ALASKA LABOR RELATIONS AGENCY
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PUBLIC SAFETY EMPLOYEES ASSOCIATION,

Complainant,

vs.

STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES,

Respondent

CASE NO. 93-180-ULP

DECISION AND ORDER NO. 173

This matter was heard on November 4, 1993, in Anchorage, Alaska, before a panel of the Alaska Labor Relations Board, members Stuart H. Bowdoin and James Elliott, and with Hearing Examiner Jan Hart DeYoung presiding. The record closed on November 24, 1993, with the submission of supplemental material.

Appearances:

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

Digest:

Transfer of work outside of a bargaining unit can be an unfair labor practice. In this case whether the State unilaterally assigned work outside of the unit in violation of AS 23.40.110 will require the interpretation of contract clauses, such as the management rights, integration, and lay-off clauses of the agreement. Questions of contract interpretation are particularly well-suited to the arbitration forum. Where possible, when the Agency's jurisdiction under AS 23.40.110 overlaps with that of an arbitrator under a collective bargaining agreement grievance arbitration clause, the Agency will defer to arbitration.

DECISION

Findings of Fact

1. The Public Safety Employees Association (PSEA)is a labor organization as that term is defined in AS 23.40.250(5) within the Public Employment Relations Act (PERA) and is the certified, exclusive representative of the RCPSO unit, consisting of State employees occupying the job titles set forth in State Labor Relations Agency Order and Decision Nos. 28, 28A, 106, and 111, including those State employees occupying the job classification airport safety officer (ASO) I-IV at the Department of Transportation and Public Facilities (DOT/PF). Stip. No. 1.

2. PSEA and the State have had a continuous collective bargaining relationship since 1978. Stip. No. 4.

3. PSEA and the State are parties to a collective bargaining agreement that expired by its terms on December 31, 1991, but which has been maintained since that date during negotiations for a successor to the expired agreement. Stip. No. 5.

4. The parties bargained to impasse, and at the time of the hearing on November 4, 1993, the parties were awaiting a decision from an interest arbitrator. Stip. No. 6.

5. The expired agreement defines "bargaining unit" to mean the Regularly Commissioned Public Safety Officers Unit (RCPSOU), consisting of those classifications listed in Article 15, Section 1, and additional classifications deemed appropriate by mutual consent or additional classifications deemed appropriate by the State Labor Relations Agency.[1]

Agreement, § 2b (1990/1991), Exh. 1, at 1. That classification list names the following positions: security specialist I and II, court service officer, state trooper recruit, constable, airport safety officers I, II, III, and IV, state trooper, deputy fire marshals I and II, corporal, investigators I, II and III, demolition specialist, sergeant, staff sergeant, warrant officer, and technical sergeant. Id., at 47.

6. Article 6 of the expired agreement is a management rights clause. Agreement, Exh. 1, at 7. Article 6 was reopened and tentatively agreed (TA'd) without change during the most recent negotiations. The clause states:

> Except -- and only to the extent -- that specific provisions of this Agreement provide otherwise, it is hereby mutually agreed that the Employer has, and will continue to retain, regardless of the frequency of exercise, rights to operate and manage its affairs in each and every respect.

Stip. No. 7.

7. Article 32 of the agreement is an integration or "zipper" clause. Agreement, Exh. 1, at 72 - 73. That article was reopened and TA'd without change during the most recent negotiations. The clause states:

> The parties acknowledge that during the negotiations which preceded this Agreement, each had the unlimited right and opportunity to make proposals with respect to any subject or matter not removed by law from the area of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement; each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated and signed this Agreement.

Stip. No. 8.

8. The agreement does not contain any provision addressing the assignment of work performed by employees within the RCPSO bargaining unit to state employees outside of the unit. Stip. No. 10.

9. Neither party proposed nor negotiated over the assignment of work performed by RCPSO unit members to workers outside of the bargaining unit. Stip. No. 11.

10. The expired agreement does include grievance arbitration procedures, which provide in part:

> For the purpose of this Agreement, a grievance is defined as a dispute arising out of the meaning or interpretation of a particular clause of this Agreement, the Personnel Rules, the Operating Procedures Manual, or the Standard Operating Procedures Manual issued by the respective Airport Safety Chief, or an alleged violation of said documents. The Employer, the Association (or its designee) and the aggrieved member or members, as the case may be, shall use the following procedure as the sole means of settling said grievance.
>
> . . . Violations of a specific term or terms of this Agreement, disputes arising out of a term or terms of this Agreement, and disciplinary grievances involving discharge, demotion or suspension, including those

> arising from violations or alleged violations of the Operating Procedures Manual, Standard Operating Procedures Manual, or the Personnel Rules, shall be subject to binding arbitration.

Agreement, Art. 10, § 1, Exh. 1, at 16.

11. The State through DOT/PF maintains an airport at Cold Bay, Alaska, which provides landing facilities for commercial air carriers. Commercial aircraft arriving and departing from Cold Bay Airport may have passengers who board or disembark at the airport. Passengers for civilian aircraft are subject to security screening before boarding. Stip. No. 12.

