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PUBLIC SAFETY EMPLOYEES)
ASSOCIATION, AFSCME LOCAL 803,)
AFL-CIO,)
)
Petitioner,)
vs.)
)
CITY OF WHITTIER,)
)
Respondent.)
)

_____)
CASE NO. 17-1708-RC

DECISION AND ORDER NO. 314

We heard this petition, by the Public Safety Employees Association, AFSCME Local 803, AFL-CIO, (PSEA) to represent a bargaining unit of employees at the City of Whittier Public Safety Department, on December 14, 2017, in Anchorage. Hearing Officer Tiffany Thomas presided. The parties filed post-hearing briefs by January 5, 2018, we completed hearing deliberations on February 21, 2018, and the record closed that day.

Digest: The petition by PSEA is granted as modified by this decision. A unit of approximately nine public safety employees at the City of Whittier is the unit appropriate for collective bargaining under AS 23.40.090. The City of Whittier’s rejection of the Public Employment Relations Act (PERA) by resolution on January 19, 1998, was untimely after employees had already exercised rights under PERA. Further, by removing its objection to PERA jurisdiction in the hearing pertaining to a 1999 election, the City waived its right to argue it has validly opted out of PERA.

Appearances: Megan Carmichael, attorney for PSEA; William Earnhart, attorney for the City of Whittier.

Board Panel: Jean Ward, Board Chair; Matthew McSorley, and Tyler Andrews, Board Members.

DECISION

Statement of the Case

On April 21, 2017, the Public Safety Employees Association, AFSCME Local 803, AFL-CIO (PSEA) filed a petition to represent a bargaining unit comprised of “All police, fire, and EMS service employees, employed at the City of Whittier, Department of Public Safety.” On August 14, 2017, the City of Whittier (City) filed an objection. The City argues that Whittier passed resolution 518-98 on January 19, 1998, to opt-out of the Public Employment Relations Act (PERA), and therefore, the Alaska Labor Relations Agency (ALRA) does not have the jurisdiction to conduct an election.¹ The City also contends the proposed bargaining unit is not appropriate in either size or community of interest, due to its mix of temporary workers and the duties of employees. The parties stipulated at the hearing that the volunteer firefighters would not be included in the bargaining unit.

Issues

1. Whether the City of Whittier validly opted out of PERA jurisdiction.
2. Is PSEA’s proposed bargaining unit at the City’s public safety department the unit appropriate for collective bargaining under AS 23.40.090?

Findings of Fact

1. The PSEA is an organization under AS 23.40.250(5).
2. The City of Whittier is a public employer under AS 23.40.250(7).
3. On April 21, 2017, PSEA filed a petition to represent employees at the City’s public safety department. The petition described the proposed unit as “All police, fire, and EMS service employees, employed at the City of Whittier, Department of Public Safety.” It excluded the “Director of Public Safety and Police Chief.”
4. On May 17, 2017, the City objected to the proposed bargaining unit in a letter. (Objection of City of Whittier to the Appropriateness of the Proposed Bargaining Unit, May 16, 2017). Because the Notice of Petition had not been posted, the objection was premature as the objection period under 8 AAC 97.070(3)(A) was not yet triggered. The City renewed its objections on August 14, 2017, and PSEA responded on August 30, 2017.
5. The Agency scheduled a prehearing conference on November 1, 2017. At that conference, a hearing was scheduled for December 14 and 15, 2017, in Anchorage.²

¹ PERA is defined in AS 23.40.070 through AS 23.40.260.

² The hearing concluded on December 14, 2017.

6. The Department of Public Safety in Whittier is comprised of the police department, fire department and emergency medical services (EMS) who are all overseen by the Director of Public Safety, Dave Schofield.³

7. Currently, there are six full-time paid police officers, two part-time/on-call paid police officers, one paid EMT position, and one paid receptionist/office assistant.⁴

8. The City is currently hiring for another police officer.

9. There are eleven volunteer firefighters, however, the record is not clear as to the number of volunteer EMT's.

10. Mark Hager is a Corporal (pending Sergeant) police officer. He has been employed with the City for four years and currently patrols in Girdwood and Whittier. As a police officer he "enforces state laws, assists the public with multiple different things." He also assists with EMS to include "driving the ambulance and performing CPR on people." Additionally, if there is a fire alarm, he will "go and check that out". (Hager testimony).

