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INTERNATIONAL BROTHERHOOD)
OF ELECTRICAL WORKERS LOCAL)
UNION 1547,)
)
Petitioner,)
)
vs.)
)
CITY OF CORDOVA,)
)
Respondent.)

CASE NO. 94-268-RC

DECISION AND ORDER NO. 177

This matter was considered on the record, including the briefs, evidence, stipulations, and tapes of proceedings on March 24, 1994, and April 11, 1994, in Cordova and Anchorage, Alaska, by a panel of the Alaska Labor Relations Board, members Alfred L. Tamagni, Sr., James W. Elliott, and Karen J. Mahurin. Hearing examiner Jan Hart DeYoung presided. The record closed on May 25, 1994.

Appearances:

William F. Morse, associate general counsel, for petitioner International Brotherhood of Electrical Workers, Local Union 1547; and William F. Mede, Owens & Turner, P.C., for respondent City of Cordova.

Digest:

Examining such factors as community of interest, wages, hours, and other working conditions, including supervisory responsibilities, we conclude that the positions of librarian (library director), water and sewer superintendent, refuse and solid waste foreman (baler foreman), and public works superintendent should be excluded from the unit.

DECISION

Findings of Fact

1. On December 8, 1993, the International Brotherhood of Electrical Workers Local Union 1547 (IBEW) filed a petition for certification as bargaining representative of all employees of the City of Cordova except the city manager, fire chief, fire department volunteers, and all community hospital employees.
2. IBEW demonstrated interest in support of its petition from at least 30 per cent of the members of the proposed unit, as required under AS 23.40.100, and on January 3, 1994, the Agency requested the city manager to post a notice of the petition in all work sites of affected employees.
3. On January 11, 1994, finance assistant Glenda Martin Currier posted a notice of the petition in various locations throughout the City, including the city hall, public safety office, harbor office, swimming pool, sewer and water plant,

refuse building, library, museum, public works shop, and Bidarki recreation building. Exh. O.

4. On January 21, 1994, the City objected to the composition of the bargaining unit, specifically objecting to including the following positions in the unit:

City manager, assistant city manager, city clerk, administrative assistant to the city manager, public safety director, fire chief, director of public works, harbor master, assistant harbor master, city planner, city librarian, museum director, finance director, finance assistant, Bidarki director, Bob Korn memorial pool director, water and sewer superintendent, refuse/solid waste foreman, fire department volunteers, city hospital employees, all SWEP employees, all grant funded employees, and any individual on a contract basis, elected or appointed officials and employees who are not entitled to receive retirement and vacation benefits from the City.

W. Mede, letter to J. DeYoung (Jan. 21, 1994).

5. The IBEW and the City did agree to exclude the following positions from the unit:

City manager; assistant city manager; city clerk; police chief; fire chief; administrative assistant to city manager; public safety director; director of public works, harbor master; city planner; finance director; Bidarki director; Bob Korn Memorial pool director, finance assistant; fire department volunteers; SWEP employees; and all Cordova Community Hospital employees.

See Election Prehearing Order (Feb. 8, 1994); W. Mede, letter to J. DeYoung (Mar. 8, 1994); W. Mede Letter to W. Morse (Mar. 21, 1994), Exh. 1.

6. Due to the restructuring of the positions of summer pool manager and assistant Bidarki instructor, the parties agreed that the two positions created, pool operations leader and recreation operations leader, would be included in the unit. W. Morse, letter to J. DeYoung (May 24, 1994).

7. Only three positions remained in dispute -- the librarian, the water and sewer superintendent, and the refuse/solid waste foreman (also called baler foreman). W. Mede, letter to W. Morse (Mar. 21, 1994), Exh. 1.

8. A hearing was held on March 24, 1994, in Cordova, Alaska, at which the parties presented testimony and other evidence.

9. At the hearing on March 24, 1994, the City stated for the first time its objection to including the public works superintendent in the unit. The IBEW objected to consideration of this objection on the basis that it was untimely. The hearing officer reserved ruling on the issue but provided the IBEW an opportunity to supplement the record on this issue.

