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ALASKA PUBLIC EMPLOYEES ASSOCIATION,

Petitioner,

vs.

CITY OF BETHEL,

Respondent.

CASE NO. 92-111-RC

DECISION AND ORDER NO. 152

This matter was heard on November 5, 1992, in Anchorage, Alaska, before the Alaska Labor Relations Board, Chairman B. Gil Johnson and member James Elliott, with Hearing Examiner Jan Hart DeYoung presiding. Darrell Smith did not participate. The record closed on November 5, 1992.

Appearances:

Sharon Goss and Lawrence A. Poltrock, Witwer, Burlage, Poltrock & Giampietro, for petitioner Alaska Public Employees Association; and C. Ann Courtney and William F. Mede, Owens & Turner, for respondent City of Bethel.

Digest:

Even if the City of Bethel could permissibly withdraw recognition of a bargaining representative certified by a labor relations agency after bargaining stopped in 1980, it could not permissibly reject the Public Employment Relations Act in 1982 due to delay, impermissible motive, and waiver.

DECISION

Findings of Fact

1. Following the filing of a petition and after conducting a secret ballot election, the Department of Labor, Labor Relations Agency (DOLLRA)[1] certified the Alaska Public Employees Association as the exclusive bargaining representative for certain designated employees of the City of Bethel on November 5, 1979. Stip. 3.

2. APEA and the City bargained but did not reach an agreement, and they mutually terminated the relationship. Stip. 3; Tr. 53.

3. The City Manager of the City of Bethel between 1977 and 1985 was Lyman Hoffman. Tr. 75. Hoffman participated in the negotiations with APEA. Tr. 75. His recollection was that bargaining occurred for a year but did not end in an agreement. His impression was that APEA walked away from the table. Tr. 76.

4. After bargaining was discontinued, Hoffman asked the City's attorney if there were "any options the city could look

at." The City's attorney recommended a resolution to "opt out" of PERA. Tr. 77. An intent to interfere with the employees bargaining rights and their selection of a bargaining representative can be inferred from this request and its timing.

5. On March 22, 1982, the City of Bethel adopted ordinance no. 131, which established personnel rules and regulations, a compensation plan, and a classification plan. Exh. 22.

6. On July 21, 1982, the City of Bethel adopted resolution no. 375, purporting to reject application of the Public Employment Relations Act. Exh. 19.

7. APEA's regional supervisor for the southcentral region in 1990, David Kaiser, searched the files of APEA and could not find any record of active bargaining following correspondence dated May 19, 1980, and nothing indicated any bargaining in 1981 or 1982. Tr. 41; Ex. 23.

8. APEA Business Manager Bruce Ludwig reviewed the files of APEA and did not discover any records of any action by the City to withdraw formal recognition of APEA.

9. On October 25, 1988, APEA filed a second petition to be declared the bargaining representative for the City of Bethel employees. Exh. 1.

10. Between the adoption of the opt out resolution in July of 1982 and the APEA's organizing drive in 1988, the City had experienced a change of city manager and a complete change of city council members. Stipulation 22; tr. 61.

11. On January 18, 1989, the Department of Labor, Labor Relations Agency (DOLLRA) conducted a secret ballot election among the employees and on January 24, 1989, certified the APEA as the bargaining representative for the City employees. Exh. 4.

12. On or about May 23, 1989, APEA first asked to meet with city officials to begin bargaining. The acting city manager at the time was Mark Barker, fire chief, who was out on adoptive leave. A request for information was delivered to his substitute, acting city manager Kevin Clayton. Tr. 44.

13. Mark Earnest became city manager of Bethel on May 30, 1989. Tr. 59.

14. The City appropriated funds for a labor attorney to negotiate with APEA and advertised for proposals in July of 1989, resulting in the retention of the law firm of Owens and Turner. Exh. 21; Tr. 64-65.

15. The City delayed responding to APEA's requests for information and commencing bargaining due to turnover of personnel and a move of the City's administrative offices in 1988, which left records in disarray. Tr. 61-63.