11. "Hager works a week-on, week-off schedule which begins on Thursdays. He primarily works a ten-hour shift, but can be called out for overtime. His work is assigned by the Police Chief, Dave Schofield." *Id.*

12. During his week on, he resides in Whittier. On his off time he shares an apartment in Anchorage with his girlfriend. *Id.*

13. Hager "shares police vehicles with the other police officers and helps to drive the ambulance." *Id.*

14. According to Hager, as a police officer "you work independently but we are a team and back each other up." Hager testified that he has "performed CPR in the back [of the ambulance] numerous times." *Id.*

15. Hager is dispatched to non-emergency calls by the administrative assistant Julia Yang, but also takes calls on the 911 cell phone. Additionally, Hager has the authority to dispatch other officers to calls. *Id.*

16. Hager serves as an FTO (field training officer) for new officers to assist them with completing their mandatory 40 hours of training. Hager testified that "the other officers help out, but [the new recruit] mainly rides with him until they feel comfortable about being on the street by themselves. As FTO he trains them on all police functions." *Id.*

³ As the Director of Public Safety, Schofield is also the Police Chief, and Fire Chief.

⁴ For consistency with the testimony of witnesses, and to avoid confusion, this position will be referred to as the administrative assistant.

17. As the Corporal, Hager “will give direction to other officers to instruct them on their duties and will also review their paperwork.” For a short period of time, he was in charge of the Department after Chief Schofield was injured and not able to report to work. According to Hager, during that time he “acted as the supervisor and provided training to officers.” However, under normal circumstances, Hager testified, that while he does attend the weekly changeover staff meeting, he does not attend manager meetings, does not hire, transfer, or lay-off employees. He has done one write-up before, but would not conduct discipline without the direction of Chief Schofield. *Id.*

18. Hager is eligible for overtime, and believes that he receives the same wages, health insurance, and benefits as others in the department. *Id.*

19. Hager believes “his position should be included in the same bargaining unit as others at the Department of Public Safety.” *Id.*

20. Robert Mallowney, is a police officer for the City, patrolling Girdwood and Whittier, but is also certified as a medic and firefighter. He works “primarily as a police officer but will backfill for the medic.” (Mallowney testimony). When he backfills for the medic he will “spend enough time to complete my report and restock the ambulance with whatever I used.” *Id.*

21. Mallowney is on the same Thursday to Thursday shift as Officer Cody Beauchamp and shares an apartment with him while in Whittier for his shift. During the course of his shift he also works with Julia Yang [the administrative assistant], and “will make it a point to talk to the EMS medic Keith [McCormick], at least once or twice a week to see if he needs help with anything.” *Id.*

22. Mallowney “will cover for other officers if anybody takes the day off and he also sees them during the pass-over shift change meeting on Thursdays.” *Id.*

23. Mallowney receives the same wages and benefits as the other police officers. *Id.*

24. Mallowney “believes that his position should be included in the same bargaining unit as the other Department of Public Safety employees.” *Id.*

25. Cody Beauchamp is employed as a police officer with the City of Whittier. He has been in that position since April 2016. He lives in Whittier while on shift and Anchorage while off shift. (Testimony of Cody Beauchamp).

26. His primary job duties are “to enforce the laws and assist the public in the City of Girdwood and Whittier. He also assists with EMS by driving the ambulance and assisting with CPR.” *Id.*

27. Due to the seasonal nature of each community, winters are primarily spent patrolling Girdwood, and summers are spent patrolling Whittier. *Id.*

28. During the course of his shift, “he works daily with Julia Yang, the administrative assistant, the Chief every other day (although it was every day prior to the Chief’s injury), and the EMT once a week.” *Id.*

29. Due to the Chief’s injury, Beauchamp is “working a split-shift to ensure there is coverage.” *Id.*

30. Dave Schofield is the Director of Public Safety for Whittier, the Police Chief, and pursuant to City Code, the Fire Chief. He has been employed with the city for approximately nine years. (Testimony of Dave Schofield).

31. The change in staffing to a larger department is in response to the City of Whittier being awarded a contract to patrol the community of Girdwood. *Id.*

32. Whittier has a wintertime population of approximately 200 permanent residents. However, in the summer, the population expands to about 700,000 people due to tourism and outdoor activities. Having a slower winter season in Whittier allows for patrolling of Girdwood which is busy in the winter once skiing starts. *Id.*

33. “Prior to having the Girdwood contract, the Department would shrink [after summer] because there was no call volume and new officers wouldn’t be hired until after New Year’s for the upcoming summer season.” *Id.*

34. Schofield said “with Girdwood [the contract] the hope was we would become more stable, that we would be able to hire people, and with the seasons being opposite with the two communities maintain a stable force and just be able to roll back from just predominantly working Whittier in the summer to Girdwood in the winter.” *Id.*

35. The Girdwood contract “started as a temporary month to month contract that began with the Whittier police patrolling the Girdwood Forest Fair in 2016. Another temporary contract started approximately on December 1, 2016, then became the current contract that started on January 1, 2017.”⁵ *Id.*

36. “The current contract is for three years but could be extended depending on what options are available at the conclusion of the contract in 2019.” *Id.*

37. “Of the Department of Public Safety’s 1.2 million dollar budget, roughly \$700,000 of that is made up through contract work between the Girdwood contract and the contract for the Anton Memorial Tunnel.” *Id.*

⁵ The contracts were included in the record as City Exhibit G and H.

