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ALASKA STATE EMPLOYEES ASSOCIATION,

Complainant,

v.

STATE OF ALASKA and JOHN H. CLARK,

Respondents.

CASE NO. 91-022-ULP

DECISION AND ORDER NO. 135

ON STATE'S MOTION TO DISMISS OR DEFER

The Alaska State Employees Association (ASEA) filed an unfair labor practice charge against the State regarding incidents arising in Region III of the Division of Sport Fish, Department of Fish and Game. The State has filed a motion to dismiss or defer the unfair labor practice charge on a number of grounds, including deferral to arbitration. ASEA opposes the motion.

The motion is granted in part and denied in part.

DISCUSSION

I. Laches.

ASEA's charge of an unfair labor practice follows a series of conflicts between division employees and supervisors, the earliest of which seems to have occurred in November of 1988. Accusation, Exhibit 1. Beginning in November of 1989, ASEA filed a number of grievances. This first grievance preceded by approximately 13 months the filing of this accusation on February 11, 1991. The National Labor Relations Act requires that a charge be filed within six months of the facts giving rise to the charge. However, neither the Public Employment Relations Act (PERA) nor the regulations adopted under it impose a deadline or statute of limitation for bringing an unfair labor practice charge.

Despite the absence of such a deadline in the law, the State has moved for dismissal in part on the basis of delay. The State's position is that general principles of equity require timeliness and ASEA was untimely, citing Alaska Public Employees Ass'n v. Cowper, Order & Decision No. 115, at 13-15. (Oct. 20, 1988). In Cowper the ULP charges stemmed from facts predating a decertification election but the charges were not filed until after the election. The delay was potentially costly to the Agency and the other parties participating in the election. Such a delay, however short, had significant repercussions and a likelihood of prejudice to other parties. These facts distinguish that case from the case before the board. The State in its motion has not provided facts showing the delay prejudiced it in any way. For example, the State does not claim that ASEA delayed the bringing of this action to gain some tactical advantage. In addition, the State does not claim that the delay resulted in the loss of witnesses or evidence. Moreover, the related grievances filed by ASEA put the State on notice to preserve evidence and identify and interview witnesses. In sum, the

State has not justified applying the extraordinary equitable defense of laches to this case.

II. Waiver and Estoppel.

The State also argues the defenses of waiver and estoppel in support of its motion to dismiss. The State's argument seems to be that ASEA's initial decision to bring the charges as grievances under the grievance arbitration clause in the collective bargaining agreement instead of a ULP under AS 23.40.110 resulted in a waiver of the statutory cause of action. However, the remedies provided in the collective bargaining agreement and in PERA are cumulative. An incident can be both grievable under the contract and an unfair labor practice under PERA. Parties are not required to elect one remedy at the expense of the other. Public Safety Employees Ass'n v. State, 799 P.2d 315, 320-321 (Alaska 1990).

To avoid the duplication of effort and increased expenses of proceeding in two forums, the NLRB has developed a policy of deferring to the contract remedy of arbitration under certain circumstances. The two lines of cases discussing when the NLRB exercises its discretion in favor of deferral are discussed below. Waiver and estoppel are discussed only as they relate to this policy of deferral.

III. Deferral.

The NLRB's deferral policy has developed in two lines of cases: Collyer Insulated Wire, 192 N.L.R.B. 837, 77 L.R.R.M. (BNA) 1931 (1971), addressing deferral of cases before the arbitrator issues an award, and Spielberg Mfg. Co., 112 N.L.R.B. No. 139, 36 L.R.R.M. (BNA) 1152 (1955), addressing postaward deferral. NLRB decisions are given weight by the Alaska Labor Relations Agency Board when it considers unfair labor practice charges. 2 AAC 10.250(c).

