

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT
UNIVERSITY OF ALASKA,
Appellant,

vs.

UNITED ACADEMIC ADJUNCTS-
AAUP/AFT/APEA, AFL-CIO,
Appellees.

Case No. 3AN-97-03432 CI.

DECISION and ORDER

1. INTRODUCTION

The University of Alaska (University) appeals to the Superior Court for the State of Alaska from the April 15, 1997 Decision and Order of the Alaska Labor Relations Agency (Agency) which (1) denied the University's objections to a representation election among a statewide unit of Adjunct Faculty; (2) determined that the unit petitioned for is the appropriate unit; and (3) directed an election among the employees in the petitioned for unit. The Agency decision on appeal is A D.

II. FACTS AND PROCEEDINGS

United Academic Adjuncts, AAUP/AFT/APEA (Union) filed a petition with the Agency on December 10, 1996 seeking an election to represent a unit of persons employed by the University as adjunct faculty. Under the Public Employment Relations Act (PERA) and Agency regulations, the Union was required to submit a showing of interest amounting to at least 30 percent of the persons in the proposed unit. A.S. 23.40.100(a)(1); 8 AAC 97.025(a)(3) & (c). The Agency investigated and found that the showing of interest was adequate to require a further hearing on the appropriateness of the bargaining unit. 8 AAC 97.060(c).

The University objected to the petition. It claimed that the adjunct faculty were not "public employees" under A.S. 23.40.250(6) because they were not permanently employed. The University also contended that the adjunct faculty did not possess the requisite community of interest to permit their placement in a bargaining unit, and argued that the desires of the employees in the proposed unit could not be determined because the persons employed at the time of the petition was filed might not be employed when an election was held.

At the hearing the parties submitted exhibits, presented and examined witnesses, and argued their respective positions. The Agency evaluated the facts under the factors imposed by A.S. 23.40.090 which include the history of collective bargaining, wages, hours and other working conditions, the desires of employees, and the community of interest. It found that the history of collective bargaining was a significant factor. In particular, the Agency observed that the faculty unit history had evolved into separate units of community college faculty and regular faculty. The Agency also found that the wages, hours and working conditions of all adjunct faculty were similar, and that the employees had a shared community of interest. It found that the desires of the employees could not be deduced from the evidence at hearing, but hold that the absence of this evidence was not determinative in and of itself in deciding the appropriateness of the proposed unit. The Agency also found that the statutory proscription against undue fragmentation supported the appropriateness of the unit proposed by the Union. On purely legal issues, the Agency held that the adjunct faculty were "public employees" under Section 250(6) PERA, regardless of their "permanent" and "probationary" status.

III. STANDARD OF REVIEW

In accord with A.S.23.40.090, PERA confers the Agency with express authority to determine appropriate bargaining units. The Decisions of the Agency with regard to matters concerning bargaining unit determinations are entitled to deference. *State v. Alaska State Employee Ass'n*, 923 P.2d 18, 24 (Alaska 1996). The rational basis standard is applied where the Agency exercises its special expertise or determines fundamental policies. Under that standard, the Agency must have considered salient problems and genuinely engaged in reasoned decision making and the Agency determination must be supported by the facts and have a reasonable basis in law.

An administrative agency's factual determinations are reviewed under a 'substantial evidence' standard to determine whether 'there is substantial evidence in light of the whole record, such that a reasonable mind might accept the Board's decision.' *Municipality of Anchorage, Police & Fire Retirement Bd. v. Coffey*, 893 P.2d 722, 726 (Alaska 1995).

An administrative agency's interpretation of its own regulations is entitled to a deferential standard of review. 'The court's role with regard to the same is to evaluate the merits of the interpretation by the Agency. *State v. Merriouns*, 894 P.2d 623, 627 (Alaska 1995). Long-standing agency interpretations of its enabling statute are also entitled to some weight. *Carr-Gottstein v. State*, 899 P.2d 134, 139-40 (Alaska 1995). Where the "Agency's experience will be of little guidance to the court in determining the meaning of [a] statute," the court applies the "substitution of judgment" standard, using its own expertise and statutory interpretation to determine the statute's meaning, without deference to the agency. *Public Safety Employers Ass'n v. State*, 799 P.2d 315, 318 n.3 (Alaska 1990); *Kodiak Island Borough v. State, Dept. of Labor, Labor Relations Agency*. 853 P.2d 1111, 11 13 (Alaska 1993) (independent judgment standard applies to review of the Agency's interpretation of the Public Employment Relations Act).

