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ALASKA PUBLIC EMPLOYEES)
ASSOCIATION, AFT/AFL-CIO,)
)
Petitioner,)
)
vs.)
)
KETCHIKAN GATEWAY BOROUGH,)
)
Respondent.)
_____)

Case No. 01-1069-RC/RD.

DECISION AND ORDER NO. 259

This matter was heard on January 28 and 29, 2002, in Ketchikan, Alaska. The panel deciding this matter includes board Chair Aaron Isaacs, Jr., and members Dick Brickley and Raymond Smith.[1] Hearing Examiner Mark Torgerson presided. The record closed on August 1, 2001.

Appearances: Peter Ford, Business Agent for the Alaska Public Employees Association (APEA); Scott Brandt-Erichsen, attorney for the Ketchikan Gateway Borough (the Borough).

Digest: The petitioner has not satisfied the requirements in AS 23.40.090 and 8 AAC 97.025(b) to sever the Class I employees from the Borough's wall-to-wall collective bargaining unit currently represented by APEA. The fact that the proposed unit has different strike eligibility restrictions than other employees in the bargaining unit does not, by itself, warrant carving them out from the larger unit. Moreover, the fact that the Class I employees share a community of interest does not diminish the fact they also share a community of interest with other employees in the broader APEA bargaining unit they have belonged to for at least 27 years.

DECISION

Statement of the Case

APEA filed this petition to sever the Borough's Class I employees from APEA's wall-to-wall bargaining unit. APEA asserts that severance is necessary because the Class I employees share a strong community of interest, and the Borough is playing the unit's Class I employees against its Class II and III employees during the negotiations process.

The Borough objects to the petition. The Borough contends, among other things, that severance is not justified because the Class I employees are being adequately represented by APEA in the current bargaining unit, and unnecessary fragmenting would result if we grant severance. The Borough further contends fragmentation would not be appropriate because the Class I employees have not satisfied the requirements for severance under AS 23.40.090.

Procedure in this case is governed by 8 AAC 97.350.

Issues

1. Is the unit that APEA seeks to represent an appropriate unit under AS 23.40.090?

2. Does APEA meet the requirements for severing a bargaining unit from an existing bargaining unit under 8 AAC 97.025(b)?

Findings of Fact[2]

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

1. APEA is recognized as a labor organization under AS.23.40.250(5). The Borough is recognized as a public employer under AS 23.40.250(7).

2. APEA represents a wall-to-wall unit (APEA unit) of employees who work for the Borough. The current collective bargaining agreement between APEA and the Borough covers the period March 1, 2000, to February 28, 2003.

3. Other Borough employees who are in bargaining units belong to either the International Brotherhood of Electrical Workers; the Inlandboatmen's Union of the Pacific; or the Masters, Mates, and Pilots.

4. The APEA unit consists of a variety of positions that range from clerical and blue-collar employees to professional employees. It includes a mixed unit consisting of Class I, II, and III employees. Class I employees may not strike but are entitled to interest arbitration. Class II employees may strike for a limited period, until the health, safety, or welfare of the public is affected. Class III employees have the right to strike, subject to a vote of the unit members.[3]

5. There are approximately 11 Class I employees in the APEA unit. There are approximately 33 to 36 total employees in the APEA unit. All of the Class I employees work full-time.

6. APEA has petitioned to sever the Class I employees from its current APEA unit. The employees that APEA seeks to carve out are described as "[a]ll Non-Supervisory or Non-Confidential Class One Employees of the Ketchikan Gateway Borough. Specifically Airport Equipment Mechanic I/ARFF, Airport Equipment Mechanic II/ARFF, Airport Safety Officer I, Airport Safety Officer II, and Airport Maintenance Technician/ARFF. Employees in these classifications are employed in the Department of Transportation Services and stationed at the Ketchikan International Airport." The petition proposes to exclude all other employees in the Borough.[4] (Petition filed October 16, 2000).

7. The airport is located on an island near Ketchikan. The island is accessible by air or ferry but not by motor vehicle. The Borough operates the ferry. The Borough employees who operate and maintain the ferry are represented by the Inlandboatmen's Union of the Pacific, and the Masters, Mates and Pilots.

8. Other employees in the APEA unit also work exclusively at the airport. They include ferry toll collectors, who are Class II employees, and custodians, who are Class III employees. There are three ferry toll takers and three airport custodians in the APEA unit. All ferry toll takers work full time. Two custodians work full-time, and one works part-time.

9. An administrative secretary position, located at the airport, was originally a part of the APEA unit. However, APEA and the Borough agreed in 1997 that the position would be placed outside the bargaining unit. The position is now exempt. (Exh. 20).

10. None of the APEA unit's airport employees has any significant work-related contact with other APEA unit employees. All of the airport employees in the APEA unit work in the Borough's Transportation Services Department. This Department contains other APEA unit employees and also employees from the Inlandboatmen's Union and the Masters, Mates and Pilots.

11. The remaining APEA unit employees work in Ketchikan, on the mainland across the channel from the island.

12. There is a diversity of functions among the employees in the APEA unit. The Class I employees' duties, responsibilities, training, purpose, and working conditions in the Borough provide a community of interest among the Class I employees. Nonetheless, the Class I employees also share a community of interest with the Class II and III employees in the APEA unit. These employees include other airport workers, specifically the ferry toll takers and custodians.

13. The job skills, duties, and qualifications of the airport equipment mechanic/aircraft rescue and fire fighter, airport equipment mechanic II/aircraft rescue and fire fighter (airport mechanics) and airport equipment technicians (technicians) differ in some respects

and are similar in some respects to those of the airport safety officers I and II (ASO's).

