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MATANUSKA-SUSITNA EDUCATION)
ASSOCIATION, NEA-ALASKA/NEA,)
)
Petitioner,)
)
vs.)
)
MATANUSKA-SUSITNA BOROUGH)
SCHOOL DISTRICT,)
)
Respondent.)
)

_____)
CASE NO. 16-1684-CBA

DECISION AND ORDER NO. 310

We heard this contract enforcement petition on September 16, 2016, in Anchorage. Hearing Officer Tiffany Thomas presided. The parties filed written closing arguments. Supplemental briefing was requested by the Board on the issue of the Board's jurisdiction and was due December 1, 2016. The record closed on January 13, 2017, after completion of final Board deliberations.

Digest: The petition to enforce contract by the Matanuska-Susitna Education Association, NEA-Alaska/NEA is denied. The Association failed to prove the Academy Charter Advisory Board was a public employer under the Public Employment Relations Act.

Appearances: David Theriault, Uniserve Director for complainant Matanuska-Susitna Employees Association, NEA-Alaska/NEA; Sarah Josephson, attorney for the Matanuska-Susitna Borough School District.

Board Panel: Jean Ward, Vice Chair; Will Askren and Lon Needles, Board Members.

DECISION

Statement of the Case

The Matanuska-Susitna Employees Association, NEA-Alaska/NEA (MSEA) filed a petition to enforce its collective bargaining agreement (CBA) with the Matanuska-Susitna

Borough School District (District). MSEA asks this Agency to enforce the recognition clause, Article 1, Section 1, and the Grievance Process, Article II, of the negotiated agreement. MSEA asserts the District is contracting with two non-certificated persons to teach physical education at Academy Charter School and that the District denied MSEA's grievance as non-arbitrable. (MSEA Petition to Enforce Contract). The District argues the CBA does not address subcontracting and therefore is not subject to the grievance or arbitration provisions of the contract. (Answer to Petition to Enforce Contract at 6). Additionally, the District argues the Tae Kwon Do and Fit for Life instructors have been subcontracted for the past nineteen years and, therefore, MSEA's Petition is not timely. (Answer to Petition to Enforce Contract at 9). Lastly, the District argues that the two employees are not public employees and are not subject to the Public Employment Relations Act (PERA) (*See* AS 23.40.070-AS 23.40.260)

Issues

1. Is the Academy Charter Advisory Board Inc.'s 501(c)(3) non-profit entity of the Academy Charter School a "public employer" under AS 23.40.250(7)?
2. Is the petitioners' grievance timely under the parties' CBA?
3. Is the petitioners' grievance subject to arbitration under the parties' CBA?

Findings of Fact

1. The Matanuska-Susitna Education Association (MSEA) represents the certificated employees at the Matanuska-Susitna Borough School District (District).
2. The MSEA is a labor organization under AS 23.40.250(5).
3. The District is a public employer under AS 23.40.250(7).
4. The parties have a collective bargaining agreement for the period July 1, 2014 to June 30, 2017. (Joint Exhibit 1).
5. The collective bargaining agreement has a recognition clause in Article 1, Section 1.
6. Article 1(1) states:

The Matanuska-Susitna School Board recognizes the Matanuska-Susitna Education Association pursuant to AS. 23, [*sic*] as the exclusive bargaining representative for certificated employees. The District will not bargain with or recognize any employee organization other than the MSEA as representing the employees of the District in the bargaining unit defined in this section. The employer agrees that any position similar to one which is currently performed by members of the bargaining unit must be subject to negotiation between the

Association and the employer to determine whether such position or job title should be included in the bargaining unit.

(Joint Exhibit I at 6).

7. The parties' grievance/arbitration procedure is contained in Article II of the CBA. This process consists of four steps with the last step culminating in arbitration. (*Id.* at 9).

8. Article II, Section 1(A) defines a grievance as "a claim based upon an event or condition which affects the conditions or circumstances under which a teacher works caused by misinterpretation or inequitable application of the terms of this agreement. Alleged [V]iolations of board policy or of the code of ethics are excluded from the grievance procedure." (*Id.*).

