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FAIRBANKS FIRE FIGHTERS ASSOCIATION, LOCAL 1324, IAFF,

Petitioner,

v.

CITY OF FAIRBANKS,

Respondent.

Case Nos. 99-922-CBA

DECISION AND ORDER NO. 244

Digest: The dispute between the parties is subject to the arbitration procedure set forth in the parties' collective bargaining agreement.

DECISION

Statement of the Case

On October 6, 1998, the Fairbanks Fire Fighters Association, Local 1324, IAFF (Fire Fighters), filed a petition to enforce the grievance procedure in the collective bargaining agreement between it and the City of Fairbanks (City). (September 30, 1998 petition). The City filed an objection on October 22, 1998. A prehearing conference was held, and the parties agreed to submit the dispute for decision based on the written record. By agreement of the parties, the final brief was due March 22, 1999. The record therefore closed on March 22, 1999.

Panel: Blair E. Marcotte, vice-chair, and members Karen J. Mahurin and Robert Doyle.

Appearances: Mark Drygas, business agent, for petitioner Fairbanks Fire Fighters Association; Paul J. Ewers and Patrick Cole, deputy city attorneys, for respondent City of Fairbanks.

Procedure in this case is governed by 8 AAC 97.350. Hearing examiner Mark Torgerson presided.

Issues

1. Does this Agency have jurisdiction to consider the issue of arbitrability?

2. If so, is the parties' dispute arbitrable?

Findings of Fact

The panel, by a preponderance of the evidence, finds the facts as follows:

1. The Fairbanks Fire Fighters Association Local 1324, IAFF (Fire Fighters), is recognized as the exclusive collective bargaining representative of certain fire fighting employees of the City of Fairbanks (City).

2. The Fire Fighters and the City entered into a collective bargaining agreement (CBA), effective January 1, 1993 -- December 31, 1995. Article 1.3 of the CBA provides that the CBA shall remain in effect until a renewal is executed. (Exh. P-1 at 3)

3. On January 12, 1998, Mark Drygas, the Fire Fighters' business agent, sent a grievance to City Mayor James Hayes. Drygas wrote Hayes that Grievance 98-04 "addresses the City's refusal to place Jim Rice back to work." (Drygas January 12, 1998 letter. Exh. P-6.1) The grievance was filed at step two of the CBA.

4. Mayor Hayes denied the grievance at both step 2 and step 3. (Hayes February 19 and March 23, 1998 letters). (Exhs. P-6.2 and P-6.5)

5. A conciliation meeting was held on March 24, 1998. On April 6, 1998, Mayor Hayes notified Drygas that Hayes' denial of the grievance was confirmed. Hayes said that as a courtesy, he would list the reasons, although not all-inclusive, for the denial. They were: 1) Rice did not meet the definition of a member under the CBA, and he was not on the hiring list; 2) Rice went to court and filed lawsuits, rather than file a grievance in 1995;[1] the issues in this grievance were subject to litigation in the lawsuits; 3) in the 1995 lawsuit, Rice never requested reinstatement; and 4) the grievance is untimely under the CBA. The Mayor concluded that for the above reasons, the City considered the matter "not arbitrable." (Exh. P-6.6)

6. The parties discussed the next step in the dispute. Deputy City Attorney John Eberhart wrote Drygas on April 23, 1998 and said, "I refer to your call of April 16 inquiring whether the City will agree to arbitrate arbitrability. My clients advise that the City will stand on Mayor Hayes' Third Step response dated April 6, 1998." (Exh. P-6.7)

7. Drygas also filed a grievance (number 98-18) on behalf of Lee Despain on July 6, 1998. Like Rice's grievance, Despain's was based on the city's refusal to hire Despain. The City denied the Despain grievance at steps 2 and 3 for essentially the same reasons as the Rice denial. (Hayes July 7 and July 20, 1998 letters). Again, Mayor Hayes asserted the matter was not arbitrable. A followup conciliation failed to resolve the matter. (Exhs. P-7.2 and P-7.4)

8. Article 4 of the parties' agreement includes a three-step grievance procedure, conciliation, and then arbitration as its final step:

> 4.1 GRIEVANCE POLICY
>
> It is the mutual desire of the City and the Association to provide for the prompt adjustment of grievances in a fair and reasonable manner, with a minimum amount of interruption of the work schedules. Every reasonable effort shall be made by both the City and the Association to effect the resolution of grievances at the earliest step possible. In the furtherance of this objective, the City and the Association have adopted the following procedure as the exclusive method of resolving grievances arising under this Agreement, not including unfair labor practices covered under PERA.[2]
>
> 4.2A GRIEVANCE DEFINITION
>
> A grievance is defined as any good faith and material dispute between any member(s) of the Association and the City involving the interpretation, application or alleged violation of any provision of this Agreement, the Rules and Regulations, or the Standing Operating Procedures of the Fairbanks Fire Department, including involuntary termination and disciplinary action. However, any dispute involving the commencement date or termination date of this contract shall not be considered a grievance, and shall not be submitted to the grievance/arbitration procedure set forth herein. Any questions concerning commencement or termination of this Agreement shall be specifically reserved for judicial review. The City and the Association may mutually agree to use the grievance procedure for other matters.
>
> 4.6A CONCILIATION
>
> If the answer of the City Manager is not satisfactory, before going to arbitration . . . those matters which are

> unresolved shall be discussed at a meeting between the parties . . . in an effort to resolve the matter through conciliation.

(Exh. P-1 at 9 and 10)

9. The CBA also discusses membership rights in section 11.1:

> The City agrees that it will not in any manner, directly or indirectly, discriminate against or attempt to interfere between any of the employees covered under the terms of this Agreement and the Association, and that it will not in any manner restrain or attempt to restrain any employee from belonging to the Association or from taking part in Association affairs, and that it will not discriminate against any employee because of the employee's Association membership or lawful Association activity.

(Exh. 9-1 at 39)

10. The Fire Fighters filed a petition with this Agency seeking enforcement of the grievance/arbitration process. The City opposed the petition.

DISCUSSION

Before discussing the primary issues for decision, we must first address two procedural matters. The first deals with the Fire Fighters' summary judgment motion. The Fire Fighters filed the petition in this matter as a request to enforce the parties' collective bargaining agreement. They also filed a motion for summary judgment. We have considered that motion as a request for a hearing and decision on the written record. Under 8 AAC 97.390, this Agency may consider motions. However, neither PERA nor our regulations requires us to apply the Alaska Rules of Civil Procedure, which contain the summary judgment procedure. We will not apply a summary judgment procedure to this proceeding. Rather, we will apply the traditional standard required by our regulations for this type of petition: "In a hearing, the petitioner . . . bears the burden of proving the truth of each element necessary to that party's cause by a preponderance of the evidence." 8 AAC 97.350. Accordingly, the Fire Fighters must prove their petition by a preponderance of the evidence.[3]

The second preliminary matter is whether to consider evidence submitted into the record after the record closed. On March 29, 1999, the Fire Fighters filed a motion to admit additional evidence. The City opposed the motion on April 5, 1999. Our regulation 8 AAC 97.410 states in relevant part that "[t]he record of a hearing includes any evidence admitted into the record at the hearing." We find that this includes any evidence properly admitted up to the time of and at the hearing. Although we have discretion to waive the requirements of a regulation if strict adherence will work an injustice (*see* 8 AAC 97.480), we conclude that strict adherence will not work an injustice here. The motion is denied.

1. Does this Agency have jurisdiction to consider the issue of arbitrability?

The City disputes the Agency's jurisdiction to consider the Fire Fighter's request for arbitration of the disputes in the petitions. The City argues that the threshold question of arbitrability must be decided by the "court" and not this Agency. For support, the City cites to *Anchorage Police Dept. Employees Ass'n v. Municipality of Anchorage*, 938 P.2d 1027 (Alaska 1997) (*APDEA*). The Fire Fighters request that we order the parties to arbitration in accordance with the contract.

The City asserts that in *APDEA*, the Alaska Supreme Court held that courts must decide arbitrability issues. The City contends that we therefore have no jurisdiction to decide whether its dispute with the Fire Fighters is arbitrable.

The Fire Fighters argue that in prior decisions, this Agency has concluded that it does have jurisdiction to decide arbitrability issues. They cite to the following language from *Fairbanks Fire Fighters Ass'n v. City of Fairbanks*, Decision and Order No. 142 (July 15, 1992):

> The Agency's authority to enforce the agreement under AS 23.40.210 can be analogized to the courts' authority under Section 301 of the Labor Management Relations Act. Under Section 301 the United States

> Supreme Court defined a relationship that recognizes arbitration as the principal mechanism to resolve disputes arising under the bargaining agreement. See Steelworkers trilogy, Steelworkers v. American Mfg. Co., 363 U.S. 564, 46 L.R.R.M. (BNA) 2414 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 L.R.R.M. (BNA) 2416; Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 46 L.R.R.M. (BNA) 2423 (1960), discussed in 1 Charles J. Morris, supra 917; see also, AT&T Technologies v. Communications Workers of America, 475 U.S. 643, 121 L.R.R.M. (BNA) 3329 (1984).
>
> This view is consistent with that of our predecessor in this case, DOLLRA.[4] When DOLLRA considered the Fire Fighters' earlier petition to enforce the collective bargaining agreement, it stated that it would not substitute itself for the parties' dispute resolution procedures in their agreement. Instead, it would give effect to the agreement by compelling the parties to arbitration.