10. Additional testimony was taken telephonically in Anchorage, Alaska, on April 11, 1994. Due to a defect in the record of the April 11 hearing, the parties supplemented the record by stipulation, filed with the Agency on May 25, 1994.

11. The interim city manager, effective December 3, 1993, was Ed Zeine. Zeine previously had served as director of the Cordova Community Hospital before retiring. When he assumed the duties of city manager, he had to contend with resignations from the finance director, public works director, and planning director. Explaining that he was fairly new to the position of city manager, Zeine accepted responsibility for failing to include the position of superintendent of public works in his memorandum to attorney Bill Mede of positions to be excluded from the unit.

12. As city manager, Zeine conducted department head meetings. He testified that all of the positions that the City sought to exclude attended these meetings. At one of these meetings, the department heads, including the librarian, and the public works superintendent, water and sewer superintendent, and

refuse/solid waste foreman, met with attorney Mede about the appropriate conduct during a union organizing drive.

13. Librarian: The incumbent librarian is Corrine Erickson and she has been employed by the City approximately 27 years.

14. The librarian is the director of the library and is responsible for the library department. The position reports directly to the city manager and to a library board. Exh. C; Exh. D, at 15.

15. The librarian's duties are to manage library operations, including supervising support staff under the general direction of the city manager and library board and to act as a liaison between staff and the library board. Exh. J. More specifically, the librarian develops work schedules and procedures, maintains book, equipment, and supplies inventories and makes orders, as needed; develops and administers community programs, including story hour, grade school programs, and assistance to higher level students; assists library patrons; develops agendas and participates in library board meetings; prepares and administers the budget; performs clerical work as needed; and monitors the library program. Exh. J.

16. The librarian supervises three positions -- an assistant librarian and two library assistants. Exh. D, at 15. Her recommendations regarding personnel usually are followed. One library employee has been fired during Erickson's employment, and her recommendation in that case was followed. However, Erickson once made a recommendation for a merit increase for an employee, which was neither granted nor addressed.

17. The personnel rules list the librarian as an exempt employee who serves at the pleasure of the city manager. Exh. R, at 5. Erickson is paid a salary and does not receive overtime. The library is open 1 p.m. to 9 p.m. Erickson states that she works when she is needed. If there are morning directors' meetings, she attends them. The library staff all work 40 hour work weeks, staggered to cover the public hours and other workload responsibilities.

18. Erickson prepares the annual budget and presents it first to the library board and then to the city manager for review. Along with the city manager, the librarian presents the budget to the city council for approval. She hires staff with review and approval by the city manager. Erickson estimates that she spends about 20 per cent of her time on personnel, budget, the state grant, monthly reports, library board agendas, and meetings of department heads, city council, and the library board.

19. As one of the directors, the librarian has the "responsibility and authority" outlined for directors in the personnel policy to

Participate in the grievance procedures as specified. . . .

Appoint employees to vacant positions within their respective departments in accordance with established personnel policies, subject to the approval of the City Manager. . . .

Administer discipline within their respective departments and delegate such authority to supervisory personnel as deemed appropriate. . . .

Appoint and dismiss all employees under the Department Head's jurisdiction, subject to the approval of the City Manager.

Exh. R, at 5-6. As a department head, the librarian also has the authority to suspend an employee for cause. Exh. R, at 26.

20. Public Works Department. The public works department performs the functions of public works administration, building maintenance, street maintenance, snow removal, equipment maintenance and park maintenance. Exh. D, at 19. The department is headed by a director, who reports to the assistant city manager. Three positions report to the director -- the water and sewer superintendent, the refuse and solid waste foreman, and the public works superintendent. Exh. S. The parties agree that the director should be excluded from the unit. The unit placement of the three positions reporting to the director is disputed.

21. George Keeney is the current public works director and planner. At the time of the hearing on March 24 he had held the position three weeks.

