

**DEPARTMENT OF LABOR
ALASKA LABOR RELATIONS AGENCY
P.O. BOX 107026
ANCHORAGE, ALASKA 99510-7026
(907) 264-2587
Fax (907) 264-2591**

ALASKA PUBLIC EMPLOYEES)
ASSOCIATION,)
Petitioner,)
)
vs.)
)
FAIRBANKS NORTH STAR)
BOROUGH,)
)
Respondent.)
_____)
CASE NO. 91-007-SP)

DECISION AND ORDER NO. 131

Heard before the Alaska Labor Relations Board, Robert M. Goldberg, Barbara Huff, and H. O. Williams, with Hearing Examiner Jan Hart DeYoung on August 27, 1990, in Fairbanks, Alaska. The record closed on August 27, 1990.

Appearances:

Bob Watts for petitioner Alaska Public Employees Association; and Borough Attorney Eugene P. Hardy for Fairbanks North Star Borough.

Digest:

Under AS 23.40.200, which classifies public employees into three groups depending upon the impact of an interruption in their services, employees working in the Borough baler/landfill facility are class (a)(2) employees, and employees working in the Borough animal control facility are class (a)(3) employees.

DECISION

The Alaska Public Employees Association (APEA) filed a petition for a strike vote, dated August 2, 1990. By letter dated August 3, 1990, the APEA notified this Agency of its position that the employees working at the sanitary landfill and the animal control facility were class (a)(1) employees. Class (a)(1) employees are not permitted to strike under AS 23.40.200 and therefore are ineligible to vote in a strike vote election. The Fairbanks North Star Borough objected to APEA's classification of these employees, and a hearing on this issue was conducted on August 27, 1990, before the Alaska Labor Relations Agency Board. The parties filed prehearing briefs and at the hearing presented evidence in the form of exhibits and witness testimony.

To allow the strike vote election to proceed on schedule, the Agency issued a summary order on August 28, 1990, which stated that Fairbanks North Star Borough employees working in the Borough's baler/landfill facility were class (a)(2) employees and employees working in the Borough's animal control facility were class (a)(3) employees. The order further stated that a memorandum decision would follow.

Findings of Fact

1. The Alaska Public Employees Association (APEA) is the certified bargaining representative for approximately 225 employees of the Fairbanks North Star Borough.
2. The collective bargaining agreement between the APEA and the Borough expired on June 30, 1990. It was extended by mutual agreement until August 15, 1990.
3. Claiming that the APEA and the Fairbanks North Star Borough had reached impasse in their contract negotiations and that they had exhausted efforts to mediate their differences, the APEA on August 2, 1990, petitioned this Agency to conduct a strike vote election under 2 AAC 10.270.
4. The petition stated that all employees in the bargaining unit were class (a)(3) employees. Class (a)(3) employees are entitled to strike under AS 23.40.200 and thus eligible to vote in a strike vote election.
5. In an amendment to its petition the APEA contended that the baler/landfill workers and the animal control officers were class (a)(1) employees. As class (a)(1) employees, the workers would not be entitled to strike and would be ineligible to vote at a strike vote election.
6. Respondent Fairbanks North Star Borough objected to the classification of the baler/landfill employees and animal control officers as class (a)(1) employees, contending that they should be class (a)(3) or, in the alternative, class (a)(2).
7. Bob Watts testified that the Borough resumed operation of the baler/landfill facility from a private contractor. When it did so, it did not have time to go through the normal procedures, and it requested the APEA's approval of emergency hires to protect the public health and welfare.
8. The Borough landfill operates 362 days a year and must operate under all weather conditions. Petitioner's Exhibit 3, at 4.
9. James R. McLean is an equipment operator at the Borough sanitary landfill. He testified that his duties are described in Petitioner's Exhibit 5. He operates a front end loader to move refuse, haul gravel, and stack bales of refuse and a dozer to compact refuse and move cover material. He also operates the baler and a forklift. In addition, his job requires him to dispose of dead animals.
10. Joseph Morrow was employed by the Borough at the sanitary landfill as an equipment operator between September 1989 to June of 1990, when he was promoted to baler equipment mechanic. He also worked for the Borough at the landfill before it was turned over to a private contractor in 1987. He testified that his job duties are described in Petitioner's Exhibit 8. He is responsible to maintain, repair, and inspect the baler equipment, support equipment, and roller equipment and to serve as a relief equipment operator. The longest period of time the baler has been shut down for repairs is three months. The landfill continued to operate during this period and waste was buried and moved.
11. Paul Young is the solid waste manager for the Borough and the supervisor of Jim McLean and Joe Morrow. He testified that, under a 1989 classification study, Borough job descriptions were rewritten. Employees were asked to provide on a form their job duties and submit the forms to their supervisors for review. The forms were then submitted to the company performing the study, and the company rewrote the job descriptions.
12. Paul Young testified that, depending on the time refuse is left unburied, it could affect the public health. Mr. Young testified that refuse may not be left without compaction for more than two days, but that the equipment and operators to compact the refuse are readily available in the Fairbanks area and could be employed in the event of a strike. Mr. Young also testified that he could operate the equipment if he had to. The Borough resumed control of the landfill from the private contractor on June 16, 1989. The Borough hired employees to begin work at the landfill a couple of days later.
13. Steven Bottasso has worked for the Borough for twelve years as an animal control officer, animal control investigator, and most recently, health and safety officer. He testified that his job duties varied in part from those described in Petitioner's Exhibit 4. His duties as described in that exhibit and in Respondent's Exhibit A, a more recent job description, include investigation of complaints of cruelty to animals, investigation of animal bite cases,

