ALASKA LABOR RELATIONS AGENCY
3301 EAGLE STREET, ROOM 208
P.O. BOX 107026
ANCHORAGE, ALASKA 99510-7026
(907) 269-4895
Fax (907) 269-4898

STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION,

Complainant,

vs.

PUBLIC SAFETY EMPLOYEES ASSOCIATION,

Respondent.

PUBLIC SAFETY EMPLOYEES ASSOCIATION,

Complainant,

vs.

STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION,

Respondent.

CASE NO. 93-152-ULP & 93-167-ULP (Consol.)

DECISION AND ORDER NO. 159

This matter was heard on April 16, 1993, in Anchorage, Alaska, before the Alaska Labor Relations Board, Chairman Gil Johnson and members Darrell Smith and James Elliott, with Hearing Examiner Jan Hart DeYoung presiding. Board member James Elliott participated by telephone and by review of the record. The record closed on April 16, 1993.

Appearances:

Art Chance, Labor Relations Analyst, for State of Alaska, Department of Administration; and James A. Gasper, Jermain Dunnagan & Owens, for Public Safety Employees Association.

Digest:

Because interest arbitration ground rules are not a mandatory subject of bargaining, a refusal to negotiate them is not an unfair labor practice. Because the parties agree they are at impasse and the State refuses to proceed to interest arbitration, the State is in violation of As 23.40.110(a)(5) and may be compelled to arbitrate under AS 23.40.200.

DECISION

Public Safety Employees Association is a bargaining representative for employees who may not strike under AS 23.40.200(a)(1) and (b) and who are entitled to interest arbitration at impasse in negotiations. The State and the PSEA have reached impasse in negotiations. The parties have exhausted mediation and should be ready to proceed to binding interest arbitration. The State, however, will not proceed to interest arbitration and will not present its last best offer until the parties can agree to, or an arbitrator determine, the meaning of the term "item" in their ground rules. The State maintains it cannot prepare its last best offer until the meaning of this word is clear. PSEA has refused to agree to

arbitration in two steps, with the first step a hearing on the meaning of "item" in the ground rules. PSEA's position is that the arbitrator can permit the parties to revise their last best offer if problems develop in the course of the arbitration.

Findings of Fact

1. The Public Safety Employees Association represents a bargaining unit of approximately 422 law enforcement officers in the Alaska Department of Public Safety and its Department of Transportation and Public Facilities.

2. The parties commenced negotiating a successor to their collective bargaining agreement in November of 1991. Exh. 1. The State's chief spokesperson was Bruce Cummings, who refused to negotiate ground rules for the contract negotiations. The parties were in negotiations on approximately 10 days. Jim Johnsen then took over as the State's spokesperson. PSEA approached Johnsen with the idea of negotiating ground rules, and the parties did negotiate them. [Piazza 2A.] Exh. 2. The ground rules address procedures for interest arbitration as follows:

> No less than two (2) weeks prior to the beginning of the arbitration hearing, the parties will meet and present their respective final stand on the item(s) of impasse. The interest arbitrator shall decide between one or the other final stand on each item.

Ground Rules (Jan. 17, 1992)(emphasis added), Exh. 2, p. 3.

3. The parties apparently dispute the meaning of "item." "Item" is defined in the ground rules as follows:

> Open items for negotiation:
>
> By 4:00 p.m. on March 13, 1992, all open items will be identified by the moving party. Existing contract language not identified as open shall remain unchanged in the successor agreement.
>
> A) An item can be an entire article, a sub section of an article, a sub section of a sub section, an introduction of a topic not presently contained in the agreement or a deletion of an existing topic.

Exh. 2, p. 1.

4. After agreeing to the ground rules, the parties negotiated until mutually determining that they had reached impasse in March of 1992. The parties agreed that PSEA and the State had met to negotiate on approximately 30 days after Johnsen had become the State's spokesperson.

5. The parties proceeded to mediation. The parties were unable to reach agreement with the assistance of the mediator and were ready to proceed to interest arbitration.

6. The parties agreed to arbitrator James Litton and to arbitration during the two week period beginning November 9, 1992.

7. The parties' ground rules established that the parties meet for a last two-week period before arbitration to determine what, if anything, the parties could remove from the jurisdiction of the arbitrator. Exh. 2. [2A Piazza.] The parties agreed that the first week they would meet in Juneau and the second week they would meet in Anchorage. The parties had agreed to accelerate the time for the exchange of final proposals to the last day of this two week session, October 16, 1992.

