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FAIRBANKS POLICE CHAPTER,)
ALASKA PUBLIC EMPLOYEES)
ASSOCIATION,)
Complainant,)
vs.)
CITY OF FAIRBANKS,)
Respondent.)

_____)
CASE NO. 92-124-ULP)

DECISION AND ORDER NO. 155

This matter was heard on October 29, 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 20, 1992.

Appearances:

Brett M. Wood, attorney, for complainant Fairbanks Police Chapter, Alaska Public Employees Association; and Patrick B. Cole, Deputy City Attorney, for respondent City of Fairbanks.

Digest:

While the safety impact of a staffing decision is negotiable, the staffing decision itself is not a mandatory subject for bargaining because it is not a "term or condition of employment" under AS 23.40.250(8).

DECISION

The Police chapter seeks to negotiate with the City the number of police officers that can safely be on duty during each of three shifts. Its argument is that minimum manning affects officer safety and officer safety is a mandatory item of bargaining. The City's resists negotiation of the issue of staffing levels for three reasons: (1) the Police Chapter waived any right to negotiate the item when it proceeded to interest arbitration because the proper time to raise the issue was during bargaining; (2) the minimum staffing is not a mandatory topic of bargaining; and (3) if staffing level can be a mandatory subject of bargaining, the police chapter has not sustained its burden to demonstrate the existence of circumstances triggering the right to bargain.

Findings of Fact

1. The Fairbanks Police Chapter/APEA is the recognized collective bargaining representative of the Public Safety Patrol Division employees of the City of Fairbanks, including dispatchers and police officers.
2. The Police Chapter and the City executed a collective bargaining agreement, effective March 1, 1991 -- June 30,

1993, following interest arbitration on March 4, 1991. Agreement § 1.1, exh. 1.

3. During negotiations for the agreement, the bargaining team for the Police Chapter consisted of police officer Norman Brake, Clarence Bolden, of APEA, and dispatcher Gwendolyn Carroll. The bargaining team for the City consisted of Deputy City Attorney Pat Cole, City Attorney Herb Kuss, and Police Chief Richard Cummings.

4. In its opening offer the Police Chapter addressed staffing levels. It proposed that the City agree to a minimum staffing level of four patrol officers and two dispatchers:

The City agrees to set the minimum patrol officers manning level at four (4) from the police classification per shift. The City also agrees to set the minimum dispatcher manning level at two (2) from the dispatcher classification per shift. These minimums shall be reopened for negotiations if the geographical boundaries in the City change.

Exh. 2 & B § 6.2 (Aug. 24, 1990). Bolden, field representative for APEA, said that minimum manning was part of the Police Chapter's initial proposal, characterizing it as a "fall on your sword sort of issue."

5. The parties reached impasse and agreed to proceed to interest arbitration. City Attorney Herb Kuss stated that the City's unwavering position was that it had to negotiate the effects of a manning decision but the decision itself was one of public policy for the City Council. Kuss sent Bolden a letter stating that the City's position on minimum staffing was that the subject was permissive and not a mandatory subject of bargaining. H. Kuss, letter to C. Bolden (Nov. 27, 1990), exhs. E & 21. The letter further stated that "judicial intervention" would be needed to decide the dispute because the arbitrator did not have the authority to decide arbitrability. By sending the letter, Kuss stated he hoped to force the union to state unambiguously its position before they proceeded to arbitration. The Police Chapter did not respond to this letter.

6. The issue of minimum staffing was not presented to the interest arbitrator. Gwendolyn Carroll, a member of the bargaining team for the Police Chapter, states she had thought the issue would go to the arbitrator but it was removed because it would delay the outcome. Another member of the Police Chapter negotiating team, Officer Brake, said he believed that they would not have a contract and would still be in court today if they had gone to court first. The Police Chapter therefore withdrew the subject from negotiations. The issue, according to Bolden, was taken off the table for presenting in a different forum. Bolden said he told the City that the matter was not settled.

7. Following the interest arbitrator's award, exh. F, the parties reached agreement. The agreement contained a management rights clause that states:

The management of the City's operations and the direction of the employees including, but not limited to, the right to plan, direct and control all City operations and the employees assigned thereto; the right to hire, schedule and assign job duties, suspend, layoff, promote, demote, transfer, discipline, or discharge for cause; to maintain order and efficiency; to determine the number of work locations, equipment, as well as the number, job classifications, and except as otherwise provided in this Agreement, is vested exclusively in the City. The foregoing enumeration of the management's rights shall not be deemed to exclude other rights of management not specifically set forth. All terms and conditions of employment not covered by this agreement shall continue to be subject to the City's direction and control.

