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INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Petitioner,

vs.

CITY OF HOMER,

Respondent.

CASE NO. 91-015-RC

DECISION AND ORDER NO. 138

This matter was heard on January 24, 1991, in Anchorage, Alaska, with Hearing Examiner Jan Hart DeYoung presiding. The record closed on June 11, 1991. In issuing this decision and order, the Alaska Labor Relations Board Members, Darrell Smith, B. Gil Johnson, and H.O. Williams, considered the record and transcript of the hearing.

Appearances:

Helene M. Antel, General Counsel, for petitioner International Brotherhood of Electrical Workers, Local 1547; and David T. Jones, Perkins Coie, for respondent City of Homer.

Digest:

A municipality is not required to adopt a particular substitute when it rejects the Public Employment Relations Act under section 4, chapter 113, SLA 1972.

DECISION

The International Brotherhood of Electrical Workers, Local 1547, filed a petition with this Agency for certification as bargaining representative for certain employees of the City of Homer under the Public Employment Relations Act (PERA). The City of Homer objected to this Agency's jurisdiction to consider this petition and to conduct any election to determine whether the employees want representation. The basis for the objection is section 4, chapter 113, SLA 1972, which allows organized boroughs and political subdivisions of the state to reject the provisions of PERA by adopting a resolution or ordinance. The Electrical Workers' position is that implicit in PERA is the requirement that a municipality adopt a substitute for collective bargaining when it rejects PERA. The Electrical Workers argue that, because the City of Homer did not adopt a local collective bargaining scheme, the resolution is ineffective and PERA applies.[1]

The City of Homer disputes that PERA requires a substitute to be adopted before PERA can be rejected. If the Agency were to find this requirement applies, the City argues in the alternative that its employee committee, which provides a vehicle for employees to communicate their views on personnel matters referred to it, provides an adequate substitute.

[1] The Electrical Workers also raise several constitutional arguments. Because they are outside of this agency's jurisdiction or authority, they are not addressed.

Findings of Fact

1. On October 16, 1990, the International Brotherhood of Electrical Workers, Local 1547, filed a petition to be certified the collective bargaining representative of the employees of the City of Homer.

2. The Alaska Labor Relations Agency investigated and determined that the petition was supported by a showing of interest in excess of 30 per cent of the proposed bargaining unit. A notice of the petition and the petition for representation were posted in various work locations of the City on November 8, 1990.

3. The City of Homer objected to the petition on two grounds: the Agency did not have jurisdiction because the City had adopted a resolution rejecting the terms of the Public Employment Relations Act; and the bargaining unit was inappropriate because it combined rank and file employees with exempt appointed officials and with confidential and supervisory employees.

4. On November 16, 1990, twelve City employees, describing themselves as a few members of the administrative and finance grouping, filed an objection stating a wish to be exempt from the union bargaining group.

5. Prehearing conferences were held on November 29 and December 7, 1990.

6. The Electrical Workers amended its petition on December 20, 1990, to provide for certification of the Electrical Workers as bargaining representative of two units: a general government unit and a supervisory unit.

7. The parties stipulated to the appropriateness of the two units on December 21, 1990. [Exhibit A.]

8. The parties stipulated to exclude from representation the positions assistant to the city manager, secretary to the city manager, city clerk, city planner, library director, port and harbor operations manager, director of public safety, director of finance, director of public works, and city manager.

9. The supervisory unit consists of 11 employees and includes the public works project engineer, water and sewer treatment superintendent, maintenance and construction manager, senior cashier, public works superintendent, police lieutenant, fire department administrator, police department lead dispatcher, customer support services, harbormaster and accounting manager/deputy treasurer.

10. The remaining employees not designated exempt or supervisory employees are in the general government bargaining unit.

11. A hearing was held on the issue of jurisdiction on January 24, 1991, in Anchorage.

12. On August 27, 1973, the City Council of the City of Homer adopted resolution no. 73-32, which states,

> WHEREAS, the City Manager and the Common Council of the City of Homer have considered the provisions of the Public Employment Relations Act, and,
> WHEREAS, the Manager and Council have determined that the Act is neither appropriate for, nor desired by, the employees of the City of Homer,
> NOW THEREFORE, BE IT RESOLVED by the Common Council of the City of Homer, that the Public Employment Relations Act is hereby rejected in its entirety.

