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ALASKA STATE EMPLOYEES ASSOCIATION/AFSCME LOCAL 52, AFL-CIO,

Complainant,

vs.

STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, DIVISION OF PERSONNEL/EEO,

Respondent.

CASE NO. 93-173-ULP

DECISION AND ORDER NO. 158

Heard on January 27 and 28, 1993, in Anchorage, Alaska, before the Alaska Labor Relations Board, Chairman B. Gil Johnson present in Anchorage and member James W. Elliott participating by telephone. Member Darrell Smith did not participate. Hearing Examiner Jan Hart DeYoung presided. The record closed on January 28, 1993. The Agency issued an abbreviated order on January 29, 1993. This memorandum decision follows.

Appearances:

Don Clocksin, Wagstaff, Pope and Clocksin, for complainant Alaska State Employees Association/AFSCME Local 52, AFL-CIO; and David T. Jones, Assistant Attorney General, for respondent State of Alaska, Department of Administration, Division of Personnel/EEO.

Digest:

Failure to bargain before changing the terms of a health benefit plan is an unfair labor practice under AS 23.40.110(a)(5).

DECISION

This charge concerns the State's notification to Alaska State Employees Association and its members that a change in health benefits would occur on February 1, 1993, due to an increase in the State's health insurance premium payment on that date. In the charge ASEA maintains that the State is required to bargain before any changes may be made. The State's position is that its action was anticipated by and consistent with the parties' collective bargaining agreement.

Findings of Fact

1. The Alaska State Employees Association/AFSCME Local 52, AFL-CIO (ASEA), is the certified bargaining representative of the State's general government bargaining unit (GGU). The bargaining unit includes employees in all three strike classes set forth in AS 23.40.200.

2. The ASEA and the State engaged in collective bargaining for a master agreement in 1988 through 1989. During bargaining one of the contested issues was health benefits. On May 19, 1989, the parties reached a memorandum of understanding to modify health benefits on July 1, 1989, with the apparent goal of reducing insurance premiums. The parties also agreed to establish a joint committee on health benefits to meet quarterly to "review and make recommendations concerning any aspect of the health insurance system . . . ." Exh. 2.

3. Donald S. Wasserman, chief negotiator for ASEA during these negotiations, states

> The effect of this MOU was to maintain the "defined benefits" plan paid for by the State, but to reduce the State's costs from $435 to $385 per month per employee -- a decrease of over 11 percent. This MOU allowed the State to realize a savings of about $600,000 per month.

Affid. of D. Wasserman, Exh. 1, at 3.

4. ASEA and the State reached an impasse in the negotiations on the master collective bargaining agreement in March of 1990. The parties proceeded to interest arbitration before J. C. Fogelberg for those GGU members in class one prohibited from striking under AS 23.40.200(a)(1) and (b).

5. The ASEA's position on health benefits in the arbitration was to retain the existing defined benefit plan through at least June 30, 1992, and allow a reopener on health benefits at that time. In Re. Interest Arbitration, FMCS No. 90/08746 (April 23, 1990), Exh. 4 & Exh. C, at 16. The State opposed a reopener because of the practical difficulties of negotiating changes before any scheduled rate increases. The State's position was to convert to a defined contribution plan and for a joint committee on health benefits to work out any changes needed to stay within the defined contribution. Exh. F, at 32.

6. On April 11, 1990, Arbitrator Fogelberg issued an interim award. The award provided health insurance benefits as follows:

Health Insurance

> 1. Incorporate the "Memorandum of Understanding" executed by the parties and dated April 19, 1989, into the new Master Agreement.
>
> 2. Maintain the current level of benefits, as modified by the Memorandum of Understanding, until February 1, 1992.
>
> 3. Convert to a "defined contribution plan" effective with the premium renewal date in 1992, at which time a premium "cap" to be paid by the Employer will be established at no more than 10% above the February 1, 1991 rate.
>
> 4. Implement the State's proposal for establishment of a joint committee on health benefits (or in the alternative, a Union provided health insurance plan), to coincide with the conversion to a defined contribution plan in 1992.

Exh. 3 & Exh. B, at 2.

