

ALASKA LABOR RELATIONS AGENCY
3301 EAGLE STREET, SUITE 206
ANCHORAGE, ALASKA 99503
(907) 269-4895 FAX (907) 269-4898

ALASKA STATE EMPLOYEES ASSOCIATION,)
AFSCME LOCAL 52, AFL-CIO,)
)
Petitioner,)
)
vs.)
)
CITY OF BETHEL,)
)
Respondent.)
)

CASE NO. 15-1666-RC

DECISION AND ORDER NO. 307

We heard this representation petition on October 27 and 28, 2015 in Anchorage. The parties subsequently filed written closing arguments. The record closed on January 14, 2016 after completion of final deliberations.

Digest: The Bethel City Manager is the highest ranking executive officer at the City of Bethel, under 8 AAC 97.990(b). The positions of Chief of Police, Fire Chief, Information Technology Director, Public Works Director, Port Director, and Planning Director are “appointed officials” and therefore do not meet the definition of “public employee” under AS 23.40.2540(6) and 8 AAC 97.990(b). The position of Assistant Finance Director does meet these definitions and is therefore a public employee. The position of Parks and Recreation Director does not currently exist at the City. The petition is dismissed.

Appearances: J. Michael Robbins, attorney for complainant Alaska State Employees Association; Robert Stewart, attorney for the City of Bethel.

Board Panel: Gary P. Bader, Chair; Will Askren and Matthew R. McSorley, Board Members.

DECISION

Statement of the Case

The Alaska State Employees Association (ASEA) filed a petition to represent eight employees who work at the City of Bethel (City) (March 31, 2015 petition). The City objected to the composition of the unit, contending that the positions in the unit are either “appointed officials” under the Public Employment Relations Act, are not city employees, or have a greater community of interest with other city employees in a bargaining unit currently represented by another union.

Issues

1. Is the Mayor or the City Manager the “highest ranking executive officer” of the City of Bethel, under 8 AAC 97.990(b)(2)?
2. Are the eight employees in the proposed bargaining unit “appointed officials” under AS 23.40.250(6) and 8 AAC 97.990(b)(2)?

Findings of Fact

1. The Alaska State Employees Association (ASEA) seeks to represent a proposed bargaining unit of eight employees who work at the City of Bethel (City).
2. The positions in the proposed unit include the Chief of Police, Fire Chief, Information Technology Director, Public Works Director, Port Director, Planning Director, Assistant Finance Director, and Parks and Recreation Director.
3. The positions in the proposed unit are appointed (or hired) by the Bethel city manager. Bethel Municipal Code (BMC) provides that “[t]he city manager, as the chief administrative officer, is responsible for the proper administration of all city affairs. (BMC section 2.21.050). Under Bethel Municipal Code, the city manager also appoints “city employees and administrative officers.” (BMC § 2.21.050A).
4. The Bethel City Manager has broad authority and responsibility in the operation of City affairs. Bethel Municipal Code section 3.08.030 outlines a number of the City Manager’s authority and responsibilities and provides in part: “The city manager shall have overall authority and responsibility for labor relations and personnel administration concerning city service. The city manager is designated as the personnel director and the director of the personnel office. In addition to the responsibilities specified elsewhere in these rules, the city manager shall:

A. Advise the officials of the city on all matters pertaining to the administration of personnel and ensure that personnel rules and related contractual obligations are observed by all concerned. In this capacity, the city manager has final responsibility for interpretation and enforcement of the rules;

.....

D. Advise and assist all supervisors in the interpretation and application of all employee relations matters;

E. Develop and maintain classification and pay plans;

F. Direct the operation of recruitment, employment and promotion programs and assure equal employment opportunity in these areas;

.....

L. Direct the labor relations functions of the city.

5. The administrative action chain in the City “is the employee’s immediate supervisor, the department head and finally the city manager.” (BMC § 3.08.050).

6. Bethel Municipal Code provides that the city manager appoints department heads, including the fire chief, chief of police, port director, public works director, parks and recreation director, and the director of finance.¹ The city manager also appoints the city planner and IT director, although there are no specific provisions for these hires in the Bethel Municipal Code. (See Exhibit N).