22. The former director of public works, Jeff Currier, testified. He was employed in that position between January or February of 1991 and January of 1994, when his resignation was accepted. He performed some consulting work for the City after his resignation. Currier considered his job a big paper push, which he performed generally in city hall. His field contact was limited. The supervisors did the work in the field without much supervision. He stated he worked well with the superintendents. They had good lines of communication and interacted daily. Currier considered himself a team leader with everyone on the team playing an important role. Currier's opinion is that including the superintendents in the unit would have an adverse effect on the "team effort."

23. The three positions that report to the director of public works have supervisory authority. The personnel rules address their authority as follows:

Supervisory Personnel Responsibility and Authority. Supervisory personnel shall have the responsibility and authority to:

- A. Implement personnel policies, rules and regulations in the units under their supervision.
- B. Administer discipline to employees under their supervision and recommend termination of employment.
- C. Train new employees and participate in the development of other employees.
- D. Evaluate employee performance.
- E. Participate in the grievance procedures as specified.

. . . . [Exh. R, at 6]

24. Only department heads have the authority to approve overtime, except in the case of an emergency. Exh. R, at 40.

25. Interim city manager Zeine indicated that he worked directly with the superintendents and the baler foreman and did not go through the public works director. He stated that the director's role in the budget was to provide cost information for equipment or materials but that the director did not play a key role in developing the budget. Each of the superintendents and foreman met with the council to address his budget. The public works director was not involved in this process. For much of the time Zeine served as interim city manager, however, the position of director of public works was vacant.

26. Water and Sewer Superintendent: The current water and sewer superintendent is Roger Havens and he has been employed in the water and sewer department since 1980. The water and sewer superintendent reports to the director of public works and is supervisor of the systems lead operator, systems operator, lab/maintenance II, and lab/maintenance I positions. Exh. C; Exh. D, at 34. Interim city manager Zeine described Havens, as "totally in charge of the water and sewer department." Zeine testified that this position ran and supervised the department and was responsible for all equipment and maintenance. Havens attends department head meetings and Zeine interacts exclusively with Havens on water and sewer matters, stating he had met with Havens' staff on only one occasion to thank them for their work in an emergency.

27. The job definition for the position states:

Under the direction of Public Works Director and/or City Manager, oversees daily operations of the Water and Sewer Department. Ensures proper maintenance and operation of municipal water and sewer systems. Supervises water and sewer personnel.

Exh. K, at 1. The specific duties include overseeing and performing daily operations on a secondary waste water

treatment facility and approximately 15 miles of sewage collection lines. The position also operates and maintains three water catchments, a water treatment plant and water transmission lines and ensures compliance with state and federal regulations and permit requirements. Id.

28. The water and sewer operation is too small for one person to sit at a desk. Havens works with the crew. Havens considers himself a working foreman. He supervises the day to day operation of the water and sewage plant, recommends a budget, makes decisions about summer temporary hires, and meets with the director from time to time. He prepares performance evaluations annually, makes hiring recommendations, assigns work to the crew, and does perform some discipline ("yelling at the crew").

29. The duties related to temporary employees include the authority to hire the summer workers. The public works director typically approves the number of hires and the superintendent does the hiring. Havens has hired only one permanent position since he has been superintendent. He worked with the public works director to make the selection but stated that his recommendation was followed.

30. The personnel rules provide for some authority in grievance resolution as the first line response. Exh R, at 31; finding of fact no. 23 supra. Formal grievances are submitted to the department head first and ultimately, if not resolved, go to a personnel board. Exh. R, at 32. Havens said he hoped to be able to settle short of a formal grievance.

31. Havens is paid on an hourly basis, \$26.00 per hour, and is overtime eligible. He is paid more than the work crew he supervises.

32. As an example of the managerial control Havens exercises over the water and sewer operation, Zeine referred to a City water emergency. Havens was in complete charge of the response.

33. Havens checks in at city hall once or twice a day and attends department head meetings. Before Zeine became interim city manager, Havens attended fewer meetings. The meetings were called staff meetings and there were only about three a year. Havens was aware of one meeting exclusively for department heads in 1993 and he had not attended that meeting.

