

# STATE OF ALASKA

## DEPARTMENT OF LABOR

### LABOR RELATIONS AGENCY

STEVE COWPER, GOVERNOR

3301 EAGLE STREET  
P.O. BOX 107021  
ANCHORAGE, ALASKA 99510-7021  
PHONE: (907) 264-2435

#### DECISION AND ORDER 90-5

The Agency accepts and adopts as its own, the Findings of Fact and Conclusions of Law of the Hearing Officer.

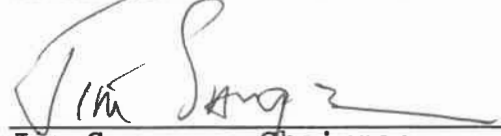
The IBEW has twenty days from the date of this order to obtain sufficient additional signature cards necessary to perfect their 30 percent showing of interest required under 2 AAC 10.020(c).

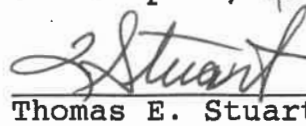
Concurrently, the Agency orders that a secret ballot election be scheduled to determine the selection of a collective bargaining representative. Pursuant to 2 AAC 10.150 the Kodiak Island Borough shall file with the Agency, and deliver to the IBEW, an election eligibility list containing the names and addresses of all eligible voters within the unit, as the unit is defined in the Hearing Decision. The election shall be conducted as specified in the notice of election to be issued by the Agency. Notices shall be posted by the Borough in accordance with 2 AAC 10.140.

It is so ordered.



DEPARTMENT OF LABOR,  
LABOR RELATIONS AGENCY

  
\_\_\_\_\_  
Jim Sampson, Chairman

  
\_\_\_\_\_  
Thomas E. Stuart Jr., Member

### 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.

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 International Brotherhood of Electrical Workers, Local Union 1547 vs. Kodiak Island Borough, Case No. RC-0489-001, dated and filed in the office of the Labor Relations Agency in Anchorage, Alaska, this 4<sup>th</sup> day of May, 1990

Nancy Gluth  
Clerk

INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS,  
LOCAL UNION 1547,  
  
Petitioner,  
  
KODIAK ISLAND BOROUGH  
  
Employer.

Specifically, the Borough objected that the IBEW had petitioned only for those employees for which they had adequate

interest cards. This "extent of organization" excluded the employees of the Mental Health Clinic. The Borough charges that to include them would have hampered the IBEW's ability to obtain an adequate showing of interest. As to the unit composition, the Borough argues that supervisory and confidential employees, such as the Finance Officer, Assessor, Planning Director, Engineering/Facilities Coordinator, Data Processing Manager and Resource Management Officer were improperly included in the petitioned for unit.

On the issue of jurisdiction, the Borough stated that it had validly opted out of the Public Employment Relations Act (PERA) by Borough Resolution on January 22, 1980, in order to "retain local control over labor relations".

The matter was heard in Kodiak on December 1, 1989 before the undersigned. At the hearing the IBEW stipulated to the removal from the petition of all of the positions objected to by the Borough, except for the Resource Management Officer. The Borough withdrew its objection to the Resource Management Officer and to the composition of the unit as a whole. The Agency heard testimony and accepted evidence on the remaining issues of jurisdiction and the scope of the unit. At the conclusion of the hearing the record was left open to allow the Borough an opportunity to gather and submit additional documents requested by the hearing officer. Both parties filed post hearing briefs.

