

STATE OF ALASKA
before, THE DEPARTMENT OF LABOR
LABOR RELATIONS AGENCY

IBEW LOCAL 1547,	)	
	)	
Petitioner,	)	
	)	
and	)	
	)	CASE NO. RC 0286-001
CITY OF FAIRBANKS,	)	
	)	
Respondent.	)	
_____	)	

DECISION AND ORDER 86-8

On February 24, 1986, the International Brotherhood of Electrical Workers Local 1547 (hereinafter IBEW) petitioned the Department of Labor to certify a unit of twenty-eight employees of the City of Fairbanks Municipal Utilities System (hereinafter MUS). The petition included all employees occupying supervisory or managerial positions. The General Teamsters Local 959 unsuccessfully attempted to intervene. DLLRA Decision and Order 86-7.

MUS objected to the proposed units on the following grounds:

(a) IBEW was not a proper bargaining agent because IBEW was also the certified bargaining agent for the rank and file employees, supervised by members of this proposed unit; (b) there was insufficient community of interest with the six members of Central Services and the balance of the proposed unit; (c) the proposed unit combined managerial/confidential positions with supervisory personnel.

The Agency conducted a hearing on 5/15/86. During the hearing the parties raised additional issues to be resolved by the Agency: (1) identification of which party bore the burden of proof at hearing; (2) appropriateness of an amendment submitted by IBEW at hearing which

sought to change the name of the proposed unit; (3) appropriateness of amendment submitted by IBEW at hearing for the addition of unpetitioned job classifications.

DISCUSSION OF THE ISSUES

We begin with the issue of which party bears the burden of proof. IBEW argued that where MUS stated it "had no problem with the concept of a supervisors bargaining unit," MUS conceded the appropriateness of the proposed unit. IBEW reasons that the burden of proof therefore shifted to MUS to sustain objections. 2AAC 10.430 states:

"In any hearing before the Labor Relations Agency, the petitioner, plaintiff or intervenor bears the burden of proving the truth of each element necessary to his cause by the preponderance of the evidence."

The Supreme Court has ruled that an unambiguous statute should be enforced if it reads without judicial modification or construction except where it is restricted by another act or must be considered in pari materia with another act. Hafling v Inland Boatman's Union of the Pacific, 585 P.2d 870 (Alaska 1978). We have reviewed the related statutes and regulations and find that other act or statute restricts 2AAC 10.430. The burden of proof remains with the petitioner IBEW in the instant case. The effect of having MUS present its case first at the hearing only reverses the order of proof, not the burden of proof.

MUS objects to the certification of IBEW as a proper bargaining agent, because it would place both supervisory and rank and file employees within the same organization. The issue of dual representation of separate bargaining units has previously been addressed by the State Labor Relations Agency (SLRA). LRA Order and Decision Number 8. The SLRA found no express prohibition of dual representation within the Public Employees Relation Act (PERA) precluding the Alaska Public Employees Association

from representing both a supervisory unit and a unit of rank and file. While the SLRA found significant that 40% of the employees in the proposed unit manifested interest in APEA, in the instant case 89% of the employees of the proposed unit have expressed interest in IBEW. Moreover, the SLRA and this Agency have consistently held that combining supervisory and non-supervisory personnel within the same unit is appropriate within political subdivisions. LRA Order and Decision No. 79, International Longshoreman's and Warehouseman's Union vs. City of Unalaska (RC-A83-2 4/24/84), DLLRA Order and Decision 84-1. The Agency is not persuaded by MUS's argument that the issue is being handled differently in other States.

MUS argued that procedural due process would be denied if we approved the unit name and additional job classification amendments presented at the hearing. The record reflects that during the post hearing briefing schedule, MUS was afforded the opportunity to be heard and either acquiesce or contest the amendments before the hearing officer. As MUS was accorded an opportunity to be heard and address the issues, we find no violation of due process.