apprehension of animals, and issuance of citations for violations of the Borough's animal control ordinances. The citations can carry a penalty, such as a fine of up to \$250 and incarceration for up to 30 days. Petitioner's Exhibit 1. Bottasso testified that he exercises substantial discretion in his job. He does not personally carry or use a weapon but does assist the police and state troopers.

14. Mr. Bottasso also testified that animal control is always in operation and the animal control employees are always on call. Employees respond to radio calls, and during off hours, one of the six shelter employees carries a pager to respond quickly to calls for assistance, including calls from the police. The animal control shelter destroys between 75 and 100 animals per week. If the animals are not controlled and run free, approximately 200 diseases could be transmitted to humans, including polio, rabies, and leptospirosis.

15. Laura Hood, the superintendent of the animal shelter, is the supervisor of Steve Bottasso. She has worked for the Borough at the shelter since May of 1980. She testified that animal control officers enforce Title 6 of the Borough ordinances, and occasionally monitor solid waste disposal under Title 8 of the Borough ordinances. Ms. Hood is the only permanent nonunion employee at the shelter. She believes that, in the event of a strike, the shelter would be able to accept animals from owners for euthanasia but not for other purposes such as adoption. She could function alone at this level, accepting additional animals for euthanasia only. Other services in the event of a work stoppage would be affected and possibly curtailed, but without affecting the public welfare. Ms. Hood believes that she could handle the normal level of emergencies that arise in the operation of the shelter.

16. Diane Thacker is the personnel administrator for the Borough. She testified that the Borough has implemented the classification study.

Conclusions of Law

The APEA argues that the baler/landfill and animal control employees should be classified as class (a)(1) employees without any right to strike but with the right to binding arbitration. In the alternative, the APEA argues that the employees should be class (a)(2) employees with a limited right to strike. In its brief the APEA added the fire department dispatcher as a class (a)(2) employee. Because APEA did not introduce evidence in support of this contention at the hearing, we find that the APEA abandoned this issue.

The Borough argues that the employees in both the baler/landfill and animal control jobsites should be classified as class (a)(3) employees with full rights to strike and no right to binding arbitration. In the alternative, it argues that the positions are class (a)(2), which have limited strike rights. The Borough also argues that the APEA had an opportunity to raise the issue of the classification of the baler/landfill employees at an arbitration on baler/landfill employee salaries, and by failing to make the argument, the APEA should be barred under the doctrine of collateral estoppel from making it now.