12. Pursuant to regulations of the Federal Aviation Administration, the Cold Bay Airport provides a crash, fire, and rescue response for air carriers taking off or landing at the airport. Stip No. 13; Central Region Airport Security Program (June 5, 1992), Exh. 5.

13. Since sometime in the early 1970's, the State has assigned a full-time employee to function as a fire fighter/guard or an airport safety officer (ASO) at the Cold Bay Airport facility. Fire fighter/guard was the predecessor job title to ASO. Stip. No. 14.

14. Ken Kreitzer was hired by the State as an ASO I on August 19, 1985, and assigned to the Cold Bay Airport to provide a regular ASO presence. Stip. No. 15.

15. Kreitzer became an ASO II upon successful completion of his probation period at Cold Bay Airport. Stip. No. 16.

16. Kreitzer's job duties appear in the State's class specification for ASO I and II positions. His principal responsibilities were to perform crash, fire, and rescue, law enforcement, and safety functions at the airport. Exh. 3. One difference between the class specification and Kreitzer's duties was that Kreitzer was not required to obtain Alaska Police Standards Council certification as a police officer, which is required for international airports. He remained an uncertified ASO II, notwithstanding the requirements of the State's amended class specification for ASOs. Exh. 2; Stip. No. 17.

17. As an ASO II, Kreitzer was a member of the RCPSO bargaining unit and represented by PSEA for all labor relations matters since 1987. Stip. No. 18.

18. Kreitzer performed or had the responsibility to perform all job duties named in the State class specification for airport safety officer (ASO) I & II from the time of his employment as an ASO until he was laid off. Exh. 3; Stip. No. 20. The class specification for airport safety officer describes the duties of the position to include security patrol, passenger screening, and checking runway, taxiway, ramp and apron for debris, animals or hazardous materials and crash, fire, and rescue responsibilities. Exh. 3. This includes routine security patrol of airport grounds; enforcing of State and federal laws, including FAA regulations; insuring adherence to safety rules; investigating suspicious persons or activities; assisting custom, public health, and immigration officials; operating two-way communications; and preparing reports. Kreitzer's crash, fire, and rescue responsibilities included operating apparatus and training other employees including the transportation maintenance leader. The airport manager, a transportation maintenance leader, was back-up for Kreitzer on all crash, fire, and rescue and security duties. For security duties, however, it was usually possible to plan work shifts so that back-up was not needed.

19. Kreitzer was continuously assigned to the Cold Bay ASO position from August 19, 1985, until July 1, 1992, and performed in that capacity as a full-time employee until he was laid off by the State's Department of Transportation and Public Facilities. Stip. No. 19.

20. The State did not notify PSEA that it was considering laying off Kreitzer before reaching the decision, Stip. No. 21, nor did it notify PSEA that it had decided to lay off Kreitzer before notifying Kreitzer. Stip. No. 22. The State has never notified PSEA of Kreitzer's layoff. Stip. No. 23.

21. The expired agreement does address layoff. Agreement, Art. II, § 10, Exh. 1, at 26. It states the procedures for determining who is laid off "[s]hould it be necessary to reduce the number of members within the bargaining unit." It

further states, "For the Department of Transportation and Public Facilities, that member who is lowest on the respective airport bargaining unit seniority list shall be laid off first." PSEA has not alleged any violation of the layoff section.

22. Bob Lee was the airport manager at Cold Bay Airport upon Ken Kreitzer's assignment as an ASO in August 1985. Bob Lee performed Ken Kreitzer's annual evaluation. Stip. No. 24.

23. Gerry Dias became the airport manager at the Cold Bay Airport on June 16, 1989, and succeeded Lee as Kreitzer's supervisor. Dias's title is that of transportation maintenance leader III, a classification in the labor, trades and crafts bargaining unit represented by Public Employees Local 71. Stip. No. 25.

24. The class specification for the transportation maintenance leader lists snow removal and the maintenance, repair and operation of equipment at the airport as the primary responsibilities. Exh. 4; Stip. No. 26. The duties include determining and performing maintenance priorities, snow removal, patching and sealing airport surfaces, record keeping, maintaining personnel records, ordering supplies, performing or supervising repair and maintenance of equipment, and checking runway braking and safety conditions. Exh. 4. While not stated in the class specification, Dias performs some law enforcement duties. Even before Kreitzer was laid off, Dias performed some law enforcement duties by providing back-up for Kreitzer's performance. Dias also covered these duties on Kreitzer's two days off per week.

25. Upon being laid off, Kreitzer was placed on the State's layoff list and is eligible for rehire in other State positions consistent with his class, location, and status. To the date of the hearing, Kreitzer had not been recalled by the State, although he has actively pursued employment opportunities with the State and other employers. Stip. No. 27.

