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ALASKA STATE EMPLOYEES ASSOCIATION/AFSCME LOCAL 52,

Complainant/ Petitioner,

vs.

STATE OF ALASKA AND ALASKA HOUSING FINANCE CORPORATION,

Respondent.

CASE NO. 93-165-ULP & 93-200-UC (Consol.)

DECISION AND ORDER NO. 164

Heard on April 15, 1993, in Anchorage, Alaska, before the Alaska Labor Relations Board, Chairman B. Gil Johnson and member Darrell Smith present in Anchorage and member James W. Elliott participating by telephone. Hearing Examiner Jan Hart DeYoung presided. The record closed on June 2, 1993, upon the filing of written closing statements.

Appearances:

Don Clocksin, Sonosky, Chambers, Sachse, Miller, Munson & Clocksin, for complainant Alaska State Employees Association/AFSCME Local 52, AFL-CIO; and Patrick J. Gullufsen, Assistant Attorney General, for respondent State of Alaska and Alaska Housing Finance Corporation.

Digest:

When the legislature consolidated various housing programs in 1992, it intended that the ASEA/State collective bargaining agreement apply after the programs and employees moved to the Alaska Housing Finance Corporation. Whether the obligation to bargain also passed to AHFC depends on the successorship doctrine. We find in this case that AHFC did succeed to the State's obligation to bargain.

DECISION

The legislature in Chapter 4 FSSLA 1992 consolidated the housing programs of a department and an agency into the Alaska Housing Finance Corporation, affecting the members of several bargaining units. The question presented in this case is the impact of consolidation on the general government bargaining unit represented by the Alaska State Employees Association. Before consolidation, ASEA represented employees in the weatherization, housing assistance, and senior housing programs in Department of Community and Regional Affairs (DCRA). These programs from DCRA were consolidated with the Alaska State Housing Authority(ASHA) and the Alaska Housing Finance Corporation. Before consolidation, ASHA's employees were divided into two units -- not represented and represented by Alaska Public Employees Association. AHFC is not represented.

ASEA's position is that it retained its status as bargaining representative of former DCRA employees and the State is bound to continue to honor the terms of the ASEA/State collective bargaining agreement for those employees. ASEA also maintains that any changes in the terms and conditions of employment must be bargained. Because changes were

made without bargaining, ASEA argues they were made unilaterally in violation of AS 23.40.110(a)(5). In addition ASEA maintains that the general government unit, which it represents, remains the appropriate unit for the former DCRA employees.

The State's position is that Chapter 4 FSSLA 1992 requires that the employees be consolidated into AHFC and into the terms and conditions of employment there. It argues that it has no duty to bargain with ASEA, because ASEA does not represent unclassified employees and AHFC employees are not classified.

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. The collective bargaining agreement between ASEA and the State provides in the recognition clause that ASEA is the exclusive representative of all permanent, probationary, provisional and nonpermanent personnel (excepting those employed in the Student, College, and Graduate Intern job classes) in the General government Unit for collective bargaining . . . .

Agreement, Art. 1, § 1, Exh. 4, at 2. In addition, the agreement defines both employee and bargaining unit members as individuals in positions this Agency has designated as general government unit positions. Id. General government positions in the Department of Community and Regional Affairs (DCRA) are in this unit.

2. In May of 1992 the Alaska Housing Finance Corporation employed approximately 160 employees. Those employees are not represented for purposes of collective bargaining and are not covered by a collective bargaining agreement. The AHFC employees are subject to the Alaska State Finance Corporation Personnel Rules. Exh. H.

3. On May 14, 1992, House Bill 595 was introduced during a special session of the legislature relating to the Alaska Housing Finance Corporation. 1992 House Journal 4359. The House Finance Committee recommended a substitute for House Bill 595 that would reorganize state housing programs by consolidating them into the Alaska Housing Finance Corporation. 1992 House Journal 4368 & 4372.

4. Senator Patrick Michael Rodey testified he wrote the merger legislation that was incorporated into House Bill 595. He stated his understanding that AHFC would maintain existing labor contracts and that this commitment was needed for the bill to pass the House. His judgment was that the bill would have been in jeopardy if the commitment were not made. He further stated that the politics of passage of the bill required that everything remain the same.

5. The House adopted the committee substitute on May 14, 1992. It also adopted a letter of intent, which states the intent that collective bargaining rights of the affected employees continue undisturbed:

> It is the intent of the Legislature that AHFC will abide by collective bargaining agreements in effect for Department of Community and Regional Affairs employees on the date of transfer. Said agreements shall remain in effect until their expiration on December 31, 1992, at which time AHFC shall honor its duty as successor employer to bargain with the affected employee groups. 1992 House Journal 4373; Exh. 7.

6. Senator Rodey also testified that Senator Jim Duncan's support was critical for the bill's passage. Senator Duncan was a key member of the majority and on the finance committee, and he was the co-chair of the subcommittee on housing consolidation, which considered the bill during the special session, along with Senators Kertulla and Pourchot.

