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PUBLIC EMPLOYEES LOCAL 71,)
AFL-CIO,)
)
Petitioner,)
)
vs.)
)
CITY OF WASILLA,)
)
Respondent.)
_____)
CASE NO. 95-413-RC)

DECISION AND ORDER NO. 197

This case was heard on August 15, 1995, before a panel of the Alaska Labor Relations Agency, Chair Alfred L. Tamagni, Sr., and member Karen J. Mahurin, participating, and member James W. Elliott, participating on the basis of a review of the record. Hearing examiner Jan Hart DeYoung presided. The record closed on August 15, 1995.

Appearances:

Kevin B. Dougherty, attorney, for petitioner Public Employees Local 71, AFL-CIO; and Richard Deuser, attorney, for respondent City of Wasilla.

Digest:

The City of Wasilla's rejection of the Public Employment Relations Act by resolution in 1978 did not interfere with any organizational activity, was reasonably prompt, and therefore was effective to opt out of PERA under section 4, ch. 113, SLA 1972.

DECISION

This case once again presents the question of the validity of a political subdivision's effort by resolution to reject the Public Employment Relations Act, AS 23.40.070 -- 23.40.260. Public Employees Local 71 has petitioned to represent a unit of employees at the City of Wasilla. The City of Wasilla maintains that this Agency does not have jurisdiction to consider the petition because it rejected PERA by resolution in 1978. Relying upon this Agency's decision in International Bhd. Elec. Workers v. Thomas Bay Power Authority, Decision & Order No. 145 (Nov. 25, 1992), Public Employees Local 71 argues that the resolution was not adopted promptly and is therefore ineffective to reject PERA.

The parties also dispute the composition of the unit Local 71 proposes to represent. The contested positions are the police sergeant and secretary to the police chief. Because we have concluded that the Agency does not have jurisdiction over the City of Wasilla, we do not address the issue of the composition of the unit.

A hearing was conducted on August 15, 1995, at which the parties presented testimony and other evidence. Upon consideration of the record, the panel finds the facts as follows:

Findings of Fact

1. On March 27, 1974, the City of Wasilla was incorporated as a second class city. Certificate of Incorporation, Exh. A. The City is now a first class city.
2. In 1970 Wasilla had a population of 376. The next year for which the city clerk provided population figures was 1975, when the population reached 563. By 1978 the population was 1566. M. Harris, area population statistics, Exh. C.
3. On or about August 1, 1976, Erling Nelson was employed as city clerk/treasurer by the City until 1986, when he was appointed as finance director/clerk until July 1, 1994. At the time of his initial hire Nelson was one of three employees. About two years later, in May of 1978, the work force remained at three employees. E. Nelson, affid. (July 7, 1995). The employees at that time were Nelson, Marjorie Harris, city clerk/treasurer, and Betty Vickers, city librarian.
4. The City's payroll in 1978 was \$65,940 for salaries and benefits. Of this amount \$55,138 was paid from Comprehensive Employment Training Act (CETA) funds. E. Nelson, memorandum to R. Deuser (July 17, 1995), Exh. D.
5. The Wasilla City hall in 1976 was located in the kitchen of the City museum. The library was built in late winter of 1977 or early spring of 1978. By May of 1978 the City offices were located in the back room of the Wasilla public library.
6. In May of 1978 the City did not provide fire or police protection. It did not operate a sewer utility, water department, telephone utility, or electric utility. The City did not have a tax mill rate separate from the Matanuska-Susitna Borough and did not collect taxes in 1978. At that time the City did not issue building permits.
7. The services the City did provide before May of 1978 include road maintenance, which it provided by contracting the service out. The City also provided maintenance for the Wasilla airport, a state-owned facility, under a \$2000 grant from the state. The City's road maintenance contractor provided the airport maintenance under contract. The City operated a library and provided summer parks maintenance through federal and state youth programs. The City issued business licenses and taxi cab permits. It also managed state day care funds.
8. As a second class city, Wasilla was governed by a seven member city council. The council members elected one among them to serve as mayor. The position of mayor was not a full time position.
9. The City in 1978 had not retained a lobbyist or labor relations consultant. The City did not have a comprehensive plan through 1978.
10. By resolution dated May 8, 1978, the City acted to reject PERA:

A RESOLUTION OF THE CITY OF WASILLA, ALASKA REJECTING PROVISIONS OF AS 23.40.070 THROUGH AS 23.40.260 ALSO KNOWN AS THE "PUBLIC EMPLOYMENT RELATIONS ACT".

