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NORTHWEST ARCTIC EDUCATION)
ASSOCIATION, NEA/ALASKA,)
)
Petitioner,)
)
vs.)
)
NORTHWEST ARCTIC BOROUGH SCHOOL)
DISTRICT,)
)
Respondent,)
)
and)
)
ALASKA TECHNICAL CENTER)
PROFESSIONAL ORGANIZATION/ NEA-ALASKA,)
)
Intervenor.)
)

CASE NO. 93-174-UC

DECISION AND ORDER NO. 162

This matter was heard on May 11, 1993, in Anchorage, Alaska, before the Alaska Labor Relations Agency, Chair Gil Johnson and board member Darrell Smith, and with Hearing Examiner Jan Hart DeYoung, presiding. Member James W. Elliott did not participate. The record closed on May 11, 1993.

Appearances:

John B. Patterson, Kelly & Patterson, for petitioner Northwest Arctic Education Association, NEA/Alaska; and Saul R. Friedman, Hedland, Fleischer, Friedman, Brennan & Cooke, for respondent Northwest Arctic Borough School District.

Digest:

A single unit combining the vocational instructors and the certificated staff of a school district is an appropriate unit if the factors set forth in AS 23.40.090 are satisfied. However, a petition for clarification of the unit may not be used to consolidate two recognized bargaining units. The reason is that consolidation presents a question of representation and a self-determination election is needed to determine if the employees desire combined representation. Such an election may be barred by a collective bargaining agreement or an election under AS 23.40.100(c) and (e) and 2 AAC 10.060 (b)(1) and (2).

DECISION

In this case an education association representing a bargaining unit of professional certificated staff seeks to add to its unit six instructors not previously included in the unit. These instructors are employed at the District's vocational facility and are represented by another bargaining representative, which was certified by this Agency in 1992. The education association does not seek to decertify the existing representative but instead has filed a petition for clarification to add to its unit the members of the other unit. The District objects to the petition on several grounds, including the contract bar, the inappropriateness of the proposed unit, and whether the petition is the appropriate

procedure for the association's objectives.

Issues

- A. Does the petition present a question of representation?
- B. Is the proposed consolidated unit an appropriate unit for purposes of collective bargaining?
- C. Does the contract bar in AS 23.40.100(e) apply?
- D. Does the election bar in AS 23.40.100(c) apply?

Findings of Fact

1. The Northwest Arctic Education Association, NEA/Alaska (NAEA) is the recognized bargaining representative of approximately 127 professional certificated employees of the Northwest Arctic Borough School District.
2. The District operates the Alaska Technical Center, formerly called the Kotzebue Technical Center. It is funded by student tuition and with grants from the legislature, Maniilaq Corporation, and the Indian Health Service. District general funds are not used to operate the Center.
3. The District employs six instructors at the Center: a vocational counselor, business instructor, building maintenance instructor, adult basic education instructor, health care occupations instructor, and a principles of technology instructor. These instructors comprise a bargaining unit represented by the Alaska Technical Center Professional Organization/NEA-Alaska (ATCPO).
4. ATCPO had petitioned the Agency for certification as the bargaining representative of the Center instructors on February 7, 1992. The Agency conducted a mail ballot election among the seven members of the unit¹ and on June 18, 1992, the Agency certified ATCPO as the exclusive bargaining representative of the unit.
5. Jerry Trainor, President of ATCPO, stated that ATCPO determined that it was too small to be effective as a bargaining representative, and the unit's members sought inclusion in the NAEA.
6. On December 28, 1992, NAEA filed this unit clarification petition to add to its unit the members of the ACTPO bargaining unit.
7. NAEA bargained with the District for a successor agreement in 1993 and reached an agreement that, as of the date the record closed in this case, May 11, 1993, had not been ratified by the unit members.
8. ATCPO does not have a collective bargaining agreement with the District and has not bargained with the District.
9. The occupants of the ACTPO unit testified about their qualifications, wages and benefits, and job duties:
 - A. Jerry Trainor is employed as a vocational counselor. He holds type A and administrative certificates from Idaho, and although he is not certified in Alaska, he is qualified to be. He serves on the District's vocational education committee with six other District employees.
 - B. Dudley Chilcott is employed as a building maintenance instructor. He was first employed by the District as a certified teacher in 1982 and the District initiated his transfer to the Center in 1985.
 - C. Mavis Troyer has been employed at the Center since September 8, 1992, as the business subjects instructor, teaching typing, computer use, business English, and business math. Troyer holds an Alaska type A teaching certificate.
 - D. Jerry Vick has taught adult basic education at the Center since the 1990 school year. The District had

originally hired him as a certified teacher in 1989. Vick holds a type A Alaska teaching certificate. He teaches academics, life skills, base level math, and English.