Agreement, art. III, § 1; exh. 1, at 5.

8. Subsequent to the agreement, staffing levels have been maintained at four commissioned officers and two dispatchers at all times. A reduction, however, was considered. Public Safety Director John Shover told Captain Mike Neilsen that he would be forced to reduce manning if overtime did not level off. Neilsen distributed a memorandum on January 7, 1992, stating that minimum staffing levels for patrol would be reduced to two officers and one supervisor and for dispatch would be reduced to two dispatchers on dayshift, weekdays, and one and one-half dispatcher on all other shifts. Exh. 7. In addition, an S.O.P. signed by Shover was issued on January 7, 1992, to be effective on February 1, 1992, that incorporated the staffing change in the memorandum. Exh. 8.

9. On January 15, 1992, the Police Chapter sent a letter seeking to negotiate minimum staffing and to grieve the proposed reduction in staffing levels. Exh. 19. On January 21, 1992, the City denied the grievance. Exh. 20. The denial stated, "While the City is ready to meet and discuss reductions in service levels if officer safety requires, we cannot agree to use the grievance process to limit the City's discretion to set staffing levels." It further stated, "The City is ready to resume talks such as those held Monday if there is any willingness on the Association's part to provide suggestions as to how the City can avoid exposing the police officers to additional safety risks." The staffing reduction was never put into effect. Shover stated he was able to move funds to the overtime account and retain the manning level. A memorandum rescinding the change was issued by Neilsen on January 28, 1992. Exh. 18.

10. The Police Chapter engaged municipal police management consultant Thompson S. Crockett to prepare a study of minimum staffing at the Fairbanks Police Department. Patrol Staffing, Fairbanks Police Department (July 1992), exh. 5. Crockett works with municipal governments to improve delivery of police services. Most of his work involves staffing levels.

11. Crockett defined minimum staffing as the lowest number of personnel on duty in a community at any time. Factors he considers to determine the level of minimum staffing include officer safety, public satisfaction, and operational effectiveness of the department.

12. Crockett looked at the department's workload and attempted to determine the impact of a staffing reduction from four to three officers. The accepted measure of officer workload is calls for service. His methodology was to take 64 daily activity log summaries to reconstruct the 1991 work schedule. He had asked for 120 daily summaries but obtained only 64. Crockett concluded that there was no workload justification for staffing reductions because the workload had not fallen. He further concluded that a shift in staffing levels would erode operational effectiveness and officer safety. Exh. 5, at 1-0-5. His opinion is the City is understaffed per workload by 5 personnel. Exh. 5, at 1-0-3.

13. Crockett believes reducing staffing affects officer safety because it can reduce the availability of backup. If staffing is cut from four to three officers, backup capability is reduced by 50 percent. With three patrol officers, only one officer can obtain backup. Exh. 5, at 1-0-5.

14. Crockett stated that the risk to officers can be reduced through officer training and increasing backup, with increasing backup being the primary method. Risk to officers is related to exposure. In 1983, officers handled 591 calls, and in 1991, handled 1122 calls. Officers doubled their risk in this time period.

15. Another response to officer risk would be to stop responding in the absence of backup. Public Safety Director Shover stated that an officer has great discretion in responding to a call. He state that there is nothing unusual in retreating before approaching a situation. The officer can back off and go to a supervisor for advice. Although, officers have this discretion, they also are subject to a code of conduct prohibiting cowardly conduct:

Commissioned members shall not refuse or abandon the performance of their duty before or in the presence of a suspect or defendant, as a result of fear.

Commentary. Cowardice is misbehavior through fear. Fear is a natural feeling of apprehension when confronting or effecting an arrest of suspects or defendants. The mere display of apprehension would not constitute this offense, but refusal or abandonment of the duty of a commissioned police officer to effect an arrest as a result of fear does constitute this offense. Commissioned members' duties encompass elements of danger and they are expected to perform their duties, however, they are not required to take unnecessary risks. Keeping several suspects under observation while awaiting other commissioned members arrival prior to effective an arrest is prudent. Withdrawing and allowing a suspect to escape because of fear alone, is cowardice. Failure to come to the aid of another for fear of personal injury is cowardice.

Rules & Regulations, 24-25; exh. 17, at 3-4.

16. Shover stated that, if he did reduce manning to three commissioned officers, the department would need to prioritize calls for service. Some calls would not be taken. The department could stop responding to shoplifting, thefts, or other nonviolent requests for service. He further stated that the City would negotiate the effects of the decision and would

solicit the input of the Police Chapter on priorities and safety and on calls requiring backup.