7. Senator Duncan stated he was concerned with the effect of the bill on union rights and contracts.

8. On May 14, 1992, Senators Duncan and Rodey met with officials of AHFC, including Robert W. Sullivan, intergovernmental affairs director at AHFC and Eric Wohlforth, bond counsel for AHFC.

Barry Hulin, chief executive officer and executive director of AHFC between July 1, 1991, and March 26, 1993, participated by telephone. At the meeting Senator Duncan sought a commitment that AHFC would maintain the collective bargaining agreement after the consolidation. Hulin stated that AHFC would try to maintain the contract but that he did not know whether it could. Duncan understood Sullivan at the meeting to commit orally to maintain the

contract. Senator Duncan stated that he would not have supported the consolidation bill without this commitment. He stated that he had originally asked for a commitment to bargain a successor agreement but that AHFC would agree only to honor the existing contract during its term.

9. Sullivan provided a letter to Senator Duncan on May 14, 1992, stating AHFC would abide by the ASEA collective bargaining agreement:

> The Corporation will abide by the terms of the DC&RA collective bargaining agreement as to DCRA employees transferred to AHFC until the agreement expires on December 31, 1992.

Exh. 6. Executive Director Hulin had authorized this letter.

10. Senator Rodey testified that he had thought about addressing the subject of the collective bargaining agreement in the legislation but he did not want any "lightening rods" in the bill. Since AHFC had signed a letter stating that it would maintain the agreement, the matter was resolved and there was no need to memorialize it as a matter of statute.

11. Senator Duncan stated that other members at the subcommittee level were aware of the commitment AHFC had made to maintain the collective bargaining agreement.[1]

12. The Senate Rules Committee considered the bill on May 15, 1992, and recommended "do pass with a house letter of intent, House Journal, page 5017." 1992 Senate Journal 3516. The Senate adopted the bill on May 15, 1992, 1992 Senate Journal 3541, which became law as Chapter 4 FSSLA 1992.

13. After the bill was passed but before it was signed, Hulin stated that AHFC's personnel director informed him that the labor relations staff at the Department of Administration had taken the position that AHFC could not comply with the ASEA collective bargaining agreement. Hulin did not know when employees were told

that the ASEA agreement would not be followed.

14. The Division of Personnel of the Department of Administration notified DCRA by memorandum that employees affected by CSHB 595 would "cease to be Executive Branch employees effective July 1, 1992. As we are ceasing an operation and these employees are no longer required due to lack of work, they are subject to layoff in accordance with the process of the appropriate collective bargaining agreement." The notice further states, "It is immaterial to us as the current employer what the legislature may have intended to happen subsequent to the effective date of the statute." R. King, Memorandum to R. Henderson (June 10, 1992), Exh. 10.

15. Bills that pass the legislature generally are transmitted to the governor with a bill review letter from the Attorney General. The bill review letter for CSHB 595 advised that the employees in DCRA were no longer in the GGU bargaining unit and no longer covered by the State/ASEA bargaining agreement. The letter provides in part:

> Sections 142(c), 143(c), and 144(c) require the transfer of certain employees from the Department of Community and Regional Affairs to the Alaska Housing Finance Corporation effective July 1, 1992. See sec. 152. These employees will as a result no longer be in the classified service, and therefore no longer members of the general government (GGU) bargaining unit. Hence, while they, and other AHFC employees, are covered by the Public Employment Relations Act, these employees are no longer covered by the collective bargaining agreement between the GGU and the state. What terms and conditions they retain, if any, we leave for another day. And we understand from the Departments of Community and Regional Affairs and Administration that they, and AHFC, will do everything they can to smooth the transition. It is clear, though, that as AHFC employees they will no longer be eligible for SBS, as AHFC did not opt out of Social Security.
>
> We bring this to your attention because a letter of intent adopted by the House purported to require AHFC to, among other things, comply with the GGU contract until December 31. See 1992 House Journal at 4373. Of course, letters of intent do not have the force of law. Further, this House letter is not useful as legislative history, as it is directly contradictory to what the legislature actually did, which is to remove the

affected employees from the classified service and from their bargaining unit.

C. Cole, Letter to Governor Hickel (June 12, 1992), Exh. 8.

16. The governor approved the bill on June 25, 1992. Exh. 1.

17. Robert L. Brean, DCRA's director of the rural development division and later director of rural housing divisions at AHFC, testified that DCRA employees' first concern was whether they would have a job. After that the biggest concern was SBS. Other concerns were the 40-hour work week, transfer or cash out of sick leave, and AHFC's dress code. Brean testified that he had to prepare for passage of the bill, if it passed, and the transfer of employees and funds. The bill's implementation date was July 1, which would give them a 30-day window -- a tight timeframe. He tried to keep employees informed. The overall premise was to avoid a hardship on employees. He communicated the leave concern to the labor relations staff.

18. Raymond Utter, AHFC administrative manager, testified. He moved to AHFC with the DCRA employees. He was a member of the APEA supervisory unit at DCRA. He stated that he acted as an information gatherer for Bob Brean, the director of the rural housing division at DCRA. He stated that the employees' main concerns were salary, leave, SBS, the AHFC dress code, and the AHFC 40-hour work week.

