BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE), LOCAL 302,

Appellant,

vs.

CBJ PERSONNEL BOARD,

Appellee.

DECISION ON APPEAL

Introduction

This is an appeal to the Assembly brought by the International Union of Operating Engineers, Local 302, pursuant to the CBJ Appeals Code, of a decision of the CBJ Personnel Board effectively denying IUOE's petition to represent a group of currently-unrepresented employees, the Juneau International Airport field maintenance employees. The IUOE had unsuccessfully brought a similar petition to the Board in 2009.[1] At the Board's January 10, 2012 meeting to consider the latest petition, both parties represented that the facts underlying the petition had not changed since 2009. Accordingly, the Board declined to give the petitioners an evidentiary hearing. Instead, the Board asked the IUOE and the CBJ Division of Human Resources and Risk Management (HRRM) to submit briefing and present oral argument on whether:

[1] The personnel board denied the petition on November 29, 2009. R79-93. As summarized by the Board in its April 20, 2012 decision, "the [2009] Board specifically considered the following factors as they applied to the Airport Field Maintenance employees: hours (shift work); wages and benefits; working conditions (that the employees are subject to the Personnel Management Code, the Labor Relations Code, the Personnel Rules, the Classification Plan, and the City Manager's administrative policies relating to personnel similar to other CBJ employees); the desires of the employees; history of collective bargaining; other working conditions; and whether the Airport Field Maintenance employees' community of interest were (sic) so distinct in relation to other CBJ employees as to justify a separate bargaining unit (finding it was not). R10 The assembly affirmed the decision on appeal on June 10, 2010. R94-98

> " . . . the February 28, 2011 amendments to the City and Borough of Juneau Labor Management Code and Personnel Board Rules of Procedure justify a reconsideration of the Board's 2009 determination of the Airport Field Maintenance employees' appropriate bargaining unit (upheld by the Assembly in its June 10, 2010 decision on appeal).

Personnel Board's May 9, 2012, Decision at p. 1.

After considering briefing by the parties and oral argument on February 23, 2012, the Board found that

> ". . .as to the Airport Field Maintenance employees, the Board did previously apply the definition of "bargaining unit" now contained in the 2011 amendments. Specifically, the Board finds that in 2009, a determination as to the Airport Field Maintenance employees' community of interest, as that term is understood under the current ordinance, was applied. For these reasons, the Board must decline IUOE's request to allow reconsideration of this issue.

Personnel Board's May 9, 2012, Decision at p. 4.

Ultimately, the Board concluded:

> The 2011 amendments to CBJ 44.10.040 and Personnel Board Rule of Procedure 4.05 would not require the Board to engage in any meaningfully different analysis of IUOE's claims, such that IUOE should be allowed to now renew the petition that was finally decided in 2009. The amendments did not "fundamentally change" the criteria the Board must consider in determining the appropriate bargaining units and created no new legal right or standing that would allow or require reconsideration of the issue.

Personnel Board's May 9, 2012, Decision at p. 8.

The union timely appealed the Board's 2012 decision to the Assembly, asking that the Assembly remand the petition back to the Personnel Board with directions to hold a hearing and issue a determination of the appropriate bargaining unit. For the reasons set forth below, we affirm the Board's decision.

Standard of Review; Burden of Proof

The CBJ Appeals Code at .070, sets forth the standard of review and burden of proof. CBJ 01.50.070 provides:

> (a) The appeal agency or the hearing officer may set aside the decision being appealed only if:
>
> (1) The appellant establishes that the decision is not supported by substantial evidence in light of the whole record, as supplemented at the hearing;
>
> (2) The decision is not supported by adequate written findings or the findings fail to inform the appeal agency or the hearing officer of the basis upon which the decision appealed from was made; or
>
> (3) The appeal agency or the hearing officer failed to follow its own procedures or otherwise denied procedural due process to one or more of the parties.
>
> (b) The burden of proof is on the appellant.

This is a deferential standard of review. The Appeals Code defines "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. CBJ 01.50.010.

In addition to the Appeals Code section set forth above, the Alaska Supreme Court uses a deferential standard of review, the "reasonable basis test," for questions of law involving agency expertise. This Supreme Court test seems appropriate for the present appeal as the Personnel Board is interpreting its own code and regulations in light of its past actions.

Thus, for both factual and legal findings, under the Appeals Code and Alaska case law, the Board is entitled to considerable deference. Even if the Assembly might decide a matter differently if presented directly, under these Code and Supreme Court standards, it must defer to the Personnel Board.