7. The City’s Mayor has limited authority. Lori Strickler has been the Bethel City Clerk for eight years. She works closely with administrative staff, including the city manager, city attorney, and department directors. She is familiar with the Bethel Municipal Code. She likened the City Manager’s responsibilities to those of a chief executive officer. She confirmed that the City’s Mayor does not have those same responsibilities.

8. The Mayor is a City Council member who is elected to the position of Mayor by the other City Council members. The Mayor does not generally have authority over city management affairs, including hiring, labor relations, or personnel matters. Those responsibilities are assigned to the City Manager. Alaska Statute 29.20.320 authorizes the Mayor (like any other Alaska mayor) to appoint members of boards and commissions. This same statute provides that the City Council confirms the Mayor’s appointments. The Mayor also runs City Council meetings.

9. The parks and recreation director position was previously funded jointly by the City and the University of Alaska Fairbanks (UAF). The position was titled “4H and Youth Development Program Director in the parties’ contractual agreement.” (Exhibit S at 1). In fiscal year 2014 (July 1, 2013 through June 30, 2014), the parties shared equally in the hiring of this director. In addition, the parties’ staffing agreement stated that the position was supervised

¹ See BMC §§ 2.16.020 (fire chief); 2.20.010 (chief of police); 2.18.030A (port director); 2.22.030A (public works director); 2.23.030A (parks and recreation director); and 2.125.030A (director of finance).

“according to UA Policy, but will occur with the advisement and consultation of the City.” (Exhibit S at 2).

10. The parties signed another “4-H Agreement” on October 5, 2015. In this agreement, the City contributes a sum of money to UAF “for the operation of the 4-H Program as UAF deems appropriate[.]” (Exhibit T at 1). However, in contrast to the fiscal year 2014 agreement, UAF has assumed responsibility to “[p]rovide all personnel to manage the program.” (Exhibit T at 1). Moreover, the City relinquished all “authority, control, or oversight of any of the programs or activities at the Teen Center and takes no responsibility whatsoever for any of UAF’s activities or personnel.” (Exhibit T at 2). City Attorney Patty Burley confirmed that UAF has complete control over hiring, hours, and oversight of the position and the program. Burley added that the City does not plan to refund the program because it could give rise to liability under the Public Employees Retirement System (PERS).

11. Lori Strickler confirmed that the City no longer funds a parks and recreation director position, although it is still “on the books” as an unfunded position. (Lori Strickler testimony). Public works now has oversight of parks and recreation activities. (Lori Strickler testimony).

12. The City’s Directors have authority over hiring, promotion, demotions and disciplinary actions. (Exhibits O, P, V, and AB. *See also*, e.g., BMC § 2.22.030B; testimony of Laura Cloward, Human Resource Manager). Chief of Police Andre Achee has 26 years of experience with the City. He testified that his hiring and firing recommendations have been supported “99.9% of the time.”

13. Department directors manage their department schedules. (Testimony of Laura Cloward, Human Resource Manager).

14. Demonstrative Exhibit AF² illustrates various aspects of the City’s director and other managerial positions. Under the Bethel Municipal Code, the Bethel City Council appoints (hires) and must approve the hiring of the City Manager, City Attorney, and City Clerk. The City Manager appoints the Finance Director and Chief of Police, and these positions must be approved (confirmed) by the City Council.

15. Of the eight positions in the proposed unit, the City Manager appoints (hires) six: the Chief of Police, Fire Chief, Information Technology (IT) Director, Public Works Director, Port Director, and Planning Director. Each reports directly to, and is supervised by the City Manager. Of the remaining two positions, the Assistant Finance Director is hired by the Finance Director, and there is no longer a Parks and Recreation Director. (Demonstrative Exhibit AF; testimony of Lori Strickler).

² Contrary to the City’s assertion in its brief, this demonstrative exhibit was indeed marked and labeled as Exhibit AF during the hearing, on October 27, 2015 at 4:30 p.m. City Clerk Lori Strickler testified that this exhibit was true and correct.