19. Norman Bair, energy specialist II and former DCRA employee, testified that meetings were held among affected employees in DCRA in late May or June after the legislation passed. He stated that the employees were told first that the ASEA collective bargaining agreement would apply the first six months and the employees would not lose wages or benefits. However, Bair testified that at a later meeting Bob Brean told the workers that AHFC would not abide by the union contract.

20. In the 30-day interim between passage of the bill and its signing, Hulin stated that a series of task force groups were put together to discuss different aspects of consolidating the programs, such as accounting, data processing, and personnel. The task force groups included employees from DCRA, AHFC and ASHA. ASEA representatives did not participate. An affected employee active in ASEA, Norman W. Bair, did ask to participate on the personnel committee as the DCRA employees' representative and did attend those meetings. See finding of fact no. 22, infra.

21. At the personnel task force meeting Hulin testified that the work week was discussed. The represented employees at ASHA had a 40-hour work week. Unrepresented ASHA employees worked a 37.5 hour week. DCRA employees worked 37.5 hours but AHFC employees worked 40. It was Hulin's best judgment to bring the new employees in line with AHFC's work week. He did not bargain the decision. Tracy Thornton, AHFC personnel director, testified that different work weeks for different employees would have interfered with the goal of unifying the employees.

22. Norman Bair had asked Shirley Vincent, an ASEA shop steward at DCRA, about querying the members on E-mail about leave transfer and told her that he would be willing to be a representative to see that issues such as leave transfer were addressed and to attend the personnel task force meetings. No one from the DCRA group of employees attended these meetings. Vincent had told Bair that Bob Brean had approved his attending.

23. Norman Bair later had a conversation with Brean about attending the task force meetings. Bair claims that Brean said that, if anyone made trouble at AHFC, AHFC would get rid of him. Bair was told that the task force committee was not the appropriate forum for Bair to raise his concerns about leave transfer and that he could attend as an observer only. Bair attended and kept minutes of the meeting. Bair interpreted his conversation with Brean as a threat.

24. Robert L. Brean, was the director of rural development division at DCRA and he moved with the programs to AHFC and became the director of the rural housing divisions there. He states that he did not threaten Bair but his recollection of their conversation is quite similar to Bair's. Brean stated that employees had expressed a concern to him that Norman was overenthusiastic on their behalf and that they did not want a third party insinuating himself into the discussions taking place between Ellen Lauer, acting DCRA personnel officer, and Tracy Thornton, AHFC's personnel director. Brean told this to Bair and told him it was inappropriate to "freelance negotiate." Brean felt it was important to have a single point of contact on personnel questions and Ellen Lauer and Tracy Thornton were working out the issues. Brean told Bair that DCRA employees were laid off and AHFC was under no obligation to hire them. Brean believes he did

not threaten retaliation but he was concerned that Norman's "enthusiasm" on the employees' behalf would result in their not being transferred. He interpreted his statements to Bair as painting a realistic picture.

25. Hulin stated that, after the bill was signed, all affected employees were brought into Anchorage for a meeting at the Egan Center, including the rural employees. The meeting was to provide information to the employees and to answer questions. SBS was a big issue. Bair put the date of this meeting on about June 26, 1992.

26. At the meeting at the Egan Center Norman Bair expressed his concerns. Remond Henderson, director of administrative services at DCRA, was involved in the transfer of functions to AHFC, including the employees' move. Norman Bair referred Henderson to Chuck O'Connell, business agent for ASEA.

27. Chuck O'Connell remembers receiving a telephone call from Norman Bair in June of 1992 with questions about union benefits at transfer. He talked to the DCRA acting personnel director, Ellen Lauer, about the differences in leave systems at DCRA and AHFC. He asked how the change to the new system would affect accrued sick leave. He was not satisfied with the response. He then contacted Remond Henderson who suggested that O'Connell put in writing a proposal for leave transfer, which he did. Exh. A. O'Connell's follow-up telephone calls were not returned, and the letter of agreement that he drafted was never signed. He had no further involvement with the letter of agreement.

28. Henderson testified that the State could agree to the terms laid out by O'Connell except one -- term number 5 on page 2. It did not want to enter into the letter of agreement with ASEA, however, because the union had lost its representative status. The letter of agreement was not finalized but an agreement for leave transfer with very similar terms was made between the Commissioner of the Department of Administration, Nancy Bear Usera, and Executive Director Hulin of AHFC. Exh. B. O'Connell did not become aware of this agreement until preparation for the hearing in this case.

29. Employees were polled to determine if they preferred to cash out 40 percent of the sick leave or convert it to personal leave. The results were a preference to convert the leave.

30. Although the State discussed leave transfer with an ASEA representative, it acted unilaterally when it transferred leave for the employees. These were the only discussions with ASEA about the merger under CSHB 595.