7. The arbitrator released the full arbitration decision and award on April 23, 1990. In Re. Interest Arbitration, FMCS No. 90/08746, at 24. It addressed health benefits by reciting the parties' respective positions, evaluating the evidence, and making the award. Exh. 4 & Exh. C. In reciting the parties' positions, Arbitrator Fogelberg stated that ASEA sought to maintain the current level of benefits or, in the alternative, to maintain the benefits until June 30, 1992 with a "reopener" at that time. Further the Union calls for the incorporation of the Memorandum of Understanding agreed to by the parties on May 19, 1989, into the final Contract, and that it remain in effect throughout the life of the Agreement, except as it may be modified by the parties if there is a reopener in 1992. In the event either party seeks to reopen negotiations on health insurance benefits, notice to the other side would be given by March 1, 1992, and bargaining to commence within 15 days thereafter, lasting for a maximum of 30 calendar days. Then, in the event that the matter

remained unresolved, it would be referred to binding interest arbitration.

Id., at 16. The arbitrator summarized the State's position as a defined contribution plan in which the State would pay not more than a premium of $385.00 per month for a plan covering the employee, the employee's spouse and dependents "unless otherwise agreed to through negotiations with the Union in advance of the next two premium rate changes, as part of their proposed wage and insurance reopener." Included also was the State's proposal of a joint committee on health benefits.

> This committee would be subject to the provisions governing Labor-Management Committees, except as may be specifically modified in this section. The committee would consist of ten members - five representing the Employer and five representing the Union. It would further have access to an analysis of current planned administration, claims payment administration, benefit plan design and utilization conducted by/or for the Division of Retirement and Benefits. A representative of the insurance carrier would also be available to the committee. The committee's responsibility would be to review and make recommendations concerning provisions for efficient, effective health care benefits within the level of the Employer's proposed contribution, including but no limited to: utilization review, hospital pre-certification, cost containment measures, employee education and preferred provider arrangement. The joint committee would then make its recommendations in writing to the Commissioner of the Department of Administration not later than 30 days after convening. In the event that the committee would be unable to reach agreement on design changes prior to the rate change dates, retention of final authority would remain with the State.
>
> Finally in the alternative, the Employer has proposed the option of making additional forms of insurance available to the employees at their expense, or if the Union can provide its own plan at a lower price, the difference in premium cost and contribution rate would be placed in trust for employees or returned to them.

Exh. 4 & Exh. C, at 17-18 (emphasis added) (State's proposal appears at Exh. E).

8. After setting forth the parties' positions, Arbitrator Fogelberg evaluated the issues. Exh. 4 & Exh. C, at 18. In his analysis the arbitrator commented on the reserves or "premium surplus" available to the State:

> A considerable amount of time and energy at the hearing was devoted to the matter of the "premium surplus" which was initially identified at $14 million at the beginning of the current plan year. Further evidence and testimony from State witness Mike Coughlin indicated that of this amount, approximately $6 million has been used to fund the previous year's deficit, leaving the balance in issue. Here the Union claims that the remaining monies will be carried forward through mid-1992, thereby allowing the State a "cushion" against incurring any additional costs to fund a new rate increase. Conversely the Employer asserts that this surplus will be consumed by the end of January next year under the current $385.00 premium rate, and that thereafter the risk will fall squarely upon the State, should the Arbitrator award a maintenance of benefits here.
>
> Having reviewed the evidence relative to this issue, the Neutral concludes that there is a greater probability that the State will not encounter inordinate rate increases at the first premium renewal date in February of 1991. The policy in effect is an "experience rate plan" meaning that any future adjustments in premium would depend in no small part, on the processed paid claims experience of the carrier . . . . While certain assumptions must be made - an unavoidable element in any cost projection estimate - it does not appear unreasonable to conclude that based upon more recent claims experience, there will not be an inordinate raise in premium rates next year.

Arbitrator Fogelberg further concludes,

> Under these circumstances, the Arbitrator finds that the State should not be adversely affected by retaining the provisions in the Memorandum of Understanding until the 1992 premium renewal date, and that any

> rate increase in the interim will be relatively moderate, and can be funded through the build-up of surplus reserves.

Exh. 3 & Exh. C, at 21-22. The arbitrator commented on the national trend for employers to discontinue paying the full cost of medical insurance -- moving to joint responsibility. In light of the negotiated cost containment measures and the reasonable projections for funding the plan through February 1992, the arbitrator reasoned that conversion to a defined contribution system to correspond with the premium renewal date and a cap of the employer's responsibility at 10 percent above the February 1, 1991, rate would be reasonable. Id., at 23. Realizing that this cap might require some changes in the health plan or at least the allocation of premium costs for it, he stated:

> Similarly the Neutral would favor the Employer's position relative to the two alternatives which they have proffered whereby the parties may elect to make other forms of insurance available at the employee's option and expense, similar to the Supplemental Benefits System options already in place . . . or otherwise allow the Union to provide its own plan. Here the State proposes that if the Local can put into place a plan at a lower price, the difference in premium costs and the contribution rate would be placed in trust for employees, or returned to them. Under this system then, the Local would have the ability to evaluate the wisdom and necessity of benefit changes, employee assumption of some portion of the cost to maintain the benefits, or the election of their own health insurance plan. At the same time, the State will have a reasonable assurance that costs can be better controlled.

