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ALASKA PUBLIC EMPLOYEES ASSOCIATION/AFT, AFL-CIO,

Complainant,

vs.

CITY OF NOME, NOME JOINT UTILITY SYSTEM,

Respondent.

CITY OF NOME, NOME JOINT UTILITY SYSTEM,

Complainant,

vs.

ALASKA PUBLIC EMPLOYEES ASSOCIATION/AFT, AFL-CIO,

Respondent.

CASE NOS. 94-259-ULP & 94-260-ULP (Consol.)

DECISION AND ORDER NO. 176

Considered on the record, including the briefs, evidence, and a transcript of proceedings, dated January 18 and 19, 1994, by a panel of the Alaska Labor Relations Board, members Alfred L. Tamagni, Sr., James W. Elliott, and Karen J. Mahurin, with hearing examiner Jan Hart DeYoung, presiding. The record closed on February 11, 1994, upon the receipt of posthearing filings.

Appearances:

Bob Watts, manager, Alaska Public Employees Association/AFT, AFL-CIO; and Parry Grover, Davis Wright Tremaine, for City of Nome, Nome Joint Utility System.

Digest:

A city committed an unfair labor practice under AS 23.40.110(a)(5) by not submitting a tentative collective bargaining agreement to its council for ratification. The predictability of the outcome before the council did not excuse submitting it in accordance with the city resolution and the parties' past practice.

DECISION

Findings of Fact

1. The Nome Joint Utility System (NJUS) is part of the City of Nome, with a separate board and manager. Tr. 10.

2. NJUS has three bargaining units. The office and water and sewer workers are represented by the Alaska Public Employees Association/AFT, AFL-CIO (APEA). Other units are represented by the International Brotherhood of Electrical Workers, Local 1547, and the International Union of Operating Engineers, Local 302. Tr. 221.

3. The most recent collective bargaining agreement between NJUS and APEA had an expiration date of December 31, 1992. Agreement, NJUS Exh. B, at 1. The signature page of the agreement shows that it was ratified by NJUS, approved by the City Council, and ratified by the APEA. Id., at 28; Tr. 222.

4. At a meeting of the Nome Joint Utility Board on October 27, 1993, the board appointed its negotiators for upcoming contract negotiations: board members Edgar Griffin and Louis Green, Sr. APEA Exh. 7.

5. APEA gave timely notice on November 10, 1992, to open the agreement for amendment or modification. B. Watts, letter to G. Butcher (Nov. 10, 1992), NJUS Exh. A.

6. APEA's northern region manager, Bob Watts, arrived in Nome on Tuesday, December 1, 1992, for the negotiations and went to the Bering Sea Saloon with Edward Murdock, chapter chair for the APEA unit. Tr. 85. They saw the "usual crowd" at the saloon, whom Murdock identified as Stan Sobocienski, owner of the saloon and chair of the NJUS board, Stan Anderson, Nome council member, John Handeland, mayor, and Marv Hannebuth. Tr. 86. Murdock stated they discussed the pending negotiations that night and the next. Tr. 87. Stan Anderson, however, was not at the saloon or even in Nome at this time. Tr. 103-104.

7. Mayor Handeland recalled seeing Watts at the saloon on December 2 or 3, 1992. He learned through this casual contact that negotiations between APEA and NJUS had begun. Tr. 292.

8. The NJUS negotiating team and the APEA team met to bargain in the office of Gary Butcher, the Nome Joint Utility System general manager, on December 2, 1992. Present during negotiations were Bob Watts and unit members Bob Russell and Sadie Reddaway for APEA, and Gary Butcher, Louis Green, and Terry Day for NJUS. The witnesses' estimates of the time spent negotiating ranged between one to three hours. Tr. 36-37, 260. The negotiators concluded the negotiations in a second, shorter, session the next day. Tr. 18-19 & 37.

9. APEA's objective in bargaining was to "roll over" the contract. APEA negotiator Russell explained that the term "rolling it over" means to maintain the same contract with little change. Tr. 17. APEA believed that the quid pro quo for resolving a past dispute over the amount of a cost of living increase was to roll over the agreement at its expiration. B. Watts letter to G. Butcher (Sept. 10, 1992), NJUS Exh. C; see also B. Watts, letter to J. Murphy (Sept. 22, 1993), NJUS Exh. J. In resolving the dispute, Watts had sought from the NJUS manager at the time, Joe Murphy, a promise that the agreement would roll over. Murphy refused to make the promise, telling Watts that he was retiring. Tr. 230.[1]

10. The NJUS and APEA negotiators did tentatively agree to roll over the contract with minor modifications for another three years, signifying that agreement by initialling and dating the changes. APEA Exhs. 4 & 5; Tr. 23.

