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LOWER YUKON EDUCATIONAL SUPPORT )  
PERSONNEL ASSOCIATION, )  
NEA-Alaska, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
LOWER YUKON SCHOOL DISTRICT, )  
Respondent. )  
 )

CASE NO. 93-238-RC

**DECISION AND ORDER NO. 182**

Considered on the briefs and the written record before a panel of the Alaska Labor Relations Board, members Stuart H. Bowdoin, Sally A. DeWitt, and Karen J. Mahurin, with Hearing Examiner Jan Hart DeYoung, presiding. The record closed on August 10, 1994.

**Appearances:**

Robert M. Johnson, Wohlforth, Argetsinger, Johnson & Brecht, for petitioner Lower Yukon Educational Support Personnel Association, NEA-Alaska; and Saul R. Friedman, Hedland, Fleischer, Friedman, Brennan & Cooke, for respondent Lower Yukon School District.

**Digest:**

An election should proceed among all classified employees regardless of receipt of retirement or vacation benefits.

**DECISION**

The question in this case is the eligibility of classified school employees to participate under the Public Employment Relations Act if they do not receive retirement and vacation benefits. 8 AAC 97.990(a)(2) defines "employee" to include a "part time or seasonal employee, who is entitled to receive retirement and vacation benefits." That regulation was found to be inconsistent with AS 23.40.250(6), which defines "public employee" under PERA to mean any employee of a public employer in Alaska State Employees Ass'n v. State, No. 3AN-94-879 CIV. (Super. Ct. July 7, 1994), appeal pending case no. S-6540 (filed Aug. 8, 1994). The Agency subsequently repealed its regulatory definition.<sup>1</sup> Because the classified employees do not fall under a statutory exclusion, they are eligible to participate under PERA.

**Preliminary Matter**

On February 21, 1994, respondent Lower Yukon School District filed a request to disqualify board member Karen J. Mahurin from participating in the decision in this case under AS 44.62.450(c) of the Administrative Procedure Act. In support of its petition, it filed the affidavit of Saul R. Friedman, counsel for the District. The grounds stated were

Mahurin's involvement in NEA-Alaska in areas of "strategic planning, organizational development, political action, employee rights, collective bargaining, and labor relations" and in organizing classified school district employees.

Procedures for hearing a petition for representation are set forth in 8 AAC 97.330 - 97.330.480. Procedures for disqualifying a board member are not included. The board members therefore rely upon the Administrative Procedure Act, AS 44.62.330 - 44.62.630, which does address disqualification in AS 44.62.450(c):

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.

See Lower Kuskokwim Education Ass'n/NEA-Alaska v. Lower Kuskokwim School District, Decision & Order No. 172 (Mar. 2, 1994). The issue is whether Mahurin's involvement with NEA-Alaska prevents a fair and impartial hearing in this case.

The record contains a copy of member Mahurin's resume. Member Mahurin has been a member of the American Federation of Teachers and a member of the Kenai Peninsula Educational Support Association, which is affiliated with NEA-Alaska. She has served as an officer of the association. She has also held positions with the state and national organizations of NEA.

Labor relations board members must have backgrounds in labor relations to qualify to serve as board members. AS 23.05.360(a) (1994 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.

Mahurin's experience with the National Education Association qualifies her to serve in the Alaska Labor Relations Board. Nothing in the record shows that her experience included any work related to the Lower Yukon School District or the employees there. There is no suggestion in the record that the issue under consideration in this case, the definition of "employee," is one that Mahurin has been involved with as an advocate.

Although two members of the board constitute a quorum and may consider a case, participation by all three members insures a balanced panel with experience on both the labor and management sides of labor relations issues. Removal of one member skews the panel and should not be done without a specific reason to question the fairness or impartiality of a member. No such reason appears here. Accordingly, the parties were notified by order dated February 28, 1993, that member Mahurin was not disqualified and would be participating in the hearing in this case.<sup>2</sup>

### Findings of Fact

1. The Lower Yukon Educational Support Personnel Association (LYESPA), is an employee association affiliated with NEA-Alaska that seeks to be certified as the bargaining representative of a unit of support personnel employed at the Lower Yukon School District.
2. On June 30, 1993, LYESPA filed its petition to represent in collective bargaining a unit of approximately 174 employees at the District. The unit LYESPA proposed to represent in its petition was composed of the following positions:

All classified personnel, including but not limited to, aides, teacher assistants, cook and food service workers, secretaries, clerks and receptionists and other clerical staff, mechanics, janitors and other maintenance personnel, library assistants and home school coordinator aides.