Id., at 23-24.

9. The arbitrator's actual award states:

> Accordingly, based upon the foregoing analysis, the Memorandum of Understanding executed by the parties and dated May 19, 1989 shall be incorporated into the new Master Agreement. Further the State is to maintain the current level of benefits as modified by the Memorandum of Understanding until February 1, 1992 and to thereafter convert to a "defined contribution plan" effective with the premium renewal date in 1992, at which time a premium "cap" to be paid by the Employer will be established at no more than 10% above the February 1, 1991 rate. Finally, the State's proposal for the establishment of a joint committee on health benefits (or in the alternative, a Union provided health insurance plan) is to be implemented, and to coincide with the conversion to the defined contribution system in 1992.

Exh. 4 & Exh. C, at 24.

10. The arbitration award does not establish that the State has authority to make changes to the health benefits without bargaining first with ASEA. The language providing the State would retain final authority appears only in the arbitrator's summary of the State's position. See paragraph 7, supra.

11. After the issuance of the arbitration award covering class 1 employees, the State and ASEA reached agreement for class 2 and 3 employees. The master agreement incorporates large parts of the arbitration award, including the terms on health benefits. Letter of Agreement (April 25, 1990), Exh. D. Dianne Corso, a member of the State's negotiating team, states that the intention of the three persons that worked on the drafting of the agreement, she and Art Chance for the State and Fred Dichter for ASEA, was that the agreement reflect the arbitration award on health benefits without alteration. The collective bargaining agreement provides:

> The Employer will provide a policy of group insurance covering the employee, the employee's spouse and the employee's dependents. The Employer shall maintain the current level of benefits as modified by the Memorandum of Understanding (incorporated as Appendix H and I) executed May 19, 1989, (as amended October 4, 1989) until February 1, 1992, and thereafter shall convert to a "defined contribution plan" effective with the premium renewal date of February 1, 1992, at which time a premium "cap" to be paid by the Employer will be established at no more than 10 percent above the February 1, 1991, rate.

Agreement, Art. 19, section 3 A.1., Exh. A, at 65 & Exh. 6, at 19. It also incorporated the parties' memorandum of

understanding at Appendix H. Exh. A, at 149 & Exh. 6, at 26.

12. The master collective bargaining agreement covers all strike classes, with some differences between class 1 (no strike) and classes 2 and 3 (some rights to strike) employees. Relevant here is the difference in the effective date of the contract. The agreement is effective between July 1, 1990, and April 30, 1993, for class 1 employees and between January 1, 1990, and December 31, 1992, for classes 2 and 3. Exh. A, at 117 & Exh. 6, at 25.

13. The parties' agreement contains a zipper clause in article 37, section C, addressing how changes would be handled during the term of the agreement:

> Prior to enacting any change in the terms and conditions of employment as established by a specific provision of the Agreement, the Commissioner of the Department of Administration shall obtain the agreement of the Union in the form of a letter of understanding or agreement. Prior to enacting any change in any mandatory subject of bargaining which is not established by a specific provision of the Agreement and which was not a subject of a negotiations proposal, the Union shall be notified in advance of the proposed change thereby enabling them to negotiate on that change.

Exh. A, at 115 & Exh. 6, at 23.

14. The parties' agreement addresses labor-management committees in Article 7. Article 7 provides in part,

> Committees shall have no power to contravene any provision of this Agreement, to enter into any agreements binding the parties, or to resolve issues or disputes surrounding the implementation or interpretation of the Agreement. Matters requiring a contract modification shall not be implemented until a written agreement has been executed.

Exh. A, at 13-14 & Exh. 6, at 16-17.

15. Under the agreement, after February 1, 1992, the State's maximum monthly liability per employee was the existing premium ($385.00) plus 10 percent ($423.50). Exh. A, at 65 & Exh. 6, at 19.