[Respondent's exhibit JJ.] There was no ongoing organizational activity at the time the resolution was adopted. [Tr. 6.]

13. The City of Homer has not adopted an ordinance or resolution requiring the City to engage in collective bargaining with its employees.

14. The city council created an employee committee on December 22, 1989 [exhibits D & E], intending that employees of the different City departments elect representatives to serve on the committee. The employee committee provides information to the city council about personnel matters referred to it. The employee committee has addressed such issues as merit increases, grievance procedures, civil rights violations, and leave issues. [Tr. 32 & 39; exhibit D.] The grievance procedure adopted by the City after input from the committee has binding arbitration as its final step. The committee has also made recommendations to the city council regarding sabbaticals, layoff procedures, access to personnel records, and use of leave time.

15. C. E. Swackhammer is the City Manager of the City of Homer and has occupied that position since June 1, 1990. He testified that there is no requirement that a particular matter be

brought before the employee committee. If he did not want employee participation on an issue, he could decline to convene the committee.

16. The Electrical Workers made an offer of proof that an employee would testify that not all employee representatives on the committee were elected but some were chosen by their supervisors. The City did not contest this point.

Discussion

A. History

Section 4, ch. 113, SLA 1972 authorizes organized boroughs and political subdivisions to opt out of the Public Employment Relations Act:

> This Act is applicable to organized boroughs and political subdivisions of the state, home rule or otherwise unless the legislative body of the political subdivision, by ordinance or resolution, rejects having its provisions apply.

Labor organizations have raised a number of challenges to municipalities' ordinances or resolutions rejecting PERA. Challenges were upheld in Alaska v. City of Petersburg, 538 P.2d 263, 89 L.R.R.M.(BNA) 3095 (Alaska 1975); International Bhd. of Elec. Workers, Local 1547 v. Kodiak Island Borough, DOLLRA Decision and Order 90-5 (May 2, 1990), appeal docketed, no. 3AN-90-4512 (super. ct. June 1, 1990); Alaska Public Employees Ass'n v. City of Bethel, DOLLRA Decision & Order 90-6 (Nov. 7, 1990), appeal docketed, no. 4BE 90-219 CIV (super. ct. Dec. 4, 1990). Challenges were overruled in Anchorage Municipal Employees Ass'n

v. Municipality of Anchorage, 618 P.2d 575, 108 L.R.R.M.(BNA) 2255 (Alaska 1980); City of Fairbanks v. Fairbanks AFL-CIO Crafts Council, 623 P.2d 321, 108 L.R.R.M.(BNA) 2397 (Alaska 1981); and City and Borough of Sitka v. International Bhd. of Elec. Workers, Local 1547, 653 P.2d 332, 114 L.R.R.M.(BNA) 2858 (Alaska 1982).

From these cases three principles can be drawn to guide a review of a municipalities' resolution or ordinance rejecting PERA: (1) any rejection of PERA must be timely; (2) a municipality may not reject PERA with knowledge of organizational activity; and (3) a municipality must adopt a substitute for PERA.

1. Timeliness of the rejection.

The Alaska Supreme Court has stated that a municipality must act "promptly" and not at its "leisure" when rejecting PERA. Anchorage Municipal Employees Ass'n, 618 P.2d at 579, 108 L.R.R.M. (BNA) at 2255. The court has not established an actual deadline for rejecting PERA, stating that the legislature could have stated specifically if it wanted the time period to reject PERA to be limited. Id. Ten months is the longest time between PERA's effective date and a municipality's rejection that the court has actually reviewed and approved. Sitka, 653 P.2d at 333, 114 L.R.R.M.(BNA) at 2859.

2. Existence and knowledge of organizational activity.

A municipality may not wait until organizational activity occurs before opting out. The supreme court held that a

municipality may not reject PERA for the purpose of frustrating ongoing efforts to exercise rights under PERA. City of Petersburg, 538 P.2d at 267, 89 L.R.R.M.(BNA) at 3098. The City of Petersburg's resolution rejecting PERA was invalidated because the City adopted it only after learning of employee organizational activity. Id.