The employees are located in 11 work locations: Alakanak, Emmonak, Hooper Bay, Kotlik, Marshall, Mountain Village, Pilot Station, Pitkas Point, Russian Mission, Scammon Bay and Sheldon Point. The proposed unit excluded classified personnel who are supervisors under PERA, confidential or exempt employees, and certificated employees.

3. On July 15, 1993, the Agency advised NEA-Alaska uniserv director Lydia Garcia-Dougherty and District superintendent John C. Hill that LYESPA had satisfied the required showing of interest. The letter stated that, ordinarily, the next step was posting copies of the petition in the work locations of the employees in the proposed unit. The parties, however, had agreed that posting of the petition at the District should not occur until after the conclusion of the summer break, August 23, 1993.

4. By August 23, 1993, copies of the notice of LYESPA's representation petition had been posted at the various work locations in the District. The notice of petition describes the proposed unit and provides that interested persons have 15 calendar days from the date of posting of the notice to object to the bargaining unit.

5. The District did not file an objection to the petition or otherwise request a hearing and a telephonic preelection conference was held on September 15, 1994. Before the conference the parties had been provided with draft copies of a memorandum of agreement for consent election, notice of secret mail ballot election, instructions to secret mail ballot election, and a sample affidavit of posting.

6. On September 22, 1993, the Agency notified the parties that the description of the bargaining unit would be changed to provide as follows:

Included: All classified personnel who are entitled to vacation and retirement benefits from the district, including but not limited to aides, teacher assistants, cook and food service workers, secretaries, clerks, and receptionists and other clerical staff, mechanics, janitors and other maintenance personnel, library assistants and home school coordinator aides.

Excluded: Classified personnel who are supervisory, confidential or exempt and certificated personnel.

LYESPA was provided until October 7, 1993, to object to the change in the composition of the unit. On September 20, 1993, LYESPA stated by letter that it did not object to the clarification of the unit description.

7. On October 7, 1993, the District provided a list of approximately 147 employees eligible to vote. On October 7, 1993, the Agency sought clarification of the list; and on October 8, 1993, the District provided a list of approximately 160 employees.

8. On October 11, 1993, the Agency provided a memorandum of agreement for consent election to the parties for signature and advised the parties that packets for posting the notice of the mail ballot election had been mailed to 11 different school district sites, and that the sites should be posted on or before October 29, 1993.

9. On October 29, 1993, superintendent Gill advised that he had not been present when the District provided the employee rosters and he provided a revised list of only 32 employees that he stated were entitled to vacation and retirement benefits and thus eligible to vote.

10. The Agency confirmed with the District that its position was that only 32 employees met the definition of "employee" under 8 AAC 97.990(a)(2) and were eligible to vote and advised LYESPA that, if it disagreed with this interpretation, it must advise the Agency no later than November 12, 1993.

11. On November 10, 1993, LYESPA filed an objection to the revised District roster and demanded a "full roster."

12. On November 15, 1993, the Agency provided notice of a prehearing conference for November 16, 1993, and on

November 15, 1993, issued a letter advising the parties that, because they did not agree to the composition of the bargaining unit, the election could not proceed as a consent election. Notice of cancellation of the election was posted at the various District work locations.

13. The issue of the application of the definition of "employee" in 8 AAC 97.990(a)(2) was submitted to the board on the basis of a written record, including the parties' briefs on the issue. The record closed the first time on February 23, 1994, upon the receipt of citation of supplemental authority.

14. On May 27, 1994, the Agency suspended action on the case during its consideration of the definition of employee in 8 AAC 97.990(a)(2):

Because the board is in the process of reconsidering the definition of "employee" in 8 AAC 97.990(a)(2), the panel assigned to this case has directed me to suspend action on this petition until after the board concludes its consideration. You are invited to participate. The regulations will be proceeding to hearing soon. When the dates are known, I will provide you with notice of the hearing dates and the deadline for public comment to assist your participation.

