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

Complainant,

vs.

STATE OF ALASKA,

Respondent.

CASE NO. 93-218-ULP

DECISION AND ORDER NO. 170

Considered on the briefs and the written record before a panel of the Alaska Labor Relations Board, members Stuart H. Bowdoin, James W. Elliott, and Darrell Smith, with Hearing Examiner Jan Hart DeYoung, presiding. The record closed on September 8, 1993.

Appearances:

Don Clocksin, Sonosky, Chambers, Sachse, Miller, Munson & Clocksin, for complainant Alaska State Employees Association/AFSCME Local 52, AFL-CIO; and Art Chance, Labor Relations Analyst, for respondent State of Alaska.

Digest:

The terms and conditions of employment for nonpermanent employees are not mandatory subjects of bargaining because those employees are not "public employees" with the right to bargain collectively under the Public Employment Relations Act, as defined in 8 AAC 97.990(a)(2) (previously, 2 AAC 10.220(b)(2)).

DECISION

During bargaining of a successor agreement, the State of Alaska refused to negotiate the terms and conditions of employment for nonpermanent employees. It based its refusal on the definition of "public employee" in the Agency's regulation, 8 AAC 97.990(a)(2), which excludes from the definition those employees who are not entitled to receive retirement and vacation benefits. ASEA has filed this unfair labor practice charge, maintaining that the terms and conditions of employment are mandatory items of bargaining for these public employees and excluding any public employees from bargaining by regulation would exceed the Agency's authority.

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).

2. Nonpermanent employees were not eligible to vote in the most recent general government unit representation

election, which was conducted in 1988. M. McMullen, letter to R. Johnson (Aug. 4, 1988), Exh. A; State Labor Relations Agency Pre-election Order (July 12, 1988), Exh. B; Affid. of M. McMullen (Aug. 20, 1993).

3. Past contracts between bargaining representatives and the State have included in the recognition clause statements that the State recognizes the representative as the exclusive representative of certain categories of employees, specifically including "nonpermanent" personnel or employees. APEA GGU Agreement (1984-1986), Exh. 1, at 4; APEA Supervisory Unit Agreement (1987 - 1989), Exh. 2, at 5; APEA Supervisory Unit Agreement (1990 - 1992), Exh. 3, at 6; and ASEA GGU Agreement (1990 - 1992), Exh. 4, at 11.

4. In those contracts the representatives have bargained wages and working conditions for the nonpermanent employees. The State and ASEA bargained terms and conditions of employment for short-term and long-term nonpermanent employees in the 1990 GGU agreement -- **wages**, ASEA GGU Agreement, Art. 9, sec. 1, Exh. 4, at 24; **credit toward completion of probation**, Id., at sec. 9, Exh. 4, at 26; and **limits on nonpermanent hires**, Id., sec. 3, Exh. 4, at 25. In addition, for long-term nonpermanent employees, the parties bargained **annual and sick leave, health and life insurance and holiday benefits**. Id., sec. 3(C), Exh. 4, at 26.

5. The State implemented the 1990 agreement's provisions on nonpermanent employees. State personnel officers were directed to follow them (D. Otto, Director, Division of Personnel, to all personnel officers (July 9, 1990), Exh. 5 & Exh. 12, at 24) and the standard operating procedure for personnel requires that selection of a person for a nonpermanent position be consistent with the 1990 GGU agreement. Standard Operating Procedure, Nonpermanent Appointment Procedures 3 (Feb. 1, 1986), Exh. 6, at 4.

6. The State identifies four categories of nonpermanent state employees in its standard operating procedure for personnel:

program nonpermanent (intern) positions (intended primarily to benefit the employee); **project** nonpermanent positions (not a regular and continuing function of the department requiring more than 120 days to perform); **normal** nonpermanent positions (to complete a work assignment requiring less than 120 days); **substitute** nonpermanent (appointment to a position temporarily vacated by a permanent employee on leave). Standard Operating Procedure, Nonpermanent Appointment Procedures 1, Exh. 6, at 2. See also Div'n of Personnel, Report on Nonpermanent and Emergency Employment (Jan. 1989), Exh. 8, at 10; Div'n of Personnel, Report on Nonpermanent and Emergency Employment (Jan. 1990), Exh. 9, at 3 & 10; Div'n of Personnel, Report on Nonpermanent and Emergency Employment (Jan. 1991), Exh. 10, at 5; Div'n of Personnel, Report on Nonpermanent and Emergency Employment (Jan. 1992), Exh. 11, at 4; Div'n of Personnel, Report on Nonpermanent and Emergency Employment (Jan. 1993), Exh. 12, at 3. The period of time a nonpermanent employee can be employed depends on the category, although all employees are restricted to a maximum of either 120 days or the life of a special project. Exh. 12, at 6.

