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LOWER KUSKOKWIM EDUCATION)
ASSOCIATION/NEA-ALASKA,)
)
Petitioner,)
)
vs.)
)
LOWER KUSKOKWIM SCHOOL)
DISTRICT,)
)
Respondent,)
)
<hr style="border-top: 1px solid black;"/>	
CASE NO. 93-225-UC	

DECISION AND ORDER NO. 172

This matter was heard on November 1, 1993, in Anchorage, Alaska, before a panel of the Alaska Labor Relations Board, with members Stuart H. Bowdoin, James W. Elliott, and Darrell H. Smith¹ participating and with hearing examiner Jan Hart DeYoung presiding. The record closed on November 1, 1993.

Appearances:

Robert M. Johnson, Wohlforth, Argetsinger, Johnson & Brecht, PC, for petitioner Lower Kuskokwim Education Association/ NEA-Alaska; and Saul Friedman, Hedland, Fleischer, Friedman, Brennan & Cooke for respondent Lower Kuskokwim School District.

Digest:

- (1) A unit clarification proceeding is not the appropriate procedure to change an established bargaining unit. It is appropriate to resolve disputes over the unit placement of a new position or disputes over a position where circumstances have changed enough to raise a question of the continued appropriateness of a unit placement.
- (2) Claims to enforce or interpret a collective bargaining agreement must first be brought under an applicable grievance arbitration procedure before this Agency will consider them under 8 AAC 97.510(a)(4) and AS 23.40.210.

DECISION

The bargaining representative of a unit of certified teachers has brought this unit clarification petition to add to the unit the position of coordinator of library/media services, which was created in 1986. It bases its petition on the definition of "teacher" and the recognition clause in the negotiated agreement. It argues that the job description and facts surrounding appointment justify inclusion in the unit. It further argues that the incumbent be awarded additional compensation as if placed in the unit from the time of hire. It also argues that changed circumstances justify adding the position to the unit because the incumbent only recently discovered that her certified status was used by the school district in support of its accreditation. Finally, the representative argues that ample precedent supports placement of a certified library/media specialist in a certified teachers' unit.

The District objects to adding the position to the unit primarily on the basis that the representative should use the procedures to resolve contract disputes in the negotiated agreement. It also argues that the position has been excluded from the unit and no changes to the job duties have occurred that would justify moving the position to the unit.

Preliminary Matter

Petitioner Lower Kuskokwim Education Ass'n/NEA-Alaska (LKEA) filed a request to disqualify board member James W. Elliott from sitting on the panel hearing its petition. In support of its petition it filed the affidavit of Robert M. Johnson, counsel for LKEA. The grounds stated were the past consultation with Saul Friedman, counsel for the Lower Kuskokwim School District, and the current representation of member Elliott by Friedman's law firm in a personal matter. At the hearing member Elliott and the parties were excused and the remaining board members, Stuart H. Bowdoin and Darrell F. Smith, considered the request and denied it.

Procedures for hearing this petition for unit clarification are set forth in the regulations adopted under the Public Employment Relations Act. At the time of filing of the petition, those regulations appeared in 2 AAC 10.400 -- 2 AAC 10.440. After July 22, 1993, they appear in 8 AAC 97.330 -- 8 AAC 97.480. None address procedures for disqualifying a board member. Although the Administrative Procedure Act, AS 44.62.330 -- 44.62.630, does not apply to unit clarification petitions, its procedure on disqualification was followed. AS 44.62.450(c) provides:

A hearing officer or agency member shall voluntarily seek disqualification and withdraw from a case in which the hearing officer or agency member cannot accord a fair and impartial hearing or consideration. A party may request the disqualification of a hearing officer or agency member by filing an affidavit, before the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. If the request concerns an agency member the issue shall be determined by the other members of the agency. If the request concerns the hearing officer, the issue shall be determined by the agency when the agency hears the case with the hearing officer, and by the hearing officer when the officer hears the case alone. An agency member may not withdraw voluntarily or be disqualified if the disqualification would prevent the existence of a quorum qualified to act in the particular case.

The issue is whether Elliott's retention of the law firm of Hedland, Fleischer, Friedman, Brennan and Cooke to represent him in a lawsuit prevents a fair and impartial hearing in this case.

In support of its request for disqualification, LKEA cited AS 22.20.020(a)(7), requiring a judicial officer to disqualify himself from hearing a case when an attorney for a party has represented the judicial officer or a person against the judicial officer, either in the judicial officer's public or private capacity, in a matter within two years preceding the filing of the action.