8. In accordance with these rules, the parties met in Juneau the week of October 5, 1992. PSEA believed the parties had made some progress during this week and expected to meet the second week in Anchorage as arranged to get more of the nonessential items off the table. On Friday, October 9, 1992, the last day of the week in Juneau, at the conclusion of its last caucus, the State announced through its spokesperson that it did not believe further negotiations would be productive. Johnsen further stated that the State bargaining team would need to caucus before submitting its last best offer and would be in Anchorage the following Thursday only to present its final offer.

9. PSEA responded to this announcement with anger. Before the parties separated, PSEA's spokesperson, Piazza, raised a matter he had raised earlier. He felt the parties needed to pay attention to "items" because that was how the arbitrator would be considering the parties' final proposals. The State did not discuss the matter further on October 9, and the PSEA bargaining team returned to Anchorage that Friday evening.

10. On Monday, October 12, 1992, Piazza sent Johnsen a letter by telecopier. Piazza reiterated his position that the parties adhere to the ground rules and continue as planned in Anchorage. Exh. 3. The letter further states:

> With regards to potential disagreements on the application of an "item". Our initial reaction is to handle this as the State did with the Gressett et al grievance. To have the matter heard before an arbitrator prior to beginning with the interest arbitration. However, we shall address this if and when such disagreement(s) emerge.

Id. p. 2. The letter also suggests that, to exchange final proposals, the parties could exchange them by mail, postmarked before October 26, 1992, instead of a face to face meeting.

11. Johnsen responded with a letter sent by telecopier on October 12, 1992. Exh. 4. The State expressed willingness to discuss "our apparent dispute over the issues that will be presented to the interest arbitrator" on the telephone that day and to meet in Anchorage on Wednesday "to discuss the issues and to exchange last best offers." The letter further explained the reasons for the change:

> As I recall, you stated that unless the parties are able to resolve the question of what is an issue for purposes of interest arbitration, we cannot exchange last best offers and we cannot proceed to arbitration. Since this appears to be a dispute in collective bargaining involving Class I employees, pursuant to AS 23.40.200(b), the parties would then take this issue to interest arbitration for resolution prior to interest arbitration on all other disputed negotiation items.

Exh. 4, pp. 1-2.

12. PSEA responded with another telecopy on October 13, 1992. Exh. 5. PSEA did not provide its interpretation of the word "item." It did repeat the proposal to mail final proposals. Id.

13. The State responded on October 13, 1992, again expressing concern about the meaning of "item" and again seeking arbitration to resolve the question:

> As the State indicated yesterday and again this morning, we agree with your statement of late last Friday afternoon, in which it was the union's position that unless the parties are able to resolve the question of what is an issue for purposes of interest arbitration, we cannot exchange last best offers and we cannot proceed to arbitration. Notwithstanding the union's verbal retraction of its statement of last Friday, this appears to be a dispute, albeit over ground rules, in collective bargaining involving Class 1 employees, pursuant to AS 23.40.200(b). Consequently, the parties would then take this threshold issue to arbitration for resolution prior to interest arbitration on all other disputed negotiation items.

Exh. 6, pp. 1-2.

14. PSEA's responding telecopy was sent to the State on October 14, 1992. It states that there is no factual dispute but it does not provide its view of the meaning of "item." PSEA repeats its availability to meet to exchange final proposals or to mail them before October 26. Exh. 7, p. 2.

15. On October 20, 1992, Johnsen proposed by telecopy two options for proceeding, neither of which involved proceeding to interest arbitration on the existing schedule. The options were for the parties to agree on a definition of "item" or, alternatively, to postpone the interest arbitration and let the arbitrator decide the meaning of "item" before the parties exchanged last best offers. Johnsen also states that, if the parties fail to agree, Johnsen will contact the arbitrator to delay the arbitration and pursue other means to resolve the dispute. Exh. 9.

16. PSEA responded by opposing cancellation of the arbitration. Exh. 10.

17. On October 26, 1992, the State filed an unfair labor practice against PSEA with this Agency. The State characterizes the charge as the mechanism available to the State to obtain an order resolving the ambiguity the State perceives over the arbitration procedures.

18. On October 27, 1992, Johnsen notified arbitrator James Litton that it was postponing arbitration and advised the arbitrator of the unfair labor practice charge it had filed against PSEA. Exh. 12.

19. PSEA discovered the postponement when informed by the arbitrator, and on October 30, 1992, PSEA sent a letter to arbitrator Litton stating that it did not concur in the postponement. Exh. 13.