### FINDINGS OF FACT - JURISDICTION

1. The Kodiak Island Borough was formed in 1963.
2. On or about February 6, 1979, the Borough, by ordinance, opted out of PERA.
3. This opt out was invalidated by the Superior Court. *STATE OF ALASKA, DEPARTMENT OF LABOR v. KODIAK ISLAND BOROUGH and STUART DENSLOW*, 3AN-79-2360 CIV.
4. On January 22, 1980, the Borough again rejected PERA through Resolution 80-5-R, in favor of retaining local control over labor relations.
5. Kodiak School District employees are not employees of the Kodiak Island Borough and are not an issue in this case.
6. Hospital employees are not employees of the Kodiak Island Borough and are not an issue in this case.
7. The Borough has not engaged in collective bargaining with any of its employees either before or after the 1980 opt out.
8. The Borough made no attempt to opt out of PERA until an organizing drive was underway, nearly seven years after the passage of PERA.
9. The Borough's stated intent for the 1979 opt out was to avoid dealing with the Alaska Public Employees Union.
10. The Borough's intent in the 1980 opt out was to avoid having to deal with any union that Borough employees might select to represent them.
11. As a result of the 1980 opt out, the Borough believes that it may ignore the desires of its employees with regard to union representation.
12. The Borough has not adopted any ordinances to allow for employee collective bargaining outside of PERA.

### DISCUSSION

The jurisdictional issue is threshold to this case. The Borough contends that the Agency lacks jurisdiction due to the 1980 opt out, which it maintains, is valid.

PERA was enacted on June 7, 1972, and became effective on September 5, 1972. Section 4 of the Act, known as the Koslosky amendment, provided for political subdivisions to reject having the terms of PERA apply.

In 1979, a group of Borough employees filed a petition with the Agency to seek representation by the Alaska Public Employees Association (APEA). The Borough Assembly, by resolution, opted out of PERA, after becoming aware of the organizational attempt. The Superior Court voided that opt out in an October 25, 1979 decision and advised the Borough that it was subject to PERA.

The Agency subsequently conducted an election by mail and the ballots were counted on January 10, 1980. The APEA failed to get a majority of the votes and the organizing attempt was defeated. Twelve days later, on January 22, 1980, the Assembly again opted out of PERA in Resolution 80-5-R, stating as the reason "a desire to retain local control over labor relations". Nine years later, in the spring of 1989, the IBEW began its organizational activities amongst the Borough employees.

The Borough argues in its brief that its motivation for the 1980 opt out was not based on a desire to avoid dealing with a particular union. The Borough acknowledged the State Supreme Court's findings in *State v. City of Petersburg*, 538 P.2d 263

(Alaska 1975), (hereinafter *Petersburg*) and clearly expressed that its intent was not to discriminate against any one particular collective bargaining representative.

Second, the Borough points out that it has never engaged in collective bargaining with any of its employees. This fact is apparently disputed by the IBEW which points to hospital and school district employee bargaining and attaches a nexus between the Borough and these bargaining units. That dispute notwithstanding, the Borough alleges that a finding of Borough employee status for hospital or school district employees is irrelevant to any determination as to the validity of the Borough's 1980 opt out of PERA. Citing a 1977 Agency decision concerning nonrepresented employees of the City of Petersburg, the Borough states that prior existing collective bargaining has no bearing on a rejection of PERA for nonrepresented employees.

The Borough contends the 1980 opt out resolution is valid. The Borough points to *Petersburg*, as proof that an opt out would only be invalid if it were done to control which organization might be selected by employees.

The Borough offers *Anchorage Municipal Employees Association v. Municipality of Anchorage*, 618 P.2d 575 (Alaska 1980), (hereinafter *AMEA*), in support of the proposition that the 8 year time lapse between the passage of PERA and the 1980 opt out is unimportant. The fact that "substantial organizational activity" may have occurred does not render a Section 4 PERA rejection ineffective, according to the Borough.

Nor does the mere frustration of the objectives of PERA, by itself, void a Section 4 opt out, according to the Borough, citing *City of Fairbanks v. Fairbanks AFL-CIO*, 632 P.2d 321 (Alaska 1981).

Lastly, the Borough submits *City and Borough of Sitka v. International Brotherhood of Electrical Workers, Local Union 1547*, 653 P.2d 332 (Alaska 1982), (hereinafter *Sitka*), to demonstrate that substantial organizational activities failed to preclude an opt out almost one year after the passage of PERA.

In summary, the Borough argues that *Sitka* should be the guiding principle. *Petersburg* applies only in cases where a PERA rejection is used to veto one particular union, according to the Borough, and that was not the case in this instance.