J. DeYoung, letter to representatives (May 27, 1994).<sup>3</sup>

15. On June 3, 1994, LYESPA requested reconsideration of the decision to suspend action and promptly decide the issue rather than wait for the adoption of regulations. Petitioner's Request for Consideration (June 3, 1994). On June 6, 1994, the District responded in opposition. Respondent's Response (June 6, 1994).

16. On June 17, 1994, the honorable Milton M. Souter, superior court judge, announced his decision that the definition of "employee" in 8 AAC 97.990(a)(2) was inconsistent with the definition of "public employee" in AS 23.40.250(6). On June 20, 1994, LYESPA supplemented its request for reconsideration on the basis of the superior court's decision. Association's Supp. to Request for Reconsideration (June 20, 1994). On July 7, 1994, the court issued its formal order and judgment on the invalidity of 8 AAC 97.990(a)(2). Alaska State Employees Ass'n/AFSCME Local 52, AFL-CIO v. State of Alaska, No. 3AN-94-879 CIV. (July 7, 1994), appeal pending case no. S-6540 (filed Aug. 8, 1994).

17. On July 26, 1994, a status conference was held on the effect of the order and judgment in Alaska State Employees Ass'n/AFSCME Local 52, AFL-CIO v. State of Alaska, No. 3AN-94-879 CIV. (July 7, 1994), on this case. A briefing schedule was ordered, and the parties filed additional briefing. The record closed on August 10, 1994.

### Conclusions of Law

1. The Lower Yukon School District is a public employer under AS 23.40.250(7) and 8 AAC 97.990(a)(4), and this Agency has jurisdiction under AS 23.40.090 and AS 23.40.100 to consider this matter.

2. The question in this case is whether District employees who under the current terms of their employment do not receive retirement and vacation benefits are "employees" entitled to collective bargaining and other rights under the Public Employment Relations Act, AS 23.40.070--23.40.260.

3. The Act defines "public employee" to mean "any employee of a public employer, whether or not in the classified service of the public employer, except elected or appointed officials or superintendents of schools." AS 23.40.250(6).

4. The Agency further defines "employee" in 8 AAC 97.990(a)(2) to mean

the same as "public employee" in AS 23.40.250 and is limited to a person employed by a public employer in a permanent or probationary status, including a part time or seasonal employee, who is entitled to receive retirement and vacation benefits from the public employer; . . . .

5. This Agency previously addressed the issue of the application of 8 AAC 97.990(a)(2), to state nonpermanent employees and found in that case that excluding these employees was consistent with PERA and a reasonable exercise of the Agency's authority. Alaska State Employees Ass'n/AFSCME Local 52, AFL-CIO v. State of Alaska, Decision &

Order No. 170, at 5 (Jan. 26, 1994), reversed No. 3AN-94-879 CIV. (Super. Ct., July 7, 1994), appeal pending case no. S-6540 (filed Aug. 8, 1994).

6. The Agency's ruling in Decision & Order No. 170, however, was reversed in the superior court, the honorable Milton M. Souter presiding. The court found that the statutory definition was unambiguous and that the broad definition of "public employee" in the statute conflicted with the narrower definition in the regulation. As the court stated in a decision from the bench,

I don't see any ambiguity in it. It provides that any -- that the term employee means any employ of a public employer, whether or not in classified service of the public employer, except elected or appointed officials or superintendents of schools. Mind you, it does not say except non-permanent employees. It sets the scheme of the definition is to make an all-inclusive definition, and then to carve out two very -- or three very narrow subsets. The broad set is any employee of a public employer whether or not in classified service. The narrow subsets that are excluded are elected, appointed officials and superintendents of schools.

The regulation from the agency provides that employee means the same as public employee in AS 23.40.250, and then goes on to say, and is limited to a person employed by a public employer in a permanent or probationary status. . . .

