DEPARTMENT OF LABOR
ALASKA LABOR RELATIONS AGENCY
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ALASKA PUBLIC EMPLOYEES ASSOCIATION,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

ALASKA STATE EMPLOYEES ASSOCIATION,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

Case No. 91-012-CBA (Consolidated)

DECISION AND ORDER NO. 143

This matter was heard on April 30, and May 29, 1991, in Anchorage, Alaska, with Hearing Examiner Jan Hart DeYoung presiding, before board members Gil Johnson, Darrell Smith and H. O. Williams. The record closed on May 29, 1991.

Appearances:

David R. Kaiser, Regional Manager, for petitioner Alaska Public Employees Association; Don Clocksin, Wagstaff, Pope & Clocksin, for petitioner Alaska State Employees Association; and Kathleen Strasbaugh, Assistant Attorney General, for respondent State of Alaska.

Digest: Adult field probation officers and juvenile probation officers are employees whose services may not be interrupted for even the shortest time under AS 23.40.200(a) and, therefore, are class 1 employees denied the right to strike under AS 23.40.200(d) but entitled to arbitration under AS 23.40.200(b).

DECISION

While providing most public employees a qualified right to strike in the Public Employment Relations Act, the legislature denied the right to certain essential public employees and substituted for it a right to binding arbitration. AS 23.40.200. The question raised in these two petitions is whether adult field probation officers in both supervisory and general government units and the juvenile field probation officers in the general government unit should be moved from class 3, with the most complete right to strike, to class 1, with no right to strike. AS 23.40.200(a)(1)&(b).

The State classifies probation officers with duty assignments in correctional institutions as class 1 "corrections officers"

under AS 23.40.200(b) and classifies field probation officers as class 3 under AS 23.40.200(d). ASEA and APEA, however, both believe that field probation officers should be classed with institutional probation officers as class 1. In support they argue three theories: (1) probation officers are "police and fire protection officers" under AS 23.40.200(b); (2) field probation officers are "jail, prison, and other correctional institution employees" under AS 23.40.200(b); and (3) the probation officers' services may not be interrupted without endangering the public welfare under AS 23.40.200(a)(1).

FINDINGS OF FACT

1. Alaska State Employees Association is the bargaining representative of the State of Alaska general government unit (GGU), a unit mixing the three strike classes in AS 23.40.200.

2. The Alaska Public Employees Association is the bargaining representative of the State of Alaska's supervisory unit, a unit mixing the three strike classes in AS 23.40.200.

3. Negotiations for the most recent GGU and supervisory unit collective bargaining agreements ended in impasse.

4. The State provided each representative with a list of unit members, assigning to each member a strike class under AS 23.40.200.

5. ASEA and APEA each proceeded to binding interest arbitration for class 1 employees without objecting to the State's strike classification assignments under AS 23.40.200.

6. The contract terms awarded class 1 supervisory unit employees included a pay increase of 4.08 percent commencing January 1990, a pay increase of 4.21 percent and additional monthly leave of 1.26 hours commencing January 1991, and a pay increase of up to 5 percent (depending on the CPI) commencing January of 1992. Ex. G, at 1.

7. Subsequently, State and APEA negotiated a bargaining agreement for class 3 employees of the supervisory unit that provides a pay increase of 3 percent and additional monthly leave of 1.26 hours effective January 1, 1990, 5 percent pay increase in January 1991, and a pay increase up to 5 percent (depending on CPI) in January 1992. Ex. G, at 1.

8. The contract terms awarded class 1 GGU employees included a one time compensatory payment of $400.00 on May 12, 1990, and 4.25 percent pay increase commencing July 1, 1990, and 5 percent increase commencing July 1, 1991. Ex. G, at 2.

9. Subsequently, ASEA and the State negotiated a collective bargaining agreement for class 3 employees of the GGU providing for a 3.3 percent wage increase effective on January 1, 1990, 5 percent pay increase on January 1, 1991, and a pay increase of up to 5 percent (depending on CPI) on January 1, 1992. Ex. G, at 2.