Deferral is an important issue in this case. The allegations covered in ASEA's charge were also the subject of 13 grievances, which the State has cataloged in Affidavit of Powelson. The status of these grievances ranges the spectrum, from dismissal to settlement to issuance of an arbitration decision. The State's motion to dismiss is based in large part on its position that the board should defer to arbitration any claims involved in grievances filed under the grievance arbitration clause. In addition, the State alleges that the ASEA did not file grievances when it should have and argues that the board should dismiss those claims as well.

A. Preaward deferral: Collyer Doctrine.

This Agency previously has had the opportunity to address preaward deferral. Alaska Education Ass'n v. Anchorage School District, Decision & Order No. 128 (Dec. 10, 1990), sets forth a three-part test applied to determine whether the Agency will exercise its discretion to defer to arbitration proceedings: (1) the existence of a longstanding stable relationship without claims of antiunion animus; (2) the parties' willingness to arbitrate under an applicable arbitration clause; and (3) whether the center of the dispute is contract interpretation. Id., at 3.

ASEA raises basic objections to adoption of a deferral policy by this Agency. Those arguments have been considered and rejected. Alaska Education Ass'n, at 4--5. ASEA also raises a specific objection to deferral of charges made under AS 23.40.110(a)(2). That subsection prohibits domination or interference with the formation, existence, or administration of an employee organization. Because the focus in (a)(2) charges is protecting a union's internal affairs from inappropriate employer influence, (a)(2) charges may be less likely than other unfair labor practices to arise under an employee grievance under the contract. However, if the subject matter is not one that can be raised under the applicable grievance arbitration clause in the contract, deferral is not appropriate under the test outlined above. Because this test is adequate to cover the concern raised by the ASEA, we decline to adopt a per se rule exempting (a)(2)charges from deferral in every case.

In addition to its objections to adopting a policy of deferral, ASEA argues that application of the three-part Collyer test does not justify the exercise of discretion to defer the charges in this case. ASEA claims that the State has raised procedural defenses in a number of the arbitrations filed. The parties' willingness to arbitrate is a key consideration in determining whether to defer to arbitration. See Public Safety Employees Ass'n v. State, 799 P.2d at 330. (review of Alaska State Labor Relations Agency decision not to defer where State refused to arbitrate). "Deferral is not available

to parties who are unwilling to arbitrate or are unwilling to waive the procedural defense that the grievance was not timely filed." I C. Morris, The Developing Labor Law, at 939 (2d ed. 1983). Where the State raises defenses to arbitrability, deferral is inappropriate.

Arbitrability appears to be at issue in a number of the grievances. In AS 90-G-261, GG 0038-F90, for example, the State appears to have resisted arbitration because the employee was probationary. Timeliness could be a defense in other grievances. For example, it may be an issue in those matters where the ASEA could have grieved the dispute but did not. See State's Memo. in Support, pp. 5-6. The State may also have defenses to grievances filed on matters predating the effective date of the negotiated agreement. The deferral doctrine depends upon the existence and applicability of a grievance arbitration procedure and the parties' willingness to arbitrate. To defer these matters, the State must waive its arbitrability defenses.

Another issue considered under the NLRB's preaward deferral policy is union animus. The ASEA's allegations of union animus by the State and its supervisor pervade the accusation. If such conduct were to rise to a level jeopardizing the stability of the labor relationship between the State and ASEA or repudiating the collective bargaining rights of the employees, deferral would be inappropriate. A policy of deferral depends on the existence of an effective dispute resolution machinery. I C. Morris, at 937, relying upon United Aircraft Corp., 204 N.L.R.B. 879, 83 L.R.R.M.(BNA) 1411 (1973), enforced, 525 F.2d 237, 90 L.R.R.M.(BNA) 2922 (2d. Cir. 1975). If the parties' conduct renders the grievance arbitration clause futile or ineffective, this Agency will decline to defer. Id.

Turning to this case, the allegations raising union animus concern a single supervisor. Issues such as futility of arbitration or repudiation of the contract or the bargaining relationship have not been raised. Any union animus does not reach the level requiring the Agency to decline to defer.