11. The past practice of APEA and NJUS had been to require ratification and approval by the NJUS board, the Nome City Council, and APEA. Tr. 222; Agreement (1988-1989), NJUS Exh. N, at 4. The process had been formal with the adoption of resolutions. See Nome resolution 83-12-2 (NJUS labor agreements, NJUS Exh. L., at 1; Nome resolution 88-6-9 (NJUS labor agreement), NJUS Exh. N, at 1; and NJUS resolution 88-13, NJUS Exh. N, at 2; Tr. 285. The City or NJUS then formally advised the APEA chapter chair after council approval. NJUS Exh. L., at 5; NJUS Exh. M, at 1; Tr. 287.[2] Butcher stated that he told the APEA negotiating team that NJUS board and city council approval would be required. Tr. 260.

12. The APEA chapter negotiators understood that the utility board and council had to approve the tentative agreement before it would be effective. Tr. 41 & 67. In Watts' experience, most municipalities require approval or rejection of a negotiated agreement by elected officials. Tr. 127.

13. Watts understood after the negotiations and speaking with Butcher on December 3, 1992, that the agreement would be presented for a vote before the NJUS board in January. Tr. 165; NJUS Exh. E.

14. On or about December 4, 1992, Mayor Handeland learned from a review of NJUS board minutes in preparation for a city council meeting on December 9, 1992, that the NJUS board was gearing up for negotiations. Tr. 292-293. Handeland confronted city manager Paul Day, who was unaware of any negotiations. Tr. 293. Handeland advised Day of resolution 86-12-1, which requires that a council member and the city manager participate in any NJUS negotiations. APEA Exh. 3; NJUS Exh. D, set forth in Appendix A.

15. Handeland with Day made NJUS manager Butcher and the NJUS board aware of their concerns about negotiations proceeding without City participation and about Handeland's concerns about the contents of the agreement. Day contacted Butcher on December 4 and followed up with a memorandum advising him of resolution 86-12-1, and Handeland and Day brought the matter to the attention of the city council at its December 9, 1992, meeting. Tr. 294 & 311. Day and Handeland participated with Butcher in the negotiations with Local 302 over the NJUS operators unit that began on December 10, 1992.

16. The unit members ratified the tentative agreement on December 4, 1992. APEA Exh. 21.

17. The tentative agreement was never formally presented to the NJUS board or the council for approval or ratification. Tr. 305-306. Mayor Handeland apparently did not believe it was necessary. Even if the agreement got past the board to the council, he believed it would not be approved by the council. Even if the council were to approve it, Handeland stated that, as mayor, he would have vetoed it because the agreement lacked cost reduction and containment provisions. Tr. 296.

18. This information was not conveyed in writing to APEA, at least not immediately. When Watts or the APEA chapter members became aware of the position of the city manager and mayor was subject to some dispute. APEA negotiator Russell did receive a copy of resolution 86-12-1 in his mail box some unspecified time after the negotiations. Tr. 33.

19. Russell, as foreman of water and wastewater treatment, was often in contact with utility manager Butcher, but Butcher did not tell him in December of a problem with the tentative agreement. Tr. 14, 31-32. Negotiator Reddaway also stated that no one told her in December of 1992 that the negotiations were invalid. Tr. 58. Murdock, foreman of water and sewer and chapter chair, made the same statement. Tr. 83. Watts also stated that no one contacted him in December to notify him of a problem with the negotiations. Tr. 116.

20. On February 24, 1993, Watts inquired of Butcher the status of the Nome Joint Utility System Board ratification of the agreement. B. Watts, letter to B. Butcher (Feb. 24, 1993), NJUS Exh. E.

21. Butcher responded on or about March 18, 1993, that the council would not approve the agreement because a City elected official and appointed official were not present at negotiations sessions, as required under City resolution 86-12-1. APEA Exh. 13; Tr. 117. Watts provided Butcher with information that he thought would help persuade the council to approve the contract. APEA Exh. 13, at 2. After speaking with Butcher, he telephoned Mayor Handeland at Handeland's place of business. Tr. 179. Handeland stated that he told Watts that, because resolution 86-12-1 had not been followed, the council would not approve the agreement, and if it did, he would veto it. Tr. 180. Handeland stated that this was his first statement to APEA that the agreement would not be approved. Tr. 307.