10. On August 14, 1990, APEA filed its petition for a determination that adult field probation officers are class 1 employees under AS 23.40.200(a)(1) and (b).

11. On October 1, 1990, ASEA filed its petition for a determination that adult and juvenile field probation officers are class 1 employees under AS 23.40.200(a)(1) and (b).

12. Adult field probation officers may in special circumstances be authorized to carry a concealed weapon. Ex. A-1; tr. 112; tr. 159, 160. They have the power to arrest a probationer, take a probationer into custody, conduct searches, and perform other law enforcement functions with respect to the probationers under their supervision. Tr. 206. They do not participate, however, in general crime detection or receive 911 calls, and they are required by department policy to call on police for assistance when violence is threatened or anticipated. Ex. A-1; tr. 150.

13. Responsibility over parolees does not extend to responsibility over the general public. A probation officer testified that, if she observed a crime in progress, she was unsure whether she had the authority to respond. Tr. 207.

14. Probation officers receive one week of officer safety training relating to street survival skills. Tr. 110.

15. Probation officers have a duty to warn potential victims, tr. 129, and are authorized to arrest probationers for parole violations that may not be violations of the law. However, troopers, and possibly police, may also arrest probationers for violations of conditions of parole and detain juveniles without probation officer assistance. Tr. 116 - 118; 162; 276.

16. The term "probation officer" covers approximately ten classification specifications. The differences involve principally experience and level of responsibility, except that juvenile probation officers are classed separately from adult probation officers. The principal responsibilities of juvenile probation officers are investigating alleged delinquency and making disposition recommendations, recommending placement to the courts, monitoring placement suitability, and cooperating with law enforcement, social workers, and judicial officers. Responsibilities also can include foster parent training and probationer supervision. Adult probation officer duties include monitoring rehabilitation, evaluation of behavior, presentence investigation, supervision and guidance of probationers, and at higher levels, training and supervising other probation officers. Other duties of adult probation officers include diagnosis and maintenance of progress reports, investigation and disposition recommendations, investigation of parole violations, apprehension of violators for return to custody, participation in crisis intervention, and assistance to the courts and to the parole board. At higher levels in both the juvenile and adult areas, the work includes development and supervision of the probation program. Ex. B.

17. The work of probation officers was characterized as primarily surveillance. Tr. 175. The effect of this surveillance is crime prevention. Id.

18. In corrections the movement has been from just incarceration and parole with nothing in between to intermediate sanctions, including community service, electronic monitoring, collecting fines, and day reporting centers. The probation officer must supervise these intermediate sanctions. Tr. 176.

19. In maximum supervision cases, a probation officer is required to make a minimum of two contacts per month, in addition to collateral contacts. Tr. 168.

20. Juvenile probation officers supervise juvenile offenders residing both inside and outside institutions. Tr. 211 & 233 - 234.

21. Juvenile probation officers are responsible for monitoring treatment of juvenile offenders but someone other than the probation officer retains custody over the juvenile. Tr. 247. Police can take into custody a juvenile for violating a term of probation.

22. Juvenile probation officers' caseloads include supervision in the community of juveniles with a history of committing serious offenses such as murder, rape, and child molestation. Tr. 217. Higher risk juveniles are on maximum supervision, requiring meeting with probation officers once a week or a minimum of three times a month. Tr. 218. At least once a month the officer will make a collateral contact. Juveniles are impulsive and can be a danger to themselves and the community if not closely supervised. Tr. 221.

23. One juvenile probation officer testified that between 18 to 25 percent of the juveniles under supervision will recidivate in another criminal offense. Tr. 236.

DISCUSSION

I. Preliminary Matter: State's Motion to Dismiss

The State filed a motion to dismiss the petitions on the grounds of estoppel and ripeness. The motion was denied at the hearing on April 30 1991. This written decision follows.

The basis of the estoppel argument is that the State provided to the labor organizations during negotiations a list classifying employees in three strike categories under AS 23.40.200. The labor organizations proceeded to interest arbitration without raising objections to the classification. The State's argument is that their failure to object before arbitration should estop them from objecting now.