26. In his capacity as airport manager, Dias has been granted police powers pursuant to AS 02.15.230(a), which states:

> **Police powers vested.** The commissioner and those officers and employees of the department who the commissioner may designate have general police powers in aid of the enforcement of this chapter, and the regulations and orders issued under it and all other laws of the state relating to aeronautics.

Stip. No. 28.

27. Prior to becoming airport manager, Dias had no appointment of such police powers by the commissioner of DOT/PF pursuant to AS 02.15.230(a). Stip. No. 29.

28. Dias attended a police training course conducted at the Sitka, Alaska, facility maintained by the Department of Public Safety, Division of State Troopers upon assuming the airport manager position. Stip. No. 30.

29. Dias attended a training program conducted by the Federal Aviation Administration in Oklahoma in 1992, after Kreitzer was laid off, for the purpose of learning airport security techniques and relevant federal aviation law. Stip. No. 31.

30. On or about June 5, 1992, DOT/PF revised its "Airport Security Program" for implementation at Cold Bay Airport. This program was approved by the FAA on August 3, 1992. Exh. 5, and Stip. No. 32.

31. On at least two occasions since July 1, 1992, police-certified ASOs regularly assigned in that capacity at Anchorage International Airport have been detailed "TDY" to perform the ASO function at Cold Bay Airport during Gerry Dias's absence. These TDY assignments have totalled between 3-4 weeks of Anchorage ASO time. Stip. No. 33.

32. Since Kreitzer's layoff Dias has assumed responsibility for law enforcement at Cold Bay Airport. These law enforcement responsibilities include passenger screening and responding to passenger violence or piracy. Central Region Airport Security Program (June 5, 1992), Exh. 5, at 4. In addition, Dias now also coordinates, supervises, and performs all crash, fire, and rescue operations at the airport formerly performed by Kreitzer as an ASO. Stip. Nos. 34 & 35.

33. PSEA did not grieve the layoff or the issue of reassignment of work outside of the unit.

34. On January 6, 1993, PSEA filed an unfair labor practice against the State alleging violations of AS 23.40.110(a)(1) and (5).

35. The Agency investigated the charge and, finding that probable cause supported the charge, issued a notice of accusation on April 1, 1993.

36. The Agency conducted a prehearing conference on May 21, 1993, and scheduled a hearing for October 28, 1993. On October 11, 1993, the State filed a motion for summary judgment. On October 12, 1993, the hearing was rescheduled to November 3 and 4, 1993.

37. On October 25, 1993, the parties were advised by letter to be prepared to address the appropriateness of deferral to arbitration at the hearing.

38. The hearing was held on November 4, 1993, and the parties presented testimony and other evidence. The record closed on November 24, 1993, after the receipt of supplemental authority.

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 8 AAC 97.350(f)[2] the complainant has the burden to prove each element necessary to its cause by a preponderance of the evidence.

3. A public employer or its agent may not "interfere with, restrain, or coerce an employee in the exercise of the employee's rights guaranteed in AS 23.40.080" nor refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

AS 23.40 110(a)(1) & (5).

4. Prohibited conduct under AS 23.40.110 includes the reclassification and redesignation of employees to another bargaining unit. See Public Safety Employees Ass'n v. Department of Public Safety, State of Alaska, State Labor Relations Agency Order & Decision No. 103 (Mar. 25, 1987), reconsideration denied (May 11, 1987), affirmed Public Safety Employees Ass'n v. State of Alaska, 799 P.2d 315, 135 L.R.R.M.(BNA) 3137 (Alaska 1990). In that case the State in violation of AS 23.40.110(a)(1),(2), and (5) had reclassified trooper recruits to college interns III, a reclassification that resulted in moving the positions from the RCPSO unit to the general government unit, represented by another labor organization. However, in this case before the Agency, the State did not transfer or reclassify airport safety officers or Kreitzer from the RCPSO unit. Instead, the reduction of Kreitzer's position in Cold Bay resulted in the assignment of Kreitzer's duties to the one remaining employee at the site, a transportation maintenance leader in the labor, trades, and crafts unit. The State shifted the work, rather than shifting the position, by reclassifying or reassigning Kreitzer to another bargaining unit.

5. The State does have some discretion in the assignment of work as it relates to the creation of the classification system. The Alaska Supreme Court has held that AS 23.40.250(8) reserves from bargaining an employer's assignment of work to a job class. As a matter within the discretion of the State, the classification system is not a mandatory item of bargaining. Alaska Public Employees Association v. State of Alaska, 831 P.2d 1245 (Alaska 1992). But in this case the State was not revising its classification system. The position classifications of airport safety officer and transportation maintenance leader remain more or less unchanged. The change of the loss of one position is not a substantial change to the unit as a whole.

6. Generally, however, public and private sector labor relations acts do require bargaining before an employer may assign work outside of the bargaining unit. Assigning work without bargaining can be an unfair labor practice. Often

this arises in the context of the decision or effect of a decision to subcontract work performed in the unit. See e.g., City of Bethlehem v. Pennsylvania Lab. Rel. Bd., 621 A.2