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STATE OF ALASKA
PCN Nos. 075132, 063198, 250267, 250276, 252959, 252098, and 066140,

Petitioner,

vs.

ALASKA STATE EMPLOYEES ASSOCIATION,

Respondent.

ALASKA STATE EMPLOYEES ASSOCIATION
PCN Nos. 2651663, 030196, 111092, 216089, 061525, 075826, and 044010,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

Case No. 91-013-UCP (Consolidated)

DECISION AND ORDER NO. 132A

The Confidential Employees Association (CEA) moved this agency on July 24, 1991, to reconsider Decision and Order No. 132. That decision concludes that the definition of "confidential" in 2 AAC 10.220(b)(1) describes the state's confidential employees bargaining unit. It also narrowly construes the definition of "confidential" to include only those employees providing analytical assistance to management personnel involved in negotiating the collective bargaining agreement. The CEA claims this decision is contrary to agency precedent and will have the undesirable effect of restructuring the boundaries of the CEA bargaining unit to exclude large numbers of employees currently included.

The CEA's motion is supported by affidavits and a motion to reopen the record to include these additional affidavits to supplement testimony taken at the hearing before the hearing officer.

ASEA opposes the motion primarily on procedural grounds. It argues that reconsideration is not authorized subsequent to an appeal; that the motion to reconsider was untimely; and that CEA has not justified admitting new evidence into the record. The CEA filed a reply on September 5, 1991.

Digest: The motion to reopen the record is denied. The motion to reconsider Decision and Order No. 132 is granted. The board affirms its decision that 2 AAC 10.220(b)(1) describes the CEA bargaining unit. It affirms its decision that 2 AAC 10.220(b)(1) requires assistance to management personnel involved in negotiations before an employee is a "confidential" employee. However, it reconsiders its decision that assistance must be in the form of analysis and

concludes that compiling data can suffice.

The agency supplements its decision in No. 132 as follows:

DISCUSSION

I. Procedural issues.

The motions made by CEA raise a number of procedural issues.

A. Is reconsideration available?

The regulations under PERA do not address reconsideration of a board decision. Past practice of the personnel board serving as the labor relations agency was to retain the discretion to reconsider its decision upon a timely motion. Eg., Alaska State Employee's Ass'n, Decision and Order 118A (Aug. 28, 1989). Reconsideration provides an opportunity to correct mistakes and prevent injustice. On the other hand, it should not be used to allow a party a second chance to make its case. Providing an opportunity to reconsider a decision can serve the administration of justice if its use is limited. We therefore retain the discretion to reconsider appropriate cases.

The ASEA urges the agency to decline to reconsider this case because the motion was not timely filed. Because PERA's regulations do not cover reconsideration, they do not impose a deadline to request reconsideration. Reconsideration, however, is addressed in the Administrative Procedure Act. AS 44.62.540. While the APA does not apply to unit clarification petitions, it can provide a model for guidance. The APA gives broad powers to agencies to reconsider decisions but those powers expire when the decision becomes final. Id. If a decision is not appealed, it becomes final 30 days after it is filed. Rule 601, Alaska R. App. P. Applying the APA's rule, we note that Decision and Order No. 132 was filed on June 13, 1991, and the deadline to appeal was July 13, 1991. CEA filed its appeal in superior court on July 12. Its appeal included a motion to the superior court to stay or suspend the appeal for 90 days to allow this agency an opportunity to reconsider its decision. The motion for reconsideration was not filed with the agency until July 24. Ordinarily, at least under the APA, the motion would be untimely. However, on August 8, the court granted a stay of the appeal for 90 days. The plain intent of the stay was to provide an opportunity for the agency to reconsider its decision. While filing an appeal concluded the agency's jurisdiction over the case, the stay returned it. The agency therefore has the jurisdiction and authority to reconsider its decision.