38. “The City does not make a profit on the Girdwood contract although there may be a small margin for incidentals.” *Id.*

39. “The City received a letter that the union for the Anchorage Police Department would not stand in the way with Whittier coming in there [to Girdwood] and would not pursue unionizing the Girdwood side of the police department. That was an important factor because it changed the budget to allow the City of Whittier to go in at the price point that both the Anchorage Police Department and the Troopers were putting out [for bidding on getting the Girdwood contract].” *Id.*

40. “If the contract in Girdwood was to no longer be in effect at the end of 2019, there would be layoffs. However, it’s not known if that would impact any of the current officers.” According to the Chief, “it is also a possibility that the service area could expand, although there is nothing on the horizon that he is aware of.” *Id.*

41. “By code, as the Director of Public Safety, he is also the Fire Chief. In that capacity he oversees the fire department budget, ensures training is occurring, and looks for grants.” *Id.*

42. “The firefighters and EMS (except for Keith McCormick) are volunteers who do not receive compensation or benefits. They do however, receive free training from the City and a \$50.00 gift card at the annual Christmas party to thank them for their service.” *Id.*

43. “The policies for the fire department and EMS are overseen by Keith McCormick who also supervises the volunteers.” *Id.*

44. “The volunteers do not have access to the grievance process if they are let go [from volunteer service.]” *Id.*

45. “Police officers can volunteer for the free training if they wish to cross-train for certification as a firefighter or EMT.” *Id.*

ANALYSIS

1. Whether the City of Whittier validly opted out of PERA jurisdiction.

The Alaska Supreme Court has said, “. . . we think that whether a local government has exercised its option to reject PERA in a sufficiently timely fashion is best determined by looking at the circumstances of the individual case rather than setting an inflexible deadline.” *Anchorage Municipal Emp. Ass’n v. Municipality of Anchorage*, 618 P.2d 575, 581 (Alaska 1980).

The Board uses a two-part test to review the effectiveness of an ordinance or resolution rejecting PERA and has established a one-year guideline as a reasonable deadline for exemption. Pursuant to agency Decision and Order No. 167,

The first part of the test is whether the political subdivision acted in derogation of employee rights under PERA.

The second part of the test is an examination of the timeliness of the decision. The timeliness requirement has evolved into a bright line test requiring action within one year of PERA's enactment or the municipality's formation, whichever occurs later.

International Union of Operating Engineers, Local 302 v. City of Kotzebue, Decision and Order No. 167 at 11, (November 22, 1993) (internal citations omitted).

Upon remand by the superior court for additional fact finding, the Board made an exception to the one year rule for the community of Kotzebue. *Id.* at 12. However, in its decision the Board reaffirmed that the one year time frame to opt out was a reasonable test. It said, "Typically one year should be a reasonable time to act on the option to reject PERA. Certainly this should be true for the larger, older communities with a longer tradition of dealing with employees and personnel issues." *Id.* at 13.

The Board continues to apply the one year test in other cases. When determining the timeliness of an opt out argument for the Thomas Bay Power Authority, the Board said:

A political subdivision should be able within one year after it commences operation and hires employees to develop its employment and labor policies, including making and exercising a decision to opt out of PERA under section 4, ch. 113, SLA 1972.

International Brotherhood of Electrical Workers, Local 1547 v. Thomas Bay Power Authority, Decision and Order No. 145 at 7, (October 6, 1992).

PERA was enacted in 1972 with the passage of §2 ch 113 SLA 1972. There is no evidence in the record to show when the City incorporated, but its opt-out resolution was not passed until 1998, more than 26 years after the enactment of PERA. In 1993, the Board found that Whittier was under PERA jurisdiction in Decision and Order No. 151 when it ordered an election.⁶

There is no dispute that the City passed a resolution on January 19, 1998, to opt out of PERA. Meeting minutes taken prior to a vote on the resolution, marked as City's Exhibit B, show that the City was concerned with maintaining City control over employee relations and was concerned about having to pay union wages.

⁶ See, *Teamsters Local 959 vs. City of Whittier*, Decision and Order No. 151 at 3 (November 25, 1992). There is nothing in the Board's decision to indicate that opting out of PERA was in question. Rather, this decision supports the conclusion that the city had not opted out of PERA.

Carrie Williams explained that this resolution was developed by the city attorney and the city manager in an attempt to maintain city control over employee relations with the city administration. This follows the state of Alaska guidelines and prevents employees from organizing with a 'union' to represent them in negotiations with the city. This keeps the city administration and council and the employees in a direct dialogue with each other. To answer Ben Butler's question, without this resolution, the employees may organize with a union and at that point negotiations would [be] between the city and the union and not with the city employees themselves. All state and federal labor laws would still be intact and not violated in any way. Unions will often disregard the community's desire for local hire.

