ALASKA LABOR RELATIONS AGENCY
3301 EAGLE STREET, SUITE 208
P.O. BOX 107026
ANCHORAGE, ALASKA 99510-7026
(907) 269-4895
FAX (907) 269-4898

FAIRBANKS FIRE FIGHTERS ASS'N, LOCAL 1324, IAFF,
Complainant,

vs.

CITY OF FAIRBANKS,

Respondent.

Case No. 99-924-ULP

DECISION AND ORDER NO. 247

This matter was heard on September 27, 1999, in Fairbanks, Alaska, before the Alaska Labor Relations Board, Vice Chair Blair Marcotte, and members Robert Doyle and Karen Mahurin. Hearing Examiner Mark Torgerson presided. The record closed on September 27, 1999.

Appearances: Mark Drygas, Business Agent, for complainant Fairbanks Fire Fighters Association; and Patrick Cole for the City of Fairbanks.

Digest: A threat by the employer of legal action against an employee/union business agent for filing grievances is a violation of AS 23.40.110(a)(5) and (a)(1). The fact that the employer decided to include a so-called reservation of rights statement along with the threat does not diminish the effect of the threat of legal action for damages.

DECISION

Statement of the Case

The Fairbanks Fire Fighters Association (Fire Fighters or Association) filed this petition charging the City of Fairbanks (City) with an unfair labor practice for threatening Business Agent Mark Drygas with a civil suit for processing frivolous or bad faith grievances. The City denies the charge and alleges the letter was only a reservation of rights. Hearing Officer Jean Ward investigated the charge and found probable cause that the City committed a violation. The City appealed, and this hearing followed.

Panel: Vice Chair Blair Marcotte, and members Robert Doyle and Karen Mahurin.

Appearances: Mark Drygas, Business Agent for petitioner Fairbanks Fire Fighters Association (Fire Fighters); Patrick Cole, Deputy City Attorney for respondent City of Fairbanks (City).

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

Issue

Whether the City of Fairbanks violated AS 23.40.110(a)(5) and (a)(1) when it sent business agent Drygas a letter reserving its right for damages against the Fire Fighters and Drygas for filing alleged "frivolous grievances."

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.

3. In a letter dated July 20, 1998, City Mayor James C. Hayes wrote Fire Fighters business agent Mark Drygas a letter concerning a grievance the Association filed on behalf of Lee DeSpain. Hayes said the City was denying the grievance at the third step in the process. The letter went on to state in part:

> The City is willing to engage in good faith attempts to resolve disputes. However, it appears that the Association is not acting in good faith and subverts the grievance procedure when it attempts to process a grievance such as this one. Accordingly, the City reserves all rights regarding any damages or remedies that it may have against the Association and/or you for processing this and other frivolous or bad faith grievances.

(Respondent's exh. N).

4. Drygas responded to Mayor Hayes in a July 24, 1998, letter. (Respondent's exh. R.). Drygas wrote that the Association was "upset by your threat to sue us for damages because the Association is pursuing the settlement of a grievance. On top of this, you have threatened me personally. . . . This amounts to an attempt to intimidate and coerce the Association and myself immediately prior to our scheduled conciliation meeting."

5. In a July 28, 1998, letter, Mayor Hayes wrote Drygas that his allegations "to the effect that John Eberhart allegedly violated PERA are rejected." (Respondent's exh. W).

6. John Eberhart was a deputy city attorney at the time of the above grievance and letters. He wrote the July 20, 1998, letter to Drygas on behalf of Mayor Hayes. Eberhart testified that no threat or intimidation was intended by the letter, and no personal threat against Drygas was intended.

7. The Association and Drygas retained attorney Michael McDonald, who wrote a letter to Mayor Hayes on August 3, 1998. In it, McDonald asserted that Mayor Hayes' reservation of rights for "any damages or remedies" was a "threat for job action and civil damages." McDonald added that the purpose of the Mayor's July 20 letter was "to intimidate, harass and coerce and otherwise obstruct the union and Mr. Drygas personally." (Respondent's exh. Y).

8. Eberhart replied to McDonald in an August 11, 1998, letter. He testified at hearing that the letter was designed to diffuse the Fire Fighters' concerns. The letter stated in part:

> As the Mayor indicated in his letter of July 28, the City rejects any allegations that threats have been leveled. The Mayor's letter did refer to the City reserving all rights regarding any damages or remedies that it may have against the Association and/or its Business Agent for processing frivolous or bad faith grievances. Your speculation as to what was intended is rejected. Also rejected is your allegation that the City has violated a Decision and Order of the Alaska Labor Relations Agency. Any such Decision and Order has no bearing or relevance to the present matter. The words used by the Mayor regarding the City's reserving its rights speak for themselves. What damages or remedies may be sought will turn on what further action the Association may attempt to take with the grievance.

