

[Labor Relations Agency Stationery]

In the Matter of:)
)
WESLEY CADE, GEORGE DANNER,)
III, PETER TEMPLETON)
)
 Petitioners,)
)
 vs.)
)
STATE OF ALASKA DEPARTMENT)
OF TRANSPORTATION AND PUBLIC)
FACILITIES, THE MARINE)
ENGINEERS BENEFICIAL)
ASSOCIATION,)
)
 Respondents.)
_____)

ULPC 85-5

ORDER AND DECISION NO. 96

SUBJECT: LACK OF AGENCY JURISDICTION TO ISSUE SUBPOENAS
FOR PRE-HEARING DISCOVERY

Petitioners Wesley Cade, George Danner, III, and Peter Templeton filed a complaint on July 26, 1985 alleging unfair labor practices and subsequently amended that complaint. Petitioners have requested the Labor Relations Agency (the "Agency") to issue subpoenas for production of documents for purposes of pre-hearing discovery by the petitioners. Respondent Marine Engineers Beneficial Association ("MEBA") opposed that request and filed a formal opposition thereto. Petitioners subsequently responded. The Agency, having considered the arguments presented, renders its decision in response to said request.

Findings of Fact

1. In late October and early November, 1985, the petitioners through their representatives requested subpoenas duces tecum for documents from MEBA, particularly documents in the custody of Mr. Carl Langrebe, Branch Agent of MEBA in Seattle, Washington and other documents in the custody of Mr. Greg O'Claray, MEBA representative in Juneau, Alaska. The documents requested from Seattle include:

1. List of all MEBA dispatches to the Alaska Marine Highway System from November, 1983 to August 6, 1985.
2. Current list of PCD members and applicants, groups I and II with original registration date in this District.
3. Calhoon School MEBA graduates and applicants 1983-1985.

Documents requested from Mr. O'Claray in Juneau included:

List of Alaska Group I and Group II members and applicants with original MEBA registration dates.

2. Counsel for the Agency discussed the request for documents with counsel for petitioners as well as with counsel for MEBA, and insured that each party had knowledge of requests made and an opportunity to object thereto. Each party filed a statement of legal reasons for issuance or denial of subpoenas.
3. The documents sought by the petitioners were sought as pre-hearing discovery production and were not framed as requests for production solely at the time of hearing in this matter. Petitioner has not filed a verified petition or affidavit as to materiality of the documents sought.
4. A hearing was originally scheduled for December 18, 1985 and was subsequently (on mutual agreement of the parties) moved to January 22, 1986.

Conclusions of Law

1. The Agency's procedures with respect to hearings and subpoenas are governed by the Alaska Administrative Procedure Act ("APA"). AS 23.40.130 requires that a "complaint or accusation and the subsequent procedures shall be handled in accordance with the administrative adjudication portions of the [APA]." If "hand[ling]... subsequent procedures" includes

subpoena power, at least two provisions of the APA are relevant: AS 44.62.430 provides different procedures for subpoena issuance "before the hearing begins" and "after the hearing begins;" AS 44.62.440 provides for depositions before the hearing but only for purposes of preserving testimony and not pre-hearing discovery. The provisions of the APA do not specifically preclude issuance of subpoenas for pre-hearing discovery but the implication of these provisions is to limit subpoena process to production at hearings. The provisions of the APA must in any event be read alongside AS 23.40.160, which provides:

(a) For the purpose of the investigations, proceedings, or hearings which the labor relations agency considers necessary to carry out the provisions of AS 23.40.070 23.40.260, the labor relations agency may issue subpoenas requiring the attendance and testimony of witnesses and the production of relevant evidence.

(b) The labor relations agency may administer oaths, examine witnesses, and receive evidence.

(c) The attendance of witnesses and the production of evidence may be required from any place in the state at any designated place of hearing.

(d) If a person refuses to obey a subpoena issued under AS 23.40.070 - 23.40.260, the superior court in the district in which the person resides or is found may, upon application by the labor relations agency, issue an order requiring the person to comply with the subpoena. [emphasis added].

2. The Agency is authorized to issue regulations pursuant to AS 23.40.170 to carry out the provisions of AS 23.40, the Public Employees Relations Act ("PERA"). With respect to issuance of subpoenas, the Agency has promulgated regulation 2 AAC 10.410 which provides in pertinent part:

(a) Only the petitioner, the public employer, and any party who has objected or intervened under sec. 70(3) of this chapter, or the plaintiff and defendant with respect to unfair labor practice charges, has the right to present evidence and call witnesses. At the request of any party who

has the right to present evidence and call witnesses or upon the labor relations agency's own motion, oral testimony may be required to be given under oath.