Ben Butler's concern is that with this resolution, the city employees cannot get the representation they may want to negotiate with the city. He feels this resolution gives the city an unfair advantage.

Carrie Williams explained that the employees can organize among themselves and approach the council as a group with issues. The resolution eliminates the third party. Union wage scales are considerably higher than municipal wage scales and this municipality cannot support union scale wages. She is not anti-union and supports unions where there exists an unfair employment situation.

(City Exhibit B at 3).

In *State v. City of Petersburg*, 538 P. 2d 263, 267 (Alaska 1975), city employees signed cards authorizing the International Brotherhood of Electrical Workers Union Local 1547 (IBEW) to represent them. The City council, held a special meeting and passed a resolution to exempt the City from PERA. *Id.* at 264. The City then suggested that employees form their own union rather than join the IBEW. *Id.* at 267. The Alaska Supreme Court held that was impermissible interference with employee rights under PERA and it reversed the superior court who had previously upheld the City of Petersburg rejection of PERA. The supreme court said,

The critical point beyond which the right and power of the City to reject the Act become subordinated to the rights of the employees granted by the same legislation must be ascertained. We hold that the analysis must turn on both the substantiality of the organizational activities undertaken by the employees and the extent of the City's awareness of those activities. Prior to becoming aware of substantial organizational activity, the City could have exempted itself from the applicability of the PERA without interfering with the right of the

employees to organize. Rejection of the PERA after becoming aware of such activity constitutes a gross and impermissible interference with the employee's freedom to choose which collective bargaining association should represent them.

Turning to the case at hand, six years before the resolution for the City of Whittier to opt-out of PERA was being deliberated, the employees had already held an election under ALRA jurisdiction in 1993.⁷

A second organization effort took place in Whittier in 1998, when the Laborers Local 341 and Operating Engineers Local 302, AFL-CIO filed a petition with the Agency. According to Decision and Order No. 242 at 1, "the City of Whittier filed an objection on October 7, 1998, and requested a hearing. The petition was heard on December 7, 1998, and the record closed at the conclusion of the hearing."⁸

Similar to this case, the City initially objected to the conduct of an election and argued in briefing that Whittier had opted out of PERA. *Id.* at 2. For unknown reasons, the City withdrew its objection, and following the conclusion of the hearing, the Board issued Decision and Order No. 242 where it found it had jurisdiction under AS 23.40.090 and AS 23.40.100 to consider the case. *Id.* at 14. An election was held on April 23, 1999, where the employees voted and elected a bargaining representative.

In *Kodiak Island Borough v. State, Dept. of Labor, Labor Relations Agency; and the International Brotherhood of Electrical Workers, Local 1547*, 853 P.2d 1111, 1114 (Alaska 1993) the Alaska supreme court affirmed its prior holding restricting a political subdivision's ability to opt out of PERA and further clarified those limits stating,

In *Petersburg* we limited a local government's ability to exempt itself from PERA once the local government became aware of substantial steps taken by employees to exercise their PERA rights. Although this holding limits the freedom of political subdivisions to opt out of PERA, we concluded that this result was consistent with the legislature's intent. 538 P.2d at 268. "[A]pplicability of PERA is the rule, exemption the exception." *Id.* We reaffirm that political subdivisions may not reject PERA after becoming aware of substantial organizational activity by employees.

Accordingly, the Board finds the City acted in derogation of employee rights under PERA, when it passed an untimely resolution to opt out of PERA after employees had already exercised

⁷ A full history of the elections will be discussed later in the decision, under e. History of collective bargaining.

⁸ *Laborers Local 341 & Operating Engineers 302, AFL-CIO v. City of Whittier*, Decision and Order 242 (March 3, 1999).

rights under PERA in 1993. Additionally, by removing its objection to PERA jurisdiction in the hearing pertaining to the 1999 election, and failing to appeal or otherwise object to the conduct of the 1993 and 1999 elections, the Board finds that the City has waived its right to argue it has validly opted out of PERA.

2. Is PSEA's proposed bargaining unit at the City's public safety department the unit appropriate for collective bargaining under AS 23.40.090?

PSEA has petitioned to represent a bargaining unit of "All police, fire, and EMS service employees, employed at the City of Whittier, Department of Public Safety." It excluded the "Director of Public Safety and Police Chief."⁹ The PSEA contends:

PSEA's proposed bargaining unit of all paid police, fire and EMS service employees employed at the City of Whittier, Department of Public Safety (DPS), excluding the Director of Public Safety and unpaid volunteers, is appropriate. PSEA's proposed bargaining unit has a sufficient community of interest among the employees because of the integrated nature of the Whittier DPS, the intermittent nature of any supervisory duties, and the common duties and schedules of the employees.