31. The State treated the consolidation as a layoff and rehire and followed the lay off procedures in the GGU collective bargaining agreement. Exh. 4, at 33-34. According to Ellen Lauer, personnel assistant at DCRA, the layoff procedure was used because AHFC is not a State department. DCRA GGU members affected by HB 595 were notified in writing on June 9, 1992, that they were being laid off due to lack of work. See e.g. Exh. D. Those who were laid off had the option under the contract of bumping. None of the employees exercised this option. All of the employees were offered jobs at AHFC. Some apparently elected not to take the offer. See Exh. F. Normally accrued leave is cashed out at layoff. Leave, however, was converted under the terms agreed to between Commissioner Usera and Director Hulin. Exh. B. With this exception the layoff provisions in the ASEA contract were followed.

32. Henderson stated that the DCRA employees desired layoff and he pursued this avenue for them. He did not, however, discuss the subject with the employees' bargaining representative, ASEA. Henderson stated that Ellen Lauer was instrumental in insuring that employees received their layoff rights.

33. On July 1, 1992, approximately 41 employees were moved from the Department of Community and Regional Affairs to the Alaska Housing Finance Corporation, including employees in the weatherization, housing assistance, and senior housing programs. After consolidation of the housing programs, AHFC's staff had grown to 375 employees. AFHC has hired seven additional employees to perform work in programs transferred from DCRA.

34. Hulin testified that the personnel rules were applied to the former DCRA employees as of July 1. He did not bargain this decision. The position of the State was that it was not under any obligation to bargain with ASEA about the consolidation. Hulin stated that he never made a comparison between AHFC's personnel rules and the ASEA/State collective bargaining agreement, as he had in the case of the ASHA employees represented by APEA.

35. The differences between transfer and layoff for an employee are significant.

36. Layoff procedures are addressed in the GGU collective bargaining agreement in article 12. Laid off employees have the right to elect a "change in status" (right to bump a less senior employee). They are entitled to a position on the layoff list, which provides priority in hiring for the position previously held. Agreement, Art. 12, § 1(C), Exh. 4, at 37--38 & 42--44. Rehire by the State within three years will restore an employee's entire sick leave balance and during layoff status the employee may pay the State's cost of insurance for a three-year period. Id. at 45. Layoff is considered a break in service.

37. Involuntary transfer, that is, "transfer for the good of the service" is covered in the GGU agreement. In a transfer, status, step placement, and all accrued benefits of a transferred employee remain unchanged and the length of service remains unbroken. Agreement, Art. 11, § 7(C) & (D), Exh. 4, at 34.

38. Changes in the employees' compensation and working conditions were effective immediately after the move to AHFC. Although employees maintained their same pay range and step, their wages were reduced because they lost the 3.1 percent cost of living increase granted employees represented in collective bargaining. Because the workweek was increased from 37.5 to 40 hours, the hourly rate decreased.

39. AHFC participates in the Public Employees Retirement System so retirement should not have changed except for the significant loss of SBS benefits. Unlike DCRA, AHFC does not participate in SBS.[2] Instead, AHFC employees are covered by federal social security system. Bair estimated that loss of SBS coverage resulted in the loss of the employer's contribution of 6.47 percent. Exh. 9.

40. Other differences were the loss of a holiday, Exh. 4, at 87--88 & Exh. 5, at 10; personal leave accrual, rather than annual and sick leave accrual, Exh. 9; reduction in life insurance benefits; adherence to the AHFC dress code; loss of a legal trust, and different per diem rates for work related travel. Exh. 9.[3] Bair estimated the changes as a loss to him of between 12 and 15 per cent in wages and benefits, not counting the loss of the supplemental benefits system.

41. Because the employees were laid off, they lost certain rights associated with career service as State employees. They lost the additional leave accrued with seniority, and they lost certain rights provided in the GGU collective bargaining agreement, such as transfer and layoff rights.

42. Former DCRA employees lost the grievance arbitration rights in the collective bargaining agreement. This includes the right to a union representative at an investigative interview that could result in discipline. Fina H. Schlosser testified that she was not allowed to have a representative present during a disciplinary interview. AHFC personnel rules do not contain the right to binding grievance arbitration.

43. The GGU collective bargaining agreement requires the State to withhold dues from employee's payroll and transmit them to ASEA for those employees authorizing payroll deduction. Agreement, Article 3, § 3, Exh. 4 at 7. Immediately after the employees became employees of AHFC, the State stopped withholding dues from employees' pay. Employees in layoff status, however, retain membership.

44. Neither the departments of administration or community and regional affairs nor AHFC bargained first with ASEA before making these changes.

45. The DCRA employees do the same kind of work at AHFC that they did at DCRA. They administer the same programs. Although former DCRA and AHFC lending functions were integrated at AHFC, the job duties of moved employees remained essentially the same. They perform similar type duties and continue to work as a unit. Former DCRA employees continue to work together at AHFC.

46. Hulin testified that the former DCRA programs are expanding at AHFC. Funding for the weatherization program was increased and the rural program was expanded to include refinancing. AHFC has undertaken a rural housing initiative to increase the housing stock in rural Alaska. Former DCRA employees remain responsible for these expanded programs.

47. At the same time that the State moved the DCRA employees to AHFC, it moved 56 employees from the Alaska

State Housing Authority who had been engaged primarily in maintenance work. Those employees were represented at ASHA by the Alaska Public Employees Association. Before the move, Hulin met with a representative of the APEA. AHFC assumed the APEA contract when the employees were absorbed into AHFC.