14. Gavin Charrier is the only Class I employee who works in the position of airport mechanic II. He first started working at the airport in 1986 as a mechanic, but in 1998, his position was reclassified to mechanic II. The airport mechanics perform a variety of activities at the airport, including but not limited to snow and ice removal; airport equipment maintenance and repair, including light maintenance on the ferries; primary response to airport emergencies, including medical procedures; primary aircraft rescue and fire fighting coverage, spill containment, carpentry and electrical repair, and attendance at required training. (Exh. C, pt. I).

15. Employee Vern Ably is a Class I employee who works as an airport technician/aircraft rescue and fire fighter (technician). The technician performs duties similar to those of airport mechanics, but the technician performs less complex mechanical tasks than the airport mechanic. While an airport mechanic performs major rebuilds and overhauls of motorized equipment, for example, the airport technicians perform minor equipment repairs and assist the mechanics. (Exh. C, pt. I).

16. The airport mechanics and technicians must have a high school diploma, required experience as mechanics, and a current CPR card. They must also have (or obtain as soon as possible) forty hours of emergency medical training and certification by the State of Alaska as an Emergency Trauma Technician (ETT).

17. ASO's perform a variety of safety, law enforcement and related duties at the airport. These include but are not limited to daily inspection and patrol of airport areas; movement area safety checks; patrol for bird and wildlife hazards; operate, maintain and perform minor repairs on departmental equipment; operate and maintain communications equipment; record aircraft landing, parking and vessel docking and collect fees, investigate crimes and complaints; prepare investigative reports; perform rescue and emergency medical activities; conduct emergency response; and attend required training. They must also have a valid driver's license and a commercial driver's license. (Exh. C, pt. I).

18. ASO's must be at least 21 years old, with no felony convictions or disqualifying criminal histories. They must have a working knowledge of applicable laws, a high school diploma or GED, an Alaska Law Enforcement Training certificate, and five years of law enforcement experience. They must have or obtain 40 hours of training and be certifiable as an ETT.

19. In addition to the airport mechanics, technicians and ASO's, the Borough's Transportation Services Department also includes transit mechanics, who inspect, repair, and maintain Borough automobiles, buses and light and heavy equipment; and bus drivers, who must have a valid commercial driver's license, have knowledge of state and local traffic laws, and have the ability to operate required equipment safely, among other duties. The transit mechanics and bus drivers work in Ketchikan, not at the airport. The transit mechanics' duties, skills and qualifications are similar to those of the airport mechanics, with the exception of the airport mechanics' fire fighting duties. For many years, the airport mechanics and technicians maintained and repaired the Borough's buses. However, the transit mechanics now have responsibility for these buses.

20. The airport custodians and ferry toll takers are also included in the Transportation Services Department. The airport custodians clean and maintain airport terminal buildings and grounds. The ferry toll collectors collect fares for ferry passengers and airport parking, and assure compliance with applicable laws and travel regulations. The custodians must have a high school diploma or GED, and knowledge of current practices, procedures, and techniques used in cleaning, sanitation, and preservation of facilities. Ferry toll collectors must have basic math skills and excellent customer service skills. (Exh. C, Pt. II).

21. Emergencies occur only occasionally at the airport. When an emergency occurs, all airport employees work together.

22. Animal protection field officers and kennel attendants belong to the APEA unit. They work in the Department of Animal Protection. They are Class II employees. The animal protection building is located one mile from the Borough's main offices. The animal protection employees do not have any significant contact with other Borough employees. The field officers do contact the Borough's Planning Department and Assessment Department employees on occasion to check zoning issues or ordinances.

23. The animal protection field officers perform law enforcement functions. Among other tasks, the field officers patrol roaded areas in the Borough, answer calls for service, and "capture, detain, control and transport stray, dangerous, injured or dead animals." (Exh. C, pt. II). They also enforce animal control ordinances, issue citations, and testify in court proceedings.

24. In addition to working in the Transportation Services and Animal Protection departments, APEA employees also work in the Administrative Services, Assessment, and Planning and Community Development departments. Some of these APEA unit positions require specialized training, licensing, or education requirements. For example, the platting and zoning secretary and planning secretary must have a high school diploma and two to four years of secretarial experience. However, other positions within the APEA unit do require higher education and /or licensing. The assistant planner and community relations/code compliance planner must have specialized college degrees. Appraiser II's must possess a bachelor of arts degree in real estate, economics, business or related field with three years' appraisal experience. The experience may be substituted for two years of education.

25. The compensation of Class I employees does not distinguish them from other members of the APEA unit. They share the same salary schedule with the Class II and III employees. Class I employees and other bargaining unit members are paid on an hourly basis and share identical pay periods. All full-time employees in the APEA unit share common workweeks and overtime pay provisions.

26. The parties' collective bargaining agreement provides that all airport employees receive free ferry transportation to and from their work duties at the airport. (Exh. 8, Article 5.5).[5]

27. The parties submitted exhibits showing changes in salaries and hourly wages between 1982 and 2003. Class I employees' wages did not increase significantly more or less when compared to the increases received by other APEA unit employees.

28. Employees of the Borough are generally paid lower wages than those employees in similar positions who work for the City of Ketchikan. Similarly, the Class I employees are paid lower wages than the wages of their counterparts who work in other areas of Alaska.

29. The Class I employees' working hours are the same as those of other APEA unit employees. Under the collective bargaining agreement, all full-time employees work eight-hour days.