MUS objected to the inclusion of certain classifications, as listed below, within the proposed unit because these employees have substantial responsibility in the area of policy formulation/determination with respect to collective bargaining:

WASTE WATER PLANT

Superintendent
Assistant Superintendent - Treatment Systems
Assistant Superintendent - Systems Maintenance

ELECTRIC UTILITY

Superintendent
Assistant Superintendent - Electric Production
Assistant Superintendent - Electric Distribution

TELECOMMUNICATIONS

Director
Subscriber Service Manager

CENTRAL SERVICES

Controller
Accounting Manager
Financial Analyst II

ADMINISTRATIVE AND SUPPORT SERVICES

Director

MUS withdrew its objections to the classifications of Assistant Superintendent - Treatment Systems and Assistant Superintendent - Systems Maintenance because these job classifications do not exist. MUS had sought to reorganized some of its various Departments in the 1986 budget and in doing so proposed the creation of these two positions. The Public Utilities Board (PUB) and the City Council did not effect the changes or authorize the addition of these two Assistant Superintendents. Therefore, we conclude the job classifications of Assistant Superintendent-Treatment Systems and Assistant Superintendent-Systems Maintenance are not appropriately included in the proposed unit.

AS 23.40.090 empowers the Agency to determine in each case the appropriate unit for collective bargaining purposes. Factors to be considered include community of interest, wages, hours and other working conditions, and the history of collective bargaining. Units shall be as large as are reasonable, and unnecessary fragmentation will be avoided.

MUS argued that the above listed "managerial" employees should be excluded from the proposed unit because of their confidential status. 2AAC 10.440(b) states that, "Relevant decisions of the National Labor Relations Board [NLRB] and the federal courts will be given great

weight in determinations made under this chapter and AS 23.40." "Managerial employee" is not defined in PERA, but has been defined by the NLRB as those who "formulate and effectuate management policies by expressing and making operative the decisions of management." Laundry Dry Cleaning Corp., 21 LRRM 1039(1947). The US Supreme Court refined this definition to include one who, "represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." Yeshiva University v NLRB, 582 F2d 686 (1980). The issue of managerial exclusion has been discussed in SLRA Order and Decision Number 12 and 13. In Order and Decision Number 12, the Agency stated:

The Labor Relations Agency's position was that there is no grounds under the Alaska Public Employee Relation Act to exclude "managerial" positions per se, since the APERA, unlike the National Labor Management Relations Act, does not exclude supervisor employees from the definition of "employee", whereas the NLRB extended the supervisory exclusion of National Labor Management Relations Act to managerial employees.

Furthermore, the SLRA opined that, "If the legislature had intended to exempt managerial employees from bargaining, they could have easily included an express exemption in its definition of employees." The argument that these employees are not properly in the proposed unit by virtue of their "management" status alone, is without merit. Confidential employees identified under 2AAC 10.220 (b)(1), has been narrowly construed by this Agency, the SLRA, the NLRB, and the Courts. Significant responsibility for collective bargaining policy formulation and implementation must therefore be narrowly construed. SLRA Order and Decision No. 79. MUS General Manager, Virgil Gillespie, testified that he and Homer Jones, Deputy City Attorney, alone participate in collective bargaining with the various labor organizations. Mr. Gillespie also represents MUS in the third step of the grievance procedure. The ten job classifications objected to by MUS as confidential, appear to share with each other similar responsibilities in the areas of hiring, discharging

employees, disciplining and promoting employees under their supervision and, at some stage of the grievance procedure, handling employee grievances. There is no evidence that these positions actually formulate or determine management policies in the area of collective bargaining. Mr. Gillespie testified that he, the City Manager, the PUB and the City Council alone retain management policy determination authority. These supervisory/management employees do not warrant a finding that they formulate, determine and effectuate management policies in the area of collective bargaining. B.F. Goodrich Co., 115 NLRB No. 722 (1956). Westinghouse Electric Co. RP v NLRB, 398 F.2d. 699 (1968).

IBEW has sought to change the name of the proposed bargaining unit from Fairbanks Municipal Utilities Systems Supervisory Personnel, as listed on the petition. During the course of the hearing IBEW requested the petition cover "all supervisors and managerial personnel not covered by any other bargaining agreement." MUS objected to the broad scope of this amended wording. IBEW then modified its amendment to read, "Fairbanks Municipal Utilities Systems Supervisory/Managerial Personnel". It is clear from the arguments presented in the post hearing briefing schedules that both parties recognize the later name change was intended as the amendment.