20. The parties never submitted their last best offers.

21. The parties have attempted to reach a resolution of this dispute but have been unsuccessful.

22. PSEA moved to dismiss the State's unfair labor practice charge on the basis that the State had not alleged any violation of AS 23.40.110.

23. The motion was denied on December 8, 1993, and a notice of accusation was issued against PSEA.

24. PSEA filed a notice of defense to the State's charge on December 16, 1992, and PSEA filed an unfair labor practice on that same day alleging violation of the duty to bargain in good faith for refusing to bargain and to present a final proposal and for cancelling the interest arbitration hearing.

25. The Agency issued a notice of accusation on PSEA's charge against the State and ordered the two complaints consolidated on December 17, 1992.

26. The Agency scheduled the cases to be heard before the board members on January 25, 1993.

27. The case was rescheduled at the parties request, for April 16, 1993.

28. A hearing was held on April 16, 1993, at which the parties presented testimony and other evidence. The record closed on that date.

Conclusions of Law

1. The State of Alaska is a public employer under AS 23.40.250(7), and the Alaska Labor Relations Agency has jurisdiction to consider unfair labor practice complaints under AS 23.40.110.

2. Under 2 AAC 10.430, the complainant in each case has the burden to prove each element necessary to its cause by a preponderance of the evidence.

3. AS 23.40.200(b) provides that police and fire employees "may not engage in strikes" and further provides that,

> 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.

4. AS 23.40.110(a)(5) and (c)(3) prohibit public employers and labor organizations from refusing to bargain collectively in good faith with the bargaining representative of the other party. This obligation of good faith extends to the parties' conduct after impasse under AS 23.40.200(b).

5. A refusal to proceed to interest arbitration can be an unfair labor practice. See Alaska Public Employees Ass'n v. City of Fairbanks, 753 P.2d 725 (Alaska 1988).

6. A party may not require an arbitrator to consider a permissive item of bargaining. Refusal to bargain a permissive item is not an unfair labor practice. Conversely, insistence on the arbitration of a permissive item is an unfair labor practice. City of Portland v. Portland Police Commanding Officers Ass'n, 12 PECBR 12/424 (Or. Empt. Rel. Bd. 1990).

7. Because arbitration ground rules are not "wages, hours or other terms and conditions of employment," they are not a mandatory subject of bargaining. AS 23.40.250(1) and (9)(1992 Supp.). Such threshold matters are permissive subjects. See NLRB v. Bartlett-Collins Co., 639 F.2d 652, 106 L.R.R.M.(BNA) 2272 (10th Cir. 1981), cert. denied 452 U.S. 961, 107 L.R.R.M.(BNA) 2768 (1981) (use of court reporter to record negotiations not a mandatory subject).

8. This Agency has concurrent jurisdiction with the superior court to compel parties to arbitration. See e.g., Public Employees Local 71, AFL-CIO v. State of Alaska, Division of Labor Relations, Case No. 3 AN-87-6902 Civil (Aug. 28, 1987)(order compelling arbitration).

9. Disputes relating to arbitration should be raised with the arbitrator in a manner directed by the arbitrator. In this case, the parties should present their last offers and proceed as directed by the arbitrator. A party may not resist that procedure or require the bifurcation of that procedures consistent with its duties in AS 23.40.200(b) and As 23.40.110.

10. The State's cancellation of the arbitration and its refusal to proceed with the arbitration unless PSEA agreed to proceed in the manner it directed are unfair labor practices under AS 23.40.110(a)(5).

11. PSEA's refusal to proceed to arbitration on the issue of the meaning of the ground rules, because the subject of ground rules is a permissive subject of bargaining, is not an unfair labor practice under AS 23.40.110(c)(2).

ORDER

1. The complaint in 93-152-ULP is DISMISSED;

2. The State shall cease and desist from refusing to provide final proposals and refusing to proceed to interest arbitration;

3. The State is compelled to submit to interest arbitration;

4. Any disputes on the interest arbitration procedures should be presented to the arbitrator in the manner the arbitrator directs.

THE ALASKA LABOR RELATIONS AGENCY

B. Gil Johnson, Chairman

James W. Elliott, Board Member

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 State of Alaska, Department of Administration v. Public Safety Employees Ass'n, case no. 93-152-ULP, and Public Safety

Employees Ass'n v. State of Alaska, Department of Administration, case no. 93-167-ULP (Con), dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 22nd day of April, 1993.

Norma Wren

Clerk IV

This is to certify that on the 22nd day of April, 1993, a true and correct copy of the foregoing was mailed, postage prepaid, to

Art Chance

James Gasper

Signature