Discussion

On November 3, 2011, the IUOE filed a "request to petition" for creation of a separate bargaining unit for the airport field maintenance workers.[2] The Board took up the petition on

[2] In fact, it was a petition under Rule 4.02 of the Board's rules of procedure.

January 10, 2012 and invited the IUOE to explain "what had changed since the July 2009 petition" (which the Board had denied). The IUOE argued to the Board (and, later, to the Assembly on appeal), that the legal background to the bargaining unit petition was changed by the Assembly's adoption of amendments to the Personnel Management Code and the Personnel Board Rules of Procedure.

The Human Resources and Risk Management (HRRM) Division responded that these amendments were not material to the present case and that they were insufficient to change the Board's finding from the previous petition that a new bargaining unit for the field maintenance employees was not warranted.

The Board established a schedule and directed the parties to submit briefs on whether it would be proper to review the previous decision or whether it was barred from considering the matter. The parties offered oral argument before the Board on February 23, 2012.

On February 23, 2012, the Board issued a minute order, set forth substantially below:

> 1. The amended ordinance does not allow the Board to consider different or additional factors because Community of Interest as understood under both federal and state labor law was considered in the 2009 Decision and Order on this same matter.
> 2. Upon review of the 2009 Decision and Order and information provided by the Board's attorney, the Board did apply the Community of Interest standards as commonly defined and understood by the National Labor Relations Board.
> 3. CBJ Code 44.10.050 does not allow for an opted-out group to form its own bargaining unit, but rather allows the opted-out group to be included in a Bargaining Unit determined appropriate by the Board, which the Board determined in respect to these employees in 2009.

R75

The Board directed its attorney to prepare a decision and order. The Board convened again on April 20, 2012, and adopted its decision and order. R5-13

Was there a material difference in the underlying facts between 2009 and 2012 before the Board?

At the January 10, 2012 meeting of the Personnel Board, both parties represented to the Board that there were no changes in the underlying facts between 2009 and 2012. In the words of HRRM's representative ". . . wages, hours, terms and conditions of employment for the Airport Field Maintenance Workers . . . are largely if not identical to those presented to the Personnel Board when it reached its previous decision."[3] R15

Was there a material change in the law between 2009 and 2012?

- **CBJ 44.10.040 (as amended)**

  CBJ 44.10.040, amended in 2011, provides that:

  > The board shall determine the unit or units appropriate for the purpose of collective bargaining. Bargaining units shall be *primarily defined by the community of interest among the positions assigned to the bargaining unit, but shall be* as large as is reasonable, and unnecessary fragmenting shall be avoided. The board decision on the appropriateness of a bargaining unit shall be appealable to the assembly as provided by Charter and ordinance.

(Emphasis added to indicate new language).

The IUOE argues that the amended ordinance requires the board to take "primary" account of the "community of interest among the positions assigned to the bargaining unit." In its view, "the primary consideration, now, is whether the positions within the proposed unit make sense to be grouped together as a unit" and "diminishes the consideration of whether there are matters of overlap (wages, hours, etc.) between the positions in the proposed unit and positions elsewhere in the City."

[3] R15. At oral argument before the Assembly counsel for IUOE asserted for the first time that it was entitled to the right to cross-examine witnesses in order to determine whether there were any changed factual circumstances. The IUOE renewed its argument in its "Comments and Objections" to our draft decision, conceding that it "did not contend that the facts were different" before the Board, but arguing that it now holds a different view. To be clear, IUOE has yet to proffer any "facts" supporting its newly-found position, only that it be allowed to cross-examine to determine whether "the factual landscape may have changed."

The HRRM Division contends that the ordinance and rule changes were not substantive, but were instead merely a clarification of existing code, and that they provided the same basis under which the Airport field maintenance employees had been previously denied their own bargaining unit. The HRRM emphasized that the existing requirements that bargaining units "shall be as large as is reasonable," and that "unnecessary fragmentation shall be avoided," remain unchanged.

Thus the IUOE and the HRRM draw opposite conclusions as to the meaning of this language. The IUOE reads the ordinance language as if the word "proposed" was included before "bargaining unit." This would focus the Board's community of interest analysis on the unit proposed by the Union for creation, rather than a larger possible unit of, *e.g.*, all positions with the same job classification within the CBJ (as was done in 2009). But, of course, the word "proposed" does not appear in the ordinance. Under IUOE's interpretation, the ordinance becomes somewhat circular, referring to the community of interest "among the positions assigned to the bargaining unit," when the very question to be answered is exactly what positions comprise the bargaining unit.