16. APEA representative David Kaiser, city manager Mark Earnest, and the City's attorney Bill Mede met in October of 1989 to discuss ground rules. Bargaining teams for the parties began negotiations on November 2 and 3, 1989. Tr. 47 - 48.

17. Some time in late November of 1989 in a casual conversation with former city manager Hoffman, city manager Earnest first learned of the existence of a resolution or ordinance on the issue of PERA. Tr. 65. After a search of the City's files, resolution no. 375, rejecting PERA, was discovered. Id.

18. The file was located in a file for resolutions and ordinances that is open to the public. Tr. 72.

19. On November 30, 1989, the City provided APEA with notice that the City had opted out of PERA by a resolution dated July 21, 1982, and that it was terminating negotiations. Exh. 18.

20. On December 22, 1989, APEA filed an unfair labor practice charge with DOLLRA, charging the City with violations of AS 23.40.110 (a)(1),(2), and (5). The specific allegations were that the City committed unfair labor practices by terminating bargaining in November of 1989 and refusing to bargain until almost ten months after APEA

was certified the bargaining representative; by failing to provide information requested for bargaining in a timely manner; by advising city employees in a memorandum dated November 30, 1989, that the City no longer recognized APEA as their bargaining representative; and by demanding exclusion of a certain job classification from the APEA bargaining unit knowing that the incumbent was an APEA officer.

21. DOLLRA conducted a hearing on the charges in Bethel, Alaska, on July 11, 1990, and on October 31, 1990, issued a decision and order. DOLLRA ordered the City to cease and desist its refusal to recognize APEA as the bargaining representative of City employees and to resume bargaining in good faith with APEA immediately. DOLLRA further ordered the City to provide APEA with all relevant information. DOLLRA dismissed the charges relating to the late commencement of bargaining and denied APEA's request for costs and attorney's fees.

22. The City appealed the decision in superior court on December 6, 1990, and APEA filed a crossappeal on December 20, 1990. The superior court, the Honorable Richard Ehrlich presiding, issued a memorandum decision on April 8, 1992. The court remanded the case to the Agency to apply a doctrine established by the National Labor Relations Board that allows an employer to withdraw recognition of a union if it can rebut the union's presumption of continuing support. The court described the presumption as follows:

> A bargaining representative enjoys a presumption of continuing majority support at the expiration of the year of certification. An employer may withdraw support by showing that on the date the support is withdrawn, the union did not enjoy majority support.

Mem. Dec., Alaska Public Employees Ass'n v. City of Bethel, F-90-219 CI, at 6 - 7 (April 6, 1992), quoting 48 Am. Jur. 2d § 999, at 807. The court asked the Agency whether the City's adoption of its personnel rules, on March 22, 1982, served to withdraw recognition from APEA. If the Agency found that it did, the court asked this Agency further to find whether sufficient facts existed at that time to rebut the presumption of majority support.

23. The court remanded three additional issues for the Agency's consideration after applying the presumption:

> II. Did the LRA err in including that the City's 1982 resolution rejecting PERA coverage was invalid and ineffective under Section 4 of SLA ch. 113 (1972).
>
> III. Did the LRA err in refusing to order a complete renewal of the APEA's certification year?
>
> IV. Did the LRA err in refusing to award the APEA attorney's fees and costs.

Id.

24. This Agency conducted a prehearing conference on May 20, 1992, and scheduled the case for hearing on August 14, 1992. The Agency rescheduled the case to November 5, 1992.

25. On July 31, 1992, the parties stipulated that there was no need for further evidentiary hearing and that the record would consist of the stenographic transcript of the July 13, 1990, hearing held before Hearing Officer Robert W. Landau; the stipulated facts and exhibits agreed to by the parties and received into evidence at the July 11, 1990, hearing; the record on appeal certified by the superior court; and the briefs filed on remand.

