A hearing was held in Fairbanks, Alaska, on October 10, 1990, and in Anchorage, Alaska, on October 31, 1990. The parties presented evidence in the form of exhibits and live and telephonic witness testimony. Following the hearing the parties submitted posthearing briefs.

On December 19, 1990, the APEA filed a motion to reopen the record to take additional evidence, which the City opposed.

This decision addresses the procedural issues of the Fairbanks Fire Fighters Association's late objection and APEA's motion to reopen the record before turning to the merits of APEA's petition.

Motion to Intervene

The Fairbanks Fire Fighters Association filed its objection to the petition approximately 54 days after the petition was posted at the fire department. Because the Fire Fighters missed the fifteen-day deadline to intervene to object under 2 AAC 10.080, the APEA contested the timeliness of their objection and their right to intervene in this case. 2 AAC 10.080 provides in part:

(a) A labor or employee organization may intervene as a candidate for representative of a proposed bargaining unit if it files a petition within 15 calendar days after the date a notice of petition is posted. The petition must contain the information set out in 2 AAC 10.020(a). The petition must also be accompanied by a showing of interest of 10 percent of the permanent and probationary employees in the proposed bargaining unit. The showing of interest must fulfill the requirements of 2 AAC 10.020(b).

....

(c) No intervention will be considered by the labor relations agency unless it is filed within the 15-calendar-day period provided for by 2 AAC 10.070. The labor relations agency will consider a petition which substantially fulfills the requirements of (a) and (b) of this section. . .

See also 2 AAC 10.070(3) (a notice of petition must state that interested parties have fifteen calendar days from the date of posting to object to the petition).

To excuse missing this deadline, the Fire Fighters argue that the notice of petition was not posted in a location reasonably calculated to give notice to the Fire Fighters and thereby violated due process. The affidavit of posting states that the notice was posted outside both chiefs' offices and on the APEA's employee notice board outside the employee break room. The Fire Fighters claim that the notice was not posted on their employee notice board. The APEA opposes intervention on the basis of 2 AAC 10.080(c) but has not claimed that the delay caused it any prejudice. The City did not oppose intervention.

The hearing examiner granted the motion to intervene at the hearing on October 10, 1990. We affirm that ruling. We believe that the posting locations were adequate to give notice and that due process was not violated. However, we hold that the late discovery of the notice of petition can be excused. First, apparently it was not posted on the Fire Fighters' employee notice bulletin board. Second, the Fire Fighters filed their objection within a reasonable time of the discovery of the notice -- eight days. Third, the delay in discovery did not delay the proceedings before this Agency and therefore did not prejudice the parties. Accordingly, we hold that strict compliance with the fifteen-day deadline is excused and the Fire Fighters could intervene to raise an objection to the APEA's petition.

Motion to Reopen

The record in this case closed on December 5, 1990, when the parties' posthearing briefs were filed. On December 19, 1990, the APEA filed a motion to reopen the record. It wanted the Agency to take evidence of action by the Fairbanks City Council eliminating the positions of fire chief and chief of police. The implication was that the positions were eliminated in retaliation for the unit clarification petition before the Agency in this case.

We are extremely concerned about retaliation against employees who exercise rights granted under the Public Employment Relations Act. Any such retaliation would be an unfair labor practice under AS 23.40.110(a)(4). We take a very dim view of retaliation -- even when cloaked as an economy measure.

However, APEA has not filed an unfair labor practice charge. The case before this Agency is a unit clarification petition to amend a bargaining unit to include two positions -- the police and fire chiefs. Facts surrounding the elimination of those positions are not relevant to determining whether they should be added to the APEA supervisory unit.

If the APEA were to file an unfair labor practice charge, because of our holding below, we would need to decide whether an appointed official has any rights under PERA and whether to adopt the position of the National Labor Relations Board under the National Labor Relations Act, as amended, that exempt employees do not have a remedy. The NLRB will address the discharge of a supervisor, exempt under the NLRA, only if the discharge interfered with the rights of employees covered under the Act. Parker-Robb Chevrolet, 262 N.L.R.B. 258, 110 L.R.R.M. (BNA) 1289 (1982), denied review, Automobile Salesmen Local 1095 v. NLRB, 711 F.2d 383, 113 L.R.R.M. (BNA) 3175 (D.C. Cir. 1983). Because an unfair labor practice charge is not before us, we do not reach these issues.