7. Between 1988 and 1992 the numbers of nonpermanent employees in the four categories ranged between a low of 836 in 1991 and a high of 2,273 in 1989. Exh. 13.

8. Project nonpermanent employees can be employed for extended periods of time, depending on the project. Affid. of D. Munson (Aug. 27, 1993); Exh. 17 (employed four years on the Exxon Valdez clean-up special project minus a four-month period). Such employees under the parties' collective bargaining agreement accrue leave benefits. Id.

9. In bargaining a successor agreement with ASEA, the State's negotiators took the position that the terms and conditions of employment for nonpermanent employees were a permissive subject of bargaining, and as a result, the State refused to bargain in good faith over terms and conditions of employment for nonpermanent employees. ASEA Unfair Labor Practice Charge paragraph 4 (May 19, 1993); State Notice of Defense paragraph 4 (June 8, 1993).

Conclusions of Law

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

2. AS 23.40.110(a)(5) provides that a public employer may not refuse to bargain collectively in good faith with an

organization which is the exclusive representative of employees in an appropriate unit . . . .

3. The question in this case is whether the nonpermanent employees are "public employees" entitled to collective bargaining and other rights under the Public Employment Relations Act. The Act defines "public employee" to mean "any employee of a public employer, whether or not in the classified service of the public employer, except elected or appointed officials or superintendents of schools." AS 23.40.250(6).

4. The Agency has the authority to adopt regulations:

> The labor relations agency may adopt regulations under the Administrative Procedure Act (AS 44.62) to carry out the provisions of AS 23.40.070-23.40.260. [AS 23.40.170.]

5. In accordance with the authority in AS 23.40.170, the Agency further defines "employee" in 8 AAC 97.990(a)(2) to mean,

> the same as "public employee" in AS 23.40.250 and is limited to a person employed by a public employer in a permanent or probationary status, including a part time or seasonal employee, who is entitled to receive retirement and vacation benefits from the public employer . . . .

This regulation was effective on July 22, 1993. However, requiring receipt of retirement and vacation benefits before an employee qualified to be a "public employee" entitled to the protections of the Act predates July 22, 1993. The predecessor to 8 AAC 97.990(a)(2), 2 AAC 10.220(b)(2), defined "employee" in pertinent part to mean, "a person employed by a public employer who is entitled to receive retirement and vacation benefits . . . ."

6. Generally nonpermanent employees would not be covered under PERA because they are ineligible for retirement benefits. The Public Employees' Retirement System (PERS) defines "employee" generally to mean those employees eligible to participate in PERS and excludes from PERS "casual or emergency workers or nonpermanent employees as defined in AS 39.25.200." AS 39.35.680(21)(C)(iii).

7. Nonpermanent employees may also be denied personal leave, which under AS 39.20.310(7) is not available to "temporary employees hired for periods of less than 12 consecutive months."

8. ASEA maintains that the requirement of retirement and vacation benefits excludes employees required to be covered under AS 23.40.250(6) and thus exceeds the Agency's authority. The Administrative Procedure Act addresses the general authority of an administrative agency to adopt regulations in AS 44.62.030. It states that a regulation must be "consistent with the statute and reasonably necessary to carry out the purpose of the statute."

9. 8 AAC 97.990(a)(2)interprets and applies AS 23.40.250(6). It resolves the question of the relationship between an individual and a public employer needed before collective bargaining rights attach. Obvious questions are whether emergency workers, interns, or temporary workers are employees under AS 23.40.250(6). Resolving any ambiguity and avoiding confusion by drawing the line for coverage at those workers with enough of a relationship with the public employer to entitle them to vacation and retirement benefits is a reasonable exercise of the Agency's interpretive authority. Chevron U.S.A., Inc. v. LeResche, 663 P.2d 923, 930-932 (Alaska 1983). It is "consistent with the statute and reasonably necessary to carry out" its purpose. AS 44.62.030; see Alaska International Industries, Inc. v. Musarra, 602 P.2d 1240 (Alaska 1979); Kelly v. Zamarello, 486 P.2d 906 (Alaska 1971); Whaley v. State, 438 P.2d 718 (Alaska 1968).

10. The definition in 8 AAC 97.990(a)(2) is not strained or artificial. Its effect, to exclude temporary employees, is consistent with the National Labor Relations Board decisions excluding temporary employees, although the NLRB defines temporary employee quite differently. Temporary employees are excluded under one test if they have no reasonable expectation of further employment, Stevens Institute of Technology, 222 N.L.R.B. No. 18, 91 L.R.R.M. (BNA) 1087 (1976), or under a second test, if they have a certain termination date, NLRB v. New England Lithographic Co., Inc., 589 F.2d 29, 33, 100 L.R.R.M.(BNA) 2001, 2003 (1st Cir. 1978). See discussion 1 Patrick Hardin, The Developing Labor Law 422 (3d ed. 1992).