To successfully demonstrate estoppel, the State must show that the labor organizations by their actions demonstrated that these employees are class 1; that the State relied on their actions; and that prejudice to the State resulted. The State has also argued quasi-estoppel, which bars a party from taking a position different from a previous position when the previous position was taken to gain some advantage. Merdes v. Underwood, 742 P.2d 245, 248 (Alaska 1987); Alaska Statebank v. Kirschbaum, 662 P.2d 939, 942 n. 10 (Alaska 1983). The argument is that acquiescing to a strike class and accepting benefits under a collective bargaining agreement applying to that strike class should stop the same employees from accepting special benefits under a collective bargaining agreement applying only to another strike class. For example, an employee could maximize wages by a mid-contract transfer between the GGU class 1 and 3 contracts if the employee were not required to offset any gains under the second contract -- "double-dipping." However, the labor organizations have denied any intent to "double dip." In addition, this Agency certainly has authority to fashion a remedy that would prevent any double compensation. In sum, the prejudice to the State needed to establish estoppel or the unfairness required for quasi-estoppel is absent.[1]

The State also argues that the petitions are premature. Neither AS 23.40.200 nor the regulations establish a time frame or any other procedures for raising the issue of strike classification. Ordinarily the issue of strike classification comes up at impasse. It comes up, for example, when determining those members of a unit who may vote in a strike vote election. E.g., Alaska Public Employees Assn v. Fairbanks North Star Borough, ALRA Decision & Order No. 131 (1990).

At the time these consolidated petitions were filed, the parties were not at impasse or even in negotiations. Because impasse and impasse resolution procedures are not at issue, the State argues that strike class determination is premature.

This argument ignores the importance of a strike classification determination in these cases. Strike classification determines the collective bargaining agreement applying to state employees in the general government and supervisory units. More than one collective bargaining agreement applies in each of the two bargaining units involved here -- APEA and ASEA. The parties' most recent negotiations had resulted in impasse. Both ASEA and APEA went to arbitration for class 1 employees, and the arbitrator imposed contracts. The parties did later negotiate contracts for class 3 employees and the arbitrated contracts are different in key terms from the contracts the parties ultimately negotiated for class 3 employees. Most important, the wages are different.

Thus, the question of strike classification is of more than academic interest. An employee's terms and conditions of employment depend upon it. Because an employee's contract depends on classification under AS 23.40.200, the issue is ripe. We conclude that the petitions are not premature and deny the motion to dismiss.

II. Application of AS 23.40.200 to Field Probation Officers

In applying the strike classes in AS 23.40.200, it is useful to review the function of strike classification. Public employees are divided into three groups based on the effect on the public of a work stoppage. If the public cannot tolerate any interruption in their work, the employees are classed as class 1 employees. Those employees lose an important economic weapon -- the right to strike. In exchange for the loss of this right, the employees acquire the right to binding arbitration. Binding interest arbitration is common in public sector labor relations and strikes a balance between employees' right under a labor relations law to participate in determining the terms and conditions of their employment and the public's right to uninterrupted essential government services. See Joseph R. Grodin and Joyce M. Najita, Judicial Response to Public-Sector Arbitration, Public Sector Bargaining 252 (2d ed. 1988).

The State Labor Relations Agency[2] addressed AS 23.40.200 in In re Tri-Trades Public Service Council Strike Ballot Election, SLRA Order & Decision Nos. 17 and 17A (1975). It took "a tentative interim position that a reading of (a)(1) together with (b) might indicate the intent of the Act was to prohibit certain employees from striking based upon what they actually perform rather than on the basis of an occupational description or an assignment to a particular department." Order & Decision No. 17, at 3-4.

The SLRA confirmed this position in In re Alaska Marine Ferry System Workers, SLRA Order & Decision No. 20, at 2-3 (1976), which states:

> The PERA must be read as a whole; thus it would appear that the enumeration of specific classes of employees in Sec. 200(b), (c) and (d) should be construed as illustrative rather than exhaustive, and that Sec. 200(a) (1), (2) and (3) is controlling. To conclude otherwise would be to conclude that a classification title is more important than the duties performed, and such a conclusion could thwart the purposes of Sec. 200(a).