30. The Class I employees work shifts differ from those of most other APEA unit employees. The majority of employees in the bargaining unit work an 8:00 a.m. to 5:00 p.m. shift, with one hour off for lunch. The airport's Class I employees, along with the Class II ferry toll takers and Class III custodians (check custodians), work two consecutive eight-hour shifts at the airport. The hours of the Class I employees distinguish them from some members of wall-to-wall unit, but not others. The Class I employees work either a 5:30 a.m. to 1:30 p.m. shift one week, and then 1:00 to 9:30 p.m. shift the next week.[6] The Class II's and III's work from 6:00 a.m. until 10:00 p.m. The other employees in the bargaining unit who work a non-8:00-to-5:00 shift are the animal control and transit employees.

31. The animal control employees' shifts are 6:00 a.m. to 3:00 p.m., 8:00 a.m. to 5:00 p.m., and 1:00 p.m. to 10:00 p.m. They must also keep pagers every other week, to respond to animal protection issues after regular hours. They are paid overtime for these pager responses. The officers average six hours weekly of overtime in the winter and 10-to-12 hours in the summer.

32. Under the current collective bargaining agreement, all APEA unit employees are eligible for overtime compensation. Employees who work the second and third shifts of the day receive shift differentials, and overtime pay adjusted according to this shift differential. (Exh. 8, Article 5.7, page 9).

33. The collective bargaining agreement and position descriptions address hours of work. (Exh. 8). The agreement addresses the workweek, days of work, overtime, lunch break, and shift differential for the current bargaining unit. (See, e.g., Exh. 3, Article 7). The collective bargaining agreement does not distinguish or differentiate among job classifications regarding work hours or work shifts. However, the agreement provides that all airport employees receive a paid meal during their shift.

34. The Borough pays 100% of the premium cost of medical benefits for all eligible bargaining unit employees. All employees in the bargaining unit receive the same medical coverage. (Exh. 8, Article 13, p. 19).

35. All APEA unit members are eligible for paid time off (PTO). This benefit provides compensation paid for the time an employee is away for vacation, illness, or medical appointment, and it may not exceed 720 hours at the end of any calendar year. The PTO rules in Article 8 of the collective bargaining agreement are identical for all APEA unit employees. (Exh. 8, pages 12-14).

36. All APEA unit members are eligible for a retirement plan. (Exh. 8, Article 14, p. 20). Class I employees are covered under the State Police and Firefighters Pension Plan, which permits employees to retire with full benefits after 20 years of full-time employment. Class II and III employees participate in the State Public Employees Retirement System (PERS). The PERS plan allows these employees to retire with full benefits after 30 years of full-time employment.

37. The supervisor of the airport mechanics and technicians is the maintenance supervisor (operations supervisor) in the Transportation Services Department. The supervisor of the ASO's is the Deputy Director of Transportation Services. (Exh. C, pt. I).

38. The supervisor of the transit mechanics and the bus drivers is the transit supervisor. The Director of Transportation Services supervises the transit supervisor.

39. The supervisor of the custodians and ferry toll collectors is the airport's administrative assistant (also called administrative secretary). The administrative assistant's position is a non-represented classification and is supervised by the Borough's business

manager. (Exh. C, pt. II, Exh. C, pt. IV).

40. David Allen is the Director of the Transportation Services Department. He is an exempt, unrepresented employee. He "directly or indirectly" supervises all personnel and activities at the Airport and also the Borough's surface transportation operations, including the ferry and transit (bus) systems. Allen's supervision includes oversight of Class I, II and III employees who are exempt or who are represented by the APEA; the Masters, Mates and Pilots; and the Inlandboatmen's Union of the Pacific. Allen reports directly to the Borough Manager.

41. The director of animal protection supervises all animal protection employees. The animal control director reports directly to the Borough Manager. The other departmental directors also report to the Borough Manager.

42. There was no evidence that airport mechanics or technicians are required to wear special uniforms while working for the Borough. The only Borough employees in the APEA unit who receive uniform allowances under the collective bargaining agreement are ASO's and Class II field/facility (animal control) officers. (Exh. 8, page 37, Letter of Agreement).

43. The Class I employees are frustrated because they believe they have lost their statutory right to participate in interest arbitration. They believe the Class II and III employees in the bargaining unit would be required to strike without pay while the Class I employees continue to work, receive their salaries, and await the outcome of their interest arbitration. The Class I employees are also frustrated because they believe the Borough negotiates with the APEA unit in such a manner that it pits the Class I employees against the Class II and III employees in the unit.

44. The Borough currently negotiates with four bargaining units that represent 100 employees. Negotiating a contract with one bargaining unit currently requires approximately 600 hours of the Borough negotiating staff's time. If this petition is granted, the Borough would be required to negotiate with five bargaining units. Granting severance would add substantial additional bargaining time for the Borough's negotiators.

45. The Class I employees have been part of the Borough's wall-to-wall bargaining unit since 1975. Prior to 1985, the unit was represented by the International Brotherhood of Electrical Workers. Since 1985, APEA has represented the unit and has successfully negotiated six contracts with the Borough, although negotiations have been contentious at times.

46. There is no separate unit in Alaska that is composed of only airport mechanics/fire fighters and airport safety officers.

47. During negotiations for the 1998 collective bargaining agreement between the parties, the Borough notified APEA that it "would maintain the terms of the current contract until the outcome of interest arbitration for Class One employees. For Class Two/Three, they would maintain the terms of the current contract, but merit increases would fall from 3% to 1.2%" (Exh 21 at 2).

48. The petition did not allege that representation by APEA was inadequate.

49. The Class I employees do not receive any separate recognition in the parties' collective bargaining agreements.

50. The two Class I employees who testified, Charrier and Ably, desire to sever from the APEA unit and continue to be represented by APEA in the carved-out, Class I-only unit. Their primary reason is they believe they have lost their statutory right to participate in interest arbitration.