48. Hulin did not meet with ASEA representatives and he never looked at the ASEA collective bargaining agreement. Id.; Exh. 6.

49. On November 17, 1992, ASEA filed the unfair labor practice charge in 93-165-ULP, charging that the GGU collective bargaining contract governed and that unilateral changes were made in the terms and conditions of employment in violation of AS 23.40.110.

50. The Agency, after investigation, found probable cause to support the complaint and issued a notice of accusation on December 1, 1992.

51. On December 21, 1992, the State filed its notice of defense and requested a hearing, and on January 13, 1993, this Agency conducted a prehearing conference to identify the issues and establish a hearing schedule.

52. On February 26, 1993, ASEA filed a petition for unit clarification for a declaration that the 36 former DCRA employees remained members of the general government unit it represents after they moved to AHFC.

53. On March 9, 1993, the Agency ordered the unit clarification petition and unfair labor practice charge consolidated.

54. On April 15, 1993, the Agency heard the consolidated cases and the parties presented testimony and other evidence. The record was left open for the receipt of written closing statements, and the record closed upon their receipt on June 4, 1993.

Conclusions of Law

1. This Agency has jurisdiction under AS 23.40.090 and 23.40.110 to consider this matter.

2. Complainant and petitioner Alaska State Employees Association has the burden of proof under 2 AAC 10.430[4] of "proving the truth of each element necessary to [that party's] cause by a preponderance of the evidence."

3. This Agency considers relevant decisions of the National Labor Relations Board and federal courts when making determinations under the Public Employment Relations Act. 2 AAC 10.440.[5]

UNFAIR LABOR PRACTICE CHARGE

Legislative Intent:

4. The legislature transferred certain housing programs from the Department of Community and Regional Affairs into AHFC. It provided for AHFC to purchase DCRA mortgage loans, and it ordered the merger of Alaska State Housing Authority and the Alaska Housing Finance Corporation. Chapter 4 FSSLA 1992.

5. Chapter 4, §§ 142 -- 144, FSSLA 1992, address the transfer of DCRA housing programs. Of particular relevance to this case is Section 142(a), which requires that AHFC assume the obligations that DCRA incurred administering the transferred programs:

> All contracts, rights, liabilities, bonds, notes or other obligations of the Department of Community and Regional Affairs under former AS 44.47.370 - 44.47.560 and 44.47.635 created by or under a law amended or repealed by this Act and in effect on the effective date of this section, remain in effect notwithstanding this Act's taking effect, with all contracts, rights liabilities, bonds, notes or other obligations of the Department of Community and Regional Affairs incurred under former AS 44.47.370 - 44.47.560 and 44.67.635 becoming contracts, rights liabilities, bonds, notes, and other obligations of the Alaska Housing

Finance Corporation.

Exh. 1, at 79. Under Section 142(a) the ASEA/State collective bargaining agreement, as a contract binding upon DCRA, would become an obligation of AHFC. See also the similar provisions in Section 143(a), covering the DCRA senior citizen housing programs, and Section 144(a), covering the DCRA home energy and weatherization programs. Exh. 1, at 79 - 80.

6. The transfer provisions specifically state that the DCRA employees in affected programs will be employees of AHFC. Section 142(c) provides:

> Employees of the Department of Community and Regional Affairs responsible for administration of [the affected programs] become employees of the Alaska Housing Finance Corporation on the effective date of this section.

See also Chapter 4, §§ 143(c) & 144(c), FSSLA 1992, Exh. 1, 79 - 80. The State's position is that this language removes these employees from the GGU contract and the GGU bargaining unit. See bill review letter, quoted in finding of fact no. 15. Although not stated in the bill review, the State's position appears also to be that it is not even obligated to bargain the effects of the consolidation with the union. But see Inlandboatmen's Union of the Pacific v. State of Alaska (DOT-PF/AMHS), Decision & Order No. 141, at 20 (Aug. 7, 1992).

7. The legislation contains similar provisions for the merger of Alaska State Housing Authority with AHFC. Section 141 provides:

> (a) All contracts, rights, liabilities, bonds, notes, or other obligations of the Alaska State Housing Authority created by or under a law amended or repealed by the Act and in effect on the effective date of this section, remain in effect notwithstanding this Act's taking effect, with all contracts, rights, liabilities, bonds, notes, or other obligations of the Alaska State Housing Authority becoming contracts, rights, liabilities, bonds, notes, and other obligations of the Alaska Housing Finance Corporation with the same limitations and provisions as under a contract, right, liability, bond, note, or other obligation of the former Alaska State Housing Authority.

. . . .

> (c) Employees of the Alaska State Housing Authority become employees of the Alaska Housing Finance Corporation on the effective date of this section.

Chapter 4, § 141, FSSLA 1992, Exh. 1, at 78 - 79.

