

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

ALASKA PUBLIC EMPLOYEES ASSOCIATION,)
)
Petitioner,)
)
and) Case No. UCF 87-1
)
CITY OF FAIRBANKS,)
)
Respondent.)

)

DECISION AND ORDER 88-1

On April 27, 1987, the Alaska Public Employees Association (APEA) petitioned the Department of Labor, Labor Relations Agency (DOLLRA) to amend a unit of employees of the City of Fairbanks. APEA was certified as the exclusive representative of this unit on December 24, 1985. The unit was amended previously by the DOLLRA on September 14, 1986. The petition at bar seeks to add the classification of Assistant Finance Director (AFD) to the existing unit.

The City of Fairbanks (City) objected to the petition on the following grounds:

- (a) The AFD position is a management position not subject to the Public Employment Relations Act (PERA).
- (b) The AFD position is also a supervisory position and not appropriately included in the same unit with rank and file employees.
- (c) The AFD position is a "confidential" employee within the meaning of 2 AAC 10.220(b)(1) and should be excluded from the APEA or any other bargaining unit unless voluntarily recognized by the City.

The DOLLRA conducted a hearing regarding this petition on September 22, 1987.

DISCUSSION OF THE ISSUES

The City objected to the inclusion of the AFD on the basis of its "management" status. The City argued that the great weight of authority at the federal level (NLRB) excludes management employees from the coverage of the National Labor Relations Act (NLRA). Therefore, the City felt the DOLLRA should follow this precedent and also exclude management employees from coverage under PERA.

The City has correctly stated that 2 AAC 10.440(b) provides for relevant decisions of the NLRB and the federal courts to be given great weight when making decisions under PERA. "Management" employees are not defined in PERA, but have been defined by the NLRB and the courts in interpreting the NLRA. The NLRB has identified management employees as those who "formulate and effectuate management policies by expressing and making operative the decisions of management." Palace Laundry Dry Cleaning Corp., 75 NLRB 320 (1947). The U.S. Supreme Court further refined this 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 DOLLRA and the State Labor Relations Agency (SLRA) have consistently held that management employees are not exempt from the coverage of PERA by virtue of their management status alone. SLRA Order and Decision Numbers 12 and 13, DOLLRA Decision and Order 86-8. The position of the DOLLRA, and the SLRA, was reiterated and confirmed by the Superior Court in City of Fairbanks v Alaska Department of Labor, Case No. 4FA-86-2271 Civil (October 12, 1987). In City of Fairbanks the Court held that:

It is true, as MUS points out, that the federal court has interpreted the Federal Labor Relations Act to exclude managerial employees even though Congress had not expressly done so. National Labor Relations Board v Bell Aerospace Co., 49 L.Ed. 2d 134 (U.S. 1974). However, the factors which led the federal court to imply an exclusion are not present here -- when it enacted the PERA in 1972, the [Alaska] legislature specifically excluded particular classes of employees: elected and appointed officials, teachers and noncertified employees of school districts. It did not exclude supervisors, despite the presence of such an exclusion in the Federal Act since 1947. It did not exclude managers, despite the fact that federal policy with regard to such an exclusion was unsettled in 1972. See Bell Aerospace, 40 L.Ed. 2d at 141. Thus, this court cannot conclude, in the face of the other specific exclusions in AS 23.40.650(6), that the legislature's failure to exclude managerial personnel was anything but a deliberate policy decision.

Employees are not precluded from exercising their rights guaranteed them under PERA by virtue of their managerial status alone.

The City argued that the APEA unit was not a proper bargaining unit for the AFD, as it would combine a supervisor with rank and file employees in the same unit. The SLRA and the DOLLRA have previously held that units which combine supervisory personnel with non-supervisory personnel are appropriate within political subdivisions of the state. SLRA Order and Decision No. 79, International Longshoremen's Union vs City of Unalaska (RC-A83-2 April 24, 1984, DOLLRA Order and Decision No. 84-1, DOLLRA Decision and Order No. 86-8. Strict adherence to the separation of supervisor and non-supervisors might result in unnecessary fragmentation, given the historically smaller size and complement of units within political subdivisions. Most often, the true powers of management and supervision rest with the uppermost levels of city government. Those authorities that trickle down to the middle management level are minimal and subject to review at one or more higher levels. Such is the case with the AFD. Testimony educed at hearing, reflects the supervisory responsibilities/ duties of the AFD to be minimal. The AFD does not have authority to discipline, hire, fire, promote, demote or resolve grievances. The staff is supervised by the Finance Director, and the AFD substitutes in his absence. Testimony further showed the AFD shares a community of interest, wages, hours and other working conditions with the APEA unit. The AFD performs essentially the same specialized technical work as do the APEA represented employees, during the same office hours, and in the same office location in the Finance Department. These factors all point to the APEA unit being an appropriate unit for the AFD.

The final objection raised to the inclusion of the AFD in the APEA Unit, was based upon the confidential status of the position. 2 AAC 10.220(b)(1) defines "confidential employee" as:

[A]n employee who assists and acts in a confidential capacity to a person who formulates, determines, and effectuates management policies in the area of collective bargaining.