DISCUSSION

The issues in this case, as in other cases to sever a group of employees from an existing unit, are whether the proposed unit is appropriate under AS 23.40.090, and whether the petitioner, APEA, has satisfied the conditions of 8 AAC 97.025(b).

A. Is the unit that APEA seeks to represent an appropriate unit under AS 23.40.090?

APEA must establish by a preponderance of the evidence that the proposed Class I bargaining unit would be the unit appropriate for purposes of collective bargaining. In doing so, it must satisfy the factors in AS 23.40.090, including community of interest, wages, hours, and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees. In addition, AS 23.40.090 requires that units must be as large as is reasonable and avoid unnecessary fragmenting.

The Class I employees are appropriately placed in the wall-to-wall unit they have been a part of for 27 years. APEA provides adequate representation for the Class I employees in the existing unit.

Recently, we considered whether to grant a petition to sever a group of school nurses from the broader wall-to-wall unit they were a part of. In *Alaska Nurses Association v. Fairbanks North Star Borough School District*, Decision and Order No. 258 (January 30, 2002), we concluded that the petition to sever the nurses should be denied because, among other things, 1) unlike the National Labor Relations Act (NLRA), the Public Employment Relations Act (PERA) does not distinguish between professional and nonprofessional employees; therefore, the nurses' status as professionals is not sufficient, by itself, to grant separate unit status; 2) allowing parties to carve out professional from nonprofessional employees would cause a major restructuring of the bargaining units under the Agency's jurisdiction; 3) the nurses' share a community of interest with the larger wall-to-wall unit despite the fact they share a strong sense of community among themselves; 4) the fact the nurses are paid more or less than their counterparts in other nursing positions in Fairbanks or elsewhere does not distinguish them from other employees in their current bargaining unit; the nurses had been part of the wall-to-wall unit for 29 years, and there are no separate units of school nurses in Alaska; and 5) the proposed unit would cause unnecessary fragmentation.

Prior to Decision and Order No. 258, we had addressed whether to sever a different group of employees from a wall-to-wall unit in the Fairbanks North Star Borough School District. In *International Brotherhood of Electrical Workers vs. Fairbanks North Star Borough School District and Education Support Staff Association*, Decision and Order No. 153 (March 24, 1993), we dismissed petitions by the International Brotherhood of Electrical Workers and Teamsters Local 959 to carve two groups of employees, including mechanics and custodians, from the District's wall-to-wall unit.[7] The Board denied the petition, primarily based on its conclusions that employees in the proposed units 1) were represented adequately by the union; 2) they have not traditionally been represented by their own representatives; 3) they had a community of interest identical with that of employees in the existing unit; and 4) granting the petitions would result in unnecessary and excessive fragmentation of the existing unit.[8]

The proposed unit of Class I employees is different in a few respects from the units petitioned for in Decision and Order No. 258 and 153. For example, the Class I employees represented by APEA are prohibited from striking and they have the right to interest arbitration. In contrast, the school nurses and mechanics and custodians (discussed in the above decisions) are Class III employees who have the right to strike. In addition, the Class I employees are permitted to retire, with full benefits, after 20 years. The nurses, mechanics and custodians participated in the State's 30-year retirement program.

However, there are several similarities. Both the nurses and the Class I employees were part of their respective bargaining units for a long period of time. They share the same hours, health plans, benefits, and salary scales as other employees in their bargaining units. During the time in their respective bargaining units, their labor representative successfully negotiated several collective bargaining agreements.

We previously denied a petition to sever airport safety officers from a wall-to-wall unit in *Public Safety Employees Ass'n vs. State of Alaska*, Decision and Order No. 187 (April 24, 1995; *aff'd Public Safety Employees Ass'n vs. State of Alaska*, 3AN-95-5208 CI (Alaska Super Ct., October 14, 1996). There, PSEA petitioned to sever 10 aircraft rescue and fire fighting specialists from the State's general government unit and add them to its regularly commissioned public safety officers unit (RCPSO). This unit consisted of airport safety officers, state troopers, and various other law enforcement positions such as constable, investigator, and deputy fire marshal. The Board of the Alaska Labor Relations Agency (Agency) denied and dismissed the petition. The Board found that unlike other employees in the RCPSO, the aircraft rescue and fire-fighting specialists had no law enforcement duties. The Board found that the "GGU [to which the aircraft rescue personnel belonged] contains various job classes that share interests with the specialists, such as fire suppression, alternate work schedules, and high hazard work." Decision and Order No. 187 at 13.

The Alaska Superior Court affirmed the decision. Although the court noted that PSEA had a unit containing both airport safety officers and fire fighters, it agreed with the Agency's conclusion that the aircraft rescue personnel had more of a community of interest with other members of the GGU than with the airport safety officers. (3AN-95-5208 CI at 9-10).

In any event, after considering the evidence presented by the parties in this petition, we deny the request to carve out the Class I's from the APEA unit.

1. Community of Interest.

Although we have found that the Class I employees share a limited community of interest with each other, we also found they share a broader community of interest with the other members of the APEA unit. In weighing all the evidence on this issue, we find it favors supporting a community of interest in the current bargaining unit. The Class I's community of interest is not so distinct or dissimilar from that of the other bargaining unit employees that it warrants granting this severance petition.

Although the Class I employees share a location and work tasks that are different from the majority of other employees, these facts do not justify severance. All of the Class I employees in the APEA unit work at the airport. They are the only fire and rescue employees in the bargaining unit, and the only ASO's. However, these unique job tasks and their work location do not support, by themselves, severance of the Class I's from the broader unit. Other borough employees could also point out their unique duties and location. For

example, the animal control employees' specific duties are clearly unique because they oversee the animal protection responsibilities for the entire Borough. They have little contact with other Borough employees, and their location is away from all other Borough employees. However, they share a general law enforcement interest with the ASO's. In that regard, the animal control officers share a community of interest with the ASO's, unlike the airport mechanics and technicians who do not share the law enforcement interest with the ASO's.