26. The parties filed briefs and on November 5, 1992, argued the matter before the Agency.

DISCUSSION

I. Did evidence of a loss of majority support in 1982 for APEA justify withdrawing recognition of APEA and did the City withdraw its recognition of APEA?

This case concerns the effectiveness of the City's attempt to reject the application of the Public Employment Relations Act under section 4, chapter 113, SLA 1972. DOLLRA examined case law and concluded that delaying until 1982 to adopt the resolution rejecting PERA was not a prompt exercise of the right. Decision & Order No. 90-6, at 13. It further

found that APEA's status as bargaining representative continued between its certification on November 9, 1979, and the adoption of the resolution on July 21, 1982, and consequently, the City's action impaired the employees' existing rights under PERA. Id. at 15 -- 16. Last, DOLLRA inferred from the adoption of personnel rules removing collective bargaining and grievance arbitration rights that the City no longer

wished to provide collective bargaining rights to its employees.

DOLLRA concluded that the City's action was untimely and invalid. Id. at 16.

The superior court asks this Agency to reconsider this decision under the doctrine of rebuttable presumption. Generally, after a bargaining representative is certified, it has one year when its support by the workers cannot be challenged. Brooks v. NLRB, 348 U.S. 96, 98, 35 L.R.R.M.(BNA) 2158, 2160 (1954). After the certification year ends, majority support is presumed to continue but this presumption may be rebutted. If the employer has evidence that the union has lost majority support, the employer may withdraw recognition. Terrall Machine Co., 173 N.L.R.B. 1480, 70 L.R.R.M. (BNA) 1049 (1969), enforced 427 F.2d 1088, 73 L.R.R.M.(BNA) 2381 (4th Cir. 1970); Bartenders Employer's Bargaining Ass'n of Pocatello, Idaho, 213 N.L.R.B. No. 74, 87 L.R.R.M.(BNA) 1194 (1974).[2]

One treatise states the rule as follows:

> An employer may withdraw recognition from an incumbent union at any time when such withdrawal is not precluded by law, if it can affirmatively establish either (1) that the union no longer enjoyed majority status when recognition was withdrawn, or (2) that the withdrawal was predicated on a reasonably grounded doubt as to the union's continued majority status, which doubt was asserted in good faith, based upon objective considerations, and raised in a context free of employer unfair labor practices. Furthermore the employer must be aware of the objective facts upon which its doubt is based at the time it withdraws recognition.

1 Patrick Hardin, The Developing Labor Law 571 (footnotes omitted) (3d ed. 1992).

Applying this rule, we note initially that the employer must establish facts supporting its withdrawal of recognition. It must demonstrate the facts rebutting the presumption. In the absence of such facts, the presumption should stand. A failure to make the argument and bring forward the facts should result in the determination that the presumption is not rebutted.

Turning to the facts existing in 1982, it should be noted that the facts are stale and the parties were unable to reconstruct them in any detail. Changes in personnel at the City since 1982 have been great enough that the City's management was unaware of the 1982 opt out resolution and proceeded to a certification election and began bargaining in 1989. The City relied upon the resolution to reject PERA in midbargaining only after the city manager discovered its existence in a casual conversation with a former city manager. The only facts in the record concerning the resolution are the date of its adoption and the apparent absence of a protest by APEA.

If the employer attempts to justify withdrawal of support by demonstrating a reasonable doubt of continuing majority status, it must establish that it was aware of the facts at the time it withdrew its support. Orion Corp., 515 F.2d 81, 89 L.R.R.M.(BNA) 2135 (7th Cir. 1975) (per curiam). The alternative is to establish that the union in fact lacked majority support at the time of the withdrawal. In either case, the employer has the burden of proof to justify withdrawal of recognition. Id.; Bartenders Employer's Bargaining Ass'n of Pocatello, Idaho, 213 N.L.R.B. No. 74, 87 L.R.R.M.(BNA) 1194.