3. Absence of a substitute.

The Department of Labor, Labor Relations Agency[2] addressed a third requirement, holding that a municipality's rejection of PERA could not completely disenfranchise employees. The Agency required the adoption of a substitute form of mutual decision making to perfect rejection of PERA. Kodiak Island Borough v. International Bhd. of Elec. Workers, Local 1547, DOLLRA Decision & Order 90-5; Alaska Public Employee's Ass'n v. City of Bethel, DOLLRA Decision & Order 90-6 (May 2, 1990).[3]

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[2] Before July 1, 1990, the Department of Labor, Labor Relations Agency administered the Public Employment Relations Act for municipalities. On July 1, 1990, the Alaska Labor Relations Agency assumed administration of the Act for municipalities, as well as the state and school districts. Executive Order 77 (eff. July 1, 1990).

[3] The appeal is pending in Alaska Public Employees Ass'n v. City of Bethel, DOLLRA Decision & Order 90-6 (Nov. 7, 1990), appeal docketed, no. 4BE 90-219 CIV (super. ct. Dec. 4, 1990). From the bench, on November 21, 1990, the court ruled in International Bhd. of Elec. Workers, Local 1547 v. Kodiak Island Borough, DOLLRA Decision & Order 90-5 (May 2, 1990), appeal docketed, no. 3AN-90-4512 (super. ct. June 1, 1990), affirming DOLLRA's decision that the opt out was invalid. However, the court's reason was that organizational activity predated the opt out. The court did not address whether failure to adopt a substitute collective bargaining scheme impermissibly interferes with employee rights under PERA.

The Electrical Workers do not argue the first or second justifications in support of its challenge. The Homer ordinance was adopted in August of 1973 -- approximately eleven months after the effective date of PERA. This lapse of time is close factually to the time approved in the Sitka case and not so "leisurely" as to invalidate the action. See Sitka v. International Bhd. of Elec. Workers, Local 1547, 653 P.2d at 335, 114 L.R.R.M.(BNA) at 2860. In addition, the Electrical Workers do not make any claims that organizational activity tainting the adoption of the ordinance occurred at this time. Thus, the sole issues before the Agency in this case are (1) whether an alternate form of mutual decision making is required, and if so, (2) does Homer's employee committee meet that requirement.

B. To reject PERA must a municipality adopt a substitute?

The legislature in adopting PERA issued a strong statement in support of mutual decision making in government labor relations. AS 23.40.070 provides:

> The legislature finds that joint decision-making is the modern way of administering government. If public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work, to provide a

> rational method for dealing with disputes and work stoppages, to strengthen the merit principle where civil service is in effect and to maintain a favorable political and social environment. The legislature declares that it is the public policy of the state to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are to be effectuated by
> (1) recognizing the right of public employees to organize for the purpose of collective bargaining;
> (2) requiring public employers to negotiate with and enter into written agreements with employee organizations on matters of wages, hours, and other terms and conditions of employment;
> (3) maintaining merit-system principles among public employees.

As the supreme court stated, "the Act 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." City of Petersburg, 538 P.2d at 267, 89 L.R.R.M.(BNA) at 3098.

In International Bhd. of Elec. Workers, Local 1547 v. Kodiak Island Borough, DOLLRA Decision and Order 90-5 (May 2, 1990), the Department of Labor, Labor Relations Agency found that this strong statement of policy created a limitation on municipalities' option to reject PERA in section 4 of the session law adopting PERA. The Agency found Kodiak's ordinance invalid because it had not adopted a substitute collective bargaining ordinance. Previously the Department of Labor, Labor Relations Agency had construed section 4 more broadly to allow municipalities

discretion to reject PERA provided that rejection did not interfere with organizational activity or was not used to veto particular unions. International Bhd. of Elec. Workers and City of Seward, DOLLRA Decision & Order No. 85-3 (1985). The Kodiak case, however, presented compelling facts for extending the reach of PERA. The borough adopted its ordinance rejecting PERA after the superior court invalidated an earlier attempt to opt out. Its action followed substantial organizational activity in the borough. In this setting DOLLRA found the requirement to adopt a substitute.

The Electrical Workers argue that this Agency extend the Kodiak decision to this case. The City of Homer, on the other hand, argues that section 4 should be construed to permit a municipality complete discretion to reject PERA. Initially we note the courts have inferred from the language and policy of PERA some limitations on this right. City of Petersburg, 538 P.2d at 267, 89 L.R.R.M.(BNA) at 3098. But while the Department of Labor, Labor Relations Agency has found that the adoption of a local collective bargaining scheme limits the power to reject PERA, the supreme court as yet has not.