16. On or about February 1, 1992, the State entered into a five year agreement with Aetna to provide and administer a health benefit plan. Exh. 7 & Exh. Q. The basic premium rate for the first year of the agreement was $384.59. Id., at 2. Premium rate changes were addressed in section E of the agreement:

> I. The State reserves the right to modify the benefits under the Health Plans and to negotiate premium rate changes to reflect those modifications. Barring any modifications:
>
> a. The premiums listed in Section 2.A. may not be increased during the 12 month period beginning February 1, 1992.
>
> b. The premium charges listed in Section 2.B. may not be increased during the five month period beginning February 1, 1992.
>
> c. Future negotiated rate changes are effective for a 12 month period. Any negotiated rate changes will be included in contract amendments.
>
> II. The Health Carrier will notify the State of any proposed rate change 120 days before the effective date of the change. Advance notices of rate changes must contain proposed renewal rates based on the experience of the plan and projections for the next 12 month period. This notice must also identify the amount of the risk charge for the same period and provide financial criteria as outlined Section 6 of this appendix. The Health Carrier will also provide claim projections for the SBS Option I for the same renewal period.

Id., at 5.

17. The premium did not increase as expected in February of 1992 and the level of State contribution was maintained at approximately $385.00, a premium savings to the State of 10 percent in 1992.

18. In 1989 - 1991, the actual cost of providing the benefits was less than the premiums paid by the State and surplus premiums, or reserves, accumulated. On June 30, 1991, seven months before the State entered into the five year contract with Aetna in 1992, the reserves were at 24.1 million. Affid. P. Shier, Exh. 11, at 5. By June 30, 1992, the reserves had been depleted to 22.7 million. Id. The actual costs of the plan in 1992 had exceeded the premium rate, and the additional costs were paid from the reserves.

19. In 1991, the premium cost "was almost exactly $385 per eligible employee per month during the period February 1991 through January 1992." Affid. J. Osterweil, Exh. 27, at 1.

20. On October 13, 1992, Aetna notified the State that the premium would increase to approximately $500.00, effective February 1, 1993, Affid. D. Corso, Exh. 8, which would exceed the cap of $423.50 on the State's contribution and constitute an increase of about 31 percent.

21. Steven LeBrun is the account manager from Aetna assigned to the State's account. He stated that the premium is determined on the basis of a 17 month projection, using claims experience, claims paid, rate of claims to premium, and factoring in inflation and administrative costs. Exh. Q & Exh. 7.

22. Patrick Pechacek, independent claims consultant who reviewed Aetna's proposed premium rate increase on behalf of the State, stated that the State health plan is an experience rated plan, that is, the rates are based on claims.

23. Jody Osterweil, health care consultant for ASEA, testified. He has 15 years of experience consulting in the health care field and his educational background includes a master's degree in health policy and management from the Harvard School of Public Health. He believes that Aetna's premium rate of approximately $500 is overstated. By his estimate the cost for the premium year February 1993 through January 1994 should be $477.00 per eligible employee, Affid. J. Osterweil, Exh. 27, at 2, which would exceed the cap by $54.00, rather than the $77.00 projected by Aetna.

24. Osterweil believes that the reserves have subsidized an artificially low premium. He contends that the claims experience was higher than anticipated in 1992 and the State was forced to draw on the reserves. ASEA argues that the same health plan should be maintained and the surplus reserves be used to pay the difference between the contract cap and the actual cost of the benefits.

25. Aetna maintains the reserves on behalf of the State and the reserves earn interest at the rate of 8.15 percent. In 1992 four million dollars was depleted from surplus to pay the difference between the premium and the actual cost of the benefits.

26. The State did not attempt to negotiate any changes in the amount of the premium increase stated by Aetna, and it did not attempt to negotiate any delay in the effective date.

27. Aetna presented information about the anticipated premium increase to the various bargaining representatives, including ASEA bargaining team members and joint committee members on October 13, 1992. Exh. N, at 3.

28. The question of health benefits was referred to the joint committee on health benefits, as the parties' agreement provided in article 19. The committee of ten members, five appointed by ASEA and five appointed by the State, is authorized to review records about the design and administration of the health plan and to make recommendations to the Commissioner of Administration. The committee met on November 13 and 23, 1992. See Exh. G (discussion topics and meeting notes for November 13, 1992, meeting); Exh. N.

29. To spark discussion, Dick Isett, ASEA's co-chair on the joint committee, sent a memorandum dated November 29, 1992, to ASEA's contract bargaining committee, with a copy to one of the State's negotiators, Jim Johnsen. Exh. H. It makes various suggestions to lower the costs of the premium to bring it closer to the State's cap.

30. Johnsen, by telecopier on November 30, 1992, sent Isett a draft he had prepared for the joint committee to provide to

the Commissioner of Administration, making recommendations for changes to the health plan to bring it within the State's contribution cap. It set forth as an alternative the proposal contained in Isett's memorandum. Exh. I.

