

**DEPARTMENT OF LABOR
ALASKA LABOR RELATIONS AGENCY
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YUKON FLATS SCHOOL DISTRICT,)
)
 Complainant,)
)
 vs.)
)
 YUKON FLATS EDUCATION ASSOCIATION,)
)
 Respondent.)
)
 _____)
 CASE NO. 91-005-ULP)

ORDER

Upon consideration of the arguments heard on March 13, 1992, and the briefs filed by the parties, IT IS HEREBY ORDERED that the motion to reconsider Decision and Order No. 136 is DENIED.

A copy of Decision and Order No. 136 is attached.

Dated: April 1, 1992

Alaska Labor Relations Agency

Darrell Smith

Chairman

NOT PARTICIPATING

James W. Elliott

Member

B. Gil Johnson

Member

This is to certify that on the 1st day of April, 1992, a true and correct copy of the foregoing was faxed and mailed, postage prepaid, to

Saul R. Friedman John B. Patterson

Signature

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CASE NO. 91-005-ULP

DECISION AND ORDER NO. 136

Heard before Jan Hart DeYoung, Hearing Examiner, on March 5, 1991, under authority delegated by the Alaska Labor Relations Board. The record closed on March 5, 1991. The Alaska Labor Relations Board rejects the decision and order proposed under AS 44.62.500(b) by the hearing examiner and adopts this decision and order.

Appearances:

Saul R. Friedman, Hedland, Fleischer, Friedman, Brennan & Cooke, for Complainant Yukon Flats School District, and John B. Patterson, Kelly & Patterson, for respondent Yukon Flats Education Association.

Digest:

The subject of teacher transfer, which was a negotiable subject under AS 14.20.550, is a mandatory subject of bargaining under the Public Employment Relations Act.

DECISION

Upon consideration of the briefs, arguments, testimony and other evidence presented, the Alaska Labor Relations Board adopts the following findings of fact and conclusions of law.

Findings of Fact

1. The Yukon Flats School District and the Yukon Flats Education Association's collective bargaining agreement was due to expire on June 30, 1989. Tr. at 21. In May the parties began negotiations. They negotiated for 12 days during four different sessions. Tr. at 22.
2. The Association sought to include in the new agreement a teacher transfer provision similar to one in the existing agreement. The idea of a preference for existing district staff to transfer to vacant positions had been in the parties' agreement since 1976. Tr. 66. The language proposed for the new contract first appeared in the parties' agreement in the 1987 -- 1989 contract. Id.
3. Other districts have provisions in their contracts granting teachers rights to transfer on the basis of seniority, such as the Yukon-Koyukuk and Alaska Gateway school districts. Tr. 68. Other districts, such as the North Slope Borough School District, do not have such provisions in their agreements. Tr. 72.

4. The teacher transfer provision the Association proposed states:

Voluntary Transfer and Reassignment. Yukon Flats teachers will be given preference over new hires when applying for vacant or new positions in the District. If two or more teachers apply for the same vacancy, the position shall be granted to the teacher with the greater seniority from the exact date of hire. In the event of equal seniority, the assignment will be determined by lot.

The District will advertise in the District first for a period of no less than nineteen (19) days, prior to advertising outside of the District. The District will assume all moving and transportation expenses. During the summer the District will contact all teachers about any vacancies or new positions.

Complainant's exhibit 2.

5. The District's initial position was that it had no intention of including teacher transfer in the agreement because it was a management right. Tr. 27. However, the District countered with the following proposal:

Voluntary Transfer/Reassignment. A teacher may request a voluntary transfer/reassignment for the next school year. Said request must be submitted to the superintendent by April 30 of current school year and must identify the desired site and position.

The District will post known vacancies in each school by April 1.

Complainant's exhibit 3.

6. The Association's last proposal before the filing of the accusation states:

Transfer and Reassignment

A. Definitions.

a. A reassignment shall refer to change in teaching duties at a school site.

b. A transfer shall refer to a change in teaching site or itinerant status.

B. Voluntary Transfers.

1. Yukon Flats teachers, when applying for a vacancy, will be given preference for vacant or new positions in the District. When two or more teachers apply for the same vacancy the following criteria will be used:

1. length of service with the District

2. length and type of teaching experience

3. appropriate certification

4. recommendation by LSAC

2. A teacher may request a voluntary transfer/reassignment for the next school year. Said request must be submitted to the superintendent by April 30 of the current school year and must identify desired sites and positions listed in order of preference. These requests will be kept on file until September 15th of the school term for which the transfer was requested.

During the summer the District will contact a teacher with a transfer request on file about a vacancy at the site requested, providing the teacher has notified the District of a phone contact number and mailing

address.

Complainant's exhibits 4 & 6.

7. The District's last proposal, submitted on August 6, 1989, states:

Transfer/Reassignment

A. With respect to this article, a reassignment shall mean a change in teaching duties at one's school site and a transfer shall mean a change in one's teaching site (village) or itinerant status.