The question for this Agency is whether the purpose, policy, and language of PERA require such a limitation. Because this Agency has only the authority granted in the law, we look to PERA for the answer. Warner v. Alaska, ___ P.2d ___, 1991 WL 208252, at 2 (Alaska 1991); Rutter v. Alaska, 668 P.2d 1343, 1349 (Alaska 1983).

Before the adoption of PERA, a municipality was authorized to enter into collective bargaining agreements[4] but could refuse to recognize or negotiate with employee representatives. By adopting PERA, the legislature departed from the former law and created the right to bargain collectively. As the supreme court stated in Alaska Public Employees Ass'n v. Municipality of Anchorage, 555 P.2d 552, 553, 93 L.R.R.M.(BNA) 2762, 2763 (1976) (review of procedural safeguards in a municipal labor ordinance substituted for PERA):

> The right of public employees in Alaska to bargain collectively was created by the Public Employment Relations Act. The act allows political subdivisions of the state to reject the act's provisions for conduct of labor relations and to substitute their own provisions.

Rejection of PERA, however, does not prohibit local governments from engaging in collective bargaining. Anchorage Municipal Employees Ass'n, 618 P.2d at 580, 108 L.R.R.M.(BNA) 2259. Because collective bargaining can occur in the absence of PERA, collective bargaining does not depend upon the existence of a statute to authorize it.

Municipalities rejecting PERA have adopted local collective bargaining ordinances. Id.; see also City of Fairbanks v. Fairbanks AFL-CIO Crafts Council, 623 P.2d 321, 108 L.R.R.M. (BNA) 2397 (city since has opted in); International Bhd of Elec. Workers, Local 1547 v. Ketchikan, 805 P.2d 340, 136 L.R.R.M.(BNA)

[4] AS 23.40.010, repealed, sec. 5, ch. 113, SLA 1972.

2362 (Alaska 1991). But the fact that PERA does not prohibit adoption of local labor ordinances does not mean that it compels their adoption.

The supreme court when reviewing a local labor ordinance has refused to impose on a municipality that has rejected PERA any of PERA's requirements. The court has stated, "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." Anchorage Municipal Employees Ass'n, 618 P.2d at 581, 108 L.R.R.M.(BNA) at 2261.

Although the scheme may vary from the state scheme in PERA, the court does look to PERA or to the national labor laws when it reviews or interprets local labor relations schemes. International Brotherhood of Electrical Workers, Local 1547 v. Ketchikan, 805 P.2d 340, 342, 136 L.R.R.M.(BNA) 2362, 2363 (Alaska 1991)(looked to PERA for guidance in review of arbitration); Alaska Public Employees Ass'n v. Municipality of Anchorage, 555 P.2d at 554 -- 555, 93 L.R.R.M.(BNA) at 2764 (application of National Labor Relations Board's blocking charge rule to municipal labor relations scheme[5]).

[5] A blocking charge is an unfair labor practice charge arising from preelection conduct that, if true, would interfere with the laboratory conditions required for a representation election. Such a charge blocks the election until the charge is resolved. Alaska Public Employees Ass'n v. Municipality of Anchorage, 555 P.2d at 552, 554 -- 555, 93 L.R.R.M.(BNA) at 2762, 2764 (Alaska 1976).

However, we refuse to read into the court's comparisons with state and national labor relations laws any requirement that the local scheme extend all rights offered in those laws. Such a holding would be contrary to the plain language that a local scheme that "varies from the state scheme" is appropriate. Anchorage Municipal Employees Ass'n, 618 P.2d at 580, 108 L.R.R.M.(BNA) at 2259.