The Attorney General issued a memorandum of advice in 1987 providing general guidance for the State's application of AS 23.40.200. Susan Cox, Inf. Op. Att'y Gen. (663-87-0559, 1987). The opinion counselled a narrow interpretation of the statute to carry out the legislature's intent to provide an economic weapon to public employees:

> It is obvious from this scheme that the legislature has given most public employees the right to strike. If an employee's work does not directly affect public health, safety or welfare, it is most likely that the employee fits into class 3. See AS 23.40.200(a)(3) & (d). While it may be undesirable from an economic standpoint to have public employees on strike, the right to strike is an economic tool the legislature has in fact given the employees to use after collective bargaining and mediation fail.
>
> . . . . Economic hardship is precisely the nature of that weapon available to employees in a strike situation.

This Agency has held that the key to determining strike class is the time that a group of employees can stop work without directly affecting the public health, safety, and welfare. Alaska Public Employees Ass'n v. Fairbanks North Star Borough, ALRA Decision & Order No. 131, at 9.

Consistent with these authorities, we conclude that, for those employees whose duties fall within a listed position, the legislature has conclusively presumed the effect on the public of a work stoppage and has determined their strike class. The legislature, for example, conclusively presumed that police and fire employees provide a service that may not be interrupted and classified these employees as class 1. AS 23.40.200(b). For those employees whose duties are not those of a position named by the legislature in AS 23.40.200(a), this Agency will determine strike class by examining the anticipated effect of a work stoppage on the public. In making this determination the Agency will keep in mind that the legislature intended interest arbitration to be the exception to the general rule of access to strike as the tool to resolve impasse. Only those employees whose work may not be interrupted without an immediate adverse effect on the public health, safety, and welfare will be classified as class 1.

A. Are field probation officers "police and fire protection employees" under AS 23.40200(b)?

To determine whether field probation officers are "police and fire protection employees" under AS 23.40.200(b), this Agency must examine their responsibilities and duties. To some extent those responsibilities and duties are set forth in the statutes. See Venneri v. County of Allegheny, 316 A.2d 120 (Pa. 1974)(looking to powers and duties defined in legislation to determine that sheriffs deputies are not "police" with the right to binding arbitration).

AS 18.65.290(5)(A) defines the duties of police officers:

> A full-time employee of the state or a local police department with the authority to arrest and issue citations; detain a person taken into custody until that person can be arraigned before a judge or magistrate; conduct investigations of violations of and enforce criminal laws, regulations, and traffic laws; search with or without a warrant persons, dwellings, and other forms of property for evidence of a crime; carry a concealed weapon; and take other action consistent with exercise of these enumerated powers when necessary to maintain the public peace.

AS 18.65.290(6) defines probation officer by cross referencing AS 33.05, where probation officers' duties appear:

> "Probation officer" means a person appointed by the commissioner of corrections to perform the duties of a probation officer under AS 33.05.

While probation officers share some of the powers of police officers, notably the power to arrest a probationer in AS

33.03.070, they do not share all of the duties and responsibilities associated traditionally with the role of police officer. These include the power to prevent and detect crime and the power to enforce all laws and regulations. State Prehearing Brief, p.6, paraphrasing 1977 Op. Att'y Gen No. 36 at 7-10 (1977).

Other states that have considered the definition of "police" for purposes of binding arbitration have narrowly construed it to exclude probation officers, correction officers and other employees that perform some but not all of the duties traditionally associated with the police. For example, a state that bars police and deputy sheriffs from striking found that corrections officers did not possess sufficient attributes of "police" or "sheriff's deputies" to be barred from striking. Jackson County v. Missouri State Bd. of Mediation, 121 L.R.R.M.(BNA) 3229 (Mo. 1985). See also Capitol City Lodge v. Ingham County, 399 N.W.2d 463, 464, 125 L.R.R.M.(BNA) 2301, 126 L.R.R.M.(BNA) 2878 (Mich. App. 1986), leave to appeal denied, 425 N.W.2d 168, 170 (Mich 1987) (jail security officers are not employees of police department and may strike absent evidence that a strike would threaten public safety); Metropolitan Council No. 23, AFSCME v. Oakland County, 294 N.W.2d 578, 581-582, 105 L.R.R.M.(BNA) 3424 (Mich. 1980)(prosecutors' investigators are not employees of police department and are not covered by arbitration statute); Yakima Co. Deputy Sheriff's Assn v. County Commissioners, 765 P.2d 1297, 1299 (Wash. En Banc 1989)(security officers are not uniformed personnel and may strike).