31. In a letter dated November 30, 1992, Isett informed Johnsen that ASEA did not consider the joint committee a substitute for bargaining on health benefits. The memorandum states in part:

> In view of the fact that we are literally on the eve of collective bargaining on the subject of health benefits, and that any interim agreement on funding deficiency could set an important precedent for the next agreement, our contract bargaining committee felt it would not be appropriate for the joint committee to continue discussions on this subject at this time.
>
> Accordingly, the subject of an interim agreement will be proposed as an issue for collective bargaining.

. . . .

> In the meanwhile, our committee on health benefits will continue to study the health plan and to be useful wherever possible.

Exh. 14 & J.

32. ASEA and the State met on December 1, 1992, to discuss health benefits. The State's position was that the joint committee makes recommendations to the commissioner who is responsible to manage the plan within the contribution level agreed to in the contract. The State's chief negotiator was Jim Johnsen. Johnsen explained the State's position to be that the State had the authority under the existing agreement to make unilateral changes to health benefits. The State therefore refused to negotiate an interim health benefits agreement on the basis that it would not renegotiate the existing contract. It did, however, negotiate health benefits for the successor agreement, for which negotiations had commenced, and discuss alternatives for addressing the rate increase at the bargaining table.

33. ASEA's position is that the State may not unilaterally determine benefits and ASEA demanded to bargain on the question of the level of benefits to be provided under the State's health benefits plan. Exh. 31 (Deb Taylor's notes).

34. ASEA, by letter from Business Manager Jennie Day Peterson, demanded that the joint committee meet again before presenting a recommendation, expressed concern about the State's intent to unilaterally implement changes in health benefits on December 7, 1992, and insisted on the right to bargain any changes. J. Peterson, letter to Johnsen (Dec. 3, 1992), Exh. L.

35. The State by J. Johnsen, letter to Peterson (Dec. 9, 1992), Exh. 12 & Exh. N, responded to ASEA, by stating the State's position that it could unilaterally change health benefits under the parties' current agreement. It did agree to convene the joint committee on December 14, 1992.

36. On December 9, 1992, the "joint committee" provided a recommendation to the Commissioner of Administration regarding changes to the GGU health care benefits. Labor Relations Manager Dianne Corso signed the memorandum, which was a product of the State representatives on the joint committee. Exh. M.

37. The joint committee met again on December 14 but did not produce any recommendations. The State members provided their recommendation to the joint committee, which they announced would be effective February 2, 1993.

38. On December 15, 1992, Patrick Shier, an ASEA member on the joint committee, stated in a letter to Johnsen that the ASEA members disavowed the recommendation to the commissioner and made its own recommendation:

> We recommend the current health plan remain unchanged until ratification of a new Bargaining Agreement between Alaska State Employees Association AFSCME Local 52, AFL-CIO and the State of Alaska covering General Government Unit employees. In the interim, any plan costs above the employer's contribution as specified in the current contract should be paid from plan surpluses or reserves.

Exh. O.

39. The parties' collective bargaining agreement for class 2 and 3 employees expired by its terms on December 31, 1992. The parties began negotiations for a new agreement in November of 1992 and met on November 17, 18, 19, and 20; December 1, 2, 3, 17, and 18; and January 5, 6, 7, and 8, 1993.

40. ASEA claims that the State did not provide it with the information it needed to engage in negotiations on health benefits. Peterson states ASEA requested information on statistics, SBS coverage, impact on reserves, cost increases and backup, and on December 1 provided a deadline of December 4 for the receipt of the information. Peterson states the information was not received. Johnsen maintains that, most of the time the joint committee met, it was engaging in an information exchange.

41. The last two weeks of December, beginning on December 17, 1992, the State began informing GGU members of the changes in health benefits and their effective date of February 1, 1992. Affid. D. Corso, Exh. 8; N. Usera, Memorandum (Dec. 17, 1992), Exh. P.

42. ASEA filed this complaint on December 24, 1992. With its complaint it filed a Request for Immediate Cease and Desist Order.

43. On December 28, 1992, the Agency conducted a status conference with the parties and issued a notice of accusation. On December 28, 1992, ASEA filed a memorandum in support of its earlier request for immediate cease and desist, which the State opposed on December 31, 1992. Agency Hearing Officer Jean Ward attempted conciliation with the parties on January 4, 1993. On January 4, 1993, ASEA filed a grievance alleging violations of the agreement. On January 5, 1993, the hearing examiner denied ASEA's request for an interlocutory order. The State filed its notice of defense and a motion to defer the proceeding to arbitration on January 8, 1993. On January 15, 1993, the hearing examiner denied the motion to defer.