22. The issue of problems with ratification of the APEA/NJUS tentative agreement should have been generally known in the Nome community no later than April 22, 1993, the date of publication of the first of three articles on the subject in the Nome Nugget, the local newspaper. APEA Exh. 19; Tr. 66. Reddaway stated that the chapter was informed there was a problem with the negotiations in May of 1993, Tr. 58 & 61, and chapter chair Murdock stated that he became aware of the problem in April of 1993. Tr. 83.

23. On June 8, 1993, attorney Parry Grover, wrote Watts advising that he had been retained to represent the City and NJUS in negotiations and seeking to negotiate during the last quarter of 1993, or "on reasonable notice" from APEA and the other unions. The letter was silent on the subject of the December 1992 tentative agreement or ratification. NJUS Exh. F.

24. On July 2, 1993, Grover advised Watts that NJUS was proceeding with negotiations with IBEW Local 1547 and IOUE Local 302 and provided a copy of the proposal it had made to those bargaining representatives. The objective

was a master collective bargaining agreement for all three NJUS bargaining units. P. Grover, letter to B. Watts (July 2, 1993), NJUS Exh. H.

25. The reason for a master agreement was to achieve in the three utility and one city bargaining units some standardization. The City wanted to standardize clauses on recognition, dues checkoff, grievance and arbitration, holidays and other matters common to all four units and to include appendices to cover provisions unique to each unit, such as wages, benefits or different work rules. NJUS Exh. H.; Tr. 149 & 190.

26. Grover wrote to Watts again on August 5, 1993, recounting his efforts to contact Watts and attempting to resume negotiations. Grover demanded a response within 10 days. NJUS Exh. I.

27. Grover and Watts did speak on the telephone at some point and Grover advised that NJUS was proceeding with negotiations with IBEW and Local 302 and was seeking to schedule negotiations with APEA. Tr. 144.

28. After some urging by Grover to move the matter forward, on October 19, 1993, APEA filed an unfair labor practice complaint against the City of Nome, Nome Joint Utility System, alleging violations of AS 23.40.110(a)(1), (2), and (5) for delaying and refusal to ratify a tentative agreement or, in the alternative, refusal to return to negotiations. Tr. 144.

29. On October 19, 1993, the City of Nome, Nome Joint Utility System, filed an unfair labor practice complaint against the APEA alleging violations of AS 23.40.110(c)(2) for refusal to bargain.

30. On November 3, 1993, upon investigation the Agency found probable cause to support the charges in each case and issued notices of accusation that same day.

31. On November 10, 1993, the City filed its notice defending against the accusation and requesting a hearing.

32. On December 27, 1993, APEA filed its notice defending against the accusation and requesting a hearing.

33. The complaints in 94-259-ULP and 94-260-ULP were consolidated on December 22, 1993, and the consolidated cases were heard on January 18 and 19, 1994, in the city council chambers in Nome, Alaska, at which the parties presented testimony and other evidence. The record closed on February 11, 1994, upon the submission of written closing arguments.

Conclusions of Law

1. The Alaska Public Employees Association/AFT, AFL-CIO, is an organization and City of Nome is a public employer as defined in AS 23.40.250(5) and (7), and this Agency has jurisdiction under AS 23.40.110 to consider these charges.

The charge against the City of Nome, NJUS

2. AS 23.40.110(a)(5) provides that a public employer or an agent of a public employer may not refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit . . . .

3. Nome Resolution 86-12-1 (Dec. 9, 1985), provides that the negotiations for all four city bargaining units were to be conducted by a bargaining team consisting of an elected and appointed official from the City and the Utility. APEA Exh. 3 & NJUS Exh. D, attached as Appendix A.

4. More important for the resolution of the dispute, under resolution 86-12-1, ratification was required before the agreement became effective. Resolution 86-12-1 states, that "all labor union contracts recommended to the City Council by the negotiating team shall be approved or disapproved by a majority vote of the Nome City Council." Id. The practice of the City and NJUS was consistently to require ratification and approval and the APEA negotiating team members expected it. Any agreement would not become final and binding until approved by the parties' principals. See e.g., National Labor Relations Board v. Alterman Transport Lines, Inc., 587 F.2d 212, 100 L.R.R.M.(BNA) 2269 (5th Cir. 1979); Hiney Printing Co. and Graphic Arts Union Local 246, 262 N.L.R.B. 157, 110 L.R.R.M.(BNA) 1257

(1982). Reserving the right to ratify, however, does not allow refusal to ratify for any reason. The refusal to be effective must be consistent with the obligation to bargain in good faith in AS 23.40.110(a)(5) and (c)(2). Alterman Transport Lines, 587 F.2d at 221, 100 L.R.R.M.(BNA) at 2275-2276.