WHEREAS; the City of Wasilla desires to reject the provisions of the "Public Employment Relations Act" as set forth in AS 23.40.070 through AS 23.40.260; and,

WHEREAS; provision is made in Section 4, Ch. 113 SLA 1972 that organized boroughs and political subdivisions of the State may, by ordinance or resolution, reject the provisions of the Public Employment Relations Act;

NOW THEREFORE BE IT RESOLVED, that the City of Wasilla hereby rejects the provisions of AS 23.40.070 through AS 23.40.260 otherwise known as the Public Employment Relations Act.

I certify that a resolution in substantially the above form was passed by a majority of those voting at a

duly called and conducted meeting of the governing body of the City of Wasilla this 8th day of May, 1978.

Exh. B.

11. Nelson believes that he first became aware of the Public Employment Relations Act and its opt out provision for municipalities in 1978. If he followed his normal practice, he would have presented the question of an opt out to the City council through the mayor a month after his discovery. The City's resolution rejecting PERA was adopted after his presentation of the question.

12. The City did not attend Alaska Municipal League meetings in 1978. The City does receive mailings from the league from time to time. Nelson has participated in league meetings, conferences, and classes. He believes that former mayor Hjellen attended some league functions in the early eighties. Council members would go to league functions at various times. Nelson did not recall the year the City joined the league.

13. Nelson became finance director for the City on July 1, 1994. Under the direction of the mayor he is responsible for all financial planning, budgeting, accounts receivable and payable, and auditing. He is also the treasurer, and bonded custodian of funds.

14. The present City clerk is Marjorie R. Harris. She maintains the legislative records of the City and is the records manager for the City. Harris also serves as the personnel clerk and maintains all City personnel records.

15. Previously Harris was employed by the City as the deputy clerk and before that as the City secretary. Harris began working as the secretary on May 1, 1978. As the secretary, Harris typed correspondence, assisted Nelson with clerical support, prepared council packets, attended council meetings, and took council minutes. She also issued business licenses. Her job description for that position provides:

1. handle correspondence
2. do clerical work
3. attend meetings
4. perform other duties specified in this title prescribed by the chief executive or by the governing body

Job Description, Exh. E. The absence of any sophisticated personnel system at this time can be inferred from this job description.

16. The City did not have a personnel code in 1978. Instead the City had work rules. The work rules provided to Harris upon her hire in May of 1978 follow:

Sign in sheet or log book

35 hour work week

City Hall hours 9-5

Stagger lunch hours

City business only at City Hall

Parking - not in front of door

Phone for City business only

Original bills to be presented to Council for payment

Restrict travel to prior approval of Council

Nature of phone calls & log

No baby sitting & dog sitting

Clerk & Secretary to clean up after themselves & keep City Hall clean

Employee Rules, Exh. F. Nelson described the baby and dog sitting prohibition as stemming from the fact that the first City office was in the basement of the home of the city clerk, who had a dog. When the City office moved to the museum, the clerk had no sitter for the dog and moved it with her, resulting in a work rule on the subject.

17. Nelson states that before the opt out resolution's adoption in 1978, he was not aware of any organizational activity of any kind by employees seeking collective bargaining rights under PERA. He believes that given the number of employees at that time he would have been aware of any activity. E. Nelson, affid. (July 7, 1995). More specifically, during the time period of his hire in 1976 until the adoption of the ordinance in 1978, he was unaware of any union activity or of any employee interest in forming a union. Nelson believes he first heard rumors about employee interest in a union in 1993 or 1994.

18. Pat Hjellen was first elected to the City council in 1975. She became mayor after election by the council. Hjellen was unaware of any efforts at union organization in 1978. Hjellen was not aware of municipalities's option to reject PERA before Nelson raised the issue in 1978.

19. City clerk Harris was unaware of PERA at the time of her hire. She was also unaware of any organizing at the time. She would have expected to have been aware of any such activity if it had been occurring. Harris did not become aware of any employee interest in organizing for purposes of collective bargaining until 1993 and that interest was not related to a specific labor organization. She did not learn of the Local 71's petition until notified by this Agency.

20. John C. Stein currently is employed as the mayor and City manager of the City. The position of mayor is now elected directly by the people and is full-time.

21. The current level of employment at the City is approximately 50 employees.

22. The City now retains a consultant, Ron Stocker, on labor issues.

23. The personnel code at the time of the hearing was undergoing revision and had been for the previous four to six months. Included in that process was the assignment of job duties and the terms and conditions of employment. Stein is involved in the project. He stated the proposed draft code is modeled to some extent on the Anchorage Municipal Code. The draft code divides employees into exempt, administrative, and professional employees. Extract, Draft Personnel Code, Exh. I. The draft at the time of the hearing was undergoing review by a staff committee. Stein was anticipating presentation of the draft to the council in September and adoption in October.

24. Stein believes the code revision was underway before the petition of Local 71 in this case.

25. The City recently (within the eight months before the hearing) hired an outside firm to conduct a pay review to set up a new salary structure for the City. The firm recommended adjustments, which resulted in a new pay scheme for City employees.