The record does not contain any evidence about the existence or absence of support for APEA. In addition, there is no actual evidence of a withdrawal of recognition except by inference from City actions inconsistent with recognition. The only evidence relating to the period was from the city manager at the time, Lyle Hoffman. His evidence might support a theory of abandonment or waiver by APEA[3] but it does not establish a factual basis for doubting continuing majority support for the union or the fact of employee nonsupport.

The mere lapse of time following certification without a contract or bargaining, in this case approximately two and one half years, should not justify withdrawal of recognition in 1982. Examples of affirmative evidence justifying withdrawal include statements from a majority of the workers that they do not support the representative, Faye Nursing Home, Inc., 215 N.L.R.B. No. 112, 88 L.R.R.M.(BNA) 1404 (1974); a poll of the workers demonstrating lack of support, White Castle System, Inc., 224 N.L.R.B. No. 153, 92 L.R.R.M.(BNA) 1591 (1976); and a petition from the workers, Carolina American Textiles Inc., 219 N.L.R.B. No. 51, 90 L.R.R.M.(BNA) 1074 (1975). Impasse or even employee abandonment of a strike without more does not justify withdrawal of recognition. See Celanese Corp. of America, 95 N.R.L.B. No. 83, 28 L.R.R.M. 1362, 1366-1367 (1951). And finally, the apparent dormancy of the union alone is generally not enough. The controlling issue is the wishes of the employees. See generally, 1 Hardin, supra at 578-579.

The City has not demonstrated that, at the time of the adoption of the personnel rules or the opt out resolution, the employees did not support the union or that the City had a reasonable doubt about their continuing support. Thus, it has not rebutted the presumption that support for APEA continued at the time these actions were taken. The situation changes, however, after the City adopted the personnel rules and the resolution in 1982. By those two actions the City had taken steps clearly contrary to APEA's interests and rights as the unit's representative. If APEA had not waived its right to bargain or abandoned its representative status already, it could probably prove a complaint of an unfair labor practice charge under AS 23.40.110(a). Impasse followed by inaction and silence in the face of action clearly contrary to rights under PERA should be sufficient evidence of the absence of continuing majority support to justify the City's withdrawal of recognition. Id. at 580. Accordingly, following July of 1982, the City would have been justified in withdrawing its recognition on the basis of a reasonable doubt of continuing majority support. The burden would then shift to APEA to establish actual majority support. Orion Corp., 515 F.2d at 85, 89 L.R.R.M.(BNA) at 2137.

Looking at whether the employer withdrew recognition, however, does not assist in resolving the key issues in the case. At the hearing, APEA did make an argument that its representative rights continued because it had not been decertified. Tr. 17. However, it did not rely on any continuing representative status in this case. Instead of demanding to bargain on the basis of the certificate of representation in 1979, it filed a new petition for certification and was certified again 10 years later.

We believe that, even if the resolution were effective to withdraw recognition for APEA, it was not effective to reject the Public Employment Relations Act under section 4, ch. 113, SLA 1972.

II. Did DOLLRA err in concluding that the City's 1982 resolution rejecting PERA was invalid and ineffective under Section 4, ch. 113, SLA 1972?

An assumption underlies the court's order: if the City could demonstrate that APEA no longer enjoyed the continuing support of a majority of the unit, it could act validly in 1982 to reject the provisions of PERA without impairing the employees' exercise of rights under PERA in violation of the Alaska Supreme Court decision in Alaska v. City of Petersburg, 538 P.2d 263, 89 L.R.R.M.(BNA) 3095 (Alaska 1975). The Agency does not share this assumption, having held that a municipality must act to reject the Act within one year.[4] Even if the City could rebut the presumption of continuing majority status, its action would serve only to withdraw recognition of the bargaining representative. It would not serve to reject application of the Public Employment Relations Act.

First, the Public Employment Relations Act applies unless it is rejected. An attempt to reject PERA more than one year after the Act's adoption or, in the case of a municipality created after the Act's adoption, after its creation, is invalid. International Bhd. of Electrical Workers, Local 1547 v. Thomas Bay Power Authority, ALRA Decision & Order 145 (Nov. 25, 1992); International Union of Operating Engineers v. City of Kotzebue, ALRA Decision & Order No. 143 (May 28, 1992), appeal filed 3AN-92-088 (June 29, 1992).