In response, the IBEW cites the same cases, interpreting their meaning differently. According to the IBEW, timing is everything. Not only does the Borough's timing prove that the opt outs were intended to frustrate or undermine a pre-established bargaining relationship, but they were intended to interfere prospectively with the rights of Borough employees. The IBEW argues that the timing of the 1979 opt out was a blatant effort to derail an ongoing organizing drive, an opinion shared by the Superior Court.

The second opt out, in 1980, carries the same illegal taint, says the IBEW. The 1980 opt out was designed to undermine not only the single unsuccessful union that had just lost the election, but any other union that might indicate an interest in representing Borough employees. The evidence of impermissible

intent found by the Superior Court in the first opt out is ongoing and applies to the second opt out as well, the IBEW states. Citing *AMEA*, the IBEW argues that the issue of timeliness must be examined:

*...by looking at the circumstances of the individual case...*

Further:

*A public employer who wishes to opt-out of PERA must do so promptly, not at its leisure.*  
(emphasis added).

The IBEW also points to *AMEA*, in showing the legislative intent for PERA:

*...requiring public employers to bargain collectively with their employees.*

At the heart of its case, the IBEW argues that the Borough's failure to promulgate a local collective bargaining ordinance is not consistent with the legislature's purpose in passing PERA. Noting that the Supreme Court in *Anchorage Education Association v. Anchorage School District*, 648 P.2d 993, found one of the primary purposes of PERA to be the provision of rational and effective guidelines for public employee relations, the IBEW contends that the Borough's failure to provide any such guidelines flies in the face of the law.

The IBEW contends that disparate treatment is only valid in Alaska if it is substantially related to the legitimate purposes of the legislation. *State v. Erickson*, 574 P.2d 1, (Alaska 1978). They point out that there is nothing in the definition of "public employee" to suggest that Borough employees should be excluded from coverage.

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The IBEW attempts to distinguish an Agency ruling that the City of Petersburg Police Department was barred from organizing under PERA by a Section 4 opt out by showing that the Agency ruled only on those employees who had not previously undertaken substantial organizing activity.

In conclusion, the IBEW alleges that Section 4 of PERA is available only to political subdivisions that provide for collective bargaining within their own ordinances or resolutions, regulated on a local level. They argue that an opt out almost eight years after the passage of PERA is clearly untimely in itself. To further juxtapose such an opt out with the illegal intent evidenced by the Borough can leave no alternative but to find the opt out invalid.

The case law on PERA is scant. The parties have cited the applicable existing precedents and interpreted them as benefits their respective positions. A review of these cases reveals apparent conflicts. However, through close scrutiny the Court's intent can be determined.

Reduced to their simplest terms, the questions surrounding the jurisdictional issue are three:

1. Is there any time limit to initiating an effective Section 4 opt out;
2. Is illegal intent restricted only to the avoidance of dealing with a single union; and
3. Must an employer perfect its opt-out by creating a local method of administering collective bargaining?

In *Petersburg*, the court found an opt out occurring six months after the passage of PERA valid. In *AMEA*, the newly formed Municipality of Anchorage (MOA) opted out three years and one month after PERA passed. In validating that exemption, the Court found that the two predecessors of the MOA, the City of Anchorage (City) and the Greater Anchorage Area Borough (GAAB) had separately executed valid opt outs. The City did so one month before the effective date of PERA. The GAAB passed a resolution rejecting PERA and establishing a comprehensive local labor relations ordinance in April 1973, seven months after PERA. The Court ruled that there is no effective time bar to a newly formed political subdivision implementing an opt out. The only mention in the *AMEA* decision of a time limitation is the Court's reference to *Petersburg* in which it said:

*...a public employer which chooses to opt out of PERA must do so promptly, rather than at its leisure... AMEA, supra, at 579.*

In the case of the GAAB, the Court found no evidence to indicate that the Greater Anchorage Area Borough acted less than diligently in rejecting PERA. The MOA rejected PERA approximately one month after its formation, and within another six months enacted its own comprehensive labor relations ordinance. Until it did so, the MOA operated under the existing GAAB labor relations ordinance.