16. The Assistant Finance Director substitutes for the Finance Director in the Finance Director's absence. Like other assistant directors who work at the City, the Assistant Finance Director has no hiring, firing, or disciplining authority. (Lori Strickler testimony). This position performs duties as directed by the Finance Director. (Exhibit Y at 1).

Analysis

1. Is the Mayor or the City Manager the "highest ranking executive officer" of the City of Bethel, under 8 AAC 97.990(b)(2)?

AS 23.40.250(6) defines who is a "public employee" under Alaska's Public Employment Relations Act: "[P]ublic employee" means any employee of a public employer, whether or not in the classified service of the public employer, *except elected or appointed officials* or superintendents of schools[.] (italicized emphasis added).

Agency regulation 8 AAC 97.990(b) provides further detail on "appointed officials." It provides:

In AS 23.40.250 "appointed officials" includes

- (1) at the state level, only persons appointed directly by the governor;
- (2) at the political subdivision level, only those persons appointed directly by the highest ranking executive officer of an organized borough or other political subdivision.³

ASEA argues that the Mayor is the City's highest ranking executive officer. (ASEA Closing Argument at 2). ASEA contends that the proof of the Mayor's executive officer status is in the Mayor's authority to appoint members of the City's boards and commissions. ASEA asserts:

The highest ranking executive officer of the City of Bethel is the mayor. As such, members of boards and commissions are appointed by the mayor and confirmed by the governing body. According to Bethel municipal ordinance [sic], "appointed official" means a board or commission member appointed by the mayor subject to city council approval. Consistent with the Alaska Municipal law, the City of Bethel adopted an ordinance that applies to all appointed bodies whose members are appointed by the mayor and confirmed by the Council. None of these appointed officials is included in Petitioner ASEA's proposed Bargaining Unit. Therefore, the assertion by Respondent City of Bethel that any of the eight employees are appointed by the mayor is unsupported by the evidence. Unless the Mayor of Bethel makes the appointment, no city employee meets the legal definition of "appointed official."

³ In this case, we find the City of Bethel is a political subdivision under 8 AAC 97.990(b)(2).

(ASEA Closing Argument at 2) (Footnotes omitted; capital letters in original).

The City argues that the City Manager, and not the Mayor, is the highest ranking executive officer in the City. (City Post-Hearing Brief at 2-3). We agree with the City.

The evidence in this record shows that the Mayor has limited authority over City operations. The Mayor chairs City Council meetings and appoints residents to boards and commissions. Other than these tasks, it appears that the Mayor has no more authority than any other City Council Member.

The Bethel Municipal Code gives the City Manager broad oversight authority to run the City's affairs. Moreover, testimony at hearing and the Bethel Municipal Code support a finding showing that the City Manager runs the day-to-day affairs of the City and possesses extensive administrative and executive authority to do so. For all intents and purposes, with limited exceptions, the buck stops at the City Manager's desk. The City Manager is hired by the City Council and is answerable to the City Council, but the City Manager possesses widespread authority to make the decisions that keep the City running on a day-to-day basis. The Mayor, on the other hand, is more of a figurehead and does not oversee the daily operations of the City.

We note that under the State of Alaska's regulations regarding personnel rules, "principal executive officer" is defined as "the highest ranking administrative officer of each principal office and department of the state" (*See* 2 AAC 07.999(28)). We find, by analogy, that the Bethel City Manager, as chief administrative officer under Bethel Municipal Code, is also its highest ranking executive officer⁴ under regulation 8 AAC 97.990(b).

ASEA asserts that five of the positions in the proposed bargaining unit are similar in many respects to positions in a bargaining unit represented by the Fairbanks North Star Borough. ASEA contends that this shows a community of interest among these employees. Further, ASEA contends that there were seven managerial employees on the Fairbanks North Star Borough bargaining unit's team, and they were not precluded from having representation. Finally, ASEA argues dealing in confidential matters does not preclude employees from joining a bargaining unit.