We believe that a narrow construction of "police and fire protection employees" in AS 23.40.200(b) better serves the legislature's choice of strike, rather than arbitration, as the principal impasse resolution tool for public sector employees in Alaska. Because probation officers do not have general authority to enforce criminal laws, regulations, or traffic laws and because their enforcement authority is limited to probationers, we conclude they do not perform enough of the duties of police officers to be "police" prevented from striking as class 1 employees under AS 23.40.200(b).

B. Are field probation officers "jail, prison, and other correctional institution employees" under 23.40.200(b)?

To determine whether field probation officers are "jail, prison, and other correctional institution employees" under AS 23.40.200(b), this Agency must examine their responsibilities and duties. The former State Labor Relations Agency considered institutional placement the key to classification of "jail, prison, and other correctional institution employees" as class 1 under AS 23.40.200(b). In re Tri-Trades Public Service Council Strike Ballot Election, SLRA Order and Decision No. 17, at 4 ¶4. The legislature's apparent intent was to provide for operation of correctional institutions uninterrupted by labor relations related work stoppage. The important duty or responsibility would be the operation of the institution. Because field probation officers operate principally, although apparently not exclusively, outside the walls of the institution, they are not included in "jail, prison, and other correctional institution employees" who are classified as class 1 employees denied the right to strike.

C. Could the public withstand a work stoppage of field probation officers under As 23.40.200(a)(1)?

Because field probation officers are not employees conclusively presumed to perform uninterruptable essential services, we must examine their work to determine the impact of an interruption on the public health, safety, and welfare. If the public cannot withstand a work stoppage for even the shortest time, the employees must be denied the right to strike and classified as class 1 under AS 23.30.200(a)(1).

We believe that probation officers play a critical role in the criminal justice system. We find the work in the field of both adult and juvenile probation officers is essential and may not be interrupted without seriously jeopardizing the public's health, safety and welfare. The record provides that a police officer could substitute for a probation officer in making an arrest for a violation of the terms of probation or parole. While making such arrests is an important duty of probation officers, probation officers have other equally important duties that could not be fulfilled during a work stoppage. Principal among these is surveillance. The direct supervisory responsibility a probation officer has over a probationer or juvenile, particularly over probationers and juveniles classified as high risk, is a key component of the justice system. Direct supervision deters the commission of crime and thus protects the public safety and welfare. We believe that an interruption in that supervision would have an immediate effect on crime rates and, as a consequence, on public safety.

Because the work of probation officers cannot be interrupted for even the shortest period without an adverse effect on public safety, we conclude that adult field and juvenile probation officers should be classified under AS 23.40.200(a)(1) as class 1.

CONCLUSIONS OF LAW

1. The petitioners each have the burden of proof to establish that the class status under AS 23.40.200 of field probation officers should be changed from class 3 to class 1. 2 AAC 10.430.

2. This Agency has jurisdiction to determine the strike classification of employees under AS 23.40.200, establishing strike classes, and AS 23.40.090, authorizing unit determinations.