8. The State argues that the transition sections for DCRA and ASHA are materially different and mandate that the collective bargaining agreement transfer in the case of ASHA employees and terminate for DCRA employees. The only difference between the two transition sections, however, is the reference in the DCRA transfer sections, Sections 142 -- 144, to the statutes governing those programs. The argument appears to be that, since the collective bargaining agreement is not unique to these programs, it was not intended to transfer with them. Respondent's Brief, p.9 & n.3. A more obvious reason for the distinction is the fact that only some of the programs in DCRA were transferred and a specific reference was needed to designate the programs affected. It is also significant that the provisions that actually address the employees are the same in both the DCRA and ASHA transfer sections. Compare section 141(c) with 142(c), Exh. 1 at 78 - 79.

9. The meaning the State reads into this distinction in transition sections is contrary to the substantial evidence of the legislature's intent that the ASEA/State GGU collective bargaining agreement apply to AHFC. The most significant evidence of that intent, and alone adequate to support a conclusion, is the letter of intent from the House and the Senate subcommittee's concurrence in it.

10. Construing subsections 142(a), 143(a), and 144(a) to obligate AHFC to the collective bargaining agreement for

former DCRA employees is supported by the plain meaning of the language used, legislative intent, and AHFC's assumption of the ASHA/APEA collective bargaining agreement for former ASHA employees.

The Successorship Doctrine:

11. DCRA is a state department and a public employer under AS 23.40.250(7). Its classified, nonsupervisory employees are in the State general government unit and represented for purposes of collective bargaining by ASEA.

12. AHFC is a creation of statute. AS 18.56.010 -- 18.56.900. It is a public corporation in the executive branch of the State which is located organizationally under the State's Department of Revenue. However, it has legal independence from the State. AS 18.56.020. It is exempt from most of the requirements for adopting regulations that apply to the State, but it is subject to the open meeting laws in AS 44.62.310 and 44.62.312. AS 18.56.088(a). In addition, AHFC's legal advisor is the Office of the Attorney General, AS 18.56.055, and the Governor appoints the board members of AHFC, AS 18.56.030. AHFC was created to serve a public purpose and "is empowered to act on behalf of the State and its people in serving this public purpose for the benefit of the general public." AS 18.56.010(c).

13. Whether or not AHFC is the State or is independent from it, the Public Employment Relations Act applies to it. AS 23.40.070 -- 23.40.260. AS 23.40.250(6) provides that a "public employee" under the Public Employment Relations Act is "any employee of a public employer, whether or not in the classified service of the public employer . . . ." Because the Public Employment Relations Act applies despite the classified status of employees, 23.40.250(6), with certain exceptions not relevant here, AHFC employees are "public employees" under PERA. As "public employees" they have all the rights afforded in PERA, including the right to organize for purposes of collective bargaining.

14. The question whether bargaining rights move with a group of employees after a legislative reorganization has been addressed by the Alaska Supreme Court. In Northwest Arctic Regional Educational Attendance Area v. Alaska Public Service Employees, Local 71, 591 P.2d 1292, 102 L.R.R.M. (BNA) 2332 (Alaska 1979), the Court applied the National Labor Relations Board's successorship doctrine to a governmental reorganization. The Court in that case reviewed legislation transferring responsibility for public education from the State to local school districts. The State's noncertified staff were organized and represented by a labor organization. The legislation specifically directed that they be terminated from State employment and rehired by the transitional school district, AUBSD, and then transferred to local regional educational attendance areas. The Court held in this case that the employees were not covered employees under the Public Employment Relations Act. However, it first examined the National Labor Relations Board's successorship doctrine.

15. The successorship doctrine, as stated in Northwest Arctic Regional Education Attendance Area, sets forth the conditions that must exist before a collective bargaining agreement or the obligation to bargain transfers to a successor to the party that made the agreement:

> Stated briefly, the successor employer doctrines provides that, when business operations and employees are transferred from one employer to another, the new employer has a duty to bargain with the union previously chosen by the transferred employees where the employing industry remains essentially the same after the transfer of ownership. Factors used to determine whether the employing enterprise has remained substantially the same include continuation of the same product lines, departmental organization, job functions and continuity of the work force. The factor which has emerged as the most important is continuity of the work force. Although the new employer may have the duty to bargain with the employees' elected bargaining representative, it is not bound by the old collective bargaining agreement except in certain limited situations.

Northwest Arctic Regional Educational Attendance Area v. Alaska Public Service Employees, Local 71, 591 P.2d at 1295, 102 L.R.R.M.(BNA) at 2335.

16. The Supreme Court quoted another court's discussion of transfer of the obligation to be bound by to the collective bargaining agreement:

> In many cases, of course, successor employers will find it advantageous not only to recognize and bargain with the union but also to observe the preexisting contract rather than to face uncertainty and turmoil. Also, in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract. Such a duty does not, however, ensue as a matter of law from the mere fact that an employer is doing the same work in the same place with the same employees as his predecessor . . . .

Id., 591 P.2d at 1295, 102 L.R.R.M.(BNA) at 2335 n. 6, quoting NLRB v. Burns Int'l Security Servs., Inc., 406 U.S. 272, 80 L.R.R.M.(BNA) 2225 (1972).

17. The legislature provided in Chapter 4, §§ 142 -- 144, FSSLA 1992, that AHFC assume the obligations of DCRA and, consequently, the obligations of the ASEA/State collective bargaining agreement. Exh. 1, at 79 - 80.