The City argues that the Fairbanks North Star Borough is a strong mayor form of government, unlike the City of Bethel. The City also contends that the job descriptions of the employees in the proposed unit are "consistent with the conclusion that each of them are 'appointed officials' exempt from PERA." (City Post-Hearing Brief at 7). The City provided

⁴ We also note that Encarta Dictionaries defines "chief executive officer" as "the highest-ranking executive officer within a company or corporation, who has responsibility for overall management of its day-to-day affairs under the supervision of a board of directors." The Bethel City Manager also fits this definition: the City Manager manages the City's day-to-day affairs and is supervised by the City Council. The Mayor does not fit this definition.

testimony and gave examples of duties that should exempt the employees, including hiring, firing, disciplinary actions, granting merit increases, preparing budgets, establishing labor relations, and so forth. (Post-Hearing Brief at 7-10; testimony of Lori Strickler and Laura Cloward).

We agree with ASEA that these factors alone do not determine status as a “public employee” or “appointed official” under AS 23.40.250(6) and 8 AAC 97.990(b). There are several bargaining units, both at the local and state level, that include employees who perform the above duties. Although there are separate confidential and supervisory units at the state level, some political subdivisions have mixed bargaining units that include supervisory and non-supervisory employees.⁵ (See e.g., *Public Safety Employees Association, AFSCME Local 803, AFL-CIO vs. City of Wasilla*, and *General Teamsters Local 959 v. City of Wasilla*, Decision and Order No. 286 (June 3, 2008). Determining status as a “public employee” and exempt “appointed official” is specific to the facts of each case.

2. Are the eight employees in the proposed bargaining unit “appointed officials” under AS 23.40.250(6) and 8 AAC 97.990(b)(2)?

We have concluded in this case that, under our regulation 8 AAC 97.990(b)(2), the Bethel City Manager, and not the Mayor, is the highest ranking executive officer at the City. We must next determine whether any or all of the eight employees in the proposed bargaining unit are “appointed directly” by the City Manager and therefore not public employees under the Public Employment Relations Act (PERA).

ASEA argues, among other things, that the eight employees in the proposed unit are entitled to representation. As noted above, ASEA maintains that the eight employees are not “appointed officials” because the Mayor does not appoint them to their positions.

We find under the facts of this case that the Parks and Recreations Director position is an unfunded position and, for all intents and purposes, does not currently exist at the City. We further find that the Assistant Finance Director is not hired or appointed directly by the City Manager and does not possess the same responsibilities or appointment status as the remaining six employees. We conclude that the position of Assistant Finance Director is a public employee under AS 23.40.250(6).

However, we conclude that none of the remaining six employees in the proposed unit is a public employee under AS 23.40.250(6). Each is appointed or hired directly by the highest ranking executive officer at the City, the City Manager. Each reports directly to the City Manager. Each is therefore exempt from collective bargaining under AS 23.40.250(6) and 8 AAC 97.990(b).

⁵ We take administrative notice that some members of the Confidential Employees Association negotiate collective bargaining agreements on behalf of their employer, the State of Alaska.

Finally, we address the City's assertion that the City possesses authority to self-determine which of its employees possess the status of "appointed officials" under PERA. According to the City, this self-determining authority stems from Article X of the Alaska Constitution and the "broad local power . . . reiterated by the legislature in AS 29.310-330." The City cites to *Liberati v. Bristol Bay Borough*, 584 P.2d 115, 1120, 1120 n. 18 (Alaska 1978). (City Post-Hearing Brief at 14-15). The City adds: "Because municipalities have unfettered discretion to exclude themselves from PERA entirely in the first place, they must have similarly broad discretion to determine which senior executive employees should be excluded from coverage in order to establish effective functioning of local government if they otherwise opt to come within PERA." (City Post-Hearing Brief at 15).

We disagree with the City's premise and contention. Although we do not have authority to decide constitutional issues, we are required to enforce PERA and related regulations. Among other things, these laws give this Board authority to decide who is or is not a public employee. A provision in these laws gives political subdivisions the option to reject the provisions of PERA and in effect "opt out." However, those political subdivisions who remain subject to the provisions of PERA must abide by all its provisions. To the City's point, PERA does not include an explicit or implicit provision that passes the authority, to political subdivisions, to decide who is an "appointed official." Including such a provision would have the incongruous effect of granting political subdivisions the implied authority to opt out of PERA anytime by simply giving all its employees status as "appointed officials."