Transcript, at 25, 3AN-94-879 CIV. The court went on to find that the statute and regulation were "hopelessly in conflict." The court concluded that nonpermanent public employees of the State of Alaska were entitled to collective bargaining under PERA. Id., at 27.

7. On September 16, 1994, this Agency repealed the definition of "employee" in 8 AAC 97.990. The repeal will be effective thirty days after review in the Department of Law and filing in the Office of the Lieutenant Governor. AS 44.62.060 & 44.62.180.

8. The parties debate the precedential effect of a superior court decision in another case that the Agency's regulatory definition of "employee" exceeded its authority.<sup>4</sup> Whether or not the Agency is bound strictly to follow the superior court ruling in other cases before it, it is persuaded in this case by the court's reasoning and the policy favoring consistency and predictability in labor relations.

9. Moreover, a decision in this case that the restrictions on coverage under PERA in 8 AAC 97.990(a)(2) would remain effective would be short lived, due to the imminent effect of the repeal.

10. We therefore conclude that the classified employees in the District may not be denied collective bargaining rights under PERA because they do not receive vacation and retirement benefits.

11. LYESPA sought to represent all classified employees, except supervisory, confidential, or exempt employees, in its representation petition. The District did not file any objection to this unit. The only dispute on the unit's composition has been the question whether the regulatory definition of "public employee" excluded from rights under PERA those employees whose terms of employment did not include retirement and vacation benefits. The District, however, states that it should be allowed an opportunity to object to the unit on the basis of the factors named in AS 23.40.090. District's Response to Association's Brief on Status of Case (Aug. 10, 1994). Such an objection should have been filed on or about September 7, 1993, 15 days after the posting of the notice of the representation petition in the District. 8 AAC 97.070(3)(A). Any objection to the composition of the unit on grounds other than the application of 8 AAC 97.990(a)(2) is untimely.

12. The employees in the positions LYESPA named in its proposed unit are entitled to participate in any representation election under PERA irrespective of entitlement to vacation and retirement benefits.

## ORDER

1. The Public Employment Relations Act applies to persons meeting the definition of "public employee" in AS

23.40.250(6) without limitation under 8 AAC 97.990(a)(2);

2. The unit in this case is composed of the positions named in the representation petition filed by the Lower Yukon Educational Support Personnel Association (LYESPA):

Included: All classified personnel, including but not limited to aides, teacher assistants, cook and food service workers, secretaries, clerks, and receptionists and other clerical staff, mechanics, janitors and other maintenance personnel, library assistants and home school coordinator aides

Excluded: Classified personnel who are supervisory, confidential or exempt and certificated personnel;

3. An election is ordered to proceed under AS 23.40.100 and 8 AAC 97.010--8 AAC 97.200; and

4. The Lower Yukon School District 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

Stuart H. Bowdoin, Board Member

Sally A. DeWitt, Board Member<sup>5</sup>

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. 182 in the matter of Lower Yukon Educational Support Personnel Association/NEA-Alaska v. Lower Yukon School District, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 25th day of November, 1994.

Victoria D. J. Scates

Administrative Clerk III

This is to certify that on the \_\_\_\_ day of November, 1994, a true and correct copy of the foregoing was mailed, postage prepaid, to

Robert M. Johnson, LYESPA Saul R. Friedman, LYSD

Signature

1At the time of this decision, the repeal, which was adopted on September 16, 1994, was not yet effective.

2Member Mahurin did not participate in that part of this decision addressing her disqualification. That decision was made by vice chair Bowdoin and member DeWitt. On July 25, 1994, after the decision on disqualification was released on February 28, 1994, member DeWitt resigned from the board.

3Members Bowdoin, DeWitt, and Mahurin participated.

<sup>4</sup>See also the decision of the honorable Michael Thompson in Confidential Employees Association v. State of Alaska, No. 1JU-93-656 CIV. (Super. Ct. Sept. 2, 1994, clarified on Oct. 12, 1994) appeal pending No. S-6706 (Supreme Ct. filed Oct. 3, 1994) (finding definition of "appointed official" in 8 AAC 97.990(b) in conflict with the definition of "employee" in AS 23.40.250(6)).

<sup>5</sup>Not participating after July 25, 1994.