This rule, which applies to judges, should be distinguished from LKEA's request to disqualify a member of an administrative panel. First, it is another lawyer, not attorney Friedman, who represents Elliott in his private matter.

Second, different considerations should apply to determine conflicts and disqualification of administrative hearing panel members than apply to judicial officers. Labor relations board members must have backgrounds in labor relations to qualify to serve. AS 23.05.360(a) (1993 Supp.) provides in part,

The agency must include two members with a background in management, two members with a background in labor, and two members from the general public. All members must have relevant experience in labor relations matters.

Because of the size of the labor relations community in Alaska, board members necessarily know or are familiar with many of the representatives and witnesses appearing in cases. Although two members constitute a quorum, three members insures a balanced panel that includes experience on both the labor and management sides of labor relations. Removal of one member skews the panel and should not be done without a genuine reason to question the fairness or impartiality of the hearing. Representation by the law firm of respondent's counsel without more does not raise such a question.²

Findings of Fact

1. The Lower Kuskokwim Education Association/NEA-Alaska (LKEA) is the recognized collective bargaining agent of certified teachers of the Lower Kuskokwim School District. The recognition clause provides recognition for "certified teachers." Negotiated Agreement 9 (July 1, 1989 -- June 30, 1993), Exh. 1, at 5.

2. Teacher is defined in the 1989 -- 1993 agreement and its successor to mean

All certificated staff members employed by the District except the Superintendent, Assistant Superintendent, and those administrative employees who have exercised their right to remove themselves from the teacher bargaining unit pursuant to AS 14.20.560(f).

Negotiated Agreement 4 (July 1, 1989 -- June 30, 1993), Exh. 1, at 3; Negotiated Agreement 2 (July 1, 1993 -- June 30, 1996), Exh. 2, at 2 & Exh. C.

3. The negotiated agreement provides a grievance procedure for resolving contract disputes through a number of levels. The last level provides for binding arbitration. Negotiated Agreement 47 - 50 (July 1, 1989 -- June 30, 1993), Exh. 1, at 24 - 26; Negotiated Agreement (July 1, 1993 -- June 30, 1996), Exh. D.

4. The agreement defines "grievance" as "an allegation that this Agreement, or an individual teacher's contract has been misinterpreted, inequitably applied or violated." Negotiated Agreement 47 - 50 (July 1, 1989 -- June 30, 1993), Exh. 1, at 24 - 26; Negotiated Agreement 47 (July 1, 1993 -- June 30, 1996), Exh. D.

5. The position of coordinator of library/media services was created in 1986. A former curriculum and bilingual director and supervisor of the coordinator of library/media services between 1986 -- 1993, Phyllis Williams, stated that there had been a history of controversy over the unit placement of the position.

6. The 1986 position specifications for the coordinator of library/media services position set forth the qualifications as follows:

1. Master's Degree or enrollment in Masters Program with emphasis in Library/Media administration preferred.
2. Valid Alaska teaching certificate required with endorsement in Library/Media preferred or three years demonstrated successful experience in Library/Media administration.
3. Background in purchasing, budgeting, cataloging and supervising in a library setting.
4. Background in Library/Media collection development preferred.
5. Willingness to live and work in a cross-cultural, rural Alaska environment and travel to remote locations.
6. Ability to carry out successfully the duties described below.

Exh. A. These qualifications were not changed when the specifications were revised on May 29, 1992. Exh. B.

7. The current incumbent in the library/media services coordinator position is Joyce Slagle. She was first employed by the District on January 3, 1990, as media coordinator. She assumed the duties of the coordinator of library/media services shortly thereafter on January 29, 1990.

8. The District employed two persons in the position before Slagle -- Tracy Allen and Mary Ellen Emmons. Neither had valid teaching certificates at the time of hire. Tracy Allen acquired a type C certificate in the position.