Finally, in *Sitka*, the Court approved an opt out which occurred some ten months after PERA was enacted. Finding no issue of timeliness, the Court held that there were:

*...no factual findings in the present case that the Sitka PERA exemption ordinance was passed with an intent to frustrate employee rights. Sitka, supra, at 335.*

Clearly, there is no specific time limit in which a political subdivision must exercise its opt out privilege. Rather, the time frame is but one element in a several step analysis in determining the validity of particular opt out.

The Court has consistently ruled that PERA was intended to recognize the rights of employees to organize for the purpose of collective bargaining and to require public employers to negotiate and enter into labor contracts with employee organizations. To wait until the employees initiated organizational attempts, and then exercise an opt out was strictly forbidden by the Court in Petersburg:

*Rejection of the PERA after becoming aware of such activity constitutes a gross and impermissible interference with the employees' freedom to choose which collective bargaining association should represent them. Petersburg, supra, at 267.*

In AMEA the Court approved opt outs where:

*...all three governments exempted themselves solely for the purpose of retaining local control over their labor relations, and with the clear intent of continuing collective bargaining rather than to interfere with established employee rights. AMEA, supra, at 579. (emphasis added)*

Perhaps more revealing is the Court's comment later in the same decision:

*It is far more likely that Section 4 was added to PERA to give political subdivisions of the state the freedom to fashion their own labor ordinances and systems of collective bargaining. AMEA, supra, at 580. (emphasis added)*

At first glance, the Court's holding in *Sitka* appears to conflict with its opinion in *Petersburg*. However, in *Sitka*, the Court found that because the employer had consistently refused to recognize the IBEW, both before and after PERA, its choice to opt out of PERA was not intended to frustrate employee rights. The Court was convinced that *Sitka's* purpose in opting out of PERA was to retain local control through an existing personnel policy rather than to interfere with employee rights.

Thus the Court implies that it is a valid purpose to opt out of PERA in order to put into place local rules or ordinances which provide a means for employees to exercise their collective bargaining rights. This leads to the conclusion that since it is impermissible to opt out of PERA to avoid dealing with a particular union, it is equally impermissible to opt out in order to avoid dealing with all unions. The result of the latter action is undeniably the same as the former; i.e., the interference with, and frustration of employee rights granted under PERA.

Ultimately, we must address whether an employer must create its own local method of administering collective bargaining. Since *Petersburg*, the Court has held that PERA:

*...was intended to recognize the right of employees to organize for the purpose of collective bargaining and to require public employers to negotiate and enter into labor contracts with employee organizations.* *Petersburg, supra*, at 267. (emphasis added).

In making this finding, the Court noted that in enacting PERA the legislature repealed existing language in AS 23.40.010 that did not require the state or political subdivisions to enter into union contracts. The Court concluded that the legislature intended to limit the freedom of a political subdivision to consider whether it wished PERA to apply to it. The Act made PERA applicable to all political subdivisions unless they took affirmative action to reject it. It is the scope of these affirmative actions which must now be decided.

Aside from opting out by resolution or ordinance, the Court requires that there be an effort to protect and guarantee the employee's rights by replacing PERA with a local procedure governing collective bargaining. In *AMEA*, the Court rejected the union's contention that local governments, who were in existence at the time PERA was enacted, and who were not engaged in collective bargaining with their employees, could maintain the status quo and avoid having collective bargaining imposed upon them by PERA. Citing *Petersburg* the court stated:

*The majority's primary concern in Petersburg was that, given a broad open-ended construction, the exemption provision could be used as a means of blocking attempts by public employees to pursue the rights granted them by PERA. AMEA, supra, at 579.*

The Court found the opt out of the MOA and others to be valid, in light of the fact that there was clear intent to guarantee the employee's collective bargaining rights by the passage of comprehensive labor relations ordinances. Those

ordinances need not mirror PERA, as the Court noted:

*Local governments which have validly rejected PERA are free to develop a local scheme of collective bargaining which varies from the state scheme as provided in PERA. AMEA, supra, at 581.*

In *Sitka*, the Court validated the opt out in light of existing language in the Sitka Charter which required the recognition of employee organizations. The Court was satisfied that the employee collective bargaining rights were protected, although it went on to find that Sitka had violated its Charter and remanded the case for a judgement ordering Sitka to adopt an ordinance that provided for recognition of employee organizations in accordance with its Charter.