9. Tim Walters, President of the MSEA, testified he attended a meeting at the Academy Charter School on January 25, 2016, where he met a person who "referred to themselves as the PE teacher." After learning that this person was not on the list of certificated positions covered by MSEA, Walters spoke with Diane Shibe, the MSEA Rights Committee chair, and a decision was made to file a grievance with the District.

10. On February 3, 2016, Shibe filed a grievance with the District, alleging a violation of Article 1, Section 1, (recognition clause) and all other articles that apply. The grievance stated, "The District is contracting out jobs that belong to the bargaining unit. Specifically the physical education position at Academy Charter [School] is being contracted out to a private company." (Joint Exhibit III).

11. Katherine Gardner, Executive Director of Human Resources for the District, denied the grievance on February 29, 2016. Gardner found the grievance did not meet the grievance definition found in Article II of the CBA, and that it was the position of the District that the matter was not arbitrable or subject to the grievance procedure. (Joint Exhibit IV).

12. After denying the grievance, the District declined to proceed with the scheduling of a level 1 hearing. (Joint Exhibit IV).

13. Academy Charter School Principal Barbra Gerard testified that the Academy Charter School was established in 1995 for grades kindergarten through eighth grade. It currently has 244 students.¹

14. The Academy Charter, which outlines the learning programs for Academy Charter School, describes the Academy as "an alliance made up of a seamless web of educators,

¹ Pursuant to Alaska Statute 14.03.255, a charter school operates as a school within the local school district, under a contract between the charter school and the local school district. The contract must be renewed every ten years and exempts the charter school from having to use the local district's textbook, program, curriculum and scheduling requirements.

parents, businesses and community services- all dedicated to the students.” (Joint Exhibit II at 14).

15. The Academy Charter is renewed every ten years and must undergo a public vetting process by the local school board. (Joint Exhibit II at 36).

16. According to Gerard, MSEA and representatives from the Classified Employee’s Association were involved in the original vetting process. They have been involved in the vetting process each time since.²

17. The Academy Charter also provides that a desired outcome for physical education is to provide students with a healthy lifestyle that allows students to develop a specific skill set to provide lifelong physical fitness. The Academy Charter provides, “The goal is to provide learning opportunities that specifically provide students with physical fitness training in stretching, aerobics, dancing, yoga, muscle names and how to strengthen and tone those muscles. Martial arts will be taught by a martial arts instructor and provide students with self-discipline, physical toning, and self-defense.” (Joint Exhibit II at 24).

18. Rather than have a traditional physical education teacher, the Academy Charter created two positions: a Tae Kwon Do and Fit for Life instructor. The instructors hired to fill these positions are not required to be certificated and are not certificated under the Academy’s charter with the State of Alaska.³

19. Gerard, the principal for twenty years, was involved with the development and opening of Academy Charter School. According to Gerard, the Tae Kwon Do position was specifically built into the Academy Charter because the founders wanted martial arts classes so they could teach students self-defense, toning, and self-respect.⁴

20. The Academy Charter Advisory Board (Advisory Board) was created to oversee the fulfillment of the Academy Charter School goals and philosophies. The Advisory Board is comprised of eight members, three of whom are parents, two community members at large (who may or may not be a parent), two teachers of the Academy Charter School, and the principal. (Joint Exhibit II at 28). Gerard testified that past and current MSEA representatives were, or have been, active members on the Advisory Board.

21. As principal, Gerard recruits, screens, interviews, and makes hiring recommendations for the certificated teachers and non-certificated Tae Kwon Do and Fit for Life instructor positions, at the Academy Charter School, but the Advisory Board has the ultimate authority on hiring. (Joint Exhibit II at 35).

² The Classified Employee’s Association represents the education support professionals in the District.

³ According to the testimony of Katherine Gardner, the State does not have a definition of “teacher”. She testified it is the District’s position that while teachers have to be certified to teach, contractors, do not.