(Respondent's exh. AA).

9. On October 12, 1998, the Association filed an unfair labor practice charge against the City. The charge alleged that the City violated AS 23.40.110(a)(1) and (a)(5) by threatening Business Agent Mark Drygas and the Association for filing frivolous bad faith grievances.

10. Mark Drygas is a business agent of the Association, and an employee of the City of Fairbanks. He testified that although at some point he may have joked with the Mayor about it, he took the letter as a threat. He testified he has learned to take correspondence from the City very seriously. He felt threatened not only as the Association's business agent but also as an employee of the City. In addition, he felt threatened personally. On cross-examination, he did admit there would be some joking and light-heartedness in the negotiations meetings.

11. Mayor James Hayes testified he does not think the language in his July 20, 1998, letter is threatening. He did not believe Drygas viewed it as a threat. Hayes did not intend it as a threat. John Eberhart testified that the letter was meant only to reserve the City's rights.

12. Robert Groseclose is an attorney who practices employment law in Fairbanks. He testified it was prudent for the City to reserve their rights in this situation. He added it was prudent in the sense the City avoids ambiguity. He said the reservation of rights is used in insurance matters, and is legal jargon, or "lawyerspeak."

13. On June 25, 1999, Hearing Officer Jean Ward issued a "Notice of Preliminary Finding of Probable Cause." Ward found probable cause existed to support the charges under both AS 23.40.110(a)(5) and (a)(1), "especially when considered in the context of the parties' history of disputes over grievance arbitrability and the cease and desist order issued in Decision & Order No. 221." (June 25, 1999 Probable Cause Notice at 3).

14. The City requested a hearing, which was held on September 27, 1999.

DISCUSSION

The Fire Fighters contend the City violated the Public Employment Relations Act (PERA) when Mayor Hayes sent Business Agent Drygas a letter threatening legal action if the Fire Fighters did not stop filing "frivolous" grievances. Drygas and the Fire Fighters argue that the letter tended to intimidate and coerce them and interfered with their right to engage in protected activities.

The City, on the other hand, denies that it violated PERA by sending the letter. The City asserts that the letter was merely a reservation of its rights against the Fire Fighters and its business agent for processing the grievances. (Respondent's Hearing Brief at 3). The City argues that the reservation of rights, often used in the insurance context, did not tend to "impair or interfere with the right of the employees." (*Id.* at 4). "By stating a reservation of rights, a party is indicating that its participation in a matter with another party does not amount to a waiver of any right. This is very common in contexts such as when an insurance company is asked to defend a claim against the insured." (*Id.*). The City asserted it could not find any decision supporting the Fire Fighters' contention that a reservation of rights "amounts to a ULP." (*Id.*).

We also could not find any cases holding that a statement of reservation of rights constitutes an unfair labor practice. But that is not what the Fire Fighters contend. They argue that the statement in Mayor Hayes' July 20, 1998 letter is a threat of legal action for processing grievances. They do not argue that a reservation of rights statement is, in general, an unfair labor practice.

We agree with the Fire Fighters that the statement is an illegal threat of legal action for pursuing rights protected under PERA. Under AS 23.40.110(a)(5), an employer is required to bargain collectively in good faith with the organization that is the exclusive representative of employees in an appropriate unit, including but not limited to discussing grievances with the exclusive representative. AS 23.40.110(a)(1) prohibits an employer from interfering with, restraining or coercing an employee in the exercise of the employee's rights guaranteed in AS 23.40.080. AS 23.40.080 protects the right to self-organize, form, join, or assist an organization to bargain collectively through representatives of the employees' own choosing, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

We could find no Alaska cases addressing the issue of threats of civil action for engaging in protected rights. However, the National Labor Relations Board (NLRB) "has held that the threat to file a lawsuit against employees engaged in protected activity is interference or restraint prohibited" by the National Labor Relations Act (Act). 1 Patrick Hardin, *The Developing Labor Law*, 136 (3d ed. 1992).[1]

The NLRB has addressed this issue in numerous cases.[2] For example, in *Clyde Taylor, d/b/a Clyde Taylor Company*, 127 N.L.R.B. 103, 45 L.R.R.M. (BNA) 1514 (1960), the NLRB concluded that the Clyde Taylor Company violated sections 8(a)(3) and (a)(1) of the National Labor Relations Act by threatening employees with legal action unless they dropped their unfair labor practice charges. Owner Clyde Taylor told sheet metal employees, soon after taking over a sheet metal business, that they could continue to work with him unless "they wanted to stick with the union." *Id.*, 127 N.L.R.B. 103, 105. He also discharged a steward who had participated in bargaining negotiations. Some of the employees then filed unfair labor practice charges against the employer. In a discussion with one of the charging employees, Taylor told the employee he should not have done so, that "we had caused him public embarrassment, and he had lost a lot of money and he was looking to get some of his money back, and we were opening ourselves wide open to a libel suit." Taylor concluded by asking the employee to talk to other employees and try to get them to drop the charges. He told another employee that "it's possible that things like that could leave people open to libel." *Id*. at 117.