11. The fact that the Agency's interpretation of "public employee" in AS 23.40.250(6) is by regulation longstanding entitles it to additional weight in the review process. Fairbanks North Star Borough v. NEA-Alaska, 817 P.2d 923, 925-926 (Alaska 1991). The requirement of retirement and vacation benefits is in a definition of "employee" that was first adopted in 1972, amended in 1974, and most recently, readopted effective July 22, 1993, when the regulations were revised and moved from Title 2 to Title 8 of the Alaska Administrative Code.

12. None of the Alaska statutes addressing nonpermanent employees conflict with or are inconsistent with the employees' exclusion from collective bargaining. The consistent theme of statutes addressing nonpermanent employees is that the temporary nature of their employment distinguishes them from other employees and at least certain terms of their employment must likewise be different. The identifying characteristic of nonpermanent employees is that employment is of limited duration. The State's personnel rules define "nonpermanent employee" to mean "an employee in the classified service whose employment is time-limited." 2 AAC 07.990(20). AS 39.25.200(4)defines "nonpermanent employee" in the negative to mean employment in a position "that is not in the exempt or partially exempt service and who is not a permanent or an emergency employee." "Permanent employee" is then defined to mean

> an employee who has been appointed to an authorized, permanent full-time or part-time or permanent seasonal position in the classified service and who is in the process of completing or has successfully completed the required probationary service in that position.

AS 39.25.200(5).

13. The legislature closely regulates the hire, termination and liability of nonpermanent employees in AS 39.25.195 -- 39.25.200 to curb the State's use of nonpermanent employees:

> The Legislature finds and declares that certain inconsistencies and abuses in the hiring of nonpermanent employees have jeopardized the integrity and efficiency of the merit system as well as the morale of employees. The Legislature intends to curb the widespread administrative practice of using nonpermanent state employment to evade departmental accountability and mask poor planning. The Legislature further intends that nonpermanent employees be used only to the extent that it is impractical to meet the need with permanent employees and that the burden of proof shall fall upon the department or agency which proposes nonpermanent hire.

Exh. 6, at 4, quoting Section 1, Ch. 67, SLA 1979. AS 39.25.195 restricts hire of nonpermanent employees, requiring director of division of personnel approval, and limiting the period of employment to a maximum of 120 days in any 12-month period.

14. Significant differences in terms of employment of nonpermanent employees are the restrictions on participation in the State retirement system and on personal leave in AS 39.35.680(21)(C)(iii) and AS 39.20.310(7). See conclusions of law paragraphs 6 & 7, supra.

15. We conclude that an individual must satisfy the definition in 8 AAC 97.990 for rights under AS 23.40.070 -- 23.40.250 to apply.

16. The next question is whether the State by a history of recognition of nonpermanent employees is bound to continue to recognize them. These employees, ineligible to vote in the representation election, were not initially in the general government unit represented by the ASEA. However, parties to a collective bargaining agreement are free to negotiate and thereby change the scope of the unit. 1 Patrick Hardin, The Developing Labor Law 931 (3d ed. 1992) & First Supplement 1990-92, at 211 (1993). Such negotiations are permissive rather than mandatory. Id. Without the exclusion in 8 AAC 97.990(a)(2) the recognition clause in the parties' collective bargaining agreement would have the effect of changing the scope of the unit to include these employees. But since we have found that these employees are not covered under PERA, the State does not commit an unfair labor practice under AS 23.40.110(a)(5) by refusing to negotiate for them.

17. A closely related question is whether the history of bargaining terms and conditions of employment for these

employees obligates the State to future bargaining. Since such bargaining is not mandatory, it is permissive. A history of bargaining a permissive term does not obligate an employer to future bargaining on the term. A subject is not transformed into a mandatory subject by bargaining. Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 78 L.R.R.M. (BNA) 2974 (1971); 1 Patrick Hardin, supra 930.

18. Because employees who do not receive vacation and retirement benefits are not public employees entitled to the protections and benefits of PERA, the State does not violate AS 23.40.110 by refusing to negotiate with ASEA over their terms and conditions of employment.

ORDER

1. The unfair labor practice charge filed in this matter by the Alaska State Employees Association/AFSCME Local 52, AFL-CIO is DISMISSED; and

2. The State of Alaska is ordered to post a notice of this decision and order at all work sites where members of the bargaining unit affected by the decision and order are employed or, alternatively, serve each employee affected personally. 8 AAC 97.460.

ALASKA LABOR RELATIONS AGENCY

Stuart H. Bowdoin, Board Member

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. 170 in the matter of Alaska State Employees Assoication/AFSCME Local 52, AFL-CIO vs. State of Alaska, case no. 93-218-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 26th day of Januanry, 1994.

Victoria D. J. Scates

Clerk IV

This is to certify that on the 26th day of January, 1994, a true and correct copy of the foregoing was mailed, postage prepaid, to

Don Clocksin, ASEA Art Chance, State

Signature