Therefore, while there is no specific time frame in which an opt out must be accomplished, a political subdivision desiring to exercise its opt out prerogative must act promptly, not at its leisure. A key element in determining the validity of any opt out, is whether or not the political subdivision has created its own labor relations ordinances in order to guarantee the collective bargaining rights granted public employees under PERA. Based upon the facts of this case, it is concluded that it is illegal for the Borough to opt out of PERA in order to avoid having to deal with unions as public employee representatives.

### CONCLUSIONS OF LAW

1. The Borough acted "at its leisure" in rejecting PERA.
2. The intent of the legislature in enacting PERA was to require public employers to enter into written collective bargaining agreements with employee organizations selected by the employees, either under the provisions of PERA, or under the provisions of a local ordinance adopted in place of PERA.
3. The Borough's adoption of resolution 80-5-R combined with the its failure to adopt any local ordinances to allow for its employees to exercise their rights in accordance with PERA's expressed declaration of policy, results in the frustration of the right of public employees to organize and bargain collectively.
4. This constitutes impermissible interference with the right of public employees to organize.
5. The Borough's 1980 rejection of PERA is invalid.
6. PERA is applicable to the Kodiak Island Borough.
7. The Labor Relations Agency has jurisdiction to act upon the petition filed by the IBEW.

### FINDINGS OF FACT - UNIT SCOPE

The community of interest, wages, hours and working conditions of the MHC employees are similar to that of the other Borough employees petitioned for.

### DISCUSSION

The Borough states that the IBEW petition is inappropriate because it is based on the "extent of organization" and the exclusion of the Mental Health Clinic (MHC) employees would cause unnecessary fragmentation. The Borough points to the fact that the MHC is one of seven major departments within the Borough, with a director as department head, just like all other Borough departments. The MHC employees are classified under the same plan as other Borough employees, and most of them are paid under the same step and grade plan. They receive the same benefit

plan as other Borough employees, and most of them are paid under the same step and grade plan. They receive the same benefit package as other Borough employees and can transfer back and forth into and out of other Borough departments. There is interaction between MHC and Borough employees on a regular basis. MHC employees are subject to the same personnel rules and their job descriptions are created in the same manner as other Borough employees. The overall analysis, asserts the Borough, is that the MHC employees share a community of interest with the other Borough employees.

Specific to the extent of organization argument, the Borough contends that the IBEW was unsuccessful in convincing the MHC employees as to the benefits of organizing and therefore chose to exclude them from the unit rather than risk the impact of their potential "no" votes in an election.

The IBEW argues that the MHC employees are located in a separate building than the rest of the Borough employees, approximately two miles away. Only a few of the MHC employees interact with the Borough offices, not all MHC employees, the IBEW points out. MHC employees do not attend monthly staff meeting with Borough employees, according to the IBEW. MHC employees spend a substantial amount of time in "on call" status compared to an occasional requirement to do so for other Borough employees. MHC people work three different shifts, unlike most Borough workers who work only one shift. Additionally, the IBEW notes that the MHC is open seven days a week, again, unlike the general work force. All these factors indicate substantially

different working conditions and work rules according to the IBEW.

Further, the IBEW contends that different skills are required for the MHC workers. Some are actually required to live with their patients/clients, a task never required of general government workers. The personnel manual addresses MHC employees in a separate section from the general government employees. There are provisions for moving expenses, dismissal and hiring and firing of department heads that differ from those applicable to most other Borough employees.

Concerning the extent of organization, the IBEW witness's recollection of the organizational meeting differs from the testimony of the Borough witness. Both witnesses appear credible, however.

Finally, the IBEW provided a witness who testified that in her capacity within the Borough Data Processing section, she had no interaction with the MHC computer people, and in fact, did not even know that MHC had a computer system.