The Public Employment Relations Act divides employees into three classes on the basis of the impact on the public of a work stoppage of the employees' services. AS 23.40.200 provides: Classes of public employees; arbitration. (a) For purposes of this section, public employees are employed to perform services in one of the three following classes:

- (1) those services which may not be given up for even the shortest period of time;
- (2) those services which may be interrupted for a limited period but not for an indefinite period of time; and
- (3) those services in which work stoppages may be sustained for extended periods without serious effects on the public.

(b) The class in (a)(1) of this section is composed of police and fire protection employees, jail, prison, and other correctional institution employees, and hospital employees. Employees in this class may not engage in strikes. Upon a showing by a public employer or the labor relations agency that employees in this class are engaging or about to engage in a strike, an injunction, restraining order, or other order which may be

appropriate shall be granted by the superior court in the judicial district in which the strike is occurring or is about to occur. If an impasse or deadlock is reached in collective bargaining between the public employer and employees in this class, and mediation has been utilized without resolving the deadlock, the parties shall submit to arbitration to be carried out under AS 09.43.030.

(c) The class in (a)(2) of this section is composed of public utility, snow removal, sanitation, and public school and other educational institution employees. Employees in this class may engage in a strike after mediation, subject to the voting requirement of (d) of this section, for a limited time. The limit is determined by the interests of the health, safety, or welfare of the public. The public employer or the labor relations agency may apply to the superior court in the judicial district in which the strike is occurring for an order enjoining the strike. A strike may not be enjoined unless it can be shown that it has begun to threaten the health, safety, or welfare of the public. A court, in deciding whether or not to enjoin the strike, shall consider the total equities in the particular class. "Total equities" includes not only the impact of the strike on the public but also the extent to which employee organizations and public employers have met their statutory obligations. If an impasse or deadlock still exists after the issuance of an injunction, the parties shall submit to arbitration to be carried out under AS 09.43.030.

(d) The class in (a)(3) of this section includes all other public employees who are not included in the classes in (a)(1) or (a)(2) of this section. Employees in this class may engage in a strike if a majority of the employees in a collective bargaining unit vote by secret ballot to do so.

The key to determining the strike class of an employee under AS 23.40.200 is the length of time the public can withstand a work stoppage.

1. Baler/landfill employees

The baler/landfill employees operate the baler and bulldoze, bury, and compact trash at the Borough landfill. This type of worker is not included in the list in subsection (b) of AS 23.40.200, which names police, fire, correctional institution, and hospital employees as class (a)(1) workers. On the other hand, they do fall within the types of workers described as class (a)(2) in subsection (c) -- public utility and sanitation workers.

That these workers appear to fall within the type of worker described in subsection (c) does not end our inquiry. The Alaska State Labor Relations Agency, a predecessor to this Agency,¹ determined that the categories of workers listed in AS 23.40.200(b),(c), and (d) were illustrative but not exhaustive of the types of workers included in the three strike classes. The Agency found that the language describing the impact of an interruption in services on the public in subsection (a) controlled. Pertaining to Status of Alaska Marine Ferry System Employees under the Alaska Public Employment Relations Act, O. & D. No. 20 at 3-4 1976, enforced sub nom. Hafling v. Inlandboatmen's Union, 585 P.2d 870 (Alaska 1978).

Applying subsection (a) to the question of the baler/landfill workers' classification, we conclude that class (a)(2) is indeed the appropriate class. If baler and landfill workers were to stop work, trash would cumulate until at some point health and sanitation problems would develop. However, at least some time would pass before the work stoppage threatened the public welfare. Because the baler/landfill workers' services could be interrupted for at least a limited period of time, these workers fit the description of class (a)(2) workers. As class (a)(2) workers, if health and sanitation problems were to develop that threatened the "health, safety, or welfare of the public," the work stoppage could be enjoined.

2. Animal Control Employees

AS 23.40.200(b) lists police as class (a)(1) employees. Class (a)(1) workers' services may not be interrupted for even the shortest period of time. APEA argues that animal control officers should be compared to police and therefore considered class (a)(1) employees because, like police, they issue citations that impose penalties, testify in court, and protect the public welfare, and because they work closely with the police.