(Fire Fighters rebuttal brief at 1-2, *citing to* Decision and Order No. 142 at 11).

As we have consistently concluded in prior decisions, we again find that we do have jurisdiction over the arbitrability issue. In doing so, we again reject the City's assertion that we do not have jurisdiction to decide arbitrability. We find that the Public Employment Relations Act (PERA) grants us jurisdiction over certain public employers and public employees in Alaska. *See* AS 23.05.370(a)(5), and Section 4, ch. 113, SLA 1972. PERA addresses grievance arbitration in AS 23.40.210. It provides this Agency with jurisdiction to enforce arbitration clauses: "The agreement shall include a grievance procedure which shall have binding arbitration as its final step. Either party to the agreement has a right of action to enforce the agreement by petition to the labor relations agency."

AS 23.40.210(a) (in part). The Agency does consider petitions to enforce collective bargaining agreements. 8 AAC 97.510--520.

This grant of jurisdiction includes our consideration of disputes that arise out of the parties' collective bargaining relationship. There is no statute in PERA (and the City has not pointed to one) that suggests our jurisdiction extends to all matters except arbitrability determinations.

As the City points out, the court in *APDEA* did conclude that it was authorized to make the threshold arbitrability determination. However, that case dealt with jurisdiction arising out of the Municipality of Anchorage's collective bargaining laws. It had nothing to do with the application of PERA. Further, we could find no cases from the federal courts or the National Labor Relations Board (NLRB) holding that a labor relations agency did not have initial jurisdiction over the arbitrability issue.[5] We therefore decline to follow *APDEA* 's holding because we find it does not apply to grievance disputes under PERA.

Moreover, as the above-cited language in Decision and Order 142 states, we have consistently held that under PERA, we have jurisdiction to decide the arbitrability issue. We do not believe the court's holding in *APDEA* changes that. We find that to cede jurisdiction at the arbitrability stage would create an awkward, time-consuming and inefficient procedure: a party would first have to file a petition with the Agency, then put proceedings before the Agency on hold while it takes the arbitrability issue to court, and finally (assuming the court finds the dispute arbitrable) take the dispute to a third forum--the arbitrator. Additional litigation with the Agency could follow the arbitrator's decision. Assuming the court, this agency and the arbitrator all retained jurisdiction over certain issues, the parties would be required to pursue resolution of various aspects of their dispute at all three forums. Such a procedural scenario would be not only inefficient and inconvenient but expensive too. In this regard, we would be concerned if the courts decided to get involved in this threshold issue between parties subject to PERA. We believe the legislature accorded that jurisdiction to this Agency. Therefore, we again find, as we have done previously for many years (including cases involving the City), that we have jurisdiction to decide arbitrability disputes between parties over whom we have jurisdiction. That includes the parties in this case.

2. Is the parties' dispute arbitrable?

We must next decide whether to submit this matter to arbitration. The Fire Fighters argue that the dispute concerns two grievances, each properly submitted under the parties' collective bargaining agreement (agreement). They contend that

arbitration is the next appropriate step in the resolution of those grievances. It asks us to enforce the agreement. The City contends the dispute over the grievances is not arbitrable primarily because the grievants are not members of the bargaining unit and are not employees as that term is used in the agreement. After reviewing the evidence in the record and considering the parties' arguments, we find by a preponderance of the evidence that this matter must be submitted to arbitration.

In its opposition brief, the City states that the grievances allege the City violated several provisions of the parties' agreement by refusing to rehire grievants Rice and DeSpain, who each had previously worked for the City in its fire department. (Opposition brief at 2). The City argues that "as former employees, Rice and DeSpain are no longer members of the Bargaining Unit and the City has no legal duty to arbitrate a grievance for actions that occurred after they left employment." *Id*. at 3. The City goes on to suggest that because they are former employees, Rice and DeSpain are not in a job classification listed in Article 16 of the agreement, and the Fire Fighters cannot be their bargaining representative under the agreement. *Id.* at 2-3.