26. A City ordinance provides a mechanism for employees of the City to address the terms and conditions of their employment with the council. Ordinance Serial No. W86-12 (Mar. 24, 1986), Exh. H. It allows employees to designate representatives and provides an opportunity for those employees or their representatives to meet and confer with the council or its designated representatives at least two times a year regarding terms and conditions of employment. The ordinance states that it replaces the Public Employment Relations Act and references the 1978 resolution rejecting PERA. Id.

27. On May 31, 1995, Public Employees Local 71 filed a petition to represent "any and all employees of the City of Wasilla, Alaska." Local 71 proposed to exclude from the unit "All department heads, to include directors, assistant directors, the police chief, police lieutenant, city clerk, mayor and city planner." Local 71 later added temporary employees to those employees excluded from the unit.
28. On June 6, 1995, the City filed notice with the Agency that it was not "subject to the procedures and requirements of PERA" due to its adoption of Resolution No. W78-A-1 on May 8, 1978.
29. On June 9, Local 71 requested a hearing before the Agency to consider the question of the City's opt-out of PERA. It challenged the resolution on two grounds -- delay in its adoption and the absence of an ordinance or resolution adopting a collective bargaining scheme to replace PERA.
30. The City provided a complete roster of employees in the unit after a request from the Agency. The City, however, has taken the position that five positions named in the roster should be excluded from the unit as supervisory and confidential employees. Exh. G.
31. The City provided job descriptions for the positions it believed should be excluded from any bargaining unit. Exh. G(1)-(5).
32. Local 71 stipulated with the City at the hearing that the following employees' confidential duties placed them appropriately outside of the bargaining unit -- Dean Baugh, senior accountant, Betty Brower, deputy clerk, and Suzanne Hartrick, senior secretary to the mayor.
33. The parties did contest the appropriate placement of James Robinson, police sergeant, and Debbie Alsterberg, secretary to the police chief.
34. The head of the City police department is the chief of police. The current chief, Irl Stambaugh, described the duties of the police sergeant as a patrol officer and second in command of the department. The personnel responsibilities include training, conducting internal investigations as assigned by the chief, handling leave requests, and performing daily administrative functions with the chief's assistance or during his absence.
35. The supervisory responsibilities of the police sergeant include participation in evaluations. His signature appears on the evaluation with the chief's. His hiring responsibility includes preliminary interviews, background investigations, and recommendations. Final authority for hiring rests with the chief and the mayor. The chief believes that the police sergeant would have a role if any collective bargaining were to occur but agreed that other City employees would be the principals in collective bargaining.
36. The present police sergeant is James (Craig) Robinson. His shift is between 4 p.m. and 12 a.m. He prefers to be excluded from the unit because of his supervisory duties.
37. The present secretary to the police chief is Debbie Alsterberg. Exh. G(5). Her work duties include preparing correspondence for the police department, paperwork, and telephone responsibilities. Her role in collective bargaining would be to type confidential documents. She would not be involved in decision making. She is not responsible for personnel records. During her testimony Alsterberg stated she was leaning toward supporting representation in the bargaining unit.
38. The Agency confirmed the required employee showing in support of the petition and the City posted the petition in work sites throughout the City on June 14, 1995.
39. On July 10, 1995, the City filed a Motion/Memorandum Objecting to Jurisdiction, supported by the affidavit of Erling P. Nelson.
40. At a prehearing conference on June 23, 1995, the matter was set for hearing before a panel of the Alaska Labor Relations Board on August 15, 1995.

Conclusions of Law

1. The City of Wasilla is a public employer under AS 23.40.250(7), and the Public Employees Local 71 is a labor organization under AS 23.40.250(5). This Agency has jurisdiction under AS 23.40.100 to consider this petition for representation.
2. Public Employees Local 71 as the petitioner has the burden to prove the truth of each element of its case by a preponderance of the evidence. 8 AAC 97.350(f).
3. The legislature in adopting the Public Employment Relations Act, AS 23.40.070 -- 23.40.260 (PERA), provided political subdivisions an opportunity to reject its provisions. Section 4, ch. 113, SLA 1972 provides:

This Act is applicable to organized boroughs and political subdivisions of the state, homerule or otherwise unless the legislative body of the political subdivision, by ordinance or resolution, rejects having its provisions apply.
4. PERA was signed into law on June 7, 1972, and became effective on September 5, 1972.
5. As a second class city after 1974, the City of Wasilla was a political subdivision under section 4 of the Public Employment Relations Act, section 4, ch. 113, SLA 1972.
6. Wasilla adopted its Resolution No. W78-A-1 approximately 5.75 years after the effective date of PERA and approximately 3.5 years after its incorporation as a second class city.
7. In International Union of Operating Engineers v. City of Kotzebue, Decision & Order No. 167, at 12 (Dec. 6, 1993), we noted that the Agency applies a two-part test to determine the effectiveness of an ordinance or resolution rejecting PERA. The first part of the test is whether the political subdivision acted in derogation of employee rights under PERA. The second part examines the timeliness of the decision. See also Public Employees Local 71 v. City of Haines, Decision & Order No. 184, at 13 (Feb. 14, 1995).
8. The parties did not present any evidence of any organizational activity predating the 1978 resolution rejecting PERA. The discovery of any organizing in the City between 1972 and 1978 would be rather surprising. The City did not incorporate until 1974, and between 1976 and some time after the resolution was adopted in 1978, the entire work force of the City consisted of three employees. Two of these three employees testified that they were not aware of any organizational activity at that time and it is unlikely that the librarian would have engaged in such actions alone. This resolution, unlike the resolution at issue in Kodiak Island Borough v. State of Alaska, 853 P.2d 1111 (Alaska 1993), is not invalidated by being preceded by organizational activity among the City's employees.
9. The only evidence of knowledge of PERA at all was the finance director's rather vague recollection that, when he learned of PERA and the City's right to opt out, he would have called it to the attention of the City council within a month of his discovery.
10. Turning to the question of the timeliness of the resolution to reject PERA, we note that this Agency on several occasions has found that the passage of time or delay can invalidate a city's ordinance or resolution to reject PERA. Public Employees Local 71 v. City of Haines, Decision & Order No. 163 (July 19, 1993), resolution found valid after remand in Public Employees Local 71 v. City of Haines, Decision & Order No. 184 (Feb. 14, 1995); International Union of Operating Engineers, Local 302 v. City of Kotzebue, Decision & Order No. 140 (May 28, 1992), resolution found valid after remand in International Union of Operating Engineers, Local 302 v. City of Kotzebue, Decision & Order No. 167 (Dec. 6, 1993); International Bhd. of Elec. Workers, Local 1547 v. Thomas Bay Power Authority, Decision & Order No. 145 (Nov. 25, 1992).
11. However, the Agency after remand in International Union of Operating Engineers, Local 302 v. City of Kotzebue, Decision & Order No. 167 ("Kotzebue"), did adopt a more flexible standard to evaluate the timeliness of a political subdivision's rejection of PERA. In the Kotzebue case, the Agency examined an opt out ordinance in a city of approximately 2000 residents. The city collected a sales tax. The city had a comprehensive plan addressing the city's

utility, communications, and land use needs. Although the city had few employees (3 or 4), it did provide police services. Id.

12. The state of services in the City of Wasilla in 1978 may even be more primitive than conditions examined in the Kotzebue decision. In Kotzebue in 1972 the Agency heard evidence of a city concerned with providing its residents with the most basic of services. The community was a remote, rural community in transition to a modern municipality. The City of Wasilla does not share the remoteness or the transitional character of Kotzebue, but it was newer and had not proceeded as far in establishing municipal services as Kotzebue. The City did not incorporate until 1974 and certainly could not have acted before that date. In 1974 the population did not exceed 600 people. By 1978 it had grown to about 1600 residents. The City barely functioned as a municipal entity. It provided few municipal services. It did not tax. It paid its employees with grant funds. The City at this time seems to have served as a conduit for state and federal funding -- road and airport maintenance, CETA funds and day care funds. City services appeared to be limited to managing those funds, business licenses, taxi permits, and a library. The offices were tucked into corners of other facilities. Employee job descriptions and personnel rules were minimal. In the early 70's, personnel were limited to three persons and labor relations was unlikely to have been much of an issue. Requiring the City to have acted sooner on the opt out issue would be unreasonable.

13. The City now employs 50 employees. It retains labor consultants, engages in salary studies, and operates a police department. Because the City adopted its resolution well before these changes, it must be found to have acted reasonably and therefore promptly under the circumstances.

14. City of Wasilla Resolution No. W78-A-1 is effective to opt out of PERA and Local 71's petition must be dismissed.

15. Because the Agency is without jurisdiction over the City of Wasilla under PERA, we do not address the issue of the appropriate composition of the bargaining unit under AS 23.40.090.

ORDER

1. The City of Wasilla's objection is GRANTED; and
2. The petition of Public Employees Local 71, AFL-CIO, is DISMISSED.

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 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 PUBLIC EMPLOYEES LOCAL 71, AFL-CIO vs. CITY OF WASILLA, CASE NO. 95-413-RC, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 7th day of November, 1995.

Margie Yadlosky

Administrative Assistant

This is to certify that on the 7th day of November, 1995, a true and correct copy of the foregoing was mailed, postage prepaid to

Kevin Dougherty, Local 71

Richard Deuser, City of Wasilla

Signature