34. This past year Havens prepared the water and sewer budget within the parameters assigned by the city manager. Havens was told to hold the line on the budget, and the budget he proposed did not exceed the previous budget. He prepared the budget in consultation with the former public works director Jeff Currier. In the past Havens had participated in the budget by writing a list of water and sewer needs that he priced. He had not been involved with personnel costs. Personnel costs had been handled by the finance director. Havens did present the previous budget to the council because Currier was on vacation when it was finalized. Normally in the past they had worked the budget together and had gone together to present the budget to the council.

35. The job description for public works superintendent states that this position may occasionally fill in for the city manager or director of public works in their absence. Exh. K, at 1. Havens, however, states that he has never served in this capacity, although there have been absences.

36. Havens believes his position belongs in the unit. The principal reason he cited was that having the position out of the unit would be divisive.

37. Refuse/Solid Waste Foreman (also called Baler Foreman): The refuse and solid waste foreman oversees the daily operations of the solid waste baling facility and landfill, performs the duties of an equipment operator I and reports to the director of public works and city manager and supervises the positions of labor/maintenance I and II and temporary staff. Exh. C; Exh. D, at 39; Exh. L, at 1. The current baler foreman is Robert Minor. He began work as the baler operator and is now the baler foreman. He supervises three permanent positions. In the summer temporary workers are added.

38. Specific duties include supervising the refuse collectors and developing work schedules; insuring conformity with Department of Environmental Conservation permitting; operating loaders, trucks and the baler; operating and maintaining the garbage compactor and dumpster trucks; picking up garbage; assisting the public in the use of the

landfill; and recording use of the landfill.

39. The actual work in the solid waste and baler operation consists of collecting residential and commercial trash, hauling the trash to a conveyor belt, dumping the trash on the belt, compacting the trash, and baling it into one ton bales. A worker uses a boom truck to set the bale on a flat bed truck and the bale is hauled to the landfill. The crew shares these tasks. The crew performs minor equipment maintenance but major repairs are taken to the shop mechanic.

40. Minor is paid on an hourly basis and receives overtime. His work schedule is the same as the members of his crew. He works 7:00 a.m. to 3:30 p.m. and switches off three hours on Saturdays with other crew members.

41. Minor works with the crew, operating equipment, performing minor maintenance, and picking up solid waste.

42. The only directors' meeting that Minor attended was the budget meeting. He wrote up the numbers in consultation with Jeff Currier, the former public works director. In prior years he had not participated in preparing the budget. Minor deals with the city manager only when the public works director is not available. He goes to city hall only to pick up the mail. The former director of public works was involved in route changes and he worked with the director on compliance with Department of Environmental Conservation requirements.

43. Minor's role in hiring is reviewing the applications with the public works director. He makes recommendations but believes the decision is made by the director. There have been three hires since he was foreman and his recommendation was followed on each. Minor believes his role in discipline and discharge is to take the matter to the director. This occurred on one occasion. He made a recommendation to the city manager as there was no director at that time and his recommendation was followed. He does not believe he has any authority to resolve grievances. Minor supervises the work of the crew and writes their evaluations, which he reviews with the director before he shows them to the employee.

44. Minor met with Zeine about a position classification change and other personnel matters. Zeine agreed with the recommendations that Minor made.

45. Minor believes his position shares a community of interest with other workers in the baler and refuse collection operation. He considers himself a lead person.

46. Public Works Superintendent: The public works superintendent reports to the director of public works. Exh. C. The job definition states,

Under the direction of Public Works Director and/or City Manager, oversees daily operation of public works department. Supervises all public works, street and shop personnel. Operates and maintains heavy equipment necessary for summer and winter street maintenance of both paved and graveled streets. Ensures proper maintenance of municipal streets, buildings, facilities, and parks.

Exh. T, at 1. The specific duties include supervising the shop foreman, equipment operators, laborers, and building maintenance personnel, developing the daily work schedule, reviewing time cards, and overseeing other personnel matters. The position also orders materials, equipment, and supplies, operates heavy equipment, performs street, building, park and cemetery maintenance tasks, and develops and administers department budget. Id.