B. Voluntary transfer/reassignment.

1. A written request for a voluntary transfer/reassignment for the next school term must be in the superintendent's office by April 1. The request must be specific as to school site and teaching assignment.

These requests will be kept on file until September 15 of the school term for which the transfer/reassignment was requested.

2. During the summer the district will contact a teacher with a transfer request on file regarding a vacancy at the site requested, provided that the teacher has filed with the district his/her summer telephone number and mailing address.

Complainant's exhibit 7.

8. The District in a letter advised the Association that it took the position that the provision interfered with its right of hire and assignment because it required the District to fill open positions from the rank of current teachers before selecting candidates from outside the district irrespective of training or qualifications. J. Elliott, letter to M. Eininger (July 10, 1990), at Complaint, exhibit B.

9. The Association responded that it disagreed and intended to present its position at advisory arbitration. G. Pierce, letter to J. Elliott (July 19, 1990), at Complaint, exhibit C.

10. The Association declared impasse on October 22, 1989. Tr. 22. A wide range of articles was negotiated to impasse, including salaries, association leave, and just cause provisions and the provisions raised in this accusation. Tr. 53 - 54. The parties went into mediation on November 30, 1989, December 1, 1989, and February 12, 13, and 14, 1990.

11. On July 27, 1990, the District filed an unfair labor practice accusation against the Association, claiming that the Association failed the duty to bargain in good faith under AS 23.40.110(c)(2) by conditioning bargaining over mandatory issues on a permissive subject -- teacher transfer.

12. On October 2, 1990, the District amended its accusation to add a claim that a proposed maintenance-of-standards provision was a permissive subject of bargaining. The provision that was proposed would continue unspecified conditions of employment, including both mandatory and permissive subjects of bargaining, that existed at the time of negotiations. By insisting on the provision, the District argued, the Association violated the duty to bargain in good faith. The parties have now agreed that the maintenance-of-standards provision may not cover matters that the parties are not required to negotiate. Tr. 12. The accusation on this issue, therefore, is moot and will not be addressed.

13. The Alaska Labor Relations Agency under AS 44.62.380 served the amended accusation on the Association on October 5, 1991, requiring the filing of a notice of defense.

14. The Association filed its notice of defense, denying the substance of the accusation and claiming that transfer generally and involuntary transfer specifically are negotiable and that the "particular proposal now advanced by YFEA" is not nonnegotiable. The Association further denied that the maintenance-of-standards proposal was nonbargainable. Reply to Amended Unfair Labor Practice Accusation (Oct. 18, 1990). 15. Subsequent to the filing of the accusation, the Association initiated discussions to expand the criteria for teacher transfer to include subjects other than seniority. Tr.

34. The Association's final position on the negotiability of teacher transfer states:

[A]s a bargaining floor we will agree a person applying for transfer to a vacant position to have any right to the position must be qualified under the circumstances. . . . In general, we believe you are entitled to insist as a policy matter on a qualified teacher. But we also believe beyond basic qualifications the issues become matters which interest the teachers at least as much as the school district and are therefore negotiable.

J. Patterson, letter to S. Friedman (Jan. 29, 1991).

16. The District's position remains that bargaining the substantive criteria used to make professional judgments exceeds its obligation to negotiate in good faith. Tr. 35.

17. The District, when exercising its professional judgment to assign teachers, would consider training and experience, recommendations, present and past immediate supervisors, evaluations, recommendations, references (Tr. 39), program needs, community wishes, and mix of experience on the teaching team. Tr. 41.

18. The teachers' interest in transfer is the impact of the assignment on their working and, particularly in remote Alaska, their living conditions. In the Yukon Flats School District, school size varies from one to 16 teachers. There are vast differences in the living and working conditions in the various communities. An assignment in Fort Yukon, for example, would mean access to easy transportation to Fairbanks, cable television, running water, and the availability of a broader range of social activities. Professional opportunities would be present such as courses at the university extension and the fellowship of other teachers. Tr. 49 - 50. These opportunities are not available in some of the villages where schools are located. Id.

19. The Association at the hearing offered the affidavit of Mary Ann Eininger. Respondent exhibit 1. The District objected to its admission on the basis that it did not have the opportunity to cross-examine the witness. On that basis, admission was denied. Tr. 78 & 79.

Discussion

Any discussion of teacher bargaining in Alaska must begin with an examination of Kenai Peninsula School District v. Kenai Peninsula Education Ass'n, 572 P.2d 416 (Alaska 1977) (Kenai I). Kenai I addressed the proper subjects of bargaining under AS 14.20.550. The Alaska Supreme Court in Kenai I establishes that educational policy belongs to the elected and appointed officials in the school district. Id. at 421. While acknowledging that it lacks expertise in this area, the court used a test to divide issues between those that were negotiable and those that were not. If the subject deals more with the economic interests of employees and less with educational goals and methods, it is negotiable. Id. at 422. The court found that wages, hours, and leave clearly fell within the employees' economic interests. On the other hand, it found that curriculum clearly fell within educational policy. The court concluded its decision in Kenai I with a list of negotiable and nonnegotiable subjects of bargaining. Teacher transfer is listed as a negotiable subject. Id. at 424.