IV. DISCUSSION

PERA grants public employees the right to 'self-organize and form, join, or assist an organization to bargaining collective through representatives of their own choosing....' A.S. 23.40.080. PERA also expressly confers the Agency with primary authority to determine an appropriate bargaining unit:

The [Agency] shall decide in each case, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [PERA] the unit appropriate for the purposes of collective bargaining, based on such factors as community of interest, wages, hours, and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees. Bargaining units shall be as large as is reasonable, and unnecessary fragmenting [sic] shall be avoided.

It is undisputed that the adjunct faculty has been unrepresented as an employee group within the University and that other university faculty are already represented by other unions. The University has consistently attempted to distinguish adjunct faculty into three separate distinct groups that are referred to as "regulars", "repeaters" and "sporadic adjuncts". The Agency found that an accretion of adjunct faculty to an existing faculty unit might be appropriate but for the history of bargaining. The Agency thus found that the adjunct faculty unit was deemed a "residual" unit. In this regard, the Agency is required to consider the rulings of the National Labor Relations Board (NLRB) and Federal Court decisions in deciding issues under PERA. *APEA v. Municipality of Anchorage*, 555 P.2d 552, 553 (Alaska 1976); 9 AAC 97.450(b). In *Fleming Foods, Inc.*, 313 NLRB 948, 145 LRRM 1301, 1303 (1994) citing, *Eastern Container Corp.*, 275 NLRB 1537, 120 LRRM 1053 (1985). The NLRB held "it is well established that a residual unit is appropriate only if it includes all represented employees of the type covered by the petition." This court finds from the record on Appeal that the University's argument that the adjunct faculty does not constitute an appropriate unit is unsupported by law. The Agency's finding that all adjuncts properly belong in a single bargaining unit is consistent with the law. In this regard, the Agency stated:

Without this history, the adjuncts might not comprise an appropriate unit. With this history, the unit becomes very appropriate because the consequence of finding the unit inappropriate would be either to deny bargaining rights to these workers or to splinter the adjuncts into possibly three more bargaining units. Neither outcome is a good one...

PERA also requires that all Agency unit determinations consider the importance of fragmentation. A.S. 23.40.090. In *Alaska State Employees Ass'n v. State*, 923 P.2d 18, 22 (Alaska 1996) the Alaska Supreme Court acknowledged that the Federal practice against over inclusiveness was based upon a need to avoid "instability" in labor relations. The University relies on the dissenting Statements of an Agency member. This court agrees with the Appellee that the dissent did not fully consider the fragmentation issue. This court finds that the dissenting opinion that the three types of adjunct faculty should not be commingled in a separate bargaining unit is not supported by the facts or law.

The University also contends that an election for adjunct faculty deprives employees the right to chose a union because most adjunct faculty are not eligible for rehire, but may be forced to join a union through the vote of others. It is well established under Federal Law that employees who are working at the time of an election are eligible to vote. *Case-Swayne Co. Inc.*, 209 NLRB No. 160, 88 LRRM 1598 (1974). By way of 8 AAC 97.130(b), the Agency's regulation promotes the same goal. In essence, the University argues that, as a public employer, it retains discretion to hire employees and that there should be no election because it may select new employees each semester as adjunct faculty who are not employed when the election occurred. If an employer was privileged to defeat a representation petition based upon the transient nature of its employee population, then every employer would use this process to frustrate the collective bargaining rights. The law does not support this position. This court finds that the University's claim that an election would deprive adjunct faculty of the right of self-determination is unsupported by the law.

(A) THE AGENCY'S DETERMINATION THAT ADJUNCT FACULTY ARE "PUBLIC EMPLOYEES" IS CONSISTENT WITH AGENCY REGULATIONS, PERA AND RECENT COURT DECISIONS.

The University objected to the Union's petition on grounds that adjunct faculty were not "public employees" under agency regulations. Specifically, the University relied upon 8 AAC 97.025(a)(3), which required that a petition for representation must be accompanied by

[A] statement that 30 percent of the *permanent and probationary employees* in the proposed unit want to be represented by the petitioner for the collective bargaining purposes. (emphasis added).