47. Former public works superintendent Bill Bernard testified about his job duties the nine years he worked in that position, until 1994. Stip. ¶1. During his time as public works superintendent, he had one occasion to report an employee to his superiors. The employee was suspended and then terminated. Stip. ¶6.

48. As public works superintendent, Bernard was responsible for the day to day operations of his department, helped the public works director draft the budget, attended department head meetings, and met with the city manager at least weekly. He supervised up to eight employees, who reported to him. A working foreman was under his direction. Stips. ¶¶7 - 12; Exh. D, at 22.

49. Bernard assigned work as public works superintendent. However, he worked in the field along with the other

employees in the department over 50 per cent of his time. When he worked in the field, he also directed the work. Stips. ¶¶13 - 15.

50. Bernard decided he no longer wanted to serve as the superintendent and chose an equipment operator in the department to replace him. The two traded positions with the approval of interim city manager Zeine.

51. The public works superintendent comes to city hall frequently and interacts with Zeine. Zeine has discussed needed road repairs with him. The superintendent sets the work plan for the summer and makes recommendations. Zeine has followed the recommendations.

52. The record closed on May 25, 1994.

DISCUSSION

Preliminary matter: The City's late objection to including the public works superintendent in the unit.

The deadline for objecting to the composition of the unit was January 26, 1994, 15 days after notice of the IBEW representation petition was posted. 8 AAC 97.070. The City objected on January 21, 1994, to the composition of the unit that IBEW proposed to represent, listing a number of specific positions that it sought to exclude from the unit. On two additional occasions the City addressed the composition of the unit -- on March 8, 1994, when the City corrected the list of positions in the prehearing order, and on March 21, 1994, when the City advised that parties had reduced the number of positions at issue. The City did not name the public works superintendent as excluded from the unit until the commencement of the hearing on March 24, 1994.

Because the City's objection to the unit placement of the public works superintendent was untimely, the IBEW objected to its consideration. The hearing examiner reserved ruling on whether the late filed objection could be considered but allowed the City to present evidence on the subject. The IBEW was provided an opportunity to supplement its evidence, which it did on April 11, 1994, with the telephonic testimony of Bill Bernard, former public works supervisor.¹

IBEW argues against consideration of the late objection because of delay to these proceedings. The late objection, which necessitated leaving the record open to permit additional testimony and evidence, did delay the decision in this case. However, the delay has occurred and further delay could not now be prevented by denying consideration. IBEW did not argue that the delay prejudiced its ability to address the issue. IBEW's representative Bill Morse indicated that he could question witnesses at the hearing. He asked for an opportunity to call an additional witness. Leaving the record open for additional testimony seems to have avoided actual prejudice to IBEW. Moreover, the record does not contain any evidence that the delay was tactical. Thus, strict adherence to the regulatory time frame does not appear required to avoid harm or prejudice.

On the other hand, there are good reasons to determine this issue on the merits. The position is one of three that reports to the director of public works -- the water and sewer superintendent, the baler foreman, and the public works superintendent. Although there are some differences in their performance of their duties, they have the same level of authority and responsibility and are appropriately addressed as a group.

This Agency has the authority to waive strict adherence to its regulations if it finds that doing so would "work an injustice." 8 AAC 97.480. In the interest of making the determination on the merits and not on technical grounds, on the basis that the Agency has a complete record from which to make the decision, and because no further prejudice to IBEW will result, the Agency waives strict adherence to 8 AAC 97.070(3) and considers the objection to placement of the public works superintendent in the unit.

Conclusions of Law

1. The Alaska Labor Relations Agency has jurisdiction of this matter under AS 23.40.090 and 23.40.100 and City of Cordova Ordinance No. 686, dated October 16, 1991 (in the record at Exhibit E).