(PSEA's January 2, 2018, Post-Hearing Brief at 1).

The City, on the other hand, argues that:

The City of Whittier ("Whittier" or "City") validly opted out of the Alaska Public Employment Relations Act ("PERA") in 1998. Further, the proposed bargaining unit is inappropriate in that there is no community of interest in the various positions within the proposed unit. The lack of community of interest is exacerbated by the small size of the proposed unit, despite the varied positions, and the unique circumstances of the small city and the contracted services.

(City's January 4, 2018, Post-Hearing Brief at 1).

The City, also argues that Corporal Mark Hager, is a supervisor and pursuant to 8 AAC 97.090, "[A] proposed bargaining unit is not appropriate if it combines supervisory or confidential employees with other personnel. *Id.* at 6.

In this petition, PSEA has the burden of proving "the truth of each element" of their case by a preponderance of the evidence. 8 AAC 97.350(f). To determine the appropriateness of a proposed bargaining unit, the Agency considers the factors listed AS 23.40.090, which provides:

⁹ The parties stipulated at the hearing that only paid firefighters would be included in the unit.

The labor relations agency shall decide in each case, in order to assure to employees the fullest freedom in exercising the rights guaranteed by AS 23.40.070 – 23.40.260, 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 shall be avoided.

In *Alaska Nurses Association v. Wrangell Medical Center*, Decision and Order No. 296 (November 30, 2011), we stated:

We have previously concluded that in applying the factors and in determining the unit appropriate under AS 23.40.090, “[t]his statute does not require we give more weight to any one factor over other factors. Our responsibility is to insure that employees are placed in a unit that results in a community of interest based on the case’s particular facts, and the factors outlined in AS 23.40.090.” *Public Safety Employees Association v. City of Wasilla*, Decision and Order No. 286 (June 3, 2008) (D&O 286), at 18, citing *Alaska Correctional Officers Association v. State of Alaska*, Decision and Order No. 284, at 22 (February 28, 2008) (D&O 284).

Put another way:

There are no per se rules to include or exclude any classification of employees in any unit. Rather, we examine the community of interest of the particular employees involved, considering their skills, duties, and working conditions, the Employer’s organization and supervision, and bargaining history, if any, but no one factor has controlling weight. (citations omitted).

D&O 286 at 18, citing D&O 284 at 22, and *Airco, Inc. and Chauffeurs & Sales Drivers, Local Union No. 402*, 273 NLRB No. 348, 118 L.R.R.M. (BNA) 1052 (1984). We make unit decisions on a case-by-case basis.

Alaska Nurses, D&O 296 at 13.

a. Community of interest and working conditions.

The Department of Public Safety is made up of an administrative assistant, police officers, EMS (medic) and firefighter personnel. Each of these positions, interacts with the public and with each other to fulfill their job duties.¹⁰ We have previously found that a mixed unit of law

¹⁰ The appropriateness of the administrative position and Corporal Mark Hager in the bargaining unit will be discussed later in the decision, under d. Unnecessary fragmentation.

enforcement and non-law enforcement public safety personnel was appropriate. In Decision and Order No. 286 we held,

For example, in D&O No. 181, we found that a mixed unit of law enforcement and non-law enforcement public safety personnel was appropriate. We concluded “that the appropriate bargaining unit consists of all employees of the Bristol Bay Borough police department except the police chief. Specifically, the unit includes the police officers, dispatch/correctional officer, dispatch supervisor, and the animal control officer.” *Public Employees Local 71 vs. Bristol Bay Borough*, Decision and Order No. 181, at 7 (Dec. 16, 1994).

In looking at the City of Wasilla’s Police Department, we find a strong community of interest and high degree of functional integration among the employees in the proposed unit. The employees work under the same organizational hierarchy and answer to the executive head of the Department, the Chief of Police. They all work toward the same mission: public safety. They are all subject to the same Police Manual and Procedural manual. Moreover, all employees in the department work under stressful conditions due to the nature of law enforcement and public safety work.

...

Although training requirements differ among the various employees in the proposed unit, this difference does not diminish the fact that all employees in the proposed unit provide direct or supporting roles in law enforcement and public safety at the City. Moreover, at the political subdivision level, differences in job qualifications and duties of public safety employees should not require splitting them into two units. These differences do not significantly affect the strong community of interest based on other factors. Because of a strong community of interest and shared working conditions, we conclude that a single unit of employees is an appropriate unit at the Police Department.

Public Safety Employees Association v. City of Wasilla, Decision and Order No. 286 at 20 (June 3, 2008).