The NLRB has held that "A union must clearly communicate to the employer the extent of the bargaining unit of employees for which it wishes to bargain in order to impose upon the employer a legal obligation to comply with the union's bargaining demand". Bailey Grocery Co., 30 LRRM 1321 (1952). IBEW argued the change more accurately reflects the nature of the responsibilities of the employees involved. MUS conceded in its initial objection to the proposed bargaining unit that, "The proposed unit is essentially a unit composed of MUS's managers and super-

visors." We have already determined that both supervisory and managerial job classifications are properly included in the proposed unit, the name change to Fairbanks Municipal Utilities Systems Supervisory/Managerial Personnel is appropriate in light of Bailey.

MUS objected to the inclusion of all Central Services job classifications because these have no community of interest with the proposed unit, and share no commonality with the Managers and Supervisors petitioned in the balance of the unit.

There is nothing within PERA which requires that a unit for bargaining be the only or ultimate unit, just an appropriate unit. The Agency has previously determined that employees at MUS share a community of interest from the balance of City of Fairbanks employees. DLLRA Order and Decision No. 84-1. The NLRB has stated its reluctance to fragmentize a utility's operations where the economic reality of the public utility industry is characterized by a high degree of interdependence of its various segments. Baltimore Gas & Electric Co., 84 LRRM 1212 (1973). In the final analysis, the nature of the workplace dictates the parties community of interest. Central Services provides administrative/accounting support for all of MUS including, but not limited to: customer billing; payroll; accounts payable; general ledger maintenance; financial reports to and from utility departments. Central Services, as a unit, shares a community of interest with the balance of the other divisions within MUS.

MUS also objected to the inclusion of Central Services personnel in this unit as they shared no "commonality" as office personnel primarily charged with accounting and financial functions. We previously stated that this unit as petitioned will be comprised of supervisory/managerial employees. Supervisory employee is defined in 2AAC 10. 220.(b)(3) as an:

"[A]n individual having substantial responsibility on behalf of the public employer to participate in the performance of all or most of the following functions: employ, promote, transfer, suspend, discharge or adjudicate grievances of other employees, if in connection with the foregoing, the exercise of such responsibility is not of a merely routine nature but requires the exercise of independent judgment."

The SLRA has ruled that of the six (6) functions within this definition (employ, promote, transfer, suspend, discharge, and adjudicate grievances), an employee adjudged to be a supervisor must have substantial responsibility regularly to participate in at least four (4) of the six (6). SLRA Order and Decision No. 15. Applying the criteria established by the SLRA for supervisory employees and the US Supreme Court ruling in Yeshiva regarding managerial employees, we find the job classification of Financial Analyst I within Central Services is not properly included in the proposed unit. The Financial Analyst I performs only routine accounting functions and has no supervisory/managerial responsibilities. Furthermore, based upon the same laws stated above, the remaining five job classifications within Central Services are supervisory/managerial in nature, and are properly included in the proposed unit.

MUS has also objected to the inclusion of: Traffic Engineer; Data Processing Operations Coordinator; and Assistant Superintendent of Water Distribution and District Heat in the proposed unit, by amendment at hearing. The NLRB has held that petition amendments at hearings can be appropriate:

"The Board has held that where the categories of employees involved in the petition as finally amended are covered in the original petition, it will not regard the amended petition as a new or original petition." Rauland Corp., 29 LRRM 1258 (1952). Cohn Goldwater Manufacturing Co., 31 LRRM 1531 (1953).

These three positions share similar responsibilities in the areas of management policy implementation, hiring, discharging, disciplining, and promoting

employees under their supervision with the balance of the job classifications in the petitioned unit. The SLRA has held that an appropriate unit must be exhaustive of the classifications. LRA Order & Decision No. 25. There is insufficient justification presented by MUS to depart from this principle. Based upon the law and the facts stated above, we find inclusion of Traffic Engineer; Data Processing Operations Coordinator; and Assistant Superintendent of Water Distribution and District Heat into the proposed unit is appropriate.

We note that two (2) objections to the petition were received by the Agency from employees of the proposed unit. Although not interested parties to the proceeding, they were allowed to enter their objections into the hearing record. While "interested parties" has not been defined in PERA, the NLRB recognizes only the petitioner, the employer, and labor organizations as interested parties.