2. As the petitioner, the International Brotherhood of Electrical Workers Local Union 1547 has the burden to prove the appropriateness of the unit by a preponderance of the evidence. 8 AAC 97.350(f).
3. To determine the appropriateness of a proposed unit, the Agency considers the factors named in AS 23.40.090:

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

4. The Public Employment Relations Act excludes certain persons from bargaining rights under PERA. For example, the Act excludes appointed officials in AS 23.40.250(6). The term "appointed officials" is defined to include "persons who exercise significant responsibilities for the public employer in the area of collective bargaining policy formulation and implementation." 8 AAC 97.990(b). Of the four positions at issue, none appear to fit this definition. None of these employees is a key member of the team that decides personnel policy. While each has some supervisory responsibilities, none of the evidence suggested that any of the four positions at issue exercised a role in "collective bargaining formulation and implementation" for the City or even in the formulation of personnel policy or rules. See Confidential Employees Ass'n v. State of Alaska, Decision & Order No. 157, at 19-20 (April 7, 1993), appeal pending 1JU-93-656 CIV (filed April 29, 1993) (state's human resource managers are appointed officials excluded from bargaining rights under PERA).
5. The City maintains that all management employees should be excluded from bargaining. Agency regulations in the definition of "appointed official" in 8 AAC 97.990(b) exclude from bargaining only those management employees with labor relations responsibilities. The City argues that the exclusion should be broader and encompass all management employees. It argues two theories to support this principle. The City argues that the definition of "public employer" in AS 23.40.250 should exclude from rights under PERA those persons who act on behalf of the employer. AS 23.40.250(7) provides that, unless the context requires otherwise,

"public employer" means the state or a political subdivision of the state, including without limitation, a municipality, district, school district, regional educational attendance area, board of regents, public and quasi-public corporation, housing authority, or other authority established by law, and a person designated by the public employer to act in its interest in dealing with public employees. [Emphasis supplied.]

The argument seems to be that, by including persons acting on behalf of the employer in the definition of "public employer," the legislature intended to exclude them from the group of employees entitled to collective bargaining rights under PERA. The City does not support this argument with case law or legislative history. The argument previously was rejected by the Agency in Confidential Employees Ass'n v. State of Alaska, Decision & Order No. 157, at 19, which stated,

The State's argument would appear to exclude anyone employed by the State as a supervisor or in some labor relations or personnel capacity. The argument is contrary to twenty years of bargaining history with the supervisory and confidential units and the regulations 2 AAC 10.110 [see 8 AAC 97.090] and 2 AAC 10.220 [see 8 AAC 97.990]. SLRA Order & Decisions No. 1, at 6 - 8 (Feb. 2, 1973) (establishing the confidential unit). The State further suggests that a major reconfiguration of the bargaining units is needed. It questions the community of interest of some of the bargaining units and would exclude from bargaining all managers -- those persons possessing significant judgement and discretion furthering management policy. We believe such sweeping changes, affecting all State bargaining units, are more appropriate through legislative or regulatory action rather than in the context of a unit clarification petition involving one bargaining unit.

The City's argument is inconsistent with the history of bargaining under PERA of including all employees in bargaining unless they play a role in collective bargaining policy formulation and implementation or, in the case of state

employees, requiring that employees who might have a conflict of interest with rank and file employees, that is, supervisors and confidential employees, be in separate bargaining units. 8 AAC 97.090. As stated in Confidential Employees Ass'n v. State of Alaska, Decision & Order No. 157, the definition of public employee in AS 23.40.250(6) should govern who is entitled to collectively bargain under AS 23.40.080.

6. The City also relies upon the national act for its argument that management employees should be excluded from rights under PERA. Specifically, the City relies upon NLRB v. Bell Aerospace Co., 416 U.S. 267, 85 L.R.R.M.(BNA) 2945 (1974), which states that managers should be excluded from bargaining rights under the National Labor Relations Act. This Agency does give weight to relevant decisions of the National Labor Relations Board and federal courts. 8 AAC 97.450(b). In Bell Aerospace Co. the United States Supreme Court reversed an NLRB decision that only those employees with duties associated with the formulation or implementation of labor relations policies were excluded from the protections of the National Labor Relations Act. The Court found that Congress did not intend all employees to be covered and recognized a category of employee whose relationship to management precluded coverage. The Court directed the National Labor Relations Board to look at the actual job responsibilities, authority, and relationship to management of an employee to determine whether the employee should be excluded as a managerial employee. The NLRB defines "managerial employees" as employees who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy.