44. On January 27 and 28, 1993, the Agency heard the matter, and the parties presented testimony and other evidence. The record closed on January 28, 1993.

45. On January 29, 1993, this Agency issued an abbreviated order, ordering the State to cease and desist violating AS 23.40.110(a)(5) by its refusal to negotiate the change in health benefits, ordering the parties to bargain, and declaring that the parties would be at impasse if they failed to reach agreement by February 16, 1993.

Discussion

I. Preliminary matters:

Although our action has mooted the two motions made before the hearing examiner in this case, we address them because these issues are the type that could continually evade review.

A. The Motion to Defer

The State filed a motion to defer the unfair labor practice charge to arbitration on the basis that the matter was appropriate for deferral under the deferral policy of the National Labor Relations Board, which the Agency applies. State's Motion for Deferral to Arbitration, p. 8. See Alaska State Employees Ass'n v. State, ALRA Decision & Order No. 135 (1991). ASEA opposed the motion. The hearing examiner denied the motion, relying on a United States Supreme Court decision under the National Labor Relations Act. Litton Financial Printing Div. v. NLRB, 111 S. Ct. 2215, 2225, 137 L.R.R.M.(BNA) 2441, 2447 (1991). That decision held that, because arbitration provisions are consensual, they do not survive the expiration date of the contract. Thus, unfair labor practice charges arising under an expired agreement cannot be deferred to the agreement's grievance procedure because the agreement has expired.

Applying these principles to this case, the hearing examiner found that, because the parties' agreement had expired, the grievance procedures were unavailable and deferral was inappropriate.

The hearing examiner, however, overlooked an important distinction between the federal law and PERA. Unlike the federal law, grievance arbitration provisions are not consensual under PERA. Instead, the provisions must appear in every contract. AS 23.40.210 provides in part,

> The agreement shall include a grievance procedure which shall have binding arbitration as its final step. Either party to the agreement has a right of action to enforce the agreement by petition to the labor relations agency.

We see no reason during the interim periods between contracts to substitute procedures before this Agency for the grievance arbitration procedures that must appear in every PERA contract. Since those provisions are required, we believe they should continue in effect in the same manner as other mandatory terms and conditions of employment as part of the obligation to bargain in good faith. That obligation requires that the terms and conditions of an expired agreement continue until a new agreement is negotiated or the parties reach impasse. Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 564 & n. 6, 127 L.R.R.M.(BNA) 2657, 2659 & n. 6 (1988). We believe this rule is more in keeping with the strong endorsement of grievance arbitration in AS 23.40.210. The alternative, inserting this Agency into the parties' grievance process, could be inefficient and disruptive.

We therefore conclude that the grievance procedures in the parties' agreement were available and the standards set forth in Alaska State Employees Ass'n v. State, ALRA Decision & Order No. 135 (1991), should have been applied. However, in this case we exercise our discretion to hear the unfair labor practice charge. See Public Safety Employees Ass'n v. State, 799 P.2d 315 (Alaska 1990).

B. Motion for Interlocutory Relief

ASEA filed a request for an interlocutory order, which the State opposed. We affirm the decision of the hearing examiner for the reasons stated in the order.

II. Health Benefits Dispute

The State characterizes its obligation after February 1992 to provide health benefits as a defined contribution plan in which the parties agree to defining the contribution level rather than the benefits levels. This change cannot be understood to mean that after February of 1992 the employees, through their bargaining representative ASEA, lost the right to have a say in the benefits provided. Consistent with the requirements of AS 23.40.070 and AS 23.40.110, the change can only mean that the contribution level was defined for the term of the contract, but the specific benefits to be provided within that contribution still must be negotiated under AS 23.40.100 and AS 23.40.250.

Conclusions of Law

1. The State of Alaska is a public employer under AS 23.40.250 and this Agency has jurisdiction under AS 23.40.110 to consider this matter.

2. Health benefits are a mandatory subject of bargaining. AS 23.40.070(2) and AS 23.40.110(a)(5) obligate the State to bargain collectively in good faith with the ASEA over the terms and conditions of employment for general government unit employees. Fringe benefits, such as health benefits, are "terms and conditions of employment." AS 23.40.250(8) (1992 Supp.); 1978 Op. Att'y Gen. 3 (J-66-444-78), Exh. 24. A change in health benefits is a change in a term or condition of employment.