The University claims that adjunct faculty are neither permanent nor probationary, and therefore not public employees. The Agency rejected this argument and observed that PERA defines "public employee" broadly and that A.S. 23.40.250(6) defines the term to mean "any employee of a public employer, whether or not in the classified service of the public employer, except elected or appointed officials or superintendents of schools.... Nothing within the statute limits exercise of the rights conferred by A.S. 23.40.080 and therefore the adjunct faculty's lack of permanence is not determinative of the employee status.

The Agency's regulation 8 AAC 97,990 (2) applicable in 1993 defined "employee" as:

[M]eans the same as "public employee" in A.S. 23.40.250 and is limited to a person employed by a public employer in a permanent or probationary status, including a part time or seasonable employee, who is entitled to receive retirement and vacation benefits from the public employer....

Relying upon this regulation, the Agency ruled in Decision & Order No. 170 that certain non-permanent state employees were not entitled to exercise rights under PERA. That ruling was appealed to the superior court and the Supreme Court, which held that the restrictive language of 8 AAC 97.990(2) was inconsistent with A.S. 23.40.250(6), and reversed the Agency. citing, *State v. ASEA*, Case No. S-6540, slip op. at 4 (1996) (Mem.Op & Judgment). Even though Appellate Rule 214(d) prohibits citation to summary opinions in proceedings before the state courts, this court finds that the reference to the citation is appropriate because the Agency relied upon the Supreme Court's unpublished memorandum opinion as one basis for its interpretation of 8 AAC 97.025(a)(3), and cited the unpublished decision in *Decision & Order* No.218. Based on the aforementioned ruling of the Supreme Court, the Agency repealed 8 AAC 97.990(2). In the present case, the Agency reasoned that the retention of the limiting terms "permanent and probationary" within 8 AAC 97.025(a)(3) would be inconstant with the court's reversal of *Decision & Order* No. 170's preclusion interpretation of 8 AAC 97.990(2). The Agency found that "the repeal of the definition of [']employee['] in 8 AAC 97.990(2) demonstrates our intent that temporary or short term employment status should *not* limit employees' right to bargaining collectively." (emphasis in original). Based upon this analysis, the Agency gave primary emphasis to the expansive language within A.S. 23.40.250(6), finding the adjunct faculty did not fall within the excluded categories listed in the statute.

This court affirms the analysis, reasoning and decision of the Agency in this regard. There is no reason why the Agency would continue to interpret one portion of its regulations in a restrictive manner when another regulation with the same language is deemed inconsistent with the broad terms of Section 250(6) of PERA.

The University argues that the State Personnel Act definitions of "permanent", "non-permanent" and "probationary" employee support a finding that 8 AAC 97.025(a)(3) intends to limit the class of persons who can exercise the rights provided for under PERA. The Act, by its terms, is not a statute that implicates or regulates collective bargaining. The exercise of rights under PERA is not dependent upon what other statutes grant or deny in general employment matters. *Hafling v. Inlandboatmen's Union of Pacific*, 585 P.2d 870, 872 (Alaska 1978); *Alaska Public Employees Ass'n v State*, 776 P.2d 1030, 1033 (Alaska 1989).

This court affirms the Agency's interpretation of its own regulation as reasonable, as well as the agency finding that adjunct faculty are 'public employees' under PERA.

(B) THE AGENCY'S DETERMINATION THAT A GROUP OF ADJUNCT FACULTY CONSTITUTED AN APPROPRIATE BARGAINING UNIT WAS CONSISTENT WITH PERA AND RELEVANT PRIVATE SECTOR LABOR DECISIONS.

A primary issue on Appeal is whether or not the Agency properly found that there was a community of interest among adjunct faculty, In determining whether there was a "community of interest" among the UAA adjunct faculty, an inquiry is made into the "wages, hours, and terms and conditions of employment." *Power Incorporated v. N.L.R.B.*, 40 F.3d 409, 420 (D.C. Cir, 1994); *N.L.R.B. v. Joe B. Foods, Inc.* 953 F.2d 287, 297 (7th Cir. 1992). The Agency found that the adjunct faculty shared a community of interest in that they worked similar hours, were denied coverage under the University's health benefit plan, their pay rates were somewhat standardized, and the University maintained an adjunct faculty personnel policy. Unlike regular university faculty, adjuncts do not participate in matters of university covenants, are not eligible for tenure, and have significant differences in their work environment from those faculty in the regular community college bargaining units.