17. Some situations requiring backup can be predicted. Lieutenant Richard Cummings stated, for example, that two officers are needed to respond to domestic violence, DWI arrests, person with a gun, and burglary in progress calls.
18. The Police Chapter has not sought to negotiate with the City on safety impacts of staffing or sought to change backup procedures.
19. On June 4, 1992, Police Chapter filed an unfair labor practice complaint, charging the City with violations of AS 23.40.110(a)(5) for refusal to bargain in good faith on the issue of minimum staffing necessary for patrol officers and dispatchers to safely perform the duties assigned them by the City.
20. The Agency conducted an investigation on the charge and issued a notice of accusation on September 1, 1992.
21. The City filed its notice of defense on September 16, 1992, denying that minimum staffing levels were a mandatory subject of bargaining.
22. A hearing was held on October 29, 1992, and the parties filed briefs and presented testimony and other evidence. The record remained open until November 20, 1992, for the filing of videotape depositions of Gwendolyn Carroll and John Shover and the closing arguments of the representatives.

Conclusions of Law

1. As an incorporated municipality, the City of Fairbanks is a political subdivision under AS 23.40.250(7) and this Agency has jurisdiction of this complaint under AS 23.40.110.
2. AS 23.40.110(a)(5) provides:

A public employer or an agent of a public employer may not refuse to bargain in good faith with an organization which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.
3. AS 23.40.070(2) provides, "Matters of wages, hours, and other terms and conditions of employment" are mandatory subjects of negotiations under PERA.
4. AS 23.40.250(8) defines "terms and conditions of employment" to mean the hours of employment, the compensation and fringe benefits, and the employer's personnel policies affecting the working conditions of the employees; but does not mean the general policies describing the function and purposes of a public employer.
5. The level of police service to be provided the public is a question affecting the "function and purposes of a public employer," which is a management policy decision under AS 23.40.250(8). Staffing level decisions bear directly on the level of police service provided the community. City of Sault Ste. Marie v. Fraternal Order of Police Labor Council, 414 N.W.2d 168, 170 (Mich. App. 1987). As one hearing examiner stated, "Whether a community will have a large police force, a small one, or none at all, is a very basic managerial decision which ultimately must be determined by the voting public through its elected representatives." International Ass'n of Fire Fighters, Local 1052 v. Public Employment Relations Comm'n, 778 P.2d 32, 36 (Wash. 1989), quoting Yakima v. Yakima Police Patrolman's Ass'n, Pub. Empl. Relations Comm'n, Dec. 1130-PECB, at 4 (1981).
5. Employee safety is a negotiable term or condition of employment. E.g., N.L.R.B. v. Gulf Power Co., 384 F.2d 822 (5th Cir. 1967). Staffing or manning decisions have an impact on officer safety. Those impacts are negotiable, International Ass'n of Fire Fighters Local 669 v. Scranton, 429 A.2d 779, 113 L.R.R.M.(BNA) 3622 (Pa. 1981), and the City has not contested their negotiability in this proceeding. For example, the parties could negotiate those calls that require backup, training, workload, and overtime.
6. The parties' agreement supports the conclusion that the Police Chapter waived any right to bargain staffing levels

even if the issue were negotiable in the management rights clause quoted in Finding 7, supra. That clause unequivocally states that all terms and conditions of employment not specifically covered are "subject to the City's direction and control." The negotiability of minimum staffing was contested during bargaining. It was discussed during negotiations and the respective positions of the parties were clear. For tactical reasons the Police Chapter chose to pursue an agreement rather than insist on the item to impasse or resolution in a judicial or administrative forum. In these circumstances, negotiations on the item were waived, at least during the life of the contract. See Rockwell International Corp., 260 N.L.R.B. 1346, 109 L.R.R.M.(BNA) 1366 (1982), quoted in East Richland Education Ass'n v. Illinois Educational Labor Relations Board, 528 N.E.2d 751, 761 (Ill. App. 1988):

Where, as here, an employer relies on a purported waiver to establish its freedom unilaterally to change terms and conditions of employment not contained in the contract, the matter at issue must have been fully discussed and consciously explored during negotiations and the union must have consciously yielded or clearly and unmistakably waived its interest in the matter.

ORDER

Fairbanks Police Chapter's complaint against the City of Fairbanks is DISMISSED.

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 Fairbanks Police Chapter, Alaska Public Employees Association v. City of Fairbanks, ALRA case no. 92-124-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 26th day of February, 1993.

Norma Wren

Clerk IV

This is to certify that on the 26th day of February, 1993, a true and correct copy of the foregoing was mailed, postage prepaid, to

Brett Wood

Patrick Cole

Signature