E. Cindy Lincoln teaches health care occupations. She began teaching at the Center in 1990. She applied for an Alaska type C or D certificate but was told she could not obtain one because the certificate was not required for her job. Lincoln holds a bachelors of science degree in nursing.

F. Todd Stephens teaches principles of technology at the Center. He began his employment there in January of 1992. He has a bachelors degree in technology. He has taken education courses towards an Alaska teaching certificate and intends to apply for one.

10. All Center instructors hold or are working toward Alaska teaching certificates, and all are college graduates.

11. Similarities between the Center instructors and the K -- 12 teachers include the following: monthly payment; shared supervision after site director; similar pay and benefits; health insurance; shared supplies and personnel office; and a similar work schedule. The two groups work the same number of work days, although the actual calendar is set by the local school board and differs from site to site.

12. The students at the Center range in age from 16 to around 45 and the average student's age was estimated to be around 20 years.

13. Differences between the two units include the following: the students pay tuition at the Center and some students board at the facility, while K -- 12 students do not; the programs are funded differently; instruction tends to be more individualized at the Center and the Center's program includes more vocational subjects and fewer academic courses than the K -- 12 program, although both are taught in both programs; and the retirement plan for certified teachers is governed by AS 14.25.010 -- 14.25.220.

14. The District's position is that the Center instructors are not teachers as defined in AS 14.20.215(6), J. Rogers memo. to D. Chilcott (Dec. 2, 1991), Exh. B, and that this is a significant difference.

15. The similarities, however, far outweigh the differences when community of interest, wages, hours, and working conditions are examined.

16. In addition to certified teaching staff, the NAEA unit includes the positions librarian, vocational education teacher, career counselor, physical therapist, staff developer, media person, and post-secondary counselor.

17. On July 21, 1992, the NAEA filed this petition for unit clarification, seeking to include the members in the ACTPO unit into its unit.

18. Notices of the petition were posted between February 17 and 26, 1993, in the faculty lounge at the Center and all NAEA unit member work locations.

19. On February 8, 1993, a prehearing conference was held in this matter before Hearing Examiner Jan Hart DeYoung.

20. On March 18, 1993, the parties were notified that board member James Elliott removed himself from the case.

21. ATCPO was provided intervenor status as the certified representative of the employees NAEA sought to represent, although ATCPO did not participate in the briefing or at the hearing.

22. On May 11, 1993, a hearing was held before the Alaska Labor Relations Agency, at which the parties presented testimony and other evidence.

Conclusions of Law

1. The Northwest Arctic Borough School District is a public employer under AS 23.40.250(7), as amended in sec. 7, ch. 1, SLA 1992.

2. The Alaska Labor Relations Agency has jurisdiction of this petition for unit clarification and the authority to determine the appropriate unit for collective bargaining under AS 23.40.090, which provides:

The labor relations agency shall decide in each case, in order to assure to employees the fullest freedom in exercising the rights 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, and the desires of employees. Bargaining units shall be as large as is reasonable, and unnecessary fragmenting shall be avoided.

3. Petitioner Northwest Arctic Education Association (NAEA) has the burden of proof under 2 AAC 10.430 to "prove the truth of each element necessary to [its] cause by a preponderance of the evidence."

4. The procedure for petitioning the Agency to clarify the composition of a bargaining unit appears in 2 AAC 10.050.

5. This Agency considers relevant decisions of the National Labor Relations Board and federal courts when making determinations under the Public Employment Relations Act. 2 AAC 10.440.