"Police officer" is defined in AS 18.65.290(5)(a) (1990 Supp.) as:

a full-time employee of the state or a local police department with the authority to arrest and issue citations; detain a person taken into custody until that person can be arraigned before a judge or magistrate; conduct investigations of violations of and enforce criminal laws, regulations and traffic laws; search with or without a warrant persons, dwellings, and other forms of property for evidence of a crime; carry a concealed weapon; and take other action consistent with exercise of these enumerated powers when necessary to maintain the public peace.

Animal control officers do not fall within this definition. They do not have the authority to detain or arrest, perform searches, or carry a weapon.

However, as stated previously, the list of class (a)(1) workers in AS 23.40.200(b) is not exhaustive. Animal control officers may still be classified class (a)(1) if the APEA can show that their services cannot be halted for any or even short periods of time. The APEA argues that their services may not be interrupted without affecting the public welfare. It relies on such facts as the health threat from the possible transmission of disease and the availability of animal control officers to respond at all times to emergencies. The animal control officers' supervisor, however, testified that she could provide an adequate level of service, including response to emergencies, to protect the public health in the event of a strike. The public could therefore tolerate an interruption in the services of the animal control officers. Class (a)(1) therefore does not apply.

APEA has argued in the alternative that animal control officers should be classified (a)(2), relying upon a decision of the Department of Labor, Labor Relations Agency, another predecessor to this Agency.² In Alaska Public Employees Ass'n v. Ketchikan Gateway Borough, D. & O. 90-2 at 8 & 23 (1990), DOLLRA concluded that a lengthy strike could affect the public health and placed the Ketchikan animal control officers in class (a)(2). However, the testimony in that case was that the supervisor in the event of a strike might have difficulty performing the functions of the animal control officers and DOLLRA concluded that there could be a resulting impact on public health and safety from rabid or diseased animals. Id. at 8-9. In contrast, the supervisor testified in this case that she could substitute for the animal control officers if they were to strike and maintain a level of service that protected the public. We therefore conclude that, because animal control officers could strike without affecting the "health, safety, or welfare of the public," animal control officers fall within class (a)(3). As class (a)(3) employees, the animal control officers have full rights to strike.

3. Collateral Estoppel

The Borough argues that, because APEA failed to raise the strike class of baler/landfill employees as an issue in an arbitration related to those employees, the doctrine of collateral estoppel should bar the issue in this proceeding. The doctrine of collateral estoppel bars relitigation of an issue if,

- (1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated;
- (2) the previous [proceeding] resulted in a final judgment on the merits; and
- (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding].

San Francisco v. Bricklayers, Local 38, 171 Cal. Ap. 3d 46, 120 L.R.R.M. (BNA) 2937, 2938 (Cal. Ct. App. 1985), quoting People v. Sims, 32 Cal. 3d 468, 484 (1982).

The Borough has not provided any information about the arbitration except to assert that it determined the wage rates for the new job classes of the baler/landfill employees. It has not, for example, provided a copy of the arbitrator's decision so it is impossible to analyze the application of the doctrine. From the description of the arbitration, however, it does not appear that strike class or even related issues were litigated at the arbitration. The record does not support the application of collateral estoppel to bar litigation of the strike class of these workers.

ORDER

As stated in the August 28, 1990, order issued by this Agency, under AS 23.40.200, Fairbanks North Star employees working in the baler/landfill facility are class (a)(2) employees and employees working in the animal control facility are

class (a)(3) employees.

Dated March 15, 1991, effective February 5, 1990.

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 , 1991, a true and correct copy of the foregoing was mailed, postage prepaid, to

Signature

¹Executive Order 77 consolidated the Alaska State Labor Relations Agency, which served as the labor relations agency for the state and its employees; the Department of Labor, Labor Relations Agency, which served as the labor relations agency for municipalities and their employees; and the Railroad Labor Relations Agency, which served as the labor relations agency for the railroad and its employees. The consolidation became effective on July 1, 1990.

²See footnote 1, supra.