The term is to be narrowly construed. *Id.* A two-step analysis must therefore follow to identify confidential employees. The DOLLRA must first determine which persons, if any, formulate, determine, and effectuate collective bargaining management policy. Then we must decide whether the AFD assists or acts in a confidential capacity to such policy makers. City of Fairbanks, *supra*.

The phrase "formulate, determine and effectuate" is inclusive. Therefore, a person must perform all the specified elements, not just one or two, relative to collective bargaining policies to be a policy maker contemplated by the definition. Evidence educed at hearing clearly demonstrated that the City Manager performed all three functions while the Finance Director did not. Therefore, an employee who assists or acts in a confidential capacity to the City Manager could be confidential. One who assists, etc., the Finance Director would not.

In assessing which employees assist or act in a confidential capacity to a policy maker, some regard must be given to the nature of the assistance or action. The very nature of PERA contemplates the assistance/action must be directly related to the collective bargaining policies of the employer. A confidential employee is one who has access to, or a knowledge of, more than mere raw data utilized in the collective bargaining process. The confidential employee is one who is privy to or helps participate in management strategy or formulation of policies relative to collective bargaining. This reasoning is consistent with the treatment of this issue by the NLRB:

The Board has in the past denied eligibility in representation elections to those employees who, in the course of their duties, regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations.

Pullman Standard Division of Pullman, Inc., 214 NLRB 762. American Radiator & Standard Sanitary Corporation, 119 NLRB 1715. BF Goodrich Company, 115 NLRB 722, 714.

Further, the NLRB has stated:

In determining the issue of confidentiality, the precise nature of the allegedly confidential information is significant.

The Board has held that it will not exclude as "confidential" employees who merely have access to personnel or statistical information upon which an employer's labor relations policy is based; nor will it exclude employees with access to labor relations information after it has become known to the union or the employees concerned.

Pullman Standard Division of Pullman, Inc., supra, American Radiator & Standard Sanitary Corporation, supra, NRLB v HCREMC, 454 US 170.

PERA does not specify the frequency an employee must assist or act in a confidential capacity to be classified as a confidential employee. The NLRB has addressed the issue of frequency regarding confidential information. Even though an employee acts in a confidential capacity a relatively small percentage of the time, it does not detract from a confidential status. Reymond Baking Company, 249 NLRB 156.

It is clear from the evidence educed at hearing, that the Finance Director participated in all collective bargaining sessions with the City Manager. The AFD is required to substitute for the Finance Director, in the Finance Director's absence, at collective bargaining sessions. During these meetings with the City Manager, the positions, policies and strategies relative to collective bargaining are discussed and developed. The Finance Director, and the AFD in his absence, have direct input into the formulation of those policies.

The data assembled and/or analyzed by the Finance Director, and the AFD in his absence, is with an eye toward the management policies/strategy of the City. The incumbent AFD participated in such sessions on two occasions within three months of the hearing into this matter. The AFD participated in policy formulation and was certainly privy to much more than the mere compilation of raw data available to employees within the APEA represented unit. While the AFD's immediate supervisor is not a policy maker contemplated by the definition of confidential employee, the AFD certainly acts in a confidential capacity to the City Manager. PERA does not specify nor do we feel the legislature intended the assistance or confidential actions to be limited to an employee's immediate supervisor. That notwithstanding, the City Manager is the AFD's supervisor in the Finance Director' s absence.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

1. Management employees are not precluded from exercising their rights guaranteed them under PERA by virtue of their management status alone. The Assistant Finance Director is not exempt from the coverage of PERA by virtue of his management status.

2. Units which combine supervisory and non-supervisory personnel are appropriate within political subdivisions of the State.

The Assistant Finance Director is not precluded from being clarified into the APEA certified unit by virtue of his supervisory status.

3. The collective bargaining policy formulation, determination and effectuation contemplated by 2 AAC 10.220(b)(1) is inclusive. A person must perform all three functions to be a policy maker as specified therein. The City Manager formulates, determines and effectuates management policy in the area of collective bargaining, the Finance Director does not.

4. PERA does not specify that an employee's immediate supervisor must be a policy maker [contemplated in 2 MC 10.220(b)(1)] for that employee to be confidential. PERA only requires an employee assist or act in a confidential capacity to a policy maker. The Assistant Finance Director assisted/acted in a confidential capacity to the City Manager.

5. The assistance and/or confidential acts contemplated by 2 AAC 10.220(b) (1) must be directly related to the collective bargaining policies of the employer. The Assistance Finance Director assists and/or acts in a confidential capacity to the City Manager in matters pertaining to collective bargaining management policies.

ORDER

Based upon the foregoing Findings of Facts and Conclusions of Law, the Agency orders and decides that the petition filed by APEA with respect to representation of the Assistant Finance Director is denied as this person is a confidential employee as that term is defined in 2 AAC 220(b) (1).

Signed this 23rd day of March, 1988.

DEPARTMENT OF LABOR
LABOR RELATIONS AGENCY

By _____
Thomas E. Stuart, Jr., Chairman

By _____
J.R. "Randy" Carr, Member

By _____
Dennis Geary, Member

[Seal 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 I of the State of Alaska.

An 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 APEA, Petitioner and City of Fairbanks, Respondent, Case No. UCF 87-1, dated and filed in the office of the Labor Relations Agency in Anchorage, Alaska, this 24th day of March, 1988.

Clerk

[Signature on File]