5. Ratification is addressed in Alaska Community College Federation of Teachers v. University of Alaska, 669 P.2d 1299 (Alaska 1983). The court found that refusal to ratify a tentative agreement was not an unfair labor practice because the parties had ground rules establishing that ratification was required. In that case the board of regents, after meeting in executive session on three days to consider the matter, rejected the agreement and directed the university president to reconstitute the bargaining team and return to the bargaining table. Id., at 1302. The union brought a complaint against the university before the State Labor Relations Agency. The SLRA did not infer bad faith from the board's action. If the city council had acted under resolution 86-12-1 to reject the tentative agreement, its action probably would have been appropriate under this decision, provided the council did not act in bad faith. However, there is a key omission.

6. The key omission and distinction in the facts of this dispute and the facts in ACCFT v. University of Alaska is the absence of any action at all by the NJUS board or city council. The utility manager or bargaining team never presented the agreement to the NJUS utility board or to the city council, as required in the resolution. The reason provided for the absence of a formal rejection was the certainty of the outcome. However, the fact that the mayor believed he could predict the outcome, or veto it if he could not, is not action by an elected body.

7. Evidence of past action by the city council indicates that it was not a rubber stamp, but a participant in the process. Formal action is required as the means by which an elected legislative body conducts its business. Failure to submit the tentative agreement, even if the grounds for rejecting it were valid or strong, is evidence of bad faith contrary to the requirements of AS 23.40.110(a)(5).

8. The absence of direct communication to an APEA representative of the position the City was taking is also a matter of concern under AS 23.40.110(a)(5). See Totem Ass'n Educational Support Personnel v. Anchorage School District, Decision & Order No. 150 (Dec. 3, 1992) (an employer's vague, contradictory or confusing statements violates the duty to bargain in good faith under AS 23.40.110(a)(5)). Reliance on the fact that in a small town news travels fast does not excuse providing clear notice to APEA of the City's position. The earliest notice was in February in response to questions by Watts, but Watts appears to have believed even then that manager Butcher would be able to advocate for ratification. The first clear and unequivocal notice that the agreement would not be ratified was Mayor Handeland's statement to Watts, again after Watts' inquiry, on May 17, 1993.

9. We have found that the conduct of City, NJUS, in this case violates the duty to bargain in good faith under As 23.40.110(a)(5). Our decision should not be construed as a decision that there was anything improper in the City's motives regarding standardizing the contract or containing costs. APEA has argued that the reversal of position of the City in its announced goal of standardizing its labor agreements is evidence of bad faith, citing San Antonio Machine and Supply Corp. v. National Labor Relations Board, 363 F.2d 633, 635, 62 L.R.R.M.(BNA) 2674 (5th Cir. 1966). That case involves a midbargaining change in position. The facts in this case are materially different. The apparent objection to the tentative agreement was its failure to include the participation of City officials, who, presumably, wanted to participate to influence the process. City/NJUS had an obligation to provide a bargaining team and APEA had a right to rely upon the authority of the bargaining team that was provided. However, the elected officials clearly by resolution, past practice, and expressed ground rules had reserved the right of ratification. APEA was entitled to have the tentative agreement presented for ratification. Likewise, the board and council were free to exercise their discretion in approving or disapproving the tentative agreement within the boundaries of good faith. In this case we found bad faith in the refusal to follow through with that procedure. Our decision here is only that the requirement of good faith in bargaining means action in accordance with the parties' ground rules, and in this case, resolution and past practice, and it means clear communications to representatives. Unlike the breakdown in the process that occurred after negotiations ended on December 3, 1992, the bargaining goals announced by the new bargaining representative are not inherently destructive of the bargaining relationship, and the record does not demonstrate that the representative or principals were acting in bad faith in announcing them.

10. Because APEA did not develop its arguments under its charges of unfair labor practices under AS 23.40.110(a)(1)

and (2), we do address them here.