Second, the City acted with an impermissible purpose when it adopted resolution no. 375 after APEA had been certified the bargaining representative of its employees. Alaska v. City of Petersburg, 538 P.2d at 267, 89 L.R.R.M.(BNA) at 3098, ("Rejection of the PERA after becoming aware of such [substantial organizational] activity constitutes a gross and impermissible interference with the employees' freedom to choose which collective bargaining association should represent them").

Third, even if resolution 375 were effective to reject PERA, the City in effect "opted in" when it participated in the election and bargaining under PERA in 1989. See Fairbanks v. Crafts Council, 623 P.2d 321, 108 L.R.R.M.(BNA) 2397 (Alaska 1981). In Fairbanks v. Crafts Council, the Court reviewed a city's refusal to continue to bargain under a municipal labor relations scheme. It found that bargaining under city ordinance did not waive rejection of PERA under section 4, chapter 113, SLA 1972. However, in so holding, the court also suggested,

> It might be a different matter if the City, despite its exemption, had dealt with employees as it were covered by PERA throughout the years, thereby encouraging its employees to rely on the continued protection of the Act. . . . [In this case] there is no evidence to suggest that the city led its employees into believing that they were covered by PERA or to rely on such coverage.

Id. at 323-324; 108 L.R.R.M.(BNA) at 2400. In contrast, in this case the City did deal with its employees as if it were covered under PERA, first in 1979 and 1980, before the opt out resolution was adopted, and later in 1989, before it terminated negotiation after discovering the resolution.

Therefore, DOLLRA did not err in concluding the 1982 resolution was invalid to reject PERA.

III. Did DOLLRA err in refusing to order a complete renewal of the APEA's certification year?

No new evidence was raised on this issue, and the court in its remand order did not identify any concerns specifically related to it. We therefore see no reason to duplicate the work of DOLLRA and reconsider this issue.

However, we agree with DOLLRA that the City's delay in responding to the requests for information and to bargain in 1989 does not appear to have been motivated by bad faith but by personnel changes in key administrative positions. Decision & Order 90-6, at 19. Moreover, APEA failed to object promptly to those delays. Id. at 20. We agree that the factual basis is missing that would justify extending the certification year beyond the 56 days remaining when the City notified APEA that it was terminating negotiations on the basis of its discovery of the opt out resolution.

IV. Did DOLLRA err in refusing to award APEA costs and attorney's fees?

The labor relations agency is a creature of statute and has only the powers specifically granted or reasonably needed to perform its statutory duties. PERA does not specifically provide the authority to assess costs and fees. AS 23.40.140 provides:

> **Orders and decisions.** If the labor relations agency finds that a person named in the written complaint or accusation has engaged in a prohibited practice, the labor relations agency shall issue and serve on the person an order or decision requiring the person to cease and desist from the prohibited practice and to take affirmative action which will carry out the provisions of AS 23.40.070 -- AS 23.40.260. If the labor relations agency finds that a person named in the complaint or accusation has not engaged or is not engaging in a prohibited practice, the labor relations agency shall state its findings of fact and issue an order dismissing the complaint or accusation.

The Agency also has the authority to investigate and compel testimony, AS 23.40.160, and to seek an injunction in superior court to enforce its orders, AS 23.40.150.

These powers do not reasonably include the power to assess costs and fees, and DOLLRA did not err in refusing to award costs and attorney's fees to APEA.

Conclusions of Law

1. As an incorporated municipality, the City of Bethel is a political subdivision under AS 23.40.250(7) and Section 4, chapter 113, SLA 1972, and this Agency has jurisdiction over this complaint.