6. The question of representation. A bargaining unit may be clarified if there is some confusion over the contours of a unit or the parties dispute whether a particular position belongs in the unit. A petition for clarification of the unit can be appropriate if circumstances have changed in the ownership or operations of the employer, such as reorganization, consolidation, abolition or creation of job classes, or if there has been a material change in the law. 1 John Feerick, Henry Baer, Jonathan Arfa, NLRB Representation Elections -- Law, Practice & Procedure § 6.1, at 184 (3d ed. 1992 Supp.). For example, a bargaining unit representative could petition for clarification of a unit after the employer enlarged its operation by adding positions if the representative could demonstrate a community of interest with the existing unit. 1 Patrick Hardin, The Developing Labor Law 404 (3d ed. 1992).

7. As a general rule positions intentionally and historically excluded from the unit may not be added to the unit in a unit clarification proceeding. N.L.R.B. v. Mississippi Power & Light Co., 769 F.2d 276, 279, 120 L.R.R.M.(BNA) 2302, 2304 (5th Cir. 1985). The court in Mississippi Power & Light described the rationale for adding employees to a unit through a unit clarification proceeding:

The added employees are considered covered by the existing collective bargaining agreement. The theory of unit clarification, insofar as adding positions to the collective bargaining unit, is that the added employees functionally are within the existing bargaining unit but had not formally been included due to changed circumstances (for example, evolving or newly created jobs).

Id.; see also Desert Palace, Inc., 209 N.L.R.B. No. 153, 85 L.R.R.M.(BNA) 1594 (1974); 1 Patrick Hardin, supra 404.

8. The National Labor Relations Board will dismiss a petition that attempts to place employees within a unit that were historically excluded from the unit. See Desert Palace, Inc., 209 N.L.R.B. No. 153, 85 L.R.R.M.(BNA) 1594 (1974); 1 John Feerick, Henry Baer & Jonathan Arfa, supra at § 6.1, at 182, citing N.L.R.B. v. First Union Management, Inc., 777 F.2d 330, 120 L.R.R.M.(BNA) 3437 (6th Cir. 1985); and Washington Post Co., 256 N.L.R.B. 1243, 107 L.R.R.M.(BNA) 1441 (1981). The reason is that these cases present a genuine question about representation. Washington Post Co., 256 N.L.R.B. at 1247, 107 L.R.R.M.(BNA) at 1444.

9. The instructors at the Center may not accrete into the professional certificated teachers unit because they were historically excluded from that unit and in fact have been certified in a separate unit by this Agency.

10. ATCPO is the exclusive bargaining representative for these employees and the Agency will not decertify that representative as part of a unit clarification proceeding.² See Crown Zellerbach Corp., 147 N.L.R.B. No. 155, 56 L.R.R.M.(BNA) 1438 (1964) (the National Labor Relations Board does not certify or decertify a new entity as a result of a unit clarification proceeding).