The University, in its opposition to the finding of a community of interest, relies in part on the Alaska State Labor Relations Agency's holding in *Order & Decision* No. 66 (1981). This court, like the Agency, does not find that *Decision* controlling. In that case, the Union submitted only three interest cards for a proposed unit of between 500 to 775 adjunct faculty. That showing was inadequate, and the old Agency's regulations required that employees be "permanent" in order to qualify for representation under PERA. While the old Agency's "permanent employee" regulation was adopted by the present Agency, it was that precise regulation which was deemed inconsistent with A.S.23,40.250 (6) by the Supreme Court in, *ASEA supra*.

(C) THE AGENCY'S FINDING THAT THE DESIRES OF THE EMPLOYEES WAS NOT CLEAR.

The Agency held that there was insufficient evidence of the desires of the employees to admit a specific finding under A.S. 23.40.090, however, the Agency found that the absence of such evidence was not determinative of the petition because the other evidence was strong enough to establish the appropriateness of the, proposed unit. The University relies upon *ASEA v. State, supra*, 923 P.2d at 26, in support of its argument that the Agency's finding that the desires of employees was not established undermines its ultimate determination that the proposed unit of adjunct faculty is appropriate. However, the circumstances applicable in that case are different from those present in the matter on Appeal. In that case, the Agency found that there was 'no evidence of employee desires' and that an election would answer the question. The agency's analysis of the continuing appropriateness of the bargaining unit was premised upon the "successorship" doctrine which requires a successor employer to bargain with the incumbent union upon demand if the continuity of the work force remains intact. The court found that the Agency in that case did not properly consider either the "fragmentation" or the "desires of the employee" factors of A.S. 23.40.090. Therefore, its conclusions as to the continuity lacked sufficient factual and legal support.

The Agency is conferred with primary authority to evaluate representation petitions under the factors specified within A.S. 23.40.090. The Agency must evaluate the evidence submitted in support of each of the factors and determine which are sufficient, which are not, and which are determinative. *Nightingale Oil Co. v NLRB*, 905 F.2d 528, 535 (1st.Cir. 1990). Appropriate unit determinations by the NLRB are exercises in administrative authority that "lie [] largely in the discretion of the Board, whose decision, 'if not final, is rarely to be disturbed'...". *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers*, 425 U.S. 800, 805, 96 S.Ct. 1842, 1844, 48 L.Ed. 2d 382 (1976) (per curiam), quoting *Packard Motor Co. v. NLRB* 330 U.S. 485, 491, 67 S.Ct. 789, 91 L.Ed. 1040 (1947).

The University's argument presupposes that the Agency's reliance upon actual testimony would have been determinative of the employee desires. In *Order & Decision* No. 105 the Agency's predecessor had held that "the desires of the employees could only be established by a showing of interest exceeding 50% from the employees in the proposed unit. The superior court found that this proposed ruling was erroneous. *Alaska Institutional Employees Ass'n v. State* Case No. 3AN-87-05791 CV (1988). A.S. 23.40. 100 expressly states that the Agency shall proceed to a hearing if a question of representation is raised by a petition supported by a 30 percent showing of interest. The court held that the "desires of employees factor of A.S. 23.40.090 was satisfied if the petition for representation was supported by the required 30 percent showing. In the present cast, the Agency found that the petition was supported by the required showing of interest.

After full consideration of the entire record on Appeal, this court finds substantial evidence to support the Agency determination that, even in the absence of any evidence in specific support of the desires of the employees, other evidence was strong enough to establish the appropriateness of the proposed unit. The determination that Adjunct faculty constitutes an appropriate unit is supported by private sector labor cases which are informative. In *San Francisco University*, 265 NLRB 1221, 112 LRRM 1 1 13 (1982), and *New York University*, 205 NLRB 4, 83 LRRM 1549, 1552 (1973) the NLRB expressly held that units of adjunct faculty separate from regular faculty were appropriate.

V. SUMMARY

After considering the record on Appeal, this court finds that the Agency's *Decision & Order* No. 218 reflects a careful consideration and weighing of evidence and the law that is consistent with the Agency's responsibility under PERA. There is both substantial evidence and decisional support behind the Agency's findings of fact and conclusions of law. The Court AFFIRMS the Agency's Decision.

DATED this 6 day of December, 1997, at Anchorage, Alaska.

Sigurd E. Murphy
Superior Court Judge