3. AS 23.40.200 sets forth the three strike classes recognized under PERA:

> Sec. 23.40.200. Classes of public employees arbitration. (a) For purposes of this section, public employees are employed to perform services in one of the three following classes:
>
> (1) those services which may not be given up for even the shortest period of time;
>
> (2) those services which may be interrupted for a limited period but not for an indefinite period of time; and
>
> (3) those services in which work stoppages may be sustained for extended periods without serious effects on the public.
>
> (b) The class in (a)(1) of this section is composed of police and fire protection employees, jail, prison, and other correctional institution employees, and hospital employees. Employees in this class may not engage in strikes. Upon a showing by a public employer or the labor relations agency that employees in this class are engaging or about to engage in a strike, an injunction, restraining order, or other order which may be appropriate shall be granted by the superior court in the judicial district in which the strike is occurring or is about to occur. If an impasse or deadlock is reached in collective bargaining between the public employer and employees in this class, and mediation has been utilized without resolving the deadlock, the parties shall submit to arbitration to be carried out under AS 09.43.030.
>
> (c) The class in (a)(2) of this section is composed of public utility, snow removal, sanitation, and public school and other educational institution employees. Employees in this class may engage in a strike after mediation, subject to the voting requirement of (d) of this section, for a limited time. The limit is determined by the interests of the health, safety, or welfare of the public. The public employer or the labor relations agency may apply to the superior court in the judicial district in which the strike is occurring for an order enjoining the strike. A strike may not be enjoined unless it can be shown that it has begun to threaten the health, safety, or welfare of the public. A court, in deciding whether or not to enjoin the strike, shall consider the total equities in the particular class. "Total equities" includes not only the impact of the strike on the public but also the extent to which employee organizations and public employers have met their statutory obligations. If an impasse or deadlock still exists after the issuance of an injunction, the parties shall submit to arbitration to be carried out under AS 09.43.030.
>
> (d) The class in (a)(3) of this section includes all other public employees who are not included in the classes in (a)(1) or (a)(2) of this section. Employees in this class may engage in a strike if a majority of the employees in a collective bargaining unit vote by secret ballot to do so.

. . . .

4. To determine strike class under AS 23.40.200, this Agency will first examine whether the employees' duties are those of a position named and classified by the legislature in AS 23.40.200(b), (c) or (d). If the employees' duties do not fit one of the named positions, the Agency will next examine the anticipated effect of an interruption of their work on the

public. Only if an interruption will have an immediate adverse effect on the public health, safety and welfare will the Agency classify the employee as class 1.

5. Field probation officers do not perform the duties of police officers and are not "police and fire protection employees."

6. Field probation officers who do not work primarily within a correctional institution do not perform the duties of "jail, prison, or other correctional employees" and are not correctional employees.

7. An interruption in the work of adult field and juvenile probation officers would immediately adversely affect the health, safety and welfare of the public.

8. Field probation officers are class 1 employees under AS 23.40.200(a)(1).

ORDER

1. The State's motion to dismiss ASEA and APEA's petitions is DENIED;

2. The ASEA and APEA's petitions to reclassify adult field and juvenile probation officers as class 1 under AS 23.40.200 are GRANTED.

3. All probation officers are classified as strike class 1 and may not strike. At impasse in collective bargaining, after the satisfaction of any conditions, probation officers have the right instead to binding interest arbitration.

4. The State is ordered to recompute under the appropriate collective bargaining agreement the wage rates, leave accrual, and any other terms that differ in the class 1 and class 3 collective bargaining agreements for any employees for whom this order requires a change in the collective bargaining agreement applying to them. Any differences must be offset to avoid the change providing a special benefit or penalty to the employee. This Agency reserves jurisdiction to respond to any disputes that may arise during the transition from the class 3 to the class 1 collective bargaining agreements.

THE ALASKA LABOR RELATIONS AGENCY

B. Gil Johnson, Board Chairman

NOT PARTICIPATING

James W. Elliott, Board Member

Darrell Smith, Board Member

1The State's argument may also fail because the labor organizations may not have had either the obligation or the right to bargain the strike classification of employees. See Alaska State Employees Ass'n v. State, __ P.2d __, Slip Op. No. 3825 (April 1990)(holding that job classification is not a mandatory subject of bargaining). If the labor organizations did not have the right to raise the issue in bargaining, failure to raise it then would not constitute a waiver.

2Before the reorganization of public sector labor relations in Executive Order 77, which created the Alaska Labor Relations Agency, the State Labor Relations Agency served as the labor relations agency for the State and State employees under the Public Employment Relations Act. Executive Order 77 (eff. July 1, 1990).