The third issue that must be considered under the Collyer doctrine is whether the dispute centers on interpretation of the contract. For several of the allegations in the accusation, the answer is plainly yes. The allegations concerning on-site visits by the union representative are without question issues of contract interpretation and should be deferred. Accusation paragraphs 16, 17, & 18, and Negotiated Agreement, Art. I, at Exhibit 6.

The remaining allegations concern retaliation or interference with employees' exercise of their rights under PERA. Accusation paragraphs 6, 7, 11-15. Such allegations raise questions under the just cause provision of the contract. Negotiated Agreement, Art. 14, at Exhibit D. (just cause policy for discharge and discipline). The National Labor Relations Board in United Technologies Corp., 274 N.L.R.B. 504, 118 L.R.R.M. (BNA) 1464, 1466 (1985), found alleged violations of individual rights appropriate for deferral if the matters could be addressed under the grievance arbitration clause. We believed that an arbitrator might resolve these issues under the grievance clause and that contract remedies should be the remedy of first resort where possible. We therefore conclude that employee rights questions involve contract interpretation and should be deferred. We are sensitive to ASEA's argument that matters of important policy under PERA are not appropriate for arbitration and may in fact not be resolved in an arbitration. This Agency, however, retains jurisdiction to review any arbitration decisions to determine if the charges were resolved in a manner not repugnant to the Act and consistent with its policies.

In sum, examination of the principles under Collyer supports deferring to arbitration all of the allegations in this case with one exception -- those allegations where the State has raised and has not waived arbitrability defenses.

B. Post award deferral: Spielberg Doctrine:

Under the Spielberg doctrine, the NLRB will defer to an arbitrator's award if a four-part test is satisfied: (1) were the proceedings fair and regular; (2) did the parties agree to be bound; (3) is the decision not repugnant to the purpose and policies of the Act; and (4) were the factual issues considered that would be considered in the ULP case (factual parallelism). Olin Corp., 268 N.L.R.B. No. 86, 115 L.R.R.M. (BNA) 1056 (1984); Spielberg Mfg. Co., 112 N.L.R.B. 1080, 36 L.R.R.M. (BNA) 1152. In general, the rule is that the NLRB defers if the issue was considered and there is no reason to suspect any irregularity.

Giving weight to arbitration awards promotes collective bargaining and the objectives of PERA in the same manner as deferring to arbitration that has not yet proceeded to award. See Alaska Education Ass'n v. Anchorage School District,

Decision & Order No. 128, at 4-5 (discussion of preaward deferral). We will therefore give weight to the Spielberg line of cases when considering whether to defer to an arbitrator's award.

Turning to the arguments made by the parties in this case, we note that none of the facts raised suggest any irregularities in those grievances that reached award. Moreover, those awards are not claimed to be repugnant to PERA. We therefore will defer to the arbitrator's award in those grievances that proceeded to an award on those issues that were presented and considered in the arbitration.

The Spielberg doctrine also applies to grievances resolved by settlement. Mahon v. NLRB, 808 F.2d 1342, 1345, 124 L.R.R.M. (BNA) 2762 (9th Cir. 1987) (upholding the NLRB's deferral to prearbitration settlement). The standards for deferral applied are basically the same: was the settlement made under the grievance arbitration procedure in the contract; were the proceedings fair and regular; did all parties agree to be bound; was the action repugnant to the policy of the Act. Id. at 2764. We note that settlement contains elements of waiver not necessarily incorporated in arbitration and, as the State argues, creates a stronger case for deferral. Id.

The State lists those paragraphs raising allegations decided by award or settlement. They are paragraphs 5, 6, and 14. Any allegations of matters that proceeded to arbitration award or settlement are dismissed.