Significantly, the court does not measure local labor relations schemes against PERA to determine whether they are adequate. For example, the court refused to find a requirement that a municipality collectively bargain in Sitka v. International Bhd. of Elec. Workers, 653 P.2d at 332, 114 L.R.R.M.(BNA) at 2858. In that case the court reviewed a local labor ordinance. The City and Borough of Sitka's charter required its assembly to adopt an ordinance "recognizing employee organizations." Id. at 333, 114 L.R.R.M.(BNA) at 2859. Sitka adopted an ordinance that established a negotiating committee and later adopted an ordinance exempting Sitka from PERA. Id., 114 L.R.R.M.(BNA) at 2859. The Electrical Workers filed suit when the municipality refused to recognize it or engage in bargaining. The court found the municipality had validly rejected PERA. Id. at 335, 114 L.R.R.M.(BNA) at 2860. It interpreted the charter to require a personnel ordinance acknowledging an employee organization set up by employees, but it would not infer from the charter an obligation to engage in the full panoply of rights covered by "collective bargaining."

Something more would have been required in the charter. Id., at 337, 114 L.R.R.M.(BNA) at 2862. The court found the obligation in the charter solely to be to "meet and confer." The court described the obligation: A "meet and confer" or "meet and discuss" obligation imposes only the duty to meet at reasonable times and to discuss recommendations or proposals submitted by the employee organization. Id. at 337 n. 13, 114 L.R.R.M.(BNA) at 2862 n. 13. Collective bargaining was found to exceed the requirement of the charter. Focusing on the charter shows that the court apparently did not believe that PERA provided the yardstick to measure the validity of the ordinance.

In City of Fairbanks v. Fairbanks AFL-CIO Crafts Council, 623 P.2d 321, 108 L.R.R.M.(BNA) 2397, the court had an opportunity to require some kind of substitute and did not. In that case the labor crafts council sought an injunction requiring the City to bargain. The question before the court was whether the City was bound by the provisions of PERA despite having rejected it years earlier because it had subsequently negotiated with employee bargaining representatives. The City's adoption of a pension plan and refusal to negotiate over the plan prompted suit by the bargaining representatives. The court found the refusal to continue to negotiate to cause labor disharmony and to frustrate the objectives of PERA. Id. at 324, 108 L.R.R.M.(BNA) at 2400. Nevertheless, the court refused to require bargaining, finding no

statutory duty to bargain. Id. at 324 n. 10, 108 L.R.R.M.(BNA) at 2400 n. 10. See also, City of Fairbanks v. Fairbanks Firefighters Union, 623 P.2d 339, 340 (Alaska 1981)(finding no duty to bargain outside of PERA).

In light of these cases we cannot find in the purpose and policy of PERA the requirement that a municipality adopt a local collective bargaining scheme when it rejects PERA. We note that in every case where an opt-out was upheld against a challenge, the facts before the court included some alternate method to resolve disputes and decide issues affecting employees. But an examination of these cases and the plain language of PERA do not support a requirement enforceable by this Agency that they do so. Section 4 provides discretion to local governments to reject PERA and substitute some alternative, but we decline to read into that section or into AS 23.40.070 the requirement that a substitute be adopted that must include a particular employee right found in PERA, such as collective bargaining.

In summary, we do not find in the case law or the statutes any requirement that a particular labor relations scheme be adopted by a municipality that rejects PERA. By holding that there is no requirement that a substitute be adopted, we do not mean to discourage their adoption. As stated in AS 23.40.070, collective bargaining, that is, a system of mutual decision making over terms and conditions of employment,promotes labor harmony and is sound public policy. We simply do not read into the current law

a requirement that local governments adopt a particular scheme when exercising the option granted in section 4, chapter 113 of SLA 1972.

Because we hold that the adoption of a collective bargaining substitute is not required in PERA, we do not need to reach the second question -- whether the particular labor scheme adopted by the City of Homer is adequate.

Conclusions of Law

1. The Alaska Labor Relations Agency has jurisdiction under AS 23.40.100 to consider whether the City of Homer validly rejected PERA when it adopted resolution no. 73-32.

2. The Public Employment Relations Act does not require a municipality to adopt a particular substitute for PERA for its ordinance rejecting PERA to be valid.

3. Resolution No. 73-32 validly exempts the City of Homer from the Public Employment Relations Act.

ORDER

1. The objection to the Electrical Workers' petition for certification as employee representative of certain City of Homer employees is upheld.

2. The Electrical Workers' petition for certification as employee representative of two bargaining units in the City of Homer is dismissed.

THE ALASKA LABOR RELATIONS AGENCY

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Darrell Smith, Board Chairman

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B. Gil Johnson, Board Member

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H. O. Williams, Board Member