The police officers in the proposed unit serve on patrol and perform other customary law enforcement duties. (Testimony of Hager, Beauchamp). They are dispatched to calls by fellow officers, or the administrative assistant. They train together, live together, and have a weekly briefing meeting with the Chief and the administrative assistant. (Testimony of Hager, Mullowney,

Beauchamp). They primarily work independently, but all the officers testified that they will assist the EMT position by driving the ambulance, or in the case of Robert Mallowney, acting as a back-up medic. All of the positions interact with one another on a daily to weekly basis.

There was no testimony from the current EMT employee, however, Robert Mallowney who was a prior medic and currently serves as a back-up medic, confirmed that the job description marked as PSEA Exhibit 2/City Exhibit E “looked very accurate”.

There are currently no paid firefighter positions, and the parties stipulated that volunteer firefighters would not be included in the proposed unit. (Testimony of Schofield). The Board finds there was not enough evidence submitted to include the firefighter positions in the proposed unit. However, should a paid firefighter position become available, the parties can negotiate its placement in the unit or petition ALRA for a unit amendment.

In sum, while there is some difference in job qualifications and duties, we find these differences do not warrant fragmentation of the unit. Because there is functional integration amongst the employees to support the mission of the Department of Public Safety in a small political subdivision, we find there is a community of interest.

b. Wages and hours.

The officers all share similar wages, hours, and benefits, and are eligible for overtime. While there was no testimony from Julia Yang, according to Officers Mark Hagar and Cody Beauchamp, the administrative assistant works Monday through Friday on a 9 a.m. to 5 p.m. schedule. Additionally, the job description provided as City’s Exhibit F indicated that the position is “non-exempt, hourly, full-time, pay DOE + benefits.”

No testimony was provided to indicate what schedule the sole, full time EMS employee works, however, pursuant to PSEA Exhibit 2, the “Work/shift schedule is 4 days on/3days off based on two or more Paramedics/EMT III’s/Firefighters to provide 24/7 coverage. Shared housing is provided while on shift. Salary: \$20-28 p/h depending on experience and certification.”

While there is some difference in shifts between the different job classes, the wages, hours, overtime eligibility, and benefits are more similar than they are different. We find these differences do not support exclusion from the unit.

c. Desires of employees.

All the employees who testified believe they should be included in the unit. However, the testimony was limited to only police officers. No testimony was provided to indicate the desires of the other positions that would be included in the unit, therefore, the evidence regarding this factor is inconclusive. The employee’s desires can best be determined through a secret ballot election.

d. Unnecessary fragmentation.

The City argues that Officer Mark Hager is a supervisor and should be excluded from the unit pursuant to 8 AAC 97.090 and Section 2(3) and Section 2(11) of the National Labor Relations Act. (City's Post Hearing Brief at 9). Further, the City argues that Officer Hager performs discipline, assists in all management duties, and acted as the Lieutenant when the Chief was not available. *Id.* at 10.

8 AAC 97.090 determines the general criteria for bargaining units at the State level and therefore does not govern political subdivisions such as the City of Whittier.¹¹ The appropriate regulation to determine whether Hager is a supervisor is 8 AAC 97.990(a)(5), which states:

“supervisory employee” means an individual, regardless of job description or title, who has authority to act or to effectively recommend action in the interest of the public employer in any one of the following supervisory functions, if the exercise of that authority is not merely routine but requires the exercise of independent judgment:

- (A) Employing, including hiring, transferring, laying off, or recalling;
- (B) Discipline, including suspending, discharging, demoting, or issuing written warnings; or
- (C) Grievance adjudication, including responding to a first level grievance under a collective bargaining agreement[.]

The testimony from Hager and the Chief shows that Hager doesn't have authority to employ or grieve, and has limited discipline functions. As such, we are not persuaded that Mark Hager is a supervisor under the definition found in 8 AAC 97.990(a)(5), and even if he were, we would be concerned that removing him from the unit would result in unnecessary fragmentation of an already small unit.

Additionally, we do not believe that intermittent authority while the Chief is incapacitated, or otherwise unavailable qualifies Hager as a supervisor. As we have previously held, “. . . we believe the regulation should not be interpreted to find an employee is a supervisor merely because the employee has intermittent authority to act or

¹¹ 8 AAC 97.090(a). General criteria for bargaining units. (a) Except as provided in As 23.40.240, at the state level a proposed bargaining unit is not an appropriate bargaining unit if it combines:

- (1) Supervisory personnel with nonsupervisory personnel; or
- (2) Confidential employees with other employees;

effectively recommend action, such as while the employee’s supervisor is on leave.” *Laborers Local 341 & Operating Engineers 302, AFL-CIO v. City of Whittier*, Decision and Order No. 242 at 12 (March 3, 1999).

The City also argues that the administrative assistant should be excluded from the unit due to confidential duties. Under 8 AAC 97.990(a)(1), a confidential employee “means an employee who assists and acts in a confidential capacity to a person who formulates, determines, and effectuates management policies in labor relations matters.” No evidence was submitted to show the administrative assistant qualifies as a confidential employee under the regulation.