3. The expiration of the parties' bargaining agreement does not release the employer from the duty to provide health benefits under the agreement. An employer's unilateral change in a term or condition of employment before the parties reach an impasse in negotiations is generally an unfair labor practice even if the parties' agreement has expired. Litton Financial Printing Div. v. NLRB, 111 S. Ct. at 2221, 137 L.R.R.M.(BNA), at 2444-2445. The reason is that the duty to bargain in good faith requires the parties to maintain the status quo until they negotiate to impasse. Intermountain Rural Electric v. NLRB, 984 F.2d 1562, 1566, 142 L.R.R.M.(BNA) 2448, 2452 (10th Cir. 1993). Alaska Community Colleges Federation of Teachers, Local No. 2404 v. University of Alaska, 669 P.2d 1299, 1303-1304 & n. 4 (Alaska 1983)(unilateral imposition of new work rules after the expiration of the contract but before impasse was an unfair

labor practice). As the United States Supreme Court states:

> Freezing the status quo ante after a collective bargaining agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract. Thus, an employer's failure to honor the terms and conditions of an expired collective-bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining in breach of sections 8(a)(1), 8(a)(5) and 8(d) of the National Labor Relations Act . . . . Consequently, any unilateral change by the employer in the pension fund arrangements provided by an expired agreement is an unfair labor practice.

Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 544 n. 6, 127 L.R.R.M. (BNA) 2657, 2659 n. 6 (1988) quoting the decision below, 779 F.2d 497, 500, 121 L.R.R.M.(BNA) 2276, 2278-2279 (9th Cir. 1985) (citations omitted).

4. The determination of the status quo is a question of fact, Intermountain Rural Electric, 142 L.R.R.M.(BNA) at 2452, controlled in large part by the language of the agreement. Id.; see also Motor Car Dealers Ass'n, 225 NLRB No. 168, 93 L.R.R.M. (BNA) 1474 (1976) (because employees paid premiums for dependents under agreement, employees absorbed premium cost increases). Generally, the status quo will be to maintain health benefits and to pay any increases in premiums. Intermountain Rural Electric, 142 L.R.R.M.(BNA) at 2452. Unless an agreement provides otherwise, the employer may not make any changes and must pay any increases in the premiums unless or until the parties negotiate to impasse. Id.

5. The ASEA/State agreement states that the employer will provide a defined benefit plan until February of 1992. On that day, the plan converted to a defined contribution plan with the State's contribution capped at about $423.00 per month per employee. The employer is not required to pay any increases when a plan is capped. See House of the Good Samaritan and Samaritan Keep Nursing Home, 268 NLRB No. 28, 114 L.R.R.M.(BNA) 1254 (1983). The cap, however, does not justify unilateral changes in the benefits provided.

6. Apparently in anticipation that the conversion to a defined contribution plan could result in the need to make changes in the benefits or the source of payment, the parties in their agreement provided for a joint committee on health benefits to consider changes and to make recommendations. However, the joint committee on health benefits did not and could not substitute for ASEA as a negotiator on health benefits. Electromation Inc., 309 NLRB No. 163, 142 L.R.R.M. (BNA) 1001, 1007--1008 (1992)(discussed at 141 L.R.R.(BNA) 522). See also, paragraph 14, supra.

7. Because the parties anticipated that benefits could change during the term of the contract, the State maintains that changes in the benefits would not disturb the status quo. Despite the fact that the change is anticipated, a change in health benefits is nevertheless a change that must be bargained.

8. We conclude that maintaining status quo in this case would be to provide benefits and to pay increases up to a cap of $423.00. Notwithstanding that the parties' agreement caps the State's obligation to pay for employee health benefits after February 1, 1992, at 110 percent of the monthly per employee rate of approximately $385.00, ASEA did not relinquish in the agreement its right to bargain changes in the terms and conditions of employment. If changes are necessitated by the cap, the parties' joint committee on health benefits is to meet and make recommendations on the changes. The changes must themselves be bargained, however, unless the State can establish some defense to the obligation to bargain, such as ASEA's waiver of that right or the defense of necessity.

9. ASEA did not waive its right to bargain over changes in health benefits. More specifically, article 19, section 4 of the agreement does not waive this right.

10. Notice of a change must be given far enough in advance to allow a reasonable time to bargain. The State provided its notice well in advance of the change. However, the State maintained throughout this period that its obligation to negotiate extended only to the successor agreement and that it was under no obligation to negotiate the terms of the health plan to be provided in the interim.