HRRM's interpretation is consistent with the legislative history of the 2011 amendments. While there was no testimony or assembly debate on Ordinance 2011-03(c),[4] the entire Assembly sitting as the Human Resources Committee devoted several hours to reviewing the proposed changes to the Code on December 18, 2010. R 33-48. Mr. Pete Ford, representing the Central Labor Council (CLC) argued for consistency in determining communities of interest for purposes of opting in and opting out of collective bargaining units.

> They [employee groups] should not constantly be dividing themselves. This keeps intact the rules for clarification, modification and amendment of a unit and allow for the creation of new units if appropriate. It maintains the language that supports the largest possible units and endorses unnecessary fragmentation. This will

[4]Ordinance 2011-03(c), encompassing the changes to CBJ 44.10.040, was adopted on February 28, 2011.

provide a greater degree of stability for the unions and the ability to represent their employees, and this improves labor relations in the borough.

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Mayor Botelho said the suggested wording from CLC that bargaining units are ". . . primarily defined. . ." suggests that there are other factors. He asked for clarification.

Mr. Ford said he thought this would help to strengthen the fact that units need to be as large as possible, they ought not be unnecessarily fragmented, and this would provide the Assembly with assurance that larger, unfragmented units would continue, but the COI would become a factor that it is not right now in making decisions whether or not a modified unit is appropriate or even a new bargaining unit.

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[Assemblymember] Dybdahl asked if this proposed change would allow for a greater number of bargaining units.

Ms. Cosgrove [HRRM director] said she did not think so. The employees that wish to organize would still need to determine they are sufficient COI, and the way the provisions are written for the General Governmental Unit (GGU) is broad. The Personnel Board would need to be convinced that a particular set of circumstances existed, similar to fire and police. The intent is to avoid unnecessary fragmentation.

R38, 39

We concur in the Board's finding that the analysis proposed by IUOE would be inconsistent with the language and intent of the CBJ Labor Relations Code and Personnel Board Rules of Procedure.

- **Board Rule 4.05**

  The following language was added to Board Rule 4.05:

  In reaching its determination [of appropriate bargaining units] the Board shall be guided by relevant decisions of the Alaska Labor Relations Agency and the National Labor Relations Board.

The IUOE argues that the 2010 amendments require the Board to consider decisions of the National Labor Relations Board and the Alaska Labor Relations Board. The HRRM argues that

the 2009 Board did in fact consider such decisions, that the IUOE cited such cases and the Board considered them.

It is evident from the record that the Board did undertake a review of both federal and state labor agency decisions. It extensively reviewed "community of interest" under both state and federal law. R8-10. While it noted that NLRB decisions are of limited application in circumstances similar to the petition before it, the Board specifically observed that its duty is to be guided by relevant decisions of the agencies and that it had done so. R12 We find no basis to conclude otherwise.

Was IUOE entitled to a hearing?

Personnel Board Rule of Procedure 4.05 provides in pertinent part: "The Board shall hold a hearing and issue a determination as set forth in Rule 9." Rule 9, in turn, establishes procedures governing hearings.

The IUOE argues on appeal that its due process rights were denied by the Board's failure to grant a full hearing, asking the Assembly to remand the matter back to the Board for a full adjudication of the petition.

HRRM argued that the 2009 Board had conducted a full hearing and issued a decision which was appealed to the Assembly. The Assembly, in turn, presided over an appeal with extensive briefing and oral argument by the parties. When the Assembly upheld the Board's denial of the bargaining unit petition, the IUOE chose not to request reconsideration or further appeal to the Superior Court. Accordingly, the matter was final under the legal doctrine of *res judicata*. The HRRM argued that what the IUOE was seeking was in essence an untimely reconsideration of the decided issue.

It is clear from a plain reading of the Board's decision and order that it adopted the view that the IUOE petition was, in essence, a request for reconsideration of its 2009 decision, a decision reached in full compliance with its Rule 9 hearing procedures. Rather than simply rejecting the reconsideration as untimely, it undertook a rigorous examination of the 2011 amendments and concluded that that the law did not create any "new legal right or standing that would allow or require reconsideration of the issue." R12 The Assembly concludes that the Board did not violate its own Rules of Procedure.

Did the Board afford the IUOE the process which it was due? The parties agreed at the outset that no material facts had changed from those presented at hearing in 2009 and at the time the Board considered the present petition in 2012. Thus, there was no basis for an evidentiary hearing. To do so would have wasted Board and parties' resources and encouraged instability in the workplace because parties would otherwise be free to initiate petitions for recognition without regard to earlier decisions of the Board.