2. Applying the NLRB rule that support for a bargaining representative is presumed to continue but an employer can rebut the presumption, we conclude that the City did not carry its burden to demonstrate facts rebutting the presumption before it adopted the personnel rules in March of 1982 and the opt out resolution in July of 1982.

3. Section 4, ch. 113, SLA 1972 authorizes organized boroughs and political subdivisions to opt out of the Public Employment Relations Act:

> This Act is applicable to organized boroughs and political subdivisions of the state, home rule or otherwise unless the legislative body of the political subdivision, by ordinance or resolution, rejects having its provisions apply.

4. The City did not act in a timely manner when it purported to reject PERA by adopting resolution no. 375 and the resolution is ineffective to reject PERA due to delay, impermissible motive, and waiver.

5. The certification year should be extended the 56 days remaining when the City terminated bargaining in November of 1989.

6. This Agency is not authorized to award costs and attorney's fees.

ORDER

1. The City of Bethel is ordered to cease and desist its refusal to recognize the Alaska Public Employees' Association as the lawful bargaining representative for City employees.

2. The City is ordered to bargain in good faith upon a request and to provide all relevant information requested.

3. APEA's certification year shall run for 56 days from the date bargaining is resumed.

4. Counts II and III are denied and dismissed and count IV is withdrawn by agreement of the parties.

5. The City is ordered to post copies of this decision in a manner reasonably calculated to give notice of the decision for a period of 14 days following the effective date of this decision.

ALASKA LABOR RELATIONS AGENCY

B. Gil Johnson, Chairman

James W. Elliott, Board Member

NOT PARTICIPATING

Darrell Smith, Board Member

APPEAL PROCEDURES

An Agency decision and order may be appealed through proceedings in superior court brought by a party in interest against the Agency and all other parties to the proceedings before the Agency, as provided in the Alaska Rules of Appellate Procedure and the Administrative Procedures Act.

The decision and order becomes effective when filed in the office of the Agency, and unless proceedings to appeal it are instituted, it becomes final on the 31st day after it is filed.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of Alaska Public Employees Ass'n v. City of Bethel, case no. 92-111-RC, dated and filed in the office of the Alaska Labor

Relations Agency in Anchorage, Alaska, this 30th day of December, 1992.

Norma Wren

Clerk IV

This is to certify that on the 30th day of December, 1992, a true and correct copy of the foregoing was mailed, postage prepaid to

S. Goss & L. Poltrock/APEA

C.A. Courtney & W. Mede/City of Bethel

Signature

1The Department of Labor, Labor Relations Agency formerly administered the labor relations laws for municipalities. In 1990 those responsibilities transferred to this Agency, the Alaska Labor Relations Agency, which serves as the labor relations agency for all public employees under the Public Employment Relations Act, AS 23.40.070 -- 23.40.260, and the Alaska Railroad labor laws under AS 42.40.705 -- 42.40.890. AS 23.05.360 & .370.

2Decertification is also barred during the term of a contract except during a window period before the contract's expiration. AS 23.40.100(e). The presumption cannot be rebutted during the life of the contract. NLRB v. Marine Optical Inc., 671 F.2d 11, 16, 109 L.R.R.M.(BNA) 2593, 2596 (1st Cir. 1982); Bartenders Employer's Bargaining Ass'n of Pocatello, Idaho, 213 N.L.R.B. No. 74, 87 L.R.R.M.(BNA) 1194 (1974).

3A representative can waive the right to bargain if it does not protest unilateral action. Failure to protest adoption of the personnel rules in March of 1982, covering mandatory items of bargaining, could constitute a waiver of the right to bargain. See Inlandboatmen's Union of the Pacific v. State, ALRA Decision & Order No. 141, at 18 (Aug. 7, 1992).

4Since the date of the court's remand, this Agency issued its decision in International Bhd. of Elec. Workers, Local 1547 v. Thomas Bay Power Authority, Decision & Order No. 145 (Nov. 25, 1992). That decision stated that, to be prompt under section 4, chapter 113, SLA 1972, a political subdivision must exercise its right to reject PERA within one year.