The airport's Class II ferry toll takers and Class III custodians share both work location (the airport) and department (Transportation Services Department) with the Class I's, but they do not share much else regarding their work. There was testimony that all airport employees work together in the event of an emergency, but emergencies are rare there.

In any case, if we were to begin allowing parties to carve out some employees from a unit because they work at an airport and have little contact with other airport or non-airport employees in the bargaining unit, there would be justification to sever all airport employees at not only the Borough but at any airport under our jurisdiction.[9] This would result in a major restructuring of other similar public employee bargaining units under our jurisdiction.

The fact that the airport is accessible primarily by ferry does not distinguish it significantly from other airports in the state. In our experience, airports are separated to some degree or other from the primary business areas of towns and cities. This physical separation, whether by land or water, should not by itself justify severing some employees who work there from the remaining members in the bargaining unit who do not work there. For that matter, it does not justify separating the class I employees who work at the airport from their bargaining unit colleagues (the Class II and III employees) who also work there. Moreover, testimony at hearing acknowledged that by and large, airport security and fire fighting employees located in other Alaska localities are included in bargaining units with other employees, rather than separated from them.

For these reasons, we reject APEA's assertion that we should consider granting its petition based upon the Class I employees' status as airport employees isolated from other members of the bargaining unit.

Frequency of contact with other Class I's or other bargaining unit employees does not support severance. The technicians and mechanics have frequent contact with each other, but there was no evidence they had more frequent contact with the ASO's than with other bargaining unit employees.

The supervisory structure of the bargaining unit does not support severance. The Class I employees share common supervision (via David Allen) with many other Borough employees, including Class II and III employees both at the airport and on the mainland in Ketchikan.

Departmental lines do not support severance. The Class I's belong to the Transportation Services Department, along with many other bargaining unit employees.

Licensing and training requirements do not support severance. Although the Class I's require a substantial amount of fire and rescue training and law enforcement training (ASO's), other bargaining unit employees also have special requirements. Other positions that require ongoing training and specific certifications include but are not limited to assessment staff; maintenance tech I's and II's, and transit drivers.

Weighing all the evidence on community of interest, we find that this evidence supports the existing bargaining unit structure.

2. Wages.

The evidence in the record indicates that the Class I employees are paid under the same wage scale as other employees in the bargaining unit. APEA argues, however, that the Class I employees are underpaid when their wages are compared to other fire fighters and safety officers at other airports in Alaska. We disagree that this factor somehow supports severing the Class I employees from other members of the wall-to-wall unit. The Class I employees' wages do not differ from wages of other wall-to-wall employees in material ways. We find the evidence on wages does not support severing the Class I employees from the wall-to-wall unit.

Further, the fact that the Class I employees are paid more or less than their counterparts in other Alaska locations does not distinguish them from other employees in their current bargaining unit for purposes of determining the outcome of a severance petition. All job classifications in the wall-to-wall unit could conceivably make this same argument in an attempt to sever from the unit.

The wages of all employees in the wall-to-wall unit are governed by the collective bargaining agreement with the Borough. Class I employees are paid at an hourly rate, the same as all other wall-to-wall employees. We could not find any wage evidence that distinguishes the Class I employees from other employees in the bargaining unit.

Class I employees share the same overtime eligibility and shift rules, and they have the same pay periods and health benefits as other APEA unit employees. They do have a 20-year retirement program instead of a 30-year program that Class II and III employees have. However, we do not find this factor alone significant. Weighing all the evidence on wages, the evidence favors the status quo.

3. Hours.

All employees in the existing bargaining unit are paid on an hourly basis and work an 8-hour day. The parties' collective bargaining agreement also provides for overtime pay. We conclude that this factor supports the existing bargaining unit structure.

4. Other working conditions.

The working conditions of the Class I employees and other bargaining unit employees support the status quo. Unlike other APEA unit employees, the Class I employees are prohibited from striking. There are several Class II employees in the APEA unit, and they have the right to strike for a limited period depending on their strike's effect on the public's health, safety, or welfare. AS 23.40.200(b). The remaining unit employees, Class III employees, have the right to strike under AS 23.40.200(d). The fact that the Class I's have no right to strike while other bargaining unit employees may strike does not support carving them out of the current unit.

However, APEA contends that the Class I's are in a mixed bargaining unit, and this status has effectively caused the Class I's to lose their statutory right to interest arbitration. They argue that the Borough effectively excludes Class I employees from arbitration when it states that if the Class I employees prevail in arbitration, there will not be enough money remaining to provide the raises offered to Class II and III employees.

However, a statement of this nature is not the same as a refusal to enter into interest arbitration. If the Borough truly denied the Class I employees the right to interest arbitration, it could be cause for concern. But we did not find a preponderance of evidence in the record supporting such a result. There was no documentation or testimony that the Borough or its negotiators specifically or impliedly denied the Class I's their right to submit a disagreement to arbitration under AS 23.40.200.

There are other mixed bargaining units under PERA. The various classes of employees in these mixed units have coexisted successfully. The Alaska Supreme Court has discussed arbitration rights in mixed bargaining units.