⁴ The Academy Charter is the contract that was created in accordance with AS 14.03.255.

22. To help pay for the Tae Kwon Do and Fit for Life instructors, the Advisory Board created a non-profit organization. The Academy Advisory Board, Inc.'s 501(c)(3) Non-profit form provided to parents indicates:

Fifteen years ago Academy families created a non-profit account that helps to pay for those extra costs outside of what the school district budget. [*sic*]. We call this an educational enhancement fee. Please keep in mind that this program is designed as a non-profit entity of Academy Charter School. This helps pay for contract staff and additional classroom supplies to support the dynamic programs. Some other uses of this fund: fieldtrips related to specific subject topics, purchasing science and art supplies, library books, paying for our music instructor, subsidizing our enrichment activities, Taekwondo instructors, teacher reimbursement, and many other unexpected costs related to maintenance and upkeep of our school buildings and grounds.

23. Parents whose children attend the Academy Charter School are required to sign a partnership agreement which allows parents to give permission for their child to “participate in activities that are taught here at the school by local businesses such as Jay’s Taekwondo, Fit for Life, and Amber Anderson music.” (Respondent’s Brief Regarding Timeliness, Exhibit C at 2). Parents acknowledge they must contribute \$171.00 per student to the Academy Advisory Board’s 501(c)(3) non-profit account to help pay for those activities. (*Id.*).

24. Gerard testified that current and previous MSEA representatives at the school were also parents of students at Academy Charter. As parents, they would have been required to sign the partnership agreement and submit funds to the Advisory Board.

25. Gerard further testified “the non-profit was like a booster club.” She indicated, “there was a waiver process for those families that are not able to pay the required fee and that some parents [voluntarily] pay more.”

26. The Tae Kwon Do and Fit for Life instructors are paid by check directly from the Advisory Board’s 501(c)(3) non-profit account for the hours they work. (Matanuska-Susitna Borough School District’s Additional Briefing at Exhibit N). The instructors receive no health coverage, pension contribution, or any other benefits from the District or the Academy Charter School. (Notice of Filing Signed Affidavit in Support of Matanuska-Susitna Borough School District’s Additional Briefing. Affidavit of Barbara Gerard at 2).

Analysis

1. Is the Academy Charter Advisory Board Inc.’s 501(c)(3) non-profit entity of the Academy Charter School a “public employer” under AS 23.40.250(7) ?

The District argues that both instructors are independent contractors paid by the Academy Advisory Board 501(c)(3) non-profit organization to provide a specialized service on an as-needed basis and therefore do not meet the definition of public employee. Conversely, the MSEA argues that the two instructors share the same core characteristics of other certificated employees, such as lesson planning and the ability to perform first aid, and therefore are public employees properly placed under the Public Employment Relations Act. (Petitioner's Response to Order for Briefing at 5). We agree with the District. However, to decide whether the instructors are public employees we must address the threshold question of whether the Advisory Board's 501 (c)(3) organization is a public employer.

Pursuant to AS 23.40.250(7) a public employer,

. . . means the state or a political subdivision of the state, including without limitation, a municipality, district, school district, regional educational attendance area, board of regents, public and quasi-public corporation, housing authority, or other authority established by law, and a person designated by the public employer to act in its interest in dealing with public employees.

Whether a 501(c)(3) non-profit organization is a public employer has not yet been decided by this Agency. However, the National Labor Relations Board (NLRB), the Federal counterpart to PERA, has addressed whether a non-profit organization was a political subdivision exempt from the National Labor Relations Act (NLRA).⁵

Since "political subdivision" was not defined in the NLRA, the NLRB created a two-part test to decide jurisdictional questions. As discussed by the United States Supreme Court in *NLRB v. Natural Gas Utility Gas Dist. of Hawkins County, Tenn.*, 402 U.S. 600, 77 LRRM 2348 (1971), the Board "has limited the exemption for political subdivisions to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate."