18. The ASEA/State collective bargaining agreement provides that any changes to the terms of the agreement must be negotiated. Agreement, Art. 37 C, Exh. 4 at 115.

19. Whether the duty to bargain extends beyond the term of the agreement depends upon the successorship doctrine.

20. To find a duty to bargain arising from the application of the successorship doctrine, ASEA must show that the employing enterprise has remained substantially the same by showing continuation of the same product line; departmental organization; job functions; and continuity of work force. Northwest Arctic Regional Educational Attendance Area v. Alaska Public Service Employees, Local 71, 591 P.2d at 1295, 102 L.R.R.M. (BNA) at 2335. To state the issue another way, ASEA must show that the former unit remains the appropriate bargaining unit despite the merger. Id.

21. Continuation of the same product line: The programs the employees administered at DCRA transferred virtually unchanged to AHFC. While there was evidence that two of the housing programs had expanded, there was no evidence that the essentials of the services offered under the programs changed.

22. Departmental organization: AHFC operates differently from the State's departments in significant ways. See conclusion of law no. 12. Most important is the fact that AHFC performs its personnel function internally and not through the Department of Administration. The personnel rules that AHFC follows, which are adopted by its board, are unique to it. There are also differences between AHFC and State rank and file employees. A principal difference is the fact that AHFC employees are exempt from the State's personnel rules, AS 18.56.070, and are not classified employees, AS 39.25.100. Another difference is that AHFC employees do not receive supplemental benefits system coverage. Other differences, resulting from the presence or absence of a collective bargaining agreement, appear in findings of fact nos. 38 and 40. Similarities include participation in PERS. The differences become less significant when the focus narrows to the work units that were transferred. The former DCRA employees continue to perform the same work under roughly the same organizational structure as they did at DCRA. Coworkers and immediate supervisors remain the same.

23. Job functions: The former DCRA employees perform the same job functions at AHFC that they performed at DCRA. These job functions earlier had been found compatible with and appropriate to the general government unit represented by ASEA. State Labor Relations Agency Order & Decision No. 1 (Feb. 2, 1973).

24. Continuity of the work force: The most important factor is continuity of the work force. The work groups from DCRA were moved without change to AHFC. AHFC has hired additional workers -- the testimony was seven -- to perform duties associated with the former DCRA programs. Approximately 40 employees moved from DCRA. These employees continue to work together as a unit. This continuity strongly supports the conclusion that AHFC succeed to the obligation to bargain.

25. The factors are very similar to those examined when the question is the appropriateness of the unit. A case examining the continuing appropriateness of units affected in a governmental reorganization is Federal Aviation

Admin. Aviation Stds. Nat'l Field Office Activity & Am. Fed'n of Gov't Employees, AFL-CIO, Local 2123, 15 F.L.R.A. 60, 1984 WL 35664 (case no 6-RA-20004; June 8, 1984), decided by the Federal Labor Relations Authority.[6] In that case a federal agency had petitioned the Federal Labor Relations Authority for a determination that it was no longer obligated to recognize several bargaining unit representatives because reorganization had substantially altered the scope and character of the units. Nine units had been transferred from the Federal Aviation Authority to form the Federal Aviation Administration Aviation Standards National Field Office Activity (Activity). The argument was that (1) the components no longer existed, (2) the employees no longer shared a community of interest separate and distinct from the employees in the other units or from other Activity employees; (3) administering 9 different Agreements would be inefficient; and (4) a single unit of all eligible Activity employees would be appropriate. The Authority found the reorganization had substantially changed the scope and character of some of the units and the Activity was not required to bargain with their representatives. However, where the unit transferred intact with the same reporting structure and the employees performed the same duties under the same supervisors at the same location, the Activity was required to bargain.

27. Turning to the present controversy, we note that the DCRA employees have continued to perform their previous job functions in a work group that is substantially the same as the work group at DCRA. The employees perform the same duties under the same immediate supervision. Only the location has changed.

28. We therefore conclude that AHFC succeeded to the duty to bargain with ASEA for the employees in the housing programs transferred from DCRA.

29. Finding a duty to bargain under the agreement and under the successorship doctrine, we must examine whether that duty was violated. We conclude the duty was violated when the terms and conditions of employment for the DCRA employees were unilaterally changed. Normally a labor organization must demand to bargain. Where the demand would be futile, however, the demand has not been required. Inlandboatmen's Union of the Pacific v. State of Alaska, Decision & Order 141, at 16 (Aug. 7, 1992). Because the State's position that bargaining was not required was announced and unequivocal, see letter of the Office of the Attorney General, finding of fact no. 15, the formal demand to bargain is not required.

30. The State has argued that through the transition it worked with ASEA. Respondent's Br. p. 5. The evidence in the record does not support a conclusion that the State "bargained" with ASEA. The discussions with ASEA about the leave transfer were the only transition related discussions with ASEA in the record and those discussions did not result in an agreement with ASEA. Instead, the agreement drafted by ASEA was made between the Department of Administration and AHFC. The State also appears to argue that the terms of the transfer were generous, at least regarding leave transfer. Id. However, if those terms were determined unilaterally, their generosity is irrelevant. The duty to bargain requires bilateral discussion culminating in an agreement or impasse. Neither occurred here.