B. Should the record be reopened?

The motion to reconsider was accompanied by a motion to reopen the record for additional evidence. Reopening the record would be permitted under AS 44.62.540. Whether to reopen the record in connection with reconsideration should be within the agency's discretion. However, reopening the record should be even more jealously guarded than reconsideration because of the potential for abuse. The opportunity to present evidence is at the hearing. To later permit a second hearing inconveniences the agency and the parties and increases costs. The record should not be reopened absent substantial justification. However, substantial justification is missing in this case. CEA does not make any excuses for not raising the evidence earlier at the hearing. Two of the four affidavits are from witnesses who did not appear at the hearing. CEA does not state that the witnesses were unavailable earlier. A third affidavit is from a witness supplementing her testimony before the hearing officer. A fourth affidavit is from a union representative present at the hearing. CEA does not argue that the witnesses were unavailable earlier or that the facts were newly discovered.

The absence of any equitable justification to open the record is fatal to CEA's motion. Retaining flexibility to relax procedures to avoid a mistake or injustice is important, but allowing a party a second chance to present its evidence creates hardship on the agency and other parties and should not be done without substantial basis. Reopening the record to accept affidavits is particularly troubling because it denies other parties the most fundamental of rights: the opportunity to cross examine. To reopen the record the agency would need to reconvene the hearing to permit cross-examination. Because of the expense and time, the agency will require some excuse for failing to elicit the testimony at the earlier hearing. None has been provided.

The absence of attorneys, the parties' perception of the importance of the issues, and the identity of the party with the

burden of proof do not justify reopening the record. The key to a bargaining unit determination in every case is the application of AS 23.40.090. In the case of a state supervisory or confidential unit, 2 AAC 10.110 and 2 AAC 10.220 must also be applied. For the most part, the issues are factual and the parties will need to introduce evidence of those facts at the hearing. Earlier tactical decisions cannot be the basis for reopening the record. The motion to reopen is denied. See Allen v. Bussell, 558 P.2d 496, 502 (Alaska 1976)(litigant may not use motion for relief from final judgment to substitute for proper litigation of a case).

II. What is a "confidential" employee.

The labor relations agency has authority by statute to determine the appropriate bargaining unit. AS 23.40.090 provides:

> **Collective bargaining unit.** The labor relations agency shall decide in each case, in order to assure to employees the fullest freedom in exercising the right guaranteed by AS 23.40.070 -- 23.40.260, the unit appropriate for the purposes of collective bargaining, based on such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, the desires of the employees. Bargaining units shall be as large as is reasonable, and unnecessary fragmenting shall be avoided.

Ordinarily when the agency is asked to clarify or amend an existing bargaining unit, it applies these factors to decide the appropriate unit for a particular position. The regulations offer little guidance in making these decisions, with one exception that is relevant here. The regulations require that at the state level supervisory and confidential employees may not be combined with rank and file employees. 2 AAC 10.110 provides:

> **General criteria for bargaining units.** (a) At the state level, a proposed bargaining unit is not considered an appropriate bargaining unit if it
>
> (1) combines supervisory personnel with non-supervisory personnel;
>
> (2) combines confidential employees with other employees.
>
> (b) collective bargaining units falling within the purview of AS 23.40.240 are not affected by (a) of this section.[1]

This regulation requires that confidential employees, if organized, be in a separate bargaining unit from non-confidential employees at the state level. 2 AAC 10.220(b)(1) defines "confidential employee" as it is used in the regulations as, an employee who assists and acts in a confidential capacity to a person who formulates, determines, and effectuates management policies in the area of collective bargaining. The term "confidential employee" shall be narrowly construed.

Decision and Order No. 132 construes this definition narrowly, as required in 2 AAC 10.220(b)(1), to include only those employees who assist or act in a confidential capacity to persons creating and implementing management policy in contract negotiations. The decision interpreted "assist or act in confidential capacity" to require something more than compiling data, such as analysis of bargaining issues. D & O No. 132, at 15.