We find no reason to deviate from this standard. However, even in consideration of the evidence advanced by these individuals, it would have made no difference in our decision.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The Agency having reviewed the transcripts of the proceedings, the post hearing briefs, and having discussed the matters,

HEREBY makes the following Findings of Fact and Conclusions of Law:

1. The City of Fairbanks is a public employer within the meaning of AS 23,40.250(6) and is under the jurisdiction of the Department of Labor,

Labor Relations Agency.

2. IBEW is an organization within the meaning of AS 23.40.250(5).
3. Employees in the classifications petitioned have the right to organize under PERA.
4. Under PERA, there is no express prohibition of including managerial employees in units containing supervisory personnel.
5. No statutory prohibition exists preventing the representation of supervisory and non-supervisory employees by the same organization, and a substantial percentage of employees of the proposed unit have manifested an interest in IBEW.
6. Employees in the classifications petitioned do not have substantial responsibilities with respect to the formulation and implementation of policies with respect to collective bargaining.
7. IBEW has failed to demonstrate a community of interest with and between the Financial Analyst I and the balance of the proposed unit. Financial Analysts I is therefore not properly included in the unit.
8. The job classifications of Assistant Superintendent - Treatment Systems and Assistant Superintendent - Systems Management do not currently exist within the personnel structure of MUS, and are therefore not properly included in the proposed unit.
9. Amendment of the original petition by adding the job classifications of Traffic Engineer, Data Processing Operations Coordinator and Assistant Superintendent of Water Distribution and District Heat into the proposed unit is appropriate.
10. The burden of proof in any hearing before the Agency is born by the petitioner, plaintiff or interviewer.
11. There was no denial of due process to either party in the conduct of the representation proceedings.

12. There is a community of interest among the job classifications petitioned, (including those identified in number 9 above and excluding those identified in numbers 7 and 8 above).
13. The proposed unit does not result in unnecessary fragmentation.

ORDER

1. It is hereby ordered that a secret ballot election be conducted in the "Fairbanks Municipal Utilities Systems Supervisory/Managerial Personnel" unit. The unit shall consist of the following job classifications:

WASTE WATER PLANT:

1. Superintendent
2. Assistant Superintendent of Water Distribution and District Heat

ELECTRICITY UTILITY:

1. Superintendent
2. Assistant Superintendent - Electric Production
3. Assistant Superintendent - Electric Distribution

TELECOMMUNICATIONS:

1. Director
2. Subscriber Service Manager
3. Network Service Manager
4. Plant Manager
5. Installation & Maintenance Manager
6. Telephone Traffic Supervisor
7. Service Center Supervisor
8. Central Office Engineering Supervisor
9. Outside Plant Engineering Superintendent
10. Outside Plant Construction Superintendent
11. Planning & Scheduling Supervisor
12. Directory Supervisor
13. Traffic Engineer

CENTRAL SERVICES:

1. Controller
2. Accounting Manager
3. Financial Analyst II
4. Data Processing Manager
5. Billing Supervisor
6. Data Processing Operations Coordinator

ADMINISTRATIVE & SUPPORT SERVICES:

1. Director
2. Customer Service Manager
3. Material & Maintenance Superintendent
4. Customer Service Supervisor

2. Pursuant to 2AAC 10.150 the City of Fairbanks shall file with the Agency and deliver to IBEW, election eligibility lists. These lists will contain the names, specific job classifications, and work addresses of all eligible voters within this unit.

3. Elections shall be conducted as specified in the Notice of Election to be issued by the Agency, and posted in accordance with 2AAC 10.140.

Signed this 16th day of September 1986.

ROBERT J. BACOLAS, CHAIRMAN
LABOR RELATIONS AGENCY

DONALD R. WILSON, MEMBER

DENNIS GEARY, MEMBER

[SEAL AFFIXED AND SIGNATURES ON FILE]

APPEAL PROCEDURES

An Agency order may be appealed through proceedings in Superior Court brought by a party in interest against the Agency and all other parties to the proceedings before the Agency, as provided in the Rules of Appellate Procedure of the State of Alaska.

n Agency order becomes effective when filed in the office of the Agency, and unless proceedings to appeal it are instituted, it becomes final on the 31st day after it is filed.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of IBEW Local 1547, Petitioner and City of Fairbanks, Respondent, Case No. RC 0286-001, dated and filed in the office of the Labor Relations Agency in Anchorage, Alaska, this _____ day of _____, 1986.

Clerk

[No date or signature on file]