On the other hand, the Board provided counsel for the IUOE and HRRM Division's representative opportunity to argue the applicable law to it on two occasions: at its January 10, 2012 meeting and again after extensive briefing on February 23, 2012.[5] IUOE received the process it was due.

Conclusion

Ultimately, this appeal turns on questions of materiality, of whether the legal changes made after the previous decision were substantial enough to require reconsideration of an issue previously decided by both the Board and the Assembly. The Board found after briefing and argument, that the code and rules changes "would not require the Board to engage in any *meaningfully different analysis* of IUOE's claims, such that IUOE should be allowed to now renew the petition that was finally decided in 2009." R8 (emphasis added). Under the standard of review

[5] We commend the Board for its methodical approach to this issue.

which must be applied in this appeal, the Assembly defers to the Board's determination of what would be "meaningfully different." The Board, the agency with the requisite expertise, did consider ACRA and NLRB decisions and concluded that there was no basis to change its earlier determination. The IUOE admitted, and the HRRM Division agreed, that the underlying facts had not changed since the earlier decision. Establishing an appropriate bargaining unit is primarily a factual analysis, and, with no changes to the facts, in light of the deference the Assembly must give the Board's actions, the Assembly affirms the Board's decision.

IT IS SO ORDERED.

DATED this 9th day of October, 2012.

ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

By: Mayor Bruce Botelho
Presiding Officer on Appeal

This is a final administrative decision of the Assembly of the City and Borough of Juneau, and it may be appealed to the Juneau Superior Court if such appeal is filed pursuant to the Alaska Rules of Appellate Procedure within 30 days from the date this decision is distributed by the Clerk.

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DISSENTING OPINION OF ASSEMBLYMEMBER RUTH DANNER

Having reviewed the draft Decision on Appeal in the above-captioned matter, the following is my dissenting opinion:

I do not agree with the majority in its decision to deny the appeal brought by IUOE Local 302 against CBJ Personnel Board.

The facts of the case decided in 2009 have not changed. On this, both parties agree. What has changed is the law. The Assembly enacted amendments to Personnel Board Rules of Procedure in 2011. The Union contends that these changes are substantial enough to have changed the outcome of the 2009 ruling. The Personnel Board says it does not know if it can hear this matter because all parties agree the facts have not changed.

I do not believe the Assembly has sufficient background and knowledge to decide without a hearing whether the law has been changed sufficiently to result in a different outcome. I think it would have been a small matter for the Assembly to say, "The Personnel Board can and shall hear the Union's arguments and make a new determination accordingly."

Rule 4.05 of the Personnel Board Rules of Procedure requires that the board "hold a hearing ... As set forth in Rule 9." In my opinion, the Assembly had the opportunity to set clearer direction, and lost it by taking this course of action. If the rules require the Personnel Board to hear in certain cases

and there is uncertainty of whether this specific case might fall in or outside of that requirement, the decision should fall toward hearing the case, to avoid any appearance of limiting the public's right to due process. The Board, after a fair hearing is always free, and is in fact required, to make a well-reasoned decision in light of the facts after they have been fully explored.

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DISSENTING OPINION OF ASSEMBLYMEMBER JESSE KIEHL

Having reviewed the draft Decision on Appeal in the above-captioned matter, the following is my dissenting opinion:

The Personnel Board would have the Assembly believe that nothing in the law has changed, despite the 2011 addition of a significant clause directing how it must evaluate communities of interest. Counsel for the Board argues that the change does nothing more than codify pre-existing practice. This is inconsistent with the Board's written findings and the Assembly's decision on appeal in the 2009 case (Record pages 92 and 96). Neither of these gave primary weight to the community of interest among the employees in the bargaining unit.

The Board's contention that it need only look at community of interest with the predominant bargaining unit of all City employees does not comport with its prior analysis or general practice. It is further inconsistent with some - though not all - testimony in the record on the 2011 change (Record page 38).

The Appellant would have us believe the 2011 language requires the Board to ignore community of interest with any employee outside the petitioning group. This is also inconsistent with the totality of City labor law and some - though not all - testimony in the record on the 2011 change (Record page 39).

While nothing in the record addresses the significant challenges the petitioner has yet to address in meeting the unnecessary fragmentation and "as large as is reasonable" tests, we need not address them here. The law changed materially. Its ambiguous text, supported by an ambiguous record justify a hearing on the new petition required by Personnel Board Rule 4.05.