Although the public safety department employee’s skills vary according to their specific job titles, their interests, duties and working conditions all focus on the public safety department’s mission. Julia Yang, the administrative assistant does not go on calls or make arrests, but her frequent contact, communication, and interaction with police and EMS employees warrants her inclusion in the unit. Lastly, there is continual interaction amongst all the employees such that a community of interest exists with the proposed unit.

In sum, we believe these two positions are properly placed in the unit and even if they met the definition of supervisor or confidential employee outlined in 8 AAC 97.990, removal from the unit would result in unnecessary fragmentation.

e. History of collective bargaining.

The City contends “[t]here has been no history of collective bargaining in Whittier. Two prior petitions in regard to the Public Works Department have failed.” (City’s Hearing Brief at 9). However, the Board takes official notice that two elections have been held and certified by this agency.¹²

¹² As the Board said in *Public Safety Employees Ass’n v. State*, Decision & Order No. 212 at 7 (February 14, 1997),

Attachments 1, 2, and 3, on the other hand, are government records. This Agency can take official notice of its action in certifying an election and, thus, can take notice that it certified the unit set forth in attachment 3. (footnote omitted) The Administrative Procedure Act addresses official notice in administrative hearings and allows an agency to take notice of scientific or technical facts within its area of expertise or as provided in the rules governing the courts. AS 44.62.480. The rules of evidence allow notice of this fact at any time in a proceeding. Rule 201(b), Alaska R. of Evid.

The first election stemmed from a petition for representation filed by the Teamsters Local 959. The unit requested for representation included “All permanent employees of the City of Whittier, including public works director, harbor master, physician’s assistant, and librarian. Excluded were the City manager, city clerk, finance director, police chief and seasonal workers.” *Teamsters Local 959 v. City of Whittier*, Decision and Order No. 151 at 2 (November 25, 1992).

A hearing was held and an election was ordered by the Board in Decision and Order 151. *Id.* at 4. The ballots were tallied on February 8, 1993, and the unit was certified by the agency on February 14, 1993. (Alaska Labor Relations Agency, Certificate of Election, February 16, 1993, 93-140-RC).

The second election was based on a petition for representation by the Laborers International Union of North America Local 341/AFL-CIO and International Union of Operating Engineers Local 302/AFL-CIO (Unions). The petition sought to represent “[a]ll public works/sewer & water department employees.” Similar to the first election, a hearing was held after the City objected to the petition and an election was ordered by the Board in Decision and Order 242. *Laborers Local 341 & Operating Engineers 302, AFL-CIO v. City of Whittier*, Decision and Order 242 at 16 (March 3, 1999). An election was held on April 23, 1999, where the agency then certified the unions as the bargaining representative for the requested unit. (Alaska Labor Relations Agency, Certificate of Election, April 29, 1999, 99-911-RC).

The record is unclear about what happened after the elections were held, however, there was no evidence submitted to show that either union had been decertified by the agency or to support the City’s argument that collective bargaining had failed. Thus, the Board is not persuaded there has been no history of collective bargaining.

f. Officers looking for other employment and end of Girdwood contract.

In addition to arguing a lack of community of interest, the City also argues that “[t]he fact that the current members of the force will likely leave, either to seek work closer to home (Anchorage) or will be laid off if the Girdwood contract is cancelled, makes it inherently unfair to have this group of employees bind future officers.” (City’s Post Hearing Brief at 10).

We will first discuss the Girdwood contract. Chief Schofield testified that Whittier was first awarded the Girdwood contract on a temporary month, to, month basis when it patrolled the Girdwood Forest Fair in 2016. A second temporary contract began on December 1, 2016, and then became the current contract that started on January 1, 2017. “The current contract is for three years but could be extended depending on what options are available at the conclusion of the contract in 2019.” (Schofield testimony).

The Board has previously allowed an election to move forward in Whittier, even though the work on a sewer project was of a temporary nature. In *Laborers Local 341 & Operating Engineers 302, AFL-CIO v. City of Whittier*, we said,

Thus, while there is no direct promise of obtaining further work for the City, employees have the opportunity to show what they can do, with the possibility that their hard work may get them further employment with the City. Based on Williams' and Eggener's testimony, and the fact that some employees continued to work for the city on an as needed basis, we find there is no definite end to work for temporary employees.

Decision and Order No. 242 at 11 (March 3, 1999).

Additionally, according to the Developing Labor Law, “. . . mere speculation about the uncertainty of future operations will not render a petition untimely.” I John E. Higgins, Jr., *The Developing Labor Law*, at 10-32 (7th ed. 2017).