CEA in its motion for reconsideration urges the agency to construe "collective bargaining" more broadly to cover the entire process of labor relations between management and labor. In addition to contract negotiations, CEA would have "collective bargaining" cover all aspects of the parties' relationship, including implementation of the contract and grievance arbitrations.

However, this argument ignores the definition of collective bargaining in PERA. The definition is narrower than that urged by CEA:

> "Collective bargaining" means the performance of the mutual obligation of the public employer or the employer's designated representatives and the representative of the employees to meet at reasonable times, including meetings in advance of the budget making process and negotiating in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or negotiation of a question arising under an agreement and the execution of a written contract incorporating an agreement reached if requested by either party, but these obligations do not compel either party to agree to a proposal or require the making of a concession.

AS 23.40.250(1).

Collective bargaining under this definition means meeting to negotiate, negotiating, negotiating after agreement, and signing a contract incorporating any agreement made. The key is the process of negotiations. Under the regulation, therefore, a confidential employee is one who assists and acts in a confidential capacity to a person who formulates, determines, and effectuates management policy in the area of negotiations with the union. We therefore reject CEA's argument that the term "collective bargaining" covers the complete labor relationship between the parties.

CEA next argues that, because the formation of the confidential bargaining unit predates adoption of the definition of "confidential" in 2 AAC 10.220(b)(1), any conflict should be resolved in favor of the bargaining unit. This argument requires reliance upon evidence not admitted to the record on the timing of the adoption of the regulation and of the creation of the bargaining unit. However, even assuming the unit predated the regulation, the two events occurred very close in time. According to the affidavit of Bruce Cummings, the unit was established in 1974 and the regulation was adopted later. However, 2 AAC 10.220(b)(1) was last amended on June 14, 1974. Clearly the two developed contemporaneously and should be construed harmoniously and not one at the expense of the other.

However, the agency does not need to determine whether the contract should preempt the regulation because the contract itself incorporates the regulation's definition of "confidential" into its recognition clause. The recognition clause provides in Article 2, Section 1, in part (emphasis added):

> The Employer recognizes CEA as the exclusive representative of all permanent, probationary, provisional, and non-permanent employees, engaged in performing personnel/payroll functions and services and as defined in 2 AAC 10.220(b)(1), in the Confidential Bargaining Unit and as the sole collective bargaining agent for the purpose of acting for the employees in negotiating salaries, wages, hours and other terms and conditions of employment.
>
> . . . .
>
> Both parties recognize that the Labor Relations Agency retains its authority to determine bargaining unit assignments. However, no field position shall be removed from this bargaining unit without written notification to CEA of such proposed action. . . .

CEA Exhibit no. 1. Transcript, p. 45 (Mar. 5, 1991).

Another concern of CEA is that precedent was overlooked in Decision and Order No. 132. It argues that the decision deviates from previous practice of the personnel board, which formerly sat as the labor relations agency for the state bargaining units.

Initially, it is important to note that this board is not bound by previous agency decisions. Administrative decisions have no formal precedential value. Only the Alaska Supreme Court can issue binding precedent. Therefore, the agency is free to choose to depart from previous labor relations agency decisions. While those decisions are not binding, however, the board does recognize the value of consistency and predictability in labor relations. Consistency and predictability promote stable labor relations and "industrial harmony."

Previous agency decisions follow the same analysis, relying upon the definition of 2 AAC 10.220(b)(1) to determine membership in the confidential bargaining unit. Alaska State Employees Ass'n v. State of Alaska & Confidential Employees Ass'n, Order and Decision No. 122 (Aug. 28, 1989), quotes and applies the definition of "confidential" in 2

AAC 10.220(b)(1) to require placement of a position in the confidential unit. The previous agency, moreover, construed "collective bargaining" in 2 AAC 10.220(b)(1) to cover only negotiations. The employee in ASEA v. Alaska & CEA, Order and Decision No. 122, provided "analysis, computation and advice respecting to maritime union contracts." Clearly contract negotiations were involved.