General Dynamics Corp., 213 NLRB 851, 857, 87 L.R.R.M.(BNA) 1705, 1715, citing Palace Laundry Dry Cleaning Corp., 75 NLRB 320, 21 L.R.R.M.(BNA) 1039 (1947), quoted in 2 Patrick Hardin, The Developing Labor Law 1616 (3d ed. 1992).

7. If this Agency were to adopt this rule and exclude management employees, it is unlikely that the three positions under the director of public works or even the library director would meet this definition of management employee. These employees may effectuate management policy but they do not appear to be key to its formulation or to have discretion to act outside of established policy.

8. However, we are not persuaded to adopt this principle today. It is a substantial departure from the history of including most employees under PERA. The legislative history under PERA is sparse and there is no reason to believe that the legislative history that is so central to the Court's decision in Bell Aerospace Co. would be similar for the Alaska legislature. In addition, PERA predates Bell Aerospace Co. so the Alaska legislature would not have been aware of the exclusion of management employees under the NLRA when adopting PERA because the issue was unsettled. It is also doubtful whether the Alaska courts would infer any exclusions from the broad definition of "public employee" in AS 23.40.250(6), which covers "any employee of a public employer" except elected or appointed officials or superintendents of schools. See the decision of the Honorable Milton Souter in Alaska State Employees Ass'n/AFSCME Local 52, AFL-CIO v. State of Alaska, 3AN-94-879 CI (July 7, 1994), reversing Decision & Order No. 170 (Jan. 26, 1994) (found that defining "employee" to exclude certain nonpermanent employees in 8 AAC 97.990 in conflict with the statutory definition of public employee as "any employee" in AS 23.40.250(6)).

9. The history under PERA has been to provide employees bargaining rights but to place them in separate units if the employees did not share a community of interest with the broader unit or where those interests conflicted. 8 AAC 97.090, for example, provides that a bargaining unit of State of Alaska employees may not combine supervisors with the staff they supervise or combine confidential employee with other employees.

10. The IBEW cites to Alaska Public Employees Ass'n v. City of Cordova, Decision & Order No. 137 (Dec. 31, 1991), to support its argument that the supervisory responsibilities of municipal employees do not exclude their placement in a unit with nonsupervisory employees. Since that time, however, the Agency has modified its position. It has held that, although 8 AAC 97.090 does not apply to nonstate employers, the Agency will be guided by it in determining appropriate units for nonstate employers. In Alaska Gateway Education Support Personnel v. Alaska Gateway School District, Decision & Order No. 154, at 5 (Feb. 26, 1993), the Agency considered the per se exclusion of confidential employees in State of Alaska rank and file units:

While the restriction against combining confidential and other employees in a unit in 2 AAC 10.110(a)(2)

does not apply to nonstate bargaining units, the reasons underlying the restriction are appropriate to consider in nonstate cases when examining the question of community of interest. An employee acting in a confidential capacity to a key manager involved in labor relations matters has access to management bargaining strategy and would be subject to conflicting loyalties if also a member of the bargaining unit. . . . While a per se restriction such as the one in 2 AAC 10.110² is too inflexible for the smaller public employers, in most cases the Agency will be guided by the restriction and find that confidential employees do not as the usual rule belong in bargaining units with nonconfidential employees.

See also Yukon-Koyukuk Educational Support Personnel Association, NEA-Alaska v. Yukon-Koyukuk School District, Decision & Order No. 175, at 7 (May 13, 1994) (extending this rule to supervisory employees).

11. Whether or not the definition of "supervisory employee" operates as a per se exclusion, the supervisory responsibilities certainly are appropriate to consider in the context of community of interest. Supervisory duties can pit a supervisor against the employees supervised. These conflicting interests are appropriately considered in determining the unit placement of a worker. Although not strictly bound to consider the regulatory definition of supervisor, this Agency will examine a position's supervisory duties and be guided by the definition when examining unit placement of nonstate employees.