In *State of Alaska v. Confidential Employees Association, APEA/AFT*, Decision and Order No. 278 (July 5, 2006), a panel of the Board analyzed whether to grant the State of Alaska's petition to remove State Labor Relations Analysts and a Human Resource Specialist from the Confidential Employees Association bargaining unit and consequently eliminate their collective bargaining rights and "public employee" status.⁶ In denying the State's petition, the panel cited to an Alaska Superior Court decision that examined PERA's broad definition of "public employee." In *Confidential Employees Association v. State of Alaska*, 1JU-93-656 CI (September 6, 1994) (*Confidential Employees Association*), the court stated:

The legislature's statements regarding the inclusion of public employees in collective bargaining in order to promote harmonious labor relations, and hence efficient government, should lead one to view any agency interpretation restricting the right of state employees under PERA somewhat critically. The Alaska Supreme Court has twice relied on the "declaration of policy" section of PERA in declining to construe another provision of the act in a manner which would curtail employee assertion of rights. [citations omitted].

The agency's definition of "appointed official" in 2 AAC 10.220(a) excludes a significant number of state employees from PERA coverage. In light of the broad declaration of policy set out by the legislature in 23.40.070, the trend of the legislature to expand PERA coverage rather than retract it, and absent any other

⁶ Board Member McSorley was a member of the panel in Decision and Order No. 278.

specific legislative direction to exclude all employees that "exercise significant responsibility on behalf of the state in collective bargaining policy formulation and implementation," it is inconsistent with PERA to do so.

Nor is it obvious that the legislature has not already spoken directly to the issue. It has excluded only elected or appointed officials from the definition of "public employee." It is consistent with the policy of PERA to include all employees but the highest state officials from coverage. Apparently, the legislature believed that the state's interest in having its bargaining interests represented with non-unionized employees was adequately met by the exemption provided, or else they believed that interest to be less important than broad ranging state employee unionization and participation in the collective bargaining process. It is not the place of the court, nor the ALRA, to second guess that decision.

Confidential Employees Association at 8-9.

We find that the court's analysis on the broad coverage of PERA applies equally to political subdivisions. Considering this coverage, we will carefully scrutinize any petitions to further exclude employees at the City from coverage under PERA.

CONCLUSIONS OF LAW

1. The Alaska State Employees Association is an organization under AS 23.40.250(5).
2. The City of Bethel is a public employer under AS 23.40.250(7).
3. This Agency has jurisdiction to consider the petition filed by the Alaska State Employees Association.
4. The Alaska State Employees Association failed to prove by a preponderance of the evidence that the eight positions in the proposed bargaining unit at the City of Bethel meet the definition of "public employee" under AS 23.40.250(6) and 8 AAC 97.990(b), or should otherwise be included in the unit.
5. The positions of Chief of Police, Fire Chief, Information Technology Director, Public Works Director, Port Director, and Planning Director do not meet the definition of "public employee" under AS 23.40.250(6) and 8 AAC 97.990(b), are "appointed officials" under AS 23.40.250(6) and 8 AAC 97.990(b), and are therefore exempt from the Public Employment Relations Act.
6. The position of Assistant Finance Director meets the definition of "public employee." The position of Parks and Recreation Director does not currently exist at the City.

7. The petition for representation is denied and dismissed.

ORDER

1. The petition of the Alaska State Employees Association is denied and dismissed in accordance with this decision.

2. The City of Bethel 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

Gary P. Bader, Chair

Matthew R. McSorley, Member

Will Askren, 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 mailing 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 State Employees Association, AFSCME Local 52, AFL-CIO vs City of Bethel*, Case No. 15-1666-RC, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 29th day of February, 2016.

Margaret L. Yadlosky
Human Resource Consultant

This is to certify that on the 29th day of February, 2016, a true and correct copy of the foregoing was mailed, postage prepaid, to:

J. Michael Robbins, ASEA
Robert Stewart, City of Bethel

Signature