By presenting this and other arguments about the status of Rice and DeSpain, the City is clearly asking us to construe the parties' agreement. In essence, the City contends the agreement does not apply to Rice and DeSpain because they are not "members" or "employees" under the agreement, and they therefore are not afforded its protections and rights. The Fire Fighters, on the other hand, argue that the agreement does apply to the two grievants: "The notion that only members that are present employees may have protection under the CBA [collective bargaining agreement] is not supported by the CBA." (Fire Fighters' rebuttal brief at 4).

We find this dispute centers on the interpretation of certain provisions of the parties' agreement, especially those provisions containing the terms "member" and "employee." The task of interpreting these and other terms and provisions of the CBA must be left to the arbitration process, as required by the grievance and arbitration provisions of the parties' agreement. Article 4.2A states in part:

> A grievance is defined as any good faith and material dispute between any member(s) of the Association and the City involving the interpretation, application, or alleged violation of any provision of this Agreement, the Rules and Regulations or the Standard Operating Procedures of the Fairbanks Fire Department, including involuntary termination and disciplinary action.

(Exh. P-1 at 9)

Article 4.6B provides for arbitration as the last step in the grievance procedure. We find these grievance/arbitration articles are broad in nature and include the disputes related to the petition submitted in this case.

As we suggested in Decision and Order 142, the grievance/arbitration mechanism serves a useful purpose in the parties' collective bargaining relationship. We quoted the following from a United States Supreme Court case:

> [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement. . . . The grievance procedure is, in other words, a part of the continuous collective bargaining process.

Decision and Order 142 at 10, *citing to United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581, 46 LRRM 2416, 2419 (1960), *quoted in* Charles J. Morris, *The Developing Labor Law* 914-915 (2d ed. 1983). We find the parties' dispute must be processed through their established grievance machinery.

Conclusions of Law

1. The City of Fairbanks is a public employer under AS 23.40.250(7) and the Fairbanks Fire Fighters Association is an organization under AS 23.40.250(5).

2. This Agency has jurisdiction to consider the Fire Fighters' petition to enforce its collective bargaining agreement with the City of Fairbanks under AS 23.05.370(a)(5) and AS 23.40.210.

3. AS 23.05.370(a)(5) and AS 23.40.210 authorize this Agency to determine the arbitrability of a dispute.

4. The parties' agreement provides a grievance procedure in Section 4. That grievance procedure culminates in binding arbitration.

5. The parties' dispute in this matter is covered under the parties' grievance procedure.

6. As a general rule to promote self-governance, this Agency will enforce a bargaining agreement by compelling the parties to follow their grievance arbitration procedure for disputes covered under it.

7. The subject matter of grievances 98-04 and 98-18 is arbitrable because it raises issues of the interpretation of the collective bargaining agreement.

ORDER

1. The Fire Fighters' petition to enforce the bargaining agreement and compel arbitration is GRANTED.

2. The parties are compelled to arbitrate the disputes in grievances 98-04 and 98-18.

3. Thirty days from the clerk's date of issuance of this decision, the Fire Fighters and the City must each file with the American Arbitration Association a request to arbitrate grievances 98-04 and 98-18.

4. Fourteen days after receipt of a decision by the arbitrator in grievances 98-04 and 98-18, the City shall file a copy of the decision with this Agency.

5. This Agency retains jurisdiction to resolve subsequent disputes related to the arbitration process for the above grievances.

6. The City of Fairbanks 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

Blair E. Marcotte, Vice Chair

Karen J. Mahurin, Board Member

Robert Doyle, Board Member

APPEAL PROCEDURES

This order is the final decision of this Agency. Judicial review may be obtained by filing an appeal under Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of filing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the decision and order in the matter of FAIRBANKS FIREFIGHTERS ASS'N, LOCAL 1324, IAFF v. CITY OF FAIRBANKS, Case No. 99-922-CBA, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 8th day of June, 1999.

Donna Bodkin

Administrative Clerk III

This is to certify that on the 8th day of June, 1999, a true and correct copy of the foregoing was mailed, postage prepaid to:

Mark Drygas, Fairbanks Fire Fighters Ass'n

Paul J. Ewers, City of Fairbanks

Signature

1According to Hayes' letter, Rice "asked for and received monetary damages, including substantial future damages."

2 PERA is an acronym for Public Employment Relations Act.

3This procedure is in accordance with the procedures set in this matter at the prehearing conference. *See* January 20, 1999 "Prehearing Order and Notice of Hearing on Written Record" at page 2.

4DOLLRA is the acronym of Department of Labor Labor Relations Agency. It was one of this agency's predecessors.

5This agency gives great weight to relevant decisions of the National Labor Relations Board and federal courts. 8 AAC 97.450(b).