When the court issued Kenai I, labor relations in the school districts was governed by the education code. At that time teachers did not have the right to strike. The impasse procedures were mediation and advisory arbitration. AS 14.20.570 & AS 14.20.580.

In 1990 the legislature adopted chapter 180, SLA 1990, which for two years applies the Public Employment Relations Act (PERA) to labor relations in the school districts. Bargaining rights under PERA are enforced through unfair labor practice charges. AS 23.40.110. When considering unfair labor practice charges, the labor relations agency gives great weight to decisions of the National Labor Relations Board. 2 AAC 10.250(c). The NLRB divides bargaining subjects into three categories: mandatory, permissive, and illegal subjects of bargaining. National Labor Relations Board v. Borg-Warner, 356 U.S. 342, 42 L.R.R.M. (BNA) 2034 (1958).

Mandatory subjects must be bargained and may even be bargained to impasse. Reaching impasse as a general rule allows use of self-help remedies, such as unilateral implementation of employment terms by the employer or a strike by the employees. Permissive subjects may be bargained only if the parties consent. A party may not insist on a permissive term to impasse.

Under the National Labor Relations Act, as amended, transfer generally has been considered a mandatory subject of bargaining. As one treatise states, "Seniority, promotions, and transfers have long been recognized as mandatory subjects of bargaining." I C. Morris, *The Developing Labor Law*, at 802 - 803, 804 (2d ed. 1983).

The question is whether the move to PERA should change the result in Kenai I. Put another way, should the expansion of impasse procedures require a different breakdown between negotiable and nonnegotiable subjects?

An examination of the two statutes does not reveal a difference that would justify requiring school districts to bargain over issues of educational policy. AS 14.20.550 provides:

Negotiation with certificated employees. Each city, borough and regional school board, shall negotiate with its certificated employee in good faith on matters pertaining to their employment and the fulfillment of their professional duties.

This apparently broad language was construed by the court in Kenai I to exclude subjects of educational policy from bargaining. PERA's language is actually narrower. PERA requires public employers to "negotiate with and enter into written agreements with employee organizations of matters of wages, hours and other terms and conditions of employment." AS 23.40.070(2). PERA defines "collective bargaining" to mean, among other things, negotiating "in good faith with respect to wages, hours, and other terms and conditions of employment" AS 23.40.250(1).

Nothing in PERA's language justifies expanding negotiation rights to require bargaining to impasse over educational policy. However, bargaining on educational policy should not offend public policy where complete discretion whether to bargain rests with the district as it would if the subject were a permissive subject of bargaining. Classification of the subjects listed in Kenai I as nonnegotiable as permissive subjects under PERA seems the appropriate outcome. This gives the employee organizations the opportunity to make proposals and communicate their concerns but leaves discretion to negotiate, and thus responsibility for educational policy, completely with the districts. Those subjects where the primary issue is the economic well being of the employees, which Kenai I lists for the most part as negotiable, would be mandatory subjects of bargaining. With these changes, Kenai I should continue to provide guidance over a subject's negotiability.

Returning to the issue in this case, we conclude that teacher transfer, which was a negotiable subject under AS 14.20.550, is a mandatory subject of bargaining under PERA.

Because the subject of teacher transfer is a mandatory subject of bargaining, the District has an obligation to bargain and the Association may insist on the subject to impasse and raise it at advisory arbitration.

Conclusions of Law

1. The Alaska Labor Relations Agency has jurisdiction over this matter under Sec. 1, Ch. 180, SLA 1990. AS 23.40.110.
2. Teacher transfer is a mandatory subject of bargaining.
3. Mandatory subjects may be bargained to impasse and may be presented at advisory arbitration.

ORDER

The unfair labor practice accusation is denied and dismissed.

THE ALASKA LABOR RELATIONS AGENCY

Darrell Smith, Board Chairman

B. Gil Johnson, Board Member

H. O. Williams, Board Member

APPEAL PROCEDURES

An Agency decision and order may be appealed through proceedings in superior court brought by a party in interest against the Agency and all other parties to the proceedings before the Agency, as provided in the Alaska Rules of Appellate Procedure and the Administrative Procedures Act.

The decision and order becomes effective when filed in the office of the Agency, and unless proceedings to appeal it are instituted, it becomes final on the 31st day after it is filed.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of Yukon Flats School District v. Yukon Flats Education Association, dated and filed in the office of the Labor Relations Agency in Anchorage, Alaska, this 6th day of December, 1991.

Clerk

This is to certify that on the 6th day of December, 1991, a true and correct copy of the foregoing was mailed, postage prepaid to

Saul R. Friedman John B. Patterson

Signature