In *Alaska Public Employees Association v. City of Fairbanks*, 753 P. 2d 725 (1988), the court was asked whether the City of Fairbanks should be required to arbitrate with all municipal employees in APEA's mixed bargaining unit[10] at the City of Fairbanks, despite the fact that only Class I employees have the statutory right under PERA to compulsory binding arbitration upon a finding of impasse. The court declined to do so. In its opinion, the court found AS 23.40.200 extended compulsory arbitration rights only to employees who are forbidden from striking.[11] It held that the City of Fairbanks was only required to arbitrate with Class I employees. Thus, the supreme court recognized the existence of mixed bargaining units and the statutory right of Class I employees to compulsory arbitration. It held that AS 23.40.200 does not provide arbitration rights for all employees in a mixed bargaining unit.[12]

The Alaska Supreme Court has also addressed the rights of employees in a mixed bargaining unit consisting of Class II and Class III employees. In *Alaska Public Employees Ass'n v. State of Alaska*, 776 P. 2d 1030 (Alaska 1989), the supreme court discussed when Class II and III employees are deemed at impasse for purposes of exercising their right to strike. The court held that for Class II employees, impasse occurs when the parties reach impasse and the mediation process is exhausted. 776 P.2d at 1033.

The Court did not address arbitration issues regarding Class I employees. However, Class I employees must be provided the right to arbitration. If an employer implements a collective bargaining agreement before the Class I employees have the opportunity to complete the arbitration process, the employer would commit an unfair labor practice violation.

Here, we find severance is not justified here based on APEA's assertion that the Borough effectively denied the Class I's their right to interest arbitration under AS 23.40.200. It appears from the record that APEA chose to have employees vote on the Borough's proposals without submitting the Class I issues to arbitration. APEA may have felt it was the best choice at the time. However, it could have submitted the Class I issues to arbitration, and then decided upon further action (such as a strike or contract vote) after the completion of the arbitration. The fact that APEA decided to forego arbitration for the Class I's and instead pursued other avenues of negotiation does not require severance of the Class I employees from the unit. The labor organization's decision to arbitrate, or not, for the employees in the bargaining unit who have the right to arbitrate, is not a factor to consider in determining a severance petition. We have found no case or decision supporting such a proposition.[13]

5. History of collective bargaining.

The history of collective bargaining supports the status quo. The Class I employees have been part of the wall-to-wall bargaining unit

since 1975. This unit has been represented by APEA since 1985. The bargaining unit has successfully negotiated several collective bargaining agreements during this period. The airport employees had a representative at the bargaining table during these negotiations, and the representative has often been a Class I employee.

There are no separate units for Class I employees in Alaska. Class I airport employees such as the mechanics, fire fighters, and airport safety officers, are part of larger mixed bargaining units in other areas of Alaska. The history of collective bargaining in the unit currently represented by APEA, and the history of collective bargaining for similar employees elsewhere in Alaska supports keeping the Class I employees in the current APEA unit.

6. Desires of the employees.

Those Class I employees who testified specifically expressed their desire to sever from the APEA unit but to still be represented by APEA. There was no contrary testimony. This factor supports granting the petition.

7. Unit size and fragmentation.

Units must be as large as is reasonable and must avoid unnecessary fragmenting. AS 23.40.090. Based on a preponderance of the evidence, we conclude that the proposed unit would cause unnecessary fragmentation.

The APEA unit is a relatively small, wall-to-wall unit containing between 33 and 36 employees. The Class I employees total approximately 1/3 of the unit. The evidence shows that APEA has represented the Class I employees in the Borough for 17 years. APEA's representation of the Class I employees has been adequate.[14]

APEA and the Borough have developed a stable -- albeit contentious -- bargaining relationship over a long period. If severance were granted to the Class I employees, the broader APEA unit would lose an active and articulate group of employees who enhance the quality of the current bargaining unit. Severance could have a negative effect on the remaining unit employees and on the stability of the APEA unit's relationship with the Borough.

Moreover, in determining whether to fragment an established unit, we must consider the effect of severance on the employer. The Borough expressed concern that carving out the Class I employees would require hundreds of hours of additional negotiating time and expense. We find the concern warranted. The undisputed evidence indicates it would take significant additional time for the Borough's negotiators to bargain another contract.

In addition, there is the possibility of more petitions to carve out in the event the Class I's are successful. We have previously stated: "This Agency and its predecessor have been reluctant in the past to create new bargaining units, fearing a proliferation of units." *See Public Safety Employees Association vs. State of Alaska, Department of Corrections*, Decision and Order No. 211, at 19 (January 16, 1997). In *Public Safety Supervisory Association vs. State of Alaska*, Decision and Order No. 188 (May 25, 1995), aff'd in *Public Safety Supervisors Ass'n vs. State of Alaska*, 3AN 95-6653 CI (January 22, 1997), we denied a severance petition by trooper supervisors in part because it could promote excessive fragmentation. (Decision and Order No. 188, at 24). In affirming this decision, the Alaska Superior court stated: "There was compelling testimony about the overburdening of the State with so many units and negotiations lasting years. . . There was . . . credible testimony from the State as to the increased burden in labor negotiations with more units. 3AN 95-6653 CI, at 8.[15] New Jersey's Superior Court has uttered similar concerns. In *State v. Professional Ass'n of N.J. Dep't of Educ.*, 64 N.J. 231, 250 (1974)[16] the court affirmed the denial of an application by New Jersey's state registered nurse employees to seek their own bargaining unit. The court reasoned that it was in the public interest to "avoid undue fragmentation of negotiating units in the public sector" since the State of New Jersey may more effectively make negotiating decisions when the unit is large rather than small.