In the current case, the Chief testified that even before the Girdwood contract that “the Department would shrink because there was no call volume and new officers wouldn't be hired until after New Years for the upcoming summer season.” Additionally, the Chief testified that while there would be layoffs if the Girdwood contract was no longer in effect, he did not know if the layoffs would impact any of the current officers. The Chief, when asked, also said “it's a possibility that the service area could expand, although there is nothing on the horizon that he is aware of.” Consequently, there is no definitive evidence that the workload will shrink and there is legal authority that even if it does, that is not determinative of preventing an election.

Next we turn to whether the police officers looking for other employment prevents them from being in the unit or from voting in an election. Voting eligibility under PERA is determined by 8 AAC 97.130(b) which says,

To be eligible to vote an employee must be listed on the employment roster of the public employer

- (1) four weeks before the date of the election, or in the case of a mail ballot election, four weeks before the date set for mailing ballots to voters; and
- (2) on the date of the election, or in the case of a mail ballot election, on the date the ballots are counted.

Thus, PERA does not require employees to refrain from seeking other employment to be eligible to vote in an election.

Further, according to 2017 *NLRB, An Outline of Law and Procedure In Representation Cases*, at 312, “an employee employed on the date of the election is eligible to vote despite an intention to quit after the election. And, as the Seventh Circuit Court said in *NLRB v. Res-Care, Inc., d/b/a Hillview Health Care Center*, 705 F.2d 1461 at 1471 (7th Cir.1983),

But she was still employed by the respondent when she voted, and the Board's unvarying policy is that any employee may vote, even if he has a fixed intention of quitting immediately after voting, as happened in *NLRB v. General Tube Co.*, 331 F.2d 751 (6th Cir. 1964).

As such, the Board is not convinced that the officers looking for other employment, or the possibility that the Girdwood contract will not be renewed, should prevent the election from moving forward. The eligibility of the voters is defined in regulation and the will of those eligible to vote will be determined through an election.

In conclusion, we find, after reviewing all the arguments, evidence and testimony in this matter, that the preponderance of the evidence in this case supports a combined bargaining unit of police officers, seasonal/temporary EMT III, and receptionist/office assistant employees, employed at the City of Whittier, Department of Public Safety. Excluded from the unit is the Director of Public Safety/Police Chief. The petition of PSEA is granted as modified by this decision.

CONCLUSIONS OF LAW

1. The Public Safety Employees Association, AFSCME Local 803, AFL-CIO, is an organization under AS 23.40.250(5). The City of Whittier is a public employer under AS 23.40.250(7).

2. The City acted in derogation of employee rights under PERA, when it passed an untimely resolution to opt out of PERA after employees had already exercised rights under PERA in 1993.

3. By removing its objection to PERA jurisdiction in the hearing pertaining to the 1999 election, and failing to appeal, or otherwise object to the conduct of the 1993 and 1999 elections, the Board finds that the City has waived its right to argue it has validly opted out of PERA.

4. This Agency has jurisdiction to determine the unit appropriate for collective bargaining under AS 23.40.090.

5. As Petitioner, Public Safety Employees Association, AFSCME Local 803, AFL-CIO, has the burden to prove each element of its claim by a preponderance of the evidence. 8 AAC 97.350(f).

6. Public Safety Employees Association, AFSCME Local 803, AFL-CIO proved its claim by a preponderance of the evidence.

7. Based on such factors as community of interest, wages, hours, and other working conditions of the employees involved, and also considering the factors of unnecessary fragmentation of units and desires of employees, a mixed bargaining unit of public safety employees is the unit appropriate for purposes of collective bargaining.

ORDER

1. The petition for certification of the Public Safety Employees Association, AFSCME Local 803, AFL-CIO, as exclusive representative of its proposed bargaining unit of public safety employees at the City of Whittier is granted. The unit appropriate for collective bargaining is police officers, seasonal/temporary EMT III, and receptionist/office assistant employees, employed at the City of Whittier, Department of Public Safety. Excluded from the unit is the Director of Public Safety/Police Chief. The election shall proceed under AS 23.40.100 and relevant regulations.

2. The City of Whittier is ordered to post a notice of this decision and order at all work sites where members of the bargaining unit affected by this decision and order are employed or, alternatively, serve each employee affected personally. 8 AAC 97.460.

ALASKA LABOR RELATIONS AGENCY

Jean Ward, Chair

Matthew R. McSorley, Board Member

Tyler Andrews, Board Member

APPEAL PROCEDURES

This order is the final decision of this Agency. Judicial review may be obtained by filing an appeal under Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of mailing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of the order in the matter of *Public Safety Employees Association, AFSCME Local 803, AFL-CIO v. City of Whittier*, ALRA Case No. 17-1708-RC, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 7th day of May, 2018.

Margie Yadlosky
Human Resource Consultant

This is to certify that on the 7th day of May, 2018, a true and correct copy of the foregoing was mailed, postage prepaid, to:
Megan Carmichael, General PSEA
William Earnhart, City of Whittier

Signature