The NLRB stated:

> Though it showed no express threat to sue for libel, the threat was plainly implied and was at best thinly veiled. But threats are no less coercive because expressed in veiled or indirect terms. 'When statements such as these are made by one who is a part of the company management, and who has the power to change prophecies into realities, such statements, whether couched in language of probability or certainty, tend to impede and coerce employees in their right of self-organization, and therefore constitute unfair labor practices.'

Id., citing to N.L.R.B. v. W.C. Nabors, d/b/a W.C. Nabors Co., 196 F.2d 272, 276 (C.A. 5).

In *Pabst Brewing Company*, 254 N.L.R.B. 494, 106 L.R.R.M. (BNA) 1112 (1981), a supervisor of the company threatened a lawsuit against employees who had signed a grievance as witnesses to harassing incidents. The supervisor also told the shop steward he would take him to court for signing the grievance. The NLRB affirmed the administrative law judge's ruling that the employer violated Section 8(a)(1) of the Act.

Likewise, the NLRB found a violation in *Long Island College Hospital*, 327 N.L.R.B. No. 169, 1999 WL 167675 (N.L.R.B. Mar. 22, 1999). In that case, social workers filed a grievance over the employer's implementation of a case management system that resulted in layoffs. At a meeting with supervisor Carolyn Nash, social worker Edward Gray and two others asked Nash whether they should go to the union with their concerns. Nash told Gray they should "proceed with caution" if they involved the union because Gray was being called the "flavor of the month" due to of his position as a spokesman on this issue. At a subsequent union meeting, Gray expressed his concerns, and a union reporter quoted Gray in a union publication that was sent to the employer.

The employer's attorney sent Gray a letter accusing him of making false statements about the hospital and stated: "Unless you agree to retract your false statements … [the employer] will have no choice but to pursue its legal remedies against you." That same day, the union's attorney faxed a letter accusing the employer of unlawfully threatening and coercing employees. The employer's attorney responded that the employer was not trying to intimidate Gray and "litigation was the last thing" the employer wanted to do. It concluded by expressing the employer's annoyance with the union's "consistent pattern" of publicly disparaging the employer.

Citing to *Clyde Taylor*, the NLRB concluded that the attorney's letter contained a threat to sue Gray for a protected concerted activity. The NLRB also rejected the employer's argument that the letter did not violate the Act because the threat of legal action contained in the letter was not intended to chill or retaliate against the exercise of Section 7 rights. The NLRB pointed out that "the test for determining whether an employer's statements or communications with

employees violate the Act is an objective one, i.e., whether the statement reasonably tends to interfere with, restrain or coerce an employee in the exercise of statutory rights. The Employer's motive in making the statement is irrelevant." *Id., citing to Florida Steel Corp,* 224 N.L.R.B. 45 (1976).

In the case before us, we find the statements in the letter are similar to those statements found to be violations by the NLRB in the above cases. We find that, as in *Clyde Taylor*, the threat against Business Agent Drygas "was plainly implied and was at best thinly veiled." The statements tended to interfere with, restrain and coerce employee and Business Agent Drygas in the exercise of statutorily protected activity, processing grievances. We find the statement threatening "damages" is a statement threatening legal or court action. The statement was made in the context of Drygas processing alleged frivolous grievances.[3]

We also find the follow-up letter affirmed the threat contained in the Mayor's July 30, 1998, letter when Eberhart stated: "What damages or remedies may be sought will turn on what further action the Association may attempt to take with the grievance." We find the language in both letters would tend to coerce, intimidate and interfere with the exercise of Drygas's (who is both an employee and a business agent), protected PERA rights. In this vein, the testimony of Mayor Hayes and Eberhart about the City's motive in sending the letter or that the letter was not intended as a threat, is irrelevant.