Findings of Fact

1. The Alaska Public Employees Association (APEA) was certified the employee representative for certain employees in the City of Fairbanks, including supervisory employees in the fire and police departments (APEA Class I), effective on December 30, 1984.
2. The Fairbanks Fire Fighters Association was certified the employee representative for the fire fighters on October 22, 1983.
3. On May 2, 1990, the APEA filed a Petition for Unit Clarification under 2 AAC 10.050 to amend the APEA Class I unit to include two positions -- the fire chief and the chief of police.
4. On May 30, 1990, the Department of Labor posted a notice of the APEA's unit clarification petition on the bulletin boards outside the offices of the fire chief and the police chief and on the APEA bulletin board downstairs in the police and fire station near the break room.
5. The City of Fairbanks filed an objection to the unit clarification petition on June 13, 1990.
6. On July 23, 1990, the APEA's unit clarification petition first came to the notice of the Fairbanks Fire Fighters Association.
7. On July 31, 1990, the Fairbanks Fire Fighters Association filed an objection to the APEA's unit clarification petition.
8. The Fairbanks Fire Fighters Association's delay in filing its objection did not delay any proceedings on the APEA's petition.
9. The fire chief is a member of the management negotiating team during negotiations of the collective bargaining agreements between the City of Fairbanks and the employee bargaining units in the fire department. Whether he serves as a resource person or an actual negotiator for the management team depends on the person occupying the position of city manager. Regardless, he does participate in labor relations negotiations.
10. The police chief is an important member of management's negotiating team during negotiations of collective bargaining agreements between the City of Fairbanks and the bargaining units in the police department. The present head negotiator, City Attorney Herb Kuss, relies on the police chief for advice in operational and economic areas during negotiations.
11. The fire and police chiefs both play an important role in personnel decisions in their departments. Under the grievance procedures in the collective bargaining agreements applying to their departments, the chiefs are the last step in their department before a grievance is appealed to the city manager. They hire, discharge, and promote staff, with the approval of the city manager and within the limitations imposed by the collective bargaining agreements that apply to their departments.
12. Both the fire and police chiefs have access to confidential labor relations information.

13. Both the fire and police chiefs have responsibility to recommend a budget and administer the budget adopted by the city council. The chiefs are responsible to advise of the service level that can be provided at a particular budget level and to allocate the budget that the city council approves. Within the constraints imposed by their budgets, the chiefs make decisions about manning levels. The chiefs also determine where in their departments reductions in budget are taken.

14. The fire and police departments are technical service departments. While the city council has the ultimate authority to formulate policy for the City, both chiefs have substantial authority and responsibility in the operations of their departments. The chiefs work independently except for general administrative direction. Formulation of policy, including collective bargaining policy, necessarily extends beyond the city council to these two department heads.

Conclusions of Law

The objections to amending the APEA bargaining unit to add the two chiefs are (1) that the chiefs are appointed officials who may not belong to any unit; and (2) that the chiefs as confidential employees may not belong to the APEA bargaining unit.

The Public Employment Relations Act grants public employees the right to self-organize and bargain collectively through representatives. AS 23.40.080. "Public employee" is defined to exclude "elected or appointed officials." AS 23.40.250(6). "Appointed official" is defined with regard to the official's role in formulating and implementing collective bargaining policy. 2 AAC 10.220 (a) provides:

"Appointed official," as used in AS 23.40.250(5), includes a person who exercises significant responsibilities for the public employer in the area of collective bargaining policy formulation and implementation.

If the chiefs are appointed officials, they do not have the right under PERA to organize and bargain collectively and they may not belong to APEA's unit. Appointed officials are the highest level of management. Persons at the highest level of management lose the protections granted to employees. The reason is that at the highest level an employer is entitled to complete loyalty.

The chiefs in their testimony downplayed their role in collective bargaining. However, their testimony and the testimony of City Manager Bob Wolting and City Attorney Herb Kuss established that they exercise significant responsibility. These chiefs are the heads of their departments. At minimum, they are a resource to the City's negotiators in collective bargaining. Their expertise in the technical aspects, operations, and budgets of their departments requires that their role be a significant one, even though they do not have ultimate authority. They also play an important role in the implementation of collective bargaining policy through enforcement of and compliance with the collective bargaining agreements that apply to their departments. In sum, the chiefs play a significant role in the formulation and implementation of collective bargaining policy for the City. They are "appointed officials" and are not public employees under PERA.

We are not unmindful of the pay inequities between the chiefs and the employees in their departments that brought the chiefs to this Agency. However, that inequity is not a matter appropriately before the Agency.

Because we hold that the chiefs are appointed officials and are not public employees, we do not need to reach the issue whether the chiefs are "confidential" public employees.

ORDER

1. The Fairbanks Fire Fighters Association's request to intervene to object to the APEA's unit clarification petition is GRANTED;
2. The Alaska Public Employees Association's Motion to Reopen the Record is DENIED; and
3. The Petition for Unit Clarification to add the positions of fire chief and police chief to the APEA unit is DENIED.

Dated: February 21, 1991, effective February 5, 1991

THE ALASKA LABOR RELATIONS AGENCY

Robert M. Goldberg, Board Chairman

Barbara Huff, Board Member

H. O. Williams, Board Member

This is to certify that on this day of February 21, 1991, a true and correct copy of the foregoing was mailed, postage prepaid, to Signature