AS 23.40.090 lists the factors to be used in determining an appropriate bargaining unit. They are: community of interest; wages; hours; working conditions; the history of collective bargaining; and the desire of the employees. The statute requires that the bargaining units be as large as reasonable, avoiding unnecessary fragmentation.

There is no bargaining history with Borough employees. There was direct testimony from only one MHC employee that even touched on the desires of the employees. That testimony is

insufficient to base any assumption as to the desires of all MHC employees. Therefore, we must focus our attention on the four remaining criteria.

All Borough employees receive the same benefits. With limited exceptions, the pay is set in the same manner for all employees. The exceptions are largely due to the fact that the MHC was once not a part of the Borough. During that time it developed its own practices, procedures and policies with regard to pay plans. When the MHC was subsumed into the Borough, those policies were transferred with the Clinic. The evidence and testimony indicate that the Borough has been addressing the differences between the two sets of procedures with the ultimate goal of eliminating them. The minor differences that remain are directly due to a unique circumstance where certain MHC employees are provided with housing necessary for the performance of their duties.

The hours worked by the MHC employees vary in both daily and weekly shift schedules. This is not unique however. Testimony shows that the Data Processing section, the Community Development staff and the Bailer/Landfill staff also work shifts that vary from the traditional 8:00 a.m. to 5:00 p.m., Monday through Friday schedule.

The working conditions are not substantially dissimilar according to the testimony received. Employees at the MHC may transfer into and out of other sections of the Borough. There is interaction between staffs. MHC staff deliver bills to the Accounting section, a function that the Bailer/Landfill people do

not perform. In addition, they pick up mail and other correspondence from the Borough's main office on a daily basis. On balance, there is more evidence to support a community of interest than there is against.

### CONCLUSIONS OF LAW

1. To segregate the Mental Health Clinic employees would constitute unnecessary fragmentation.
2. The Mental Health Clinic employees share adequate community of interest, wages, hours, and working conditions with the other Borough employees to justify their inclusion in the bargaining unit.

### RECOMMENDATIONS

1. The Labor Relations Agency has jurisdiction in this matter and should proceed accordingly.
2. The Mental Health Clinic employees should be included in the unit petitioned for by IBEW.
3. Since this action changes the ratio of signature cards to unit members, the IBEW should be given twenty days from the date of the signed Agency order to perfect their showing of interest with additional cards. Simultaneously, the Agency should initiate action to conduct an election to allow the Borough employees to select representation by the IBEW or no representation.
4. The unit in which the election should be held is a general government unit comprised of the following positions:

#### Facilities

Construction Inspector  
Baler Operator  
Baler/landfill Supervisor  
Secretary

#### Assessing

Appraiser  
Assessment Clerk

#### Community Development

Associate Planner  
Draftsman/technician  
Secretary

#### Finance

Accountant  
Accounting Clerk  
Secretary

#### Borough Mayor

Switchboard Operator/  
Receptionist  
Resource Management  
Officer  
Secretary  
Administrative Assistant

#### Borough Assembly

Records Coordinator

Data Processing

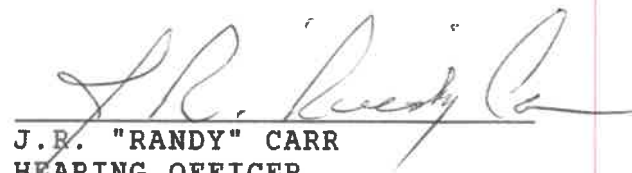
Programmer/analyst  
Programmer  
Computer Operator

Mental Health Clinic

Rehabilitation Director  
Skills Trainer  
Residential Trainer  
Case Manager  
Employment Training  
Specialist  
Job Coach  
Clinician  
Administrative Assistant  
Rehabilitation Program  
Coordinator  
Secretary  
Clerk/cashier

Excluded from the unit are elected officials, the Borough Attorney, Borough Clerk, Deputy Clerk, Facility Coordinator, Community Development Director, Personnel Officer, Assessor, Finance Officer, Data Processing Manager, Mental Health Director and the Fire Chief.

Signed May 2, 1990

  
J.R. "RANDY" CARR  
HEARING OFFICER