The one difference appears to be the nature of the assistance provided by the prospective bargaining unit member. In Alaska State Employees Ass'n v. State of Alaska and Confidential Employees Ass'n, Order and Decision Nos. 118 and 118A (April 20, 1989 & Aug. 28, 1989), the agency emphasized the need for members to be related to the collective bargaining process. To be "confidential" the employee had to assist or act in a "confidential capacity" to a decision maker, such as a member of the state's negotiating team. "Participation in information gathering" and "responses to requests by decision makers" could place an accounting clerk in the category "confidential employee" under 2 AAC 10.220(b)(1). Order and Decision No. 118A, at 3 ¶ 3.

Contrary to the argument made by CEA, previous agency decisions reinforce the central role that participation and/or assistance to negotiations plays in determining who belongs in the confidential unit. The only difference is that the previous agency gave a broader reading to "assistance' which, upon reconsideration, we believe is more consistent with the plain language of 2 AAC 10.220(b)(1).

The regulation requires that an employee, to be included, must "assist and act in a confidential capacity." Our decision in Decision and Order No. 132 was to require some assistance in analysis of bargaining issues. However, upon reconsideration of the definition of "confidential employee" and earlier cases interpreting it, we now conclude that any assistance to one who acts in policy formulation or implementation is sufficient. For example, compiling and providing data to assist a negotiator in formulating negotiating policy, such as spreadsheets on different wage rates, should suffice.

In sum, the definition of "confidential" in 2 AAC 10.220(b)(1) was and continues to be essential to determining the boundaries of the confidential employees bargaining unit. A broad definition of that regulation is inconsistent with its plain language. The key issue in this analysis is whether a particular position is called upon to "assist or act in a confidential capacity" to a person who determines and implements management negotiation policy. That assistance can include, for example, compiling data for a negotiating team member.

III. Application of the definition "confidential employee" to the evidence.

Applying this analysis, the question is whether the facts in the record are adequate to provide the basis for concluding that a particular employee assisted or acted in a confidential capacity to someone who formulated or carried out negotiation policy.

The transcript and evidence reviewed in light of these principles supports the decision in Decision and Order No. 132 on the accounting clerk II positions, PCN 044010 (Bell); PCN 250276 (Thompson); and PCN 235959 (Lewis). The testimony was that those positions had no involvement in contract negotiations and did not provide information used by the state's bargaining team members. Transcript, pp. 38 & 47 (Mar. 14, 1991); Transcript, p. 23 (Mar. 5, 1991).

Upon reconsideration, however, the accounting technician I position, PCN 250267 (Ashley) does assist or act in a confidential capacity to someone who formulates or carries out negotiation policy. We earlier relied on Clois Hamilton's testimony that, as a state negotiator, he did not recall a personnel officer or staff member having direct input in negotiations. Decision and Order 132, at 12; Transcript, p. 23 (Mar. 14, 1991). However, Hamilton also testified that he obtained payroll and financial information from the personnel officers. Id., p. 24. Personnel Officer Brian Keith testified that Ashley provides such data for him related to contract negotiations. Id., pp. 10, 11, 13 & 14. This evidence was not contradicted and provides substantial evidence that Ashley assists someone who formulates or carries out negotiation policy. We therefore

reconsider our decision and find substantial evidence supports moving the accounting technician I position to the confidential bargaining unit.

ORDER

Upon reconsideration of Decision and Order No. 132, we order that PCN 250267 (accounting technician I -- Ashley) be moved to the CEA bargaining unit. In all other respects the decision, as supplemented herein, is affirmed.

Date:

THE ALASKA LABOR RELATIONS AGENCY

Darrell Smith, Board Chairman

B. Gil Johnson, 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

1AS 23.40.240 provides that nothing in PERA modifies an existing collective bargaining unit or agreement if it is in effect on September 5, 1972.