IV. Naming John Clark

The State has moved to dismiss John Clark as a respondent, arguing that singling out a single State supervisor is harassment and interferes with the State's selection of a representative in violation of AS 23.40.110(c)(1)(B). Certainly the ASEA does not need to name Mr. Clark to establish responsibility under AS 23.30.110. The National Labor Relations Act has been construed to make an employer liable for the acts of its agents. I C. Morris, at 237; II C. Morris, at 1445--1446. AS 23.40.110(a) states, "A public employer or an agent of a public employer may not" commit acts the statute identifies as unfair labor practices. "Employer" is defined to include "persons designated to act in its interest in dealing with public employees." AS 23.40.250(7). Clearly under PERA, the State likewise is liable for the acts of its agents. The language in AS 23.40.110(a) would also appear to allow for liability against the agent. However, because complete relief is available against the State and the State has not contested its responsibility for the acts of Mr. Clark, ASEA does not need to name Mr. Clark to obtain the relief it seeks.

Another State employment relations board considering a similar question has determined that employees are not proper parties to an unfair labor practice charge unless they acted outside the scope of their authority as an agent. Oregon School Employees Ass'n v. Medford School District 549C, 10 P.E.C.B.R. 296 (1987). We believe that the possible ill effects outweigh any gains in naming an individual supervisor and therefore adopt the position of the Oregon Employment Relations Board. Because the State has not contested Mr. Clark's authority as its agent, we dismiss him as a respondent in this case.

V. Lack of specificity of the allegations

The State argues that the allegations in paragraphs 6d, 6e, 6f, and 7 of the accusation are too indefinite to enable it to prepare a defense. The allegations may lack detail but contain a general statement of the allegation and the individuals involved. The allegations should be sufficient to allow the State to inquire with these individuals to prepare its defense. Before any hearing is held on allegations not deferred under this order, the ASEA will be filing lists of witnesses and copies of the exhibits it intends to introduce at the hearing. If the State is unfairly surprised in a manner prejudicial to preparing its defense, it can make a motion at that time.

VI. Paragraph 10

The State moves to dismiss paragraph 10 of the complaint on the grounds supporting the dismissal of paragraph 9 in the Notice of Accusation. The ASEA does not oppose dismissal of paragraph 10. Paragraph 10 is dismissed.

VII. Standing

Paragraph 17 of ASEA's accusation alleges that a letter sent to supervisors requiring the reporting of unauthorized union

access is an unfair labor practice. The State argues that the general government bargaining unit does not have standing to raise this issue. The State provides no authority for its position.

ASEA argues that there are working supervisors in its unit and therefore it has standing. In addition, if the issue is the claim that sending the letter is a breach of contract, ASEA would have standing to raise it regardless of the identity of the addressee. The State's standing argument is denied.

ORDER

1. The allegations in paragraphs 4, 5, 6a - 6f, 7, 8, 11, 12, 13, 14, 15, 16, 17 and 18 are suspended and deferred to arbitration PROVIDED the State waives any arbitrability defenses;

2. John Clark is dismissed as a respondent in the accusation;

3. Paragraph 10 is dismissed;

4. Any allegations arising in the paragraphs named above where the State has contested and continues to contest arbitrability will proceed to hearing before the labor relations board as scheduled in the Notice Rescheduling Hearing issued on August 22, 1991. That notice is hereby amended to require the parties to file on TUESDAY, October 15, 1991, a notice of the issues with the Agency that includes an explanation why the issue was not pursued in arbitration;

5. The remaining arguments made by the State in its motion are denied;

6. The Alaska Labor Relations Agency retains jurisdiction to reopen any matter upon the conclusion of arbitration on the motion of either party.

Date: September 17, 1991

THE ALASKA LABOR RELATIONS AGENCY

Darrell Smith, Board Chairman

B. Gil Johnson, Board Member

H. O. Williams, Board Member

This is to certify that on this 20th day of September, 1991, a true and correct copy of the foregoing was mailed, postage prepaid, to

Chuck O'Connell

Kathleen Strasbaugh

Signature

1We reserve for a later day the appropriateness of applying the equitable doctrine of laches to the statutory cause of action under AS 23.40.110 as did the state labor relations agency in APEA v. Cowper, Order and Decision No. 115 (Oct. 20, 1988).