Generally, this Agency gives great weight to relevant decisions of the NLRB and federal courts. 8 AAC 97.450(b). However, we have departed from that practice where there are significant differences between the federal law and PERA.[17] We do so here. Unlike the NLRA, PERA specifically requires us to consider if unnecessary fragmentation would result if we granted a petition to carve out a group of employees.[18] Clearly, there would be more fragmentation if we granted APEA's petition. The question is whether this fragmentation is unnecessary. We find that the evidence supports a conclusion that fragmentation is unnecessary and should be avoided.

This Agency and its predecessors have seldom granted severance petitions. One example of an exception is *Public Safety Employees Association v. State of Alaska, Department of Corrections*, Decision and Order No. 211 (January 16, 1997). We found a separate bargaining unit of correctional officers would not result in excessive fragmentation because the employer and union representing the State's general government unit were already negotiating separately for the correctional officers. Despite assertions by APEA, we do not find any evidence that the Class I employees were separated from the unit's Class II and III employees during

the negotiations process with the Borough.

Furthermore, we found several other factors that justified granting severance in Decision and Order No. 211. Among them were: the correctional officers worked 40-hour week instead of the 37.5 hours most other employees worked; they worked a week on and week off schedule, consisting of seven 12-hour workdays during the week worked, instead of five 7.5 hour days; they had a different retirement plan; they were paid for lunch breaks whereas other GGU employees were not; and they had a pay scale separate from other employees. The correctional officers also maintained a separate identity within the general government unit. Finally, correctional officers were Class I employees for strike purposes. They therefore were prohibited from striking, in contrast to most other GGU employees who were eligible to strike by virtue of their class III status. The correctional officers also had a national tradition of separate representation.

In summary, we conclude that the Class I employees have failed to prove by a preponderance of the evidence that unnecessary fragmentation would be avoided if this petition is granted, or that the existing unit is unreasonable or inappropriate. While there may be other circumstances or petitions that establish the necessity of fragmentation, the evidence in this case shows that allowing the Class I employees to carve out would result in unnecessary fragmentation.

B. Does the proposed unit of Class I employees meet the requirements for severing a bargaining unit from an existing bargaining unit under 8 AAC 97.025(b)?

If APEA had established that the proposed unit was an appropriate unit, because it seeks to sever a group of employees from an existing unit, it would also have to satisfy the requirements of 8 AAC 97.025(b):

In addition to the requirements of (a) of this section, if a petition for certification proposes to sever a bargaining unit from an existing bargaining unit, the petition must state:

(1) why the employees in the proposed bargaining unit are not receiving adequate representation in the existing unit;

(2) whether the employees in the proposed bargaining unit are employed in jobs that have traditionally been represented in the same unit;

(3) why the employees in the proposed unit have a community of interest that is not identical with that of the employees in the existing unit;

(4) how long the employees in the proposed bargaining unit have been represented as part of the existing unit; and

(5) why the grant of the petition will not result in excessive fragmentation of the existing bargaining unit.

We address each of these factors below.

1. Adequacy of representation.

As we have stated above, the Class I employees are frustrated with their current bargaining unit, particularly with the mixed nature of the unit. However, they did not complain that APEA represented them inadequately. In fact, APEA would represent them in the separate unit they seek. The evidence supports a finding that APEA's representation has been adequate.

2. Tradition of representation in the same unit.

Generally, in Alaska there is a tradition of representation of airport safety officers and airport mechanics/fire fighters in broader, wall-to-wall type bargaining units, and not as separate units. The Class I employees have been represented by either APEA or the IBEW in the same wall-to-wall bargaining unit since 1975.

3. Community of interest.

See discussion in section A, above.

4. Bargaining history.

See discussion in section A, above. The existing unit has a long history of bargaining with the Borough, and this unit has included the Class I employees since 1975. Although negotiations have been contentious at times, the parties have successfully negotiated several contracts since APEA became the representative for the Class I, II and III employees in the wall-to-wall unit.

5. Excessive fragmentation.

See discussion in section A, above. Granting APEA's petition would create unnecessary fragmentation.

6. Mallinckrodt Chemical Works.

This Agency also takes into account the factors the National Labor Relations Board considers in craft severance cases under *Mallinckrodt Chemical Works*, 162 N.L.R.B. No. 48, 64 L.R.R.M.(BNA) 1011, 1016 (1966). *RPM v. State*, Decision and Order No. 216, at 21 (Feb. 19, 1997). The evidence did not establish that the Class I employees are a distinct and homogenous craft.

CONCLUSIONS OF LAW

1. The Alaska Public Employees Association is an organization under AS 23.40.250(5). The Ketchikan Gateway Borough is a public employer under AS 23.40.250(7). This Agency has jurisdiction under AS 23.40.090 and AS 23.40.100 to consider this case.

2. As the petitioner, the Alaska Public Employees Association has the burden to prove each element of its claim by a preponderance of the evidence. 8 AAC 97.350(f).

3. Based on the factors in AS 23.40.090, such 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, we conclude on balance that the existing bargaining unit of wall-to-wall employees in the Borough is the appropriate unit for the Class I employees.

4. 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, a bargaining unit composed solely of Class I Borough employees is not an appropriate unit.

5. Creating a separate bargaining unit of Class I employees would result in excessive fragmentation at the Borough. The current APEA wall-to-wall unit is as large as is reasonable and avoids unnecessary fragmenting. Severing the Class I employees from the current bargaining unit represented by the APEA will result in excessive or unnecessary fragmentation.

6. The Alaska Public Employees Association has not satisfied the requirements in 8 AAC 97.025(b) to sever the Class I employees from the wall-to-wall unit it currently represents.

7. The Alaska Public Employees Association has not established, by a preponderance of the evidence, the requirements needed to sever a group of employees from an existing bargaining unit and has not established that such a group, if so severed, would be an appropriate bargaining unit under AS 23.40.090.