9. An Alaska C certificate does not qualify the holder to serve as a regular classroom teacher. Exh. F.

10. Slagle's background before she began work for the District was as a language arts teacher certified for elementary and high school in Oklahoma for 27 years. For her last year in Oklahoma she was a certified media specialist with a masters in library science. She currently holds Alaska A and C certificates.
11. The position specification provides for salary at range 20 of the classified salary scale. Exh. 3, & Exh. B.
12. Slagle believes she should be compensated as a certified teacher. Exh. 5.
13. Peter Fisher, retirement field representative for the state division of retirement and benefits, testified about the public employees' retirement and teachers' retirement systems. He had talked to Joyce Slagle in April of 1993 after she contacted him about her placement in the public employees' retirement system rather than the teachers' retirement system (TRS). To qualify for TRS, Fisher stated a teaching certificate must be required for the position. Fisher reviewed Slagle's position specification at Slagle's request and believed initially that a certificate was required. He contacted the District and spoke with the District's director of personnel and student services, Gary Baldwin. Baldwin told him the qualifications were written to allow a masters degree, experience in the field, or a certificate to qualify for the position. Fisher accepted Baldwin's statement of the District's intent that a noncertificated person be able to hold the position but advised that the position specification be changed as it was ambiguous.
14. Accreditation standards for schools require the employment of a certified instructional media center specialist. Policies and Standards for Accreditation of K - 12 Schools, at 18 (Comm'n on Schools, Northwest Ass'n of Schools & Colleges 1986), Exh. 7, at 4.
15. Michelle Castaneda, a National Education Association professional, testified that individuals situated similarly to Slagle are included in teacher units in other districts.
16. On June 1, 1993, the Education Association filed a petition for unit clarification, alleging that, as a certified position, the coordinator of library/media services belonged in the certified teachers' bargaining unit.
17. The District posted a copy of the petition at the work site on June 18, 1993, and mailed Slagle a copy of the petition as well.
18. The District filed an objection to the petition on July 6, 1993, denying that an Alaska teaching certificate was required for the position and arguing that the responsibilities for the position were substantially different than the responsibilities for teachers.
19. On September 7, 1993, the District requested to remove board member Karen J. Mahurin from the case. On September 13, 1993, the parties were notified that board member Karen J. Mahurin removed herself from the case.
20. On October 26, 1993, LKEA requested to remove board member James W. Elliott from the case.
21. A hearing was held on November 1, 1993, and the parties filed briefs and presented testimony and other evidence. The record closed that same day.

Conclusions of Law

1. As a school district or regional educational attendance area, the District is a public employer under AS 23.40.250(7) (1993 Supp.) and this Agency has jurisdiction of this petition under AS 23.40.090 and AS 23.40.210.
2. As petitioner, LKEA has the burden under 8 AAC 97.350(f) to prove "the truth of each element necessary to [its] cause by a preponderance of the evidence."³
3. AS 23.40.090 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.

4. After initial recognition of a bargaining unit, a bargaining agent or public employer may bring a petition for unit clarification to resolve a dispute over the unit's composition under 8 AAC 97.050(a) (effective July 22, 1993):

A public employer or a public employee representative may file a petition seeking

- (1) clarification of an existing bargaining unit, where no question concerning representation exists, in order to resolve a question of unit composition raised by changed circumstances since certification; or
- (2) amendment of certification to reflect changed circumstances, including a change in name, affiliation, site, or location.

5. Before July 22, 1993, the preceding regulation governing unit clarification, 2 AAC 10.050, provided only for bargaining representatives to file unit petitions and did not exclude cases raising a question of representation or require changed circumstances. However, the Agency, consistent with National Labor Relations Board practice, did not consider as a petition for unit clarification those petitions that raised a question of representation by seeking to add a position historically excluded from the unit. Northwest Arctic Education Ass'n, NEA-Alaska v. Northwest Arctic Borough School District, Decision & Order No. 162, at 6-7 (June 30, 1993). See also, Union Electric Co., 217 NLRB No. 124, 89 L.R.R.M.(BNA) 1535 (May 1, 1975).

6. The appropriate time to raise a unit dispute based on accretion is when the position is created or reasonably soon thereafter. Since creation of the position of coordinator of library/media services in 1986, the position has not been considered in the unit and has been compensated as a classified employee. To change the scope of a unit to add a position historically excluded, some changed circumstances must be shown. Changes that would be relevant to a unit determination would be changes to the factors listed in AS 23.40.090 -- community of interest, wages, hours, working conditions, history of collective bargaining, and desires of employees.

7. The changed circumstance that the LKEA argues to justify adding the position to the unit is the District's use of Slagle's certificate to support a bid for accreditation. LKEA does not argue any changes affecting community of interest or working conditions, such as a change in the duties or responsibilities of the position, or other factors listed in AS 23.40.090. The argument seems to be based on equity; because the District profited from the certificate, it should treat the holder as a certified teacher. This fact, however, has no bearing on unit placement.

8. Because LKEA has not demonstrated a change in circumstances justifying a change to the bargaining unit, we are not required to address whether placement of the coordinator of library/media services in the unit is appropriate under AS 23.40.090.