11. APEA has argued that the appropriate remedy for the failure to ratify is the enforcement of the contract, citing National Labor Relations Board v. Strong Roofing & Insulation Co., 393 U.S. 357, 70 L.R.R.M.(BNA) 2100 (1969). In that case, the employer without justification refused to execute the collective bargaining agreement. The court found that it was proper under such circumstances to award the payment of the fringe benefits that would have been owed under an executed, effective contract. Id., at 361, 70 L.R.R.M.(BNA) at 2102. In this case, the unfair labor practice is not a failure to execute a final agreement. The unfair labor practice is the failure to present a tentative agreement for ratification. The appropriate remedy is to require the submission of the tentative agreement to the utility board and city council for approval or disapproval under resolution 86-12-1 and the parties' past practice.

12. The remedy of ordering the employer to submit the tentative agreement for approval before the NJUS board and city council supports the bargaining process without interfering with the public process provided in the resolution. During bargaining, most of the terms of a predecessor agreement continue to apply, at least until impasse, which under the facts of this case does not reward the City, NJUS for the delay. The APEA sought in bargaining a continuation of the predecessor agreement and, therefore, has received a substantial part of this goal during the pendency of these proceedings. In addition, the remedy we order does not eliminate the authority and discretion of the elected bodies that were retained by the ratification requirement. In sum, the facts in this case do not justify the extraordinary remedy of imposing the tentative agreement on the City, NJUS.

The charge against the City and NJUS

13. AS 23.40.110(c)(2) provides that a labor or employee organization or its agents may not refuse to bargain collectively in good faith with a public employer, if it has been designated in accordance with the provisions of AS 23.40.070 -- 23.40.260 as the exclusive representative of employees in an appropriate unit.

14. The City's charge is a charge of refusal to bargain. APEA had bargained, however, when asked initially in December of 1992. Notice of the City's interest in reopening negotiations did not occur until June of 1993, a full six months after, in APEA's view, an agreement had been tentatively made. We have held that rejection of the tentative agreement required a formal act by the elected legislative bodies directly communicated to APEA representatives. This did not occur. Any duty to bargain would be contingent on such action by the City.

15. Because we do not find a prima facie case for an unfair labor practice against APEA, we do not need to reach APEA's defenses. One, however, requires comment. APEA takes the position that an unfair labor practice charge during bargaining stays any obligation to bargain. There is no doctrine excusing bargaining while a charge is pending. Admittedly the parties will often stop bargaining or refuse to bargain after a charge is filed, but the fact of filing the charge itself does not excuse the bargaining obligation.

ORDER

1. The complaint in 94-259-ULP is GRANTED, and the City of Nome, Nome Joint Utility System, is ordered to present the tentative agreement to "be approved or disapproved by a majority of the Nome City Council" (resolution 86-12-1);

2. The complaint in 94-260-ULP is DISMISSED; and

3. The City of Nome, Nome Joint Utility System, is ordered to post a notice of this decision and order at all work sites where members of the bargaining unit affected by the decision and order are employed or, alternatively, serve each employee affected personally. 8 AAC 97.460.

ALASKA LABOR RELATIONS AGENCY

Alfred L. Tamagni, Sr., Chair

James W. Elliott, Board Member

Karen J. Mahurin, 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. 176 in the matter of Alaska Public Employees Association/AFT, AFL-CIO vs. City of Nome, Nome Joint Utility System, Case No. 94-259-ULP and City of Nome, Nome Joint Utility System vs. Alaska Public Employees Association/AFT, AFL-CIO, Case No. 94-260-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 24th day of May, 1994.

Victoria D. J. Scates

Clerk IV

This is to certify that on the 24th day of May, 1994, a true and correct copy of the foregoing was mailed, postage prepaid, to

Parry Grover, City of Nome, NJUS Bob Watts, APEA

Signature

1Murphy left the position of manager in September of 1992, but returned to it in July of 1993. After he returned to the position, he did respond to APEA with his version on the earlier dispute and his discussion with Watts. Murphy's October 5, 1993, letter stated that NJUS had agreed to pay the cost of living increases under the agreement, but that it had adjusted the 1992 increases to correct for overpayment the previous two years. According to Murphy, the unit members over the life of the contract had received cost of living adjustments totalling 13.9 percent but that article 17 of the agreement provided for adjustments under the Anchorage CPI-U index of 13.7 percent. NJUS Exh. K, at 2. Murphy also specifically refuted the statement that the parties had agreed to roll over the contract:

> At the end of the meeting with Ed Murdock, Matilda Davena, and me, you asked if we could "roll" the same agreement into a new 3-year agreement. I stated that I would be retiring on September 1, 1992, and would have nothing to do with the new contract which was several months away.

Id., at 3. Tr. 235.

2The process of approval appears to have been taken seriously. See Tr. 165.