In *Chicago Mathematics & Science Academy Charter School, Inc., Employer and Chicago Alliance of Charter Teachers & Staff, IFT, AFT, AFL-CIO*, 359 NLRB No. 41 (2012), the NLRB applied the two-prong *Hawkins County* test to find a non-profit corporation, that operated a charter school, was not a political subdivision of the State of Illinois and was therefore under the jurisdiction of the NLRB.

Applying the two analytical prongs contained in the *Hawkins County* case, we find the Advisory Board clearly does not qualify as a political subdivision. It was not created directly by the state so as to constitute departments or administrative arms of the government, and it is not

⁵ Under 8 AAC 97.450(b), "Relevant decisions of the National Labor Relations Board and federal courts will be given great weight in the decisions and orders made under this chapter and AS 23.40.070-23.40.260 and AS 42.40.720-42.40.890.

fully administered by individuals who are responsible to public officials or to the general electorate.

More importantly, we find the Advisory Board is the employer for purposes of hiring and paying the Tae Kwon Do and Fit for Life instructor positions. However, the Advisory Board does not meet any other aspect of the definition of “public employer” under AS 23.40.250(7). In addition to not meeting the definition of “political subdivision,” the Advisory Board and its non-profit organization are not a district, school district, or regional attendance area. It is a private, non-profit entity created and operated separate and apart from the Matanuska-Susitna Borough School District, and it exercises independent authority over the two non-certificated instructor positions in dispute.

Accordingly, we conclude the Advisory Board does not meet the definition of “public employer.” Because it fails to qualify as a public employer under the Public Employment Relations Act, the Tae Kwon Do and Fit for Life instructor positions cannot qualify as public employees under AS 23.40.250(6).

2. Timeliness and Arbitrability issues.

We have concluded in this case that the Advisory Board is not a public employer and the Tae Kwon Do and Fit for Life instructors are not public employees under the jurisdiction of the Public Employment Relations Act. Because we have determined we do not have jurisdiction, we need not address the remaining two issues.

CONCLUSIONS OF LAW

1. The Matanuska-Susitna Education Association, NEA-Alaska/NEA is an organization under AS 23.40.250(5).

2. The Matanuska-Susitna Borough School District is a public employer under AS 23.40.250(7).

3. As petitioner, the Matanuska-Susitna Education Association, NEA-Alaska/NEA has the burden to prove each element of its claim by a preponderance of the evidence. 8 AAC 97.350(f).

4. The Academy Charter School Advisory Board and the Academy Charter School non-profit 501(c)(3) organization are not public employers under AS 23.40.250(7).

5. The Tae Kwon Do and Fit for Life Instructors are not public employees under AS 23.40.250(6).

6. The private funds of the Academy Charter School Advisory Board 501(c)(3) non-profit organization, and not the public funds of the Matanuska-Susitna Borough School District, pay for the Tae Kwon Do and Fit for Life instructors.

7. This Agency does not have jurisdiction to consider the complaint filed by the Matanuska-Susitna Education Association, NEA-Alaska/NEA under AS 23.40.210 because we concluded that the Advisory Board is not a public employer and the Tae Kwon Do and Fit for Life instructors are not public employees under PERA.

8. The Matanuska-Susitna Education Association, NEA-Alaska/NEA failed to prove by a preponderance of the evidence that this Agency has jurisdiction to hear this matter under the facts presented in this case.

ORDER

1. The petition to enforce contract filed by the Matanuska-Susitna Education Association, NEA-Alaska/NEA is denied and dismissed in accordance with this decision.

2. The Matanuska-Susitna Borough School District 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

Jean Ward, Vice Chair

Will Askren, Member

Lon Needles, 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 *Matanuska-Susitna Education Association, NEA-Alaska/NEA vs. Matanuska-Susitna Borough School District*, Case No. 16-1684-CBA, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 23rd day of February, 2017.

Margie Yadlosky
Human Resource Consultant

This is to certify that on the 23rd day of February, 2017, a true and correct copy of the foregoing was mailed, postage prepaid, to:
David Theriault, Matanuska-Susitna Employees Association
Sarah Josephson, Mat-Su Borough School District

Signature