9. LKEA has also argued a contractual basis for placing the coordinator of library/media services in the certified teachers unit. The composition of the bargaining unit is a permissive subject of bargaining and the parties may negotiate changes to the scope of a unit. Alaska State Employees Ass'n AFSCME Local 52, AFL-CIO v. State of Alaska, Decision and Order No. 170, at 6-7 (Jan. 26, 1994), appeal pending super. ct. no. 3AN-94-879 (filed Jan. 28, 1994). The parties' negotiated agreement contains a recognition clause that describes the unit as "certified teachers." The agreement defines "teacher" as all certified staff with some exceptions. See finding of fact no. 2. LKEA argues that the coordinator of media/library services position falls within this definition.

10. Disputes over the terms and interpretation of a negotiated agreement can be grieved under the grievance arbitration procedures in the agreement. Finding of fact no. 3. LKEA could therefore grieve this dispute under the negotiated agreement.

11. This Agency has jurisdiction to enforce collective bargaining agreements. AS 23.40.210 provides in part, "Either party to the agreement has a right of action to enforce the agreement by petition to the labor relations agency." It follows that the Agency may construe and interpret the terms of the agreement. However, every contract must have in it

a grievance procedure culminating in binding arbitration. AS 23.40.210. By deferring to the contract remedies where possible, this Agency supports the parties' resolution of their own disputes. The Alaska Supreme Court has recognized this Agency's discretion to hear a case or defer it where the Agency's jurisdiction over unfair labor practices in AS 23.40.110 overlaps with the grievance arbitration procedures in the contract. See Public Safety Employees Ass'n v. State of Alaska, 799 P.2d 315, 135 L.R.R.M.(BNA) 3137 (Alaska 1990) (recognizing the Agency's discretion to defer). However, the strong preference of the Agency is to defer and allow the contract remedies to run their course before interfering. Fairbanks Fire Fighters Ass'n, Local 1324, Int'l Ass'n of Fire Fighters v. City of Fairbanks, Decision & Order No. 142 (Aug. 7, 1992) (Agency will not substitute for arbitration but will enforce agreement by compelling arbitration). See also Mid-Kuskokwim Education Ass'n v. Kuspuk School District; Decision & Order No. 156 (Mar. 8, 1993); Alaska State Employees Ass'n v. State of Alaska, Decision & Order No. 135 (Sept. 17, 1991). Thus, contract claims should proceed first to arbitration.

12. Requiring exhaustion of contract remedies is consistent with regulations recently adopted and effective on July 22, 1993, that include a procedure for bringing a contract enforcement claim before this Agency. Most important for our purpose here, the procedure requires that a petition to enforce the contract include

a statement that the party has exhausted its rights under the grievance arbitration procedure in the collective bargaining agreement or that the procedure does not apply.

8 AAC 97.510(a)(4).

13. The record in this case does not establish that LKEA has exhausted its rights under the grievance arbitration procedure in the agreement or that it does not apply. We therefore refer the parties first to this procedure.

14. Since we have not found that the coordinator of library/media services is in the unit, we do not address whether the change to the unit should be made retroactive to the date of the incumbent's hire, with an award of wages and other compensation consistent with the collective bargaining agreement.

ORDER

1. The petition of the Lower Kuskokwim Education Association/NEA-Alaska petition in 93-225-UC is DISMISSED;
2. The District is ordered to post copies of this decision in a manner reasonably calculated to give notice of the decision for a period of 10 days following service of this decision. The District may substitute service of the decision on affected employees in accordance with 8 AAC 97.015 and 8 AAC 97.460(c).

ALASKA LABOR RELATIONS AGENCY

Stuart H. Bowdoin, Board Member

James W. Elliott, Board Member

Darrell F. 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 No. 172 in the matter of

Lower Kuskokwim Education Association/NEA-Alaska vs. Lower Kuskokwim School District, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 2nd day of March, 1994.

Victoria D.J. Scates

Clerk IV

This is to certify that on the 2nd day of March, 1994, a true and correct copy of the foregoing was mailed, postage prepaid to

Robert M. Johnson

Saul Friedman

Signature

1Member Darrell Smith was required suddenly to leave the hearing part way through the taking of testimony. He participated in the remainder by reviewing tapes of the hearing.

2Member James W. Elliott did not participate in that part of this decision addressing the request for his disqualification.

3Before July 22, 1993, the effective date of 8 AAC 97.350, the burden of proof was set forth in 2 AAC 10.430.