11. Combining the two units would create a new entity. Merger is generally outside the scope of a unit clarification proceeding. Mac Towing, Inc., 262 N.L.R.B. No. 168, 110 L.R.R.M.(BNA) 1537 (1982). See 1 Patrick Hardin, supra at 1469 -- 1470.
12. Other states have examined a labor organization's attempt to combine with another unit. A unit clarification petition generally is not the appropriate method to address the issue because such cases usually present a question of representation. Welches School Dist. v. Welches Educ. Ass'n, 842 P.2d 437, 439 (Or. Ap. 1992), quoting AFSCME Local 3580 v. Metropolitan Service Dist., 12 P.E.C.B.R. 835, 861 (Ore. Employment Relations Bd. 1991). The appropriate procedure is a representation petition. Id.; Dupage Area Vocational Educ. Auth. v. Illinois Educ. Labor Relations Bd., 522 N.E.2d 292, 130 L.R.R.M.(BNA) 3184 (Ill. App. 1988); see also Lake County Bd. of Mental Retardation & Developmental Disabilities v. State Employment Relations Bd., 1993 WL 34634 (Ohio App., Feb. 11, 1993) (unpublished).
13. A representation petition to consolidate two units should be supported by a showing of interest from the employees the petitioner proposes to add to the unit. Dupage Area Vocational Educ. Auth., 522 N.E.2d at 299, 130 L.R.R.M. (BNA) at 3187.
14. Both groups should be provided an opportunity to vote in the election. Dupage Area Vocational Educ. Auth. v. Illinois Educ. Labor Relations Bd., 522 N.E.2d 292, 130 L.R.R.M.(BNA) 3184; Welches School Dist. v. Welches Educ. Ass'n, 842 P.2d at 439, quoting AFSCME Local 3580 v. Metropolitan Service Dist., 12 P.E.C.B.R. 835, 861 (Ore. Empt. Re. Bd. 1991). In Welches the labor relations agency after receipt of a representation petition conducted an election among both groups providing each group with three ballot choices: representation in the combined unit, representation in the original unit, and no representation. The board was found to have the discretion to order this type of election, although the statute did not specifically provide for it. In Dupage Area Vocational Educ. Auth., the court reversed the decision below on the basis that only the smaller unit had been provided the opportunity to vote. The court held that, if the nature of the two groups is different, as it was in Dupage Area Vocational Educ. Auth., which involved professional and nonprofessional staff, both groups have the right to vote on the consolidation. 522 N.E.2d at 300, 130 L.R.R.M.(BNA) at 3190.
15. NAEA's petition must be distinguished from a line of authority under the National Labor Relations Act. The NLRB has combined single plant units into existing multiplant units in a unit clarification proceeding when both units were presumptively appropriate and the same bargaining representative represented both units. In such cases the Board will conduct a self-determination election among the employees in the unit to be added and, if appropriate, certify the multiplant unit. Libbey-Owens-Ford, 202 N.L.R.B. No. 15, 82 L.R.R.M.(BNA) 1417 (1973), enforced Libbey-Owens-Ford v. N.L.R.B., 495 F.2d 1195, 85 L.R.R.M.(BNA) 2668 (3d Cir. 1974). In Libbey-Owens-Ford a labor organization representing a multiplant unit and a single plant unit for the same employer filed a unit clarification petition to combine the units. After finding the separate unit and the merged unit equally appropriate, the board ordered an election in the single plant unit to determine if the employees wanted representation in the multiplant unit. Id., 82 L.R.R.M.(BNA) 1417. A federal court of appeals had decided that a unit clarification petition could be used to consolidate existing appropriate bargaining units. United Glass and Ceramic Workers of North America, AFL-CIO v. N.L.R.B., 463 F.2d 31, 80 L.R.R.M.(BNA) 2882 (3d Cir. 1972), enforcing Libbey-Owens-Ford Glass Co., 169 N.L.R.B. No. 2, 67 L.R.R.M.(BNA) 1096 (1968). These cases do not present a question of representation because the same labor organization has representative status for all members of the units to be consolidated. 169 N.L.R.B. No. 2, 67 L.R.R.M. (BNA) 1096. The N.L.R.B. reasons that, because both units are appropriate, it is important to give weight to the employees' preferences and exercise the Board's inherent power to conduct an election. Id.
16. The key feature that distinguishes the petition brought by the NAEA from the Libbey-Owens-Ford line of cases is that the ACTPO is the certified bargaining representative of the Center professional staff and its joinder with the NAEA unit necessarily presents a question of representation. Unlike the bargaining representative in Libbey-Owens-Ford, NAEA does not represent both units.
17. Because a question of representation exists, this Agency may not consolidate the two units in this clarification proceeding and the petition must be dismissed. Anticipating the filing of a representation petition under the guidelines set forth above, we address the other issues presented -- the appropriateness of the unit, the election bar, and the

contract bar.

18. Appropriateness of the unit. Before a consolidation election can be ordered, the Agency must first determine that the unit that would be created by consolidation is an appropriate unit. Welches School District, 842 P.2d at 839; Dupage Area Vocational Education Authority, 522 N.E.2d at 296, 130 L.R.R.M.(BNA) at 3188.

19. The principal question is whether the employees in the two units share a community of interest. Determining community of interest requires

looking at such factors as similarity in employment benefits, hours of work and other terms and conditions of employment; (1) similarity in the scale and manner of determining earnings; (2) similarity in employment benefits, hours of work and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skills and training of the employees; (5) frequency of contact or interchange among the employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) desires of the affected employees; (12) extent of union organization.

N.L.R.B. v. Saint Francis College, 562 F.2d 246, 249, 96 L.R.R.M.(BNA) 2134, 2136 (3d Cir. 1977), quoting R. Gorman, *Labor Law: Organization and Collective Bargaining* 69 (1976).