ORDER

1. The petition of the Alaska Public Employees Association to sever Class I employees from the broader APEA wall-to-wall bargaining unit at the Ketchikan Gateway Borough and represent them separately in bargaining is DENIED and DISMISSED.

2. The Ketchikan Gateway Borough 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

_____

Aaron Isaacs, Jr., Chair

_____

Raymond Smith, Board Member

_____

Dick Brickley, 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 *Alaska Public Employees Association, Petitioner, v. Ketchikan Gateway Borough, Respondent,* Case No. 01-1069-RC/RD, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 28th day of June, 2002.

_____

Margie Yadlosky

Personnel Specialist

This is to certify that on the 28th day of June, 2002, a

true and correct copy of the foregoing was mailed,

postage prepaid to

Pete Ford, Alaska Public Employees Association

Scott Brandt-Erichsen, Ketchikan Gateway Borough

_____

Signature

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[1] Under 8 AAC 97.370, the panel appointed the Hearing Examiner to hear the case alone and prepare a proposed decision. In accordance with 8 AAC 97.440, the proposed decision and order, the case record, and the hearing tapes were transferred to panel members for review under 8 AAC 97.450.

[2] The parties filed a stipulation of facts. We accept the stipulation and include it in the record of this decision.

[3] See AS 23.40.200. The statute lists the strike classes in AS 23.40.(a)(1), (a)(2), and (a)(3). For simplicity, and in accordance with the designations used by the Alaska Supreme Court in *State v. Public Safety Employees Ass'n*, 798 P.2d 1281 (Alaska 1990), we identify them as Classes I, II, and III.

[4] At the beginning of the hearing, APEA suggested we should consider adding other bargaining unit employees into the unit it proposes to sever from the wall-to-wall unit. This petition is based on APEA's petition and the proposed unit described in that petition.

[5] This provision was contained in Article 5.4 of the prior collective bargaining agreements, including the IBEW contracts. See Exhibits 1 - 7.

[6] David Allen testified there is a 1/2 hour overlap between the first and second shifts.

[7] The IBEW petitioned to sever various mechanics, carpenters, a warehouseman and other employees. The Teamsters petitioned to carve out custodians from the unit. *See* Decision and Order No. 153, at 26 for citations to severance decisions of the former State Labor Relations Agency.

[8] *Id*. at 28. Board member James Elliot dissented in Decision and Order No. 153.

[9] New Jersey's Public Employment Relations Commission "has been reluctant to approve small units, organized by a single title or department, where the employer objects to such a proposed unit." It expressed concern that these so-called "splinter units" could result in "multiple, fragmented units, creating the potential for competing demands . . . ." *In the Matter of Kearney Board of Education*, 27 NJPER P 32030 (December 29, 2000).

The New Jersey PERC further noted that it had "long favored negotiations units structured along broad-based, functional lines" and was "reluctant to approve units organized along narrow lines such as those structured along occupational, departmental or geographic lines."

[10] A mixed bargaining unit is one that contains employees of various strike classes. Under PERA, there are three strike classes. Class I employees (those described in AS 23.40.200(a)(1)) may not strike under any circumstances. Class II employees (AS 23.40.200(a)(2)) may strike for a limited period, and Class III employees (ASD 23.,40.200(a)(3)) have the right to strike after a majority of the bargaining unit employees vote to strike. The APEA unit comprised employees from all three classes.

[11] The court did point out in a footnote that Class II employees also have arbitration rights under certain specific circumstances.

[12] *Compare International Ass'n of Firefighters, Local 413*, 14 Pub. Employee Rep. for Illinois P 2030 (July 22, 1998). There, the Illinois State Labor Relations Board held that the collective strength and unity of a bargaining unit could be undermined if a predominantly police and fire unit with a small number of strike-eligible employees would be required to resort to different impasse resolution mechanisms to resolve their collective bargaining disputes. It ordered all employees in the mixed unit (including the strike-eligible employees) to participate in interest arbitration.

[13] Ohio's statutes prohibit mixing units of employees, some of whom may strike and some who are prohibited from striking, unless employees in each of the separate types of units vote to combine. New Jersey's Public Employment Relations Commission has held that mixing a unit of employees who may strike with a group prohibited from striking is appropriate. *In the matters of State of New Jersey*, 12 New Jersey Pub. Employee Rep. P 17081 (February 20, 1986) (presumption that firefighters represented in a mixed unit should be severed was rebutted where evidence showed that their interests were adequately represented by the union.)

[14] None of the witnesses questioned the adequacy of APEA's representation of the wall-to-wall unit.

[15] *Compare Placer Hills Union Elementary School District*, 8 Pub. Employee Rep. for California 15013 (1983), where the California Board held that testimony regarding cost of negotiations was speculative where there had never been another classified unit in the school district.

[16] Cited in *In the Matter of Ocean County Sheriff*, 26 NJPER 31067 (March 14, 2000).

[17] *See* discussion in *Public Safety Employees Ass'n v. State of Alaska*, Decision and Order No. 233, at 29-30 (November 24, 1997).

[18] Although there is no statutory provision addressing fragmentation of units, Congress and the federal courts have expressed a desire to avoid undue proliferation of bargaining units in the health care industry. *See St. Catherine's Hospital of Dominican Sisters of Kenosha, Wisconsin, Inc.*, 217 N.L.R.B 787, 89 L.R.R.M. (BNA) 1070 (1975); *Crittenton Hospital*, 328 N.L.R.B. No. 120, 162 L.R.R.M. (BNA) 1022 (1999); and *California PacificMedical Center v. National Labor Relations Board*, 87 F.3d 304, 152 L.R.R.M. (BNA) 2593 (9th Cir. 1996).