11. Announcement of a fait accompli does not afford a reasonable opportunity to bargain. Gulf States Mfg., Inc. v.

NLRB, 704 F.2d 1390, 113 L.R.R.M.(BNA) 2789, 2794-2795 (5th Cir. 1983), rehearing denied 715 F.2d 1020, 114 L.R.R.M.(BNA) 2727 (1983) (cited in 142 L.R.R.(BNA) 233). A union that receives notice must act diligently or its right to bargain before a unilateral change is waived. However, failure to respond to a fait accompli is not a waiver of the right to bargain, Id., and ASEA insisted on its right to bargain.

12. Necessity or some compelling business justification does not provide a defense in this case. When the State was notified of the premium change, it knew it needed to act quickly to avoid payment above the premium cap. The State seems to argue that the nature of negotiations and the time they take justify unilateral action. Here the State had notice approximately three and one half months before the premium rates were scheduled to increase. This time period far exceeds the minimum times found adequate by the National Labor Relations Board in its cases. See Jim Walter Resources Inc., 289 NLRB 1441, 129 L.R.R.M. (BNA) 1091 (1988)(held that ten days notice was adequate to provide a meaningful opportunity to bargain health insurance premium payments) (cited in 142 L.R.R.(BNA) 235). The time period in this case was ample in comparison.

13. The State argues also as a defense that, because its money terms are subject to legislative appropriation, it may not be ordered to pay any increases in premiums because these increases have not been authorized. See AS 23.40.215(b). ASEA's claim is that the reserves, already appropriated, should be available to pay any increases in premiums pending conclusion of the negotiation on health benefits. We see no such requirement in the contract. The fact that the premiums did not increase does not mean, as ASEA argues, that the fund is available to subsidize future rate increases exceeding the cap. The cap is a maximum liability. It may not be exceeded but it is possible that liability could be less. Because the agreement contains a cap that may not be exceeded, the State's defense that the reserves may not legally be used for this purpose because they are not appropriated funds need not be addressed.

14. The State's failure to bargain a change in the health benefit plan is an unfair labor practice under AS 23.40.110(a)(5).

15. The obligation to bargain in good faith includes the duty to disclose relevant information about matters at issue in bargaining. NLRB v. Truitt Mfg. Co., 351 U.S. 149, 38 L.R.R.M.(BNA) 2042 (1956). Insurance cost information must be provided. NLRB v. Borden, Inc., 600 F.2d. 313, 101 L.R.R.M.(BNA) 2727, 2729 (1st Cir. 1979) (request for average cost per bargaining unit employee and other information related to insurance programs requested)("where the requested information is intrinsic to the core of the employer-employee relationship, and the employer refuses to provide requested information, the employer has the burden to prove either lack of relevance or to provide adequate reasons why he cannot, in good faith, supply the information").

16. The duty to disclose relevant information is contingent upon a request. 1 Patrick Hardin, The Developing Labor Law at 659 (3d. ed. 1992).

17. A request need not be in writing. Id., at 660. However, a request must be made. The evidence of the requests for information is insufficient in this case to find a violation.

18. The State has an obligation to make a diligent effort to provide the information upon a request for information relevant and necessary for bargaining.

19. If the parties reach impasse, they may resort to the procedures appearing in AS 23.40.200.

ORDER

This order incorporates provisions of the abbreviated order issued on January 29, 1993, adding the customary order to post copies of the decisions in the workplace:

1. The State of Alaska is ordered to **CEASE AND DESIST** its changes to health benefits in violation of AS 23.40.110(a)(5).

2. The parties are **ORDERED TO BEGIN BARGAINING IMMEDIATELY** on health benefits "within the level of Employer contribution" in the Agreement.

3. In light of the premium cap and additional expense anticipated by this order, it is further ordered that, if the parties have not reached agreement by Monday, February 15, 1993, the parties are at impasse.

4. The State is ordered to post notice of this decision within 14 days after service in workplaces of unit members at locations, such as employee bulletin boards, reasonably chosen to give members actual notice of the decision.

ALASKA LABOR RELATIONS AGENCY

B. Gil Johnson, Chairman

James W. Elliott, Board Member

NOT PARTICIPATING

Darrell Smith, 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 Alaska State Employees Ass'n/AFSCME Local 52, AFL-CIO v. State of Alaska, Department of Administration, Division of Personnel/EEO, case no. 93-17349-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 14th day of May, 1993.

Norma Wren

Clerk IV

This is to certify that on the 14th day of May, 1993, a true and correct copy of the foregoing was mailed, postage prepaid to

Don Clocksin

David T. Jones

Signature