20. In examining the positions in the ACTPO unit and comparing them to the professional staff in the NAEA unit, we determined that the similarities outweighed the differences. See paragraph 15, supra. The similarity in wages, benefits, educational background, and teaching responsibilities support the conclusion that the ACTPO instructors share a community of interest with the certified teaching staff in the NAEA unit. These factors override the absence of bargaining history shared with the K - 12 teaching staff.³ We therefore conclude that a unit combining the members of the NAEA unit and the ACTPO unit would be appropriate.

21. While aware of the differences between the two units on the basis of the requirement of a certificate, that factor alone is not sufficient to require that the units be kept separate. Other states examining units mixing certified and noncertified staff, even when the noncertified staff is not teaching staff, have been found appropriate. See Dupage Area Vocational Educ. Auth., 522 N.E.2d at 297, 130 L.R.R.M.(BNA) at 3188; Anthon - OTO Community School Dist. v. Public Employment Relations Bd., 404 N.W.2d 140, 125 L.R.R.M.(BNA) 3056 (Iowa 1987).

22. Contract bar. In a unit clarification case the positions accreted to the unit are considered to have been members of the unit and any existing collective bargaining agreement covers them. In this case, however, the Agency has determined that a unit combining two preexisting units would be appropriate, recognizing fully that a new unit would be created. This new unit's composition would be materially different than the previous unit and coverage under an existing contract should not be assumed. Moreover, AS 23.40.100(e) provides:

An election may not be directed by the labor relations agency in a bargaining unit in which there is in force a valid collective bargaining agreement, except during a

90-day period preceding the expiration date. However, a collective bargaining agreement may not bar an election upon petition of persons in the bargaining unit but not parties to the agreement if more than three years have elapsed since the execution of the agreement or the last timely renewal, whichever was later.

Under this section, any agreement between NAEA and the District would bar an election among members of the existing NAEA unit. We do not see any basis in the statute for providing an exception to the contract bar rule in a consolidation case. This case is distinguishable from those cases involving the consolidation of two units represented by a single bargaining representative. See, e.g., N.L.R.B. v. Mississippi Power & Light, 769 F.2d 276, 120 L.R.R.M.(BNA) 2302 (5th Cir. 1985)(an election conducted despite contract bar in 29 U.S.C. §§ 158(a)(1) & (5)).

23. Election bar. As 23.40.100 (c) provides:

An election may not be held in a bargaining unit or in a subdivision of a bargaining unit if a valid election has been held within the preceding 12 months.

The election conducted by this agency on July 9, 1992, prevents the conduct of an election among the members of the bargaining unit in this matter on or before July 9, 1993.

ORDER

The unit clarification petition filed by the NAEA is **DISMISSED**.

ALASKA LABOR RELATIONS AGENCY

B. Gil Johnson, Chairman

Not Participating

James W. Elliott, Board Member

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 Decision and Order No. 160 in the matter of Northwest Arctic Education Ass'n, NEA/Alaska v. Northwest Arctic Borough School District and Alaska Technical Center Professional Organization/NEA-Alaska, Intervenor, case no. 93-174-UC, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 30th day of June, 1993.

Norma Wren

Clerk IV

This is to certify that on the 30th day of June, 1993, a true and correct copy of the foregoing was mailed, postage prepaid to

John Patterson

Saul Friedman

Jerry Trainor

Signature

1At the time of the petition the Alaska Technical Center also employed an instructor of industrial mechanics.

2At any time ATCPO could disclaim further interest in representation of the bargaining unit. A disclaimer would have the effect of removing its status as exclusive bargaining representative. See N.L.R.B. Casehandling Manual, Representation Proceedings §§ 11120 -- 11124 (1989).

3The absence of bargaining history is undercut by the fact that the positions could not have shared bargaining history before the adoption of Ch. 118 SLA 1990, which applied the Public Employment Relations Act

to school districts on an interim basis, and Ch. 1 SLA 1992, which applied PERA to the school districts without limitation. Before that date labor relations for certified teachers, as defined in AS 14.20.215(6), were governed exclusively by AS 14.20.550 -- 14.20.610, repealed sec. 10, ch. 1, SLA 1992. See Rentor Education Ass'n v. Public Employment Relations Comm'n, 680 P.2d 40, 44-45, 117 L.R.R.M.(BNA) 2089, 2093 (Wa. 1989) (en banc) (not allowing bargaining history compelled by statute to preclude severance election).