Furthermore, we find the fact that the employer decided to include a so-called reservation of rights statement along with the threat does not diminish the violative effect of the threat of legal action for damages. If we were to conclude that the statement was not a violation because it included a reservation of rights, we would essentially be allowing the employer to make threats as long as the threats included a so-called reservation of rights.[4] With or without a reservation of rights, the threat to pursue an action for damages for pursuing protected rights is a violation of AS 23.40.110(a)(5) and (a)(1).

The parties have experienced a difficult relationship for many years, and this is certainly not the first time disputes have arisen over grievances. *See, for example, Fairbanks Fire Fighters Association, Local 1324, IAFF vs. City of Fairbanks,* Decision and Order No. 221 (June 25, 1997) (City of Fairbanks conduct in certain grievance proceedings found to violate AS 23.40.110(a)(1) and (a)(5), and City ordered to cease and desist from obstructing grievance procedures.). The legislature's statutory declaration, that it is the "public policy of the state to promote harmonious and cooperative relations between government and its employees,"[5] is not furthered by the conduct at issue in this unfair labor practice charge. In that vein, we agree with that part of Member Doyle's dissent that encourages the parties to engage in a more collaborative approach to labor relations.

CONCLUSIONS OF LAW

1. The Fairbanks Fire Fighters Association is an organization under AS 23.40.250(5).

2. The City of Fairbanks is a public employer under AS 23.40.250(7).

3. This Agency has jurisdiction to consider unfair labor practice complaints under AS.23.40.110.

4. Filing grievances is an activity protected by the Public Employment Relations Act. AS 23.40.080.

5. By threatening the Fire Fighters' Business Agent with an action for damages unless he stopped filing alleged "frivolous" grievances, the City violated AS 23.40.110(a)(5) and (a)(1).

6. The appropriate remedy is for the City to cease and desist its conduct in violation of AS 23.40.110(a)(1) and (a)(5).

ORDER

1. The City of Fairbanks shall CEASE AND DESIST from threatening the Fire Fighters and Business Agent Mark Drygas with a damages action. The City shall also take affirmative action designed to effectuate the policies of the Public Employment Relations Act.

2. 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 Marcotte, Vice-chair

_____

Karen Mahurin, Board Member

Dissent of Member Robert Doyle

I respectfully dissent from the majority's decision. I believe the reservation of rights was just that and nothing more. A threat to file a libel suit quid pro quo for filing a ULP, or resorting to civil courts is not the same as a party reserving its rights. If the city has rights, then the expression of those rights should not be deemed a threat. It is merely a fact of our litigious society and, unfortunately, in the parties' relationship. Given their contentious relationship, I would not find it was a veiled threat, or any threat.

While the City used "words" to reserve legal rights, the Fire Fighters and its members have taken "actions" to reserve legal rights. Taking so many issues to litigation has caused a bilateral collapse of good will. Both parties could use grievance procedures to really solve problems, and thereby reduce legal expenses. Neither side of this dispute has taken the high road. Legal rights will never replace old-fashioned respect, honesty, problem solving, and common sense. A zero sum game where one party loses at the expense of the other only reinforces the conflict cycle, whereby the loser works even harder to get even next time. As long as each party hires adversarial lawyers to take legal action or reserve legal rights, this long-term conflict cycle will worsen. Both sides could reduce billable hours, which will benefit both the Fire Fighters and residents of Fairbanks, but only through a more collaborative approach to labor relations.

_____

Robert A. 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 FIRE FIGHTERS ASS'N, LOCAL 1324, IAFF vs. CITY OF FAIRBANKS, Case No. 99-924-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 14th day of December, 1999.

_____

Margie Yadlosky

Personnel Specialist I

This is to certify that on the 14th day of December, 1999, a true and correct copy of the foregoing was mailed, postage prepaid to

Mark Drygas, FFFA, Local 1324, IAFF

Patrick Cole, Deputy City Attorney

James Hayes, Mayor, City of Fairbanks

Signature

1The NLRB distinguishes between the actual filing of a civil suit and a threat to sue. The former is generally not deemed a violation while the latter is considered a violation. *See* 1 Patrick Hardin, *The Developing Labor Law* (3d ed. 1992) 136.

2We give great weight to relevant decisions of the NLRB and the federal courts. 8 AAC 97.450(b).

3*See Consolidated Edison Company Of New York, Inc.*, 286 N.L.R.B. 1031, 126 L.R.R.M. (BNA)1305 (1987) (violation found where employer's district manager threatened employee with lawsuit for filing grievances and unfair labor practice charges; and *S.E. Nichols Marcy Corp*, 229 NLRB No. 19, 95 L.R.R.M. (BNA) 1110 (1977).

4We question whether a reservation of rights was necessary, in any event, in this labor relations context.

5AS 23.40.070.