12. In examining whether a person is a supervisor, this Agency looks at 8 AAC 97.990(a)(5), which provides

"supervisory employee" means an individual, regardless of job description or title, who has authority to act or to recommend action in the interest of the public employer related to employing, promoting, transferring, suspending, discharging, laying off, recalling, assigning, rewarding, disciplining, or directing employees or adjusting the grievances of other employees, if the exercise of that authority is not merely routine but requires the exercise of independent judgment.

13. Applying this definition we believe that these employees are supervisors. Although each may not have final authority over personnel issues, each exercises independent judgment and makes effective recommendations in the key areas of employing, discharging, and discipline and each is responsible for assigning and directing the work in his or her work group. In addition, the personnel rules provide for a role in employee grievances. In summary, these persons are supervisory employees under this definition.

14. Looking more closely at the positions of the superintendents of public works and sewer and water and the baler foreman, we note that they spend a majority of their time on the work site performing the same or similar duties as the employees they supervise. They are hourly employees working a similar schedule as the other workers. The incumbents in the water and sewer superintendent and baler foreman positions testified that they thought the position should be in the unit, from which a preference for placement in the unit can be inferred. These factors favor placement in the unit under AS 23.40.090. On the other hand, their supervisory responsibilities are significant. The responsibilities may not take much time because the work groups are small, but each of the positions is in charge of the other employees in the work group. They evaluate the number of seasonal, temporary employees needed and make the hiring decisions. They make effective recommendations regarding hire, transfer, discipline, and discharge of permanent employees. They assign and direct the work and are the first response in the event of a formal grievance filing. The supervisory duties are significant and set these positions apart from other members of the unit and preclude a finding that they share a community of interest with the members of the unit.

15. The superintendent of public works, the water and sewer superintendent, and the baler foreman (refuse/solid waste foreman) do not share sufficient community of interest, wages, hours, and other working conditions with other employees in the unit to be appropriate members of that unit under AS 23.40.090.

16. The case for excluding the librarian from the unit is even stronger than the cases of the public works supervisors. She is a department head, clearly a senior level position. Not only does she have supervisory responsibilities over her staff at the library, she attends and participates in key meetings with department heads, the city council, and the library board. Because of her responsibilities as a department head, the librarian does not share sufficient community of

interest or other factors with the proposed members of the bargaining unit to be an appropriate member of the unit under AS 23.40.090.

17. The bargaining unit consists of all employees of the City of Cordova except the positions of city manager; assistant city manager; city clerk; police chief; fire chief; administrative assistant to city manager; public safety director; director of public works; harbor master; city planner; finance director; finance assistant; fire department volunteers; SWEP employees; all Cordova Community Hospital employees; librarian (library director); superintendent of water and sewer; superintendent of public works; and solid waste/refuse foreman (baler foreman). This bargaining unit constitutes an appropriate unit under AS 23.40.090.

ORDER

1. The objection of the City of Cordova to the composition of the bargaining unit as proposed in the representation petition of the International Brotherhood of Electrical Workers Local 1547 is GRANTED;
2. The appropriate unit is described as all employees of the City of Cordova except the positions of city manager; assistant city manager; city clerk; police chief; fire chief; administrative assistant to city manager; public safety director; director of public works; harbor master; city planner; finance director; finance assistant; fire department volunteers; SWEP employees; all Cordova Community Hospital employees; librarian (library director); superintendent of water and sewer; superintendent of public works; and solid waste/baler foreman (baler foreman);
3. The election shall proceed under AS 23.40.100 and the regulations;
4. The City of Cordova 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, in the alternative, serve each employee affected personally. 8 AAC 97.460.

THE 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 the Decision and Order in the matter of International Brotherhood of Electrical Workers Local Union 1547 vs. City of Cordova, case no. 94-268-RC, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 13th day of October, 1994.

Victoria D. J. Scates

Administrative Clerk III

This is to certify that on the 13th day of October, 1994, a true and correct copy of the foregoing was mailed, postage prepaid to

William F. Morse/IBEW

William F. Mede/City of Cordova

Signature

1Due to a problem with the record, the parties later substituted a stipulation for the testimony.

28 AAC 97.090 (effective July 17, 1993).