UNIT CLARIFICATION PETITION

31. AS 23.40.090 sets forth the factors used to determine the appropriate bargaining unit:

> The labor relations agency shall decide in each case, in order to assure to employees the fullest freedom in exercising the rights guaranteed by AS 23.40.070--23.40.260, the unit appropriate for the purposes of collective bargaining, based on such factors as community of interest, wages, hours, and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees.

32. The general government bargaining unit is defined in State Labor Relations Agency's Order & Decision No. 1, dated February 2, 1973:

> The unit of general state government employees shall include all classified employees of the State of Alaska, except as follows: (a) partially exempt employees as defined in AS 39.25.120.

This unit crosses department lines and is the unit for rank and file classified employees, who do not belong in one of the other units, such as the confidential employees unit, the supervisors' unit, or the labor, trades, and crafts unit, among

others. The work performed by members of the general government unit covers a broad range of activities. Nothing in the record suggests that the work performed by former DCRA workers at AHFC is inappropriate for inclusion because the location where it is performed has changed.

33. Community of interest has been discussed under the successorship doctrine and, while there are some differences, even significant ones, between the former DCRA employees and the other members of the ASEA GGU unit such as classified status and the SBS benefits, we find they are outweighed by the similarities.

34. The testimony supported the conclusion that the employees are doing the same work only under a different organization. Except for lending, which was integrated with AHFC lending activities, DCRA employees perform substantially the same work in the same work group as they did before the change.

35. The former DCRA employees have a long history of collective bargaining in the ASEA GGU unit, which supports retaining them in the unit.

36. There is not any evidence in the record of the desires of the employees. It is reasonable to infer from the testimony of one employee, Norman Bair, that he would prefer to be in the ASEA unit. However, he is only one of approximately 40 employees. An election would be needed to determine the desires of the employees.

37. The factors supporting finding the former DCRA members appropriately in the ASEA bargaining unit outweigh those factors supporting finding that they have been absorbed by and integrated into the nonrepresented employees at AHFC. We therefore conclude that the ASEA GGU appropriately includes the employees engaged in the job duties of the programs assumed by AHFC under Chapter 4 FSSLA 1992.

ORDER

1. The State of Alaska and Alaska Housing Finance Corporation is ordered to cease and desist from refusal to bargain with Alaska State Employees Association as bargaining representative of General Government Unit employees over the wages, hours, and other terms and conditions of employment of former DCRA employees at AHFC;

2. The Alaska Housing Finance Corporation is ordered to bargain upon a request by the Alaska State Employees Association;

3. The General Government Unit represented by Alaska State Employee Association is clarified to include Alaska Housing Finance Corporation employees working in programs transferred from Department of Community and Regional Affairs; and

4. Under 8 AAC 97.460 the Alaska Housing Finance Corporation is ordered to post copies of the enclosed notice of this decision no later than 10 days after service of this decision in the workplaces of affected employees at locations, such as employee bulletin boards, reasonably chosen to give actual notice of the decision.

ALASKA LABOR RELATIONS AGENCY[7]

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 Decision and Order No. 164 in the matter of Alaska State Employees Ass'n AFSCME Local 52, v. State of Alaska and Alaska Finance Corporation, case no. 93-165-ULP & 93-200-UC (Consol.), dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 27th day of September, 1993.

Victoria D.J. Scates

Clerk IV

This is to certify that on the 27th day of September, 1993, a true and correct copy of the foregoing was mailed, postage prepaid, to

Signature

1Senator Duncan was asked if it were his opinion that "the Senate understood that the collective bargaining agreement would be abided by when they enacted the legislation on May 15." The State objected on the basis that a legislator's opinion after the fact of the intent of the legislature is not admissible to prove intent. The hearing officer ruled that individual legislator's testimony is not admissible on the intent of the legislature as a whole.

2State employees' right to SBS is governed by state and federal law. AHFC employees do not qualify for an exemption for the social security system and do not qualify for SBS, which is authorized by statute. AS 39.30.150 -- 39.30.180. SBS coverage therefore may not be bargained.

3Norman Bair prepared exhibit 9 from a number of sources, including Brad Campbell at AHFC's accounting office, pay schedules, Bair's DCRA and AHFC pay stubs, the State/ASEA collective bargaining agreement, and AHFC's personnel rules.

4See 8 AAC 97.350 (effective July 22, 1993).

5See 8 AAC 97.450(b) (effective July 22, 1993).

6The Civil Service Reform Act of 1978, 5 U.S.C. § 7101 et seq., covering federal government employees, provides for bargaining of working conditions but prohibits bargaining of wages and other compensation. See 5 U.S.C. § 7103 (12) & (14). While this and other differences between the FLRA and PERA are important, the case's examination of unit issues in the context of a public sector reorganization is helpful.

7Chair B. Gil Johnson's term expired on June 30, 1993, after the record closed on June 2, 1993, but before this decision was issued.