(d) The labor relations agency, on its own initiative, will, in its discretion, require any person it considers appropriate to appear and testify at the hearing and to produce evidence.

(e) Upon application of any party who has the right to present evidence and call witnesses at the hearing, the labor relations agency will issue a subpoena requiring the attendance and testimony of witnesses and the production of evidence.

3. To further implement the PERA, the Agency has adopted regulation 2 AAC 10.440(b) which provides that "Relevant decisions of the National Labor Relations Board and Federal Courts will be given great weight in determinations made under this chapter [2 AAC 10] and AS 23.40."

4. The National Labor Relations Act as implemented by the National Labor Relations Board ("NLRB") does not provide for pre-hearing discovery and provides that the NLRB is authorized to issue subpoenas only with respect to production of documents or attendance at NLRB hearings. This interpretation is consistent with federal decisions including Dow Chemical Co. v. Allen, 672 F.2d 1262, 1270-71 fn. 13 (7th Cir. 1982); NLRB v. Interboro Contractors, Inc., 432 F.2d 854 (2nd Cir. 1970), cert denied 402 U.S. 915 (1971); and NLRB v. Miami Coca-Cola, 403 F.2d 994 (5th Cir. 1968). The federal cases cited by petitioners have been distinguished or are distinguishable as relating to delegation of subpoena-issuing authority. (For example, NLRB v. Interboro distinguishes North American Rockwell v. NLRB, 389 F.2d 866 (10th Cir. 1968) at 432 F.2d at 858). These decisions can, however, be read for the proposition that, because the NLRB must permit the fair presentation of a case, if evidence can not be obtained by a party to the case deemed to be critical to a fair representation of that party's case, a rehearing may be ordered. See for example NLRB v. Interboro, 432 F.2d at 859-60. Thus while the NLRB is not compelled to issue pre-hearing discovery subpoenas, it may if it were necessary to insure a fair hearing. The NLRB's authority to issue such subpoenas however is premised upon an

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adoption by reference of the rules of evidence applicable in the Federal District Courts. Such an analogy does not exist with respect to this Agency, although the obligation to provide fair hearings to parties before it is implicit.

5. The State of Alaska Attorney General's Office has issued memoranda of advice (informal opinions) with respect to the use of subpoena power by administrative agencies. These opinions, which are entitled to some weight (Allison v. State, 583 P.2d 813 (Alaska 1978)), have held that in the absence of express statutory authority, administrative agencies do not have subpoena power. 1985 Inf. Op. Atty Gen (Jan. 29; Rubini). See also State v. Layman, AK Supreme Court file 3351 (unpubl opinion). The subpoena power is therefore, in the view of the State Attorney General, to be narrowly rather than broadly construed.

6. The jurisdiction of the Agency to issue subpoenas compelling production of documents or witnesses does not extend beyond the territory of the State of Alaska. AS 23.40.160(c). Under AS 44.62.430-440, the Agency may order appearances upon verification of affidavit, with jurisdiction and enforcement left unclear or in the hands of the Superior Court.

7. Nothing precludes petitioners from seeking production of documents within the jurisdiction of the Agency at the January 22, 1986 hearing.

Decision

Based on the foregoing findings of fact and conclusions of law, the Labor Relations Agency decides that:

1. The Agency does not have jurisdiction to compel production of documents or attendance of witnesses, when those documents or witnesses are outside the jurisdiction of the Agency, and said jurisdiction extends only to the boundaries of the State of Alaska. Subpoenas for documents outside the State of Alaska cannot be issued for lack of jurisdiction.

2. The Agency is without authority to issue subpoenas for pre-hearing discovery seeking production of documents at proceedings other than hearings in the State of Alaska. However, the right to a fair hearing by petitioner may well require that if documents are not produced such that a party to a proceeding before the Agency is unable to fairly present its case (in spite of the use of subpoenas for production of documents at a hearing), the Agency may well order a re-hearing or second hearing on a matter in order to afford such a party an opportunity to better present its case.

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3. The petitioners' requests for pre-hearing subpoenas made in late October and early November, 1985 are denied.

4. A request for subpoenas compelling production of documents at the January 22, 1986 hearing, if within the jurisdiction of this Agency as provided in AS 23.40.160(c), will be promptly acknowledged and acted upon.

DATED this 18th day of December, 1985.

STATE OF ALASKA LABOR RELATIONS
AGENCY

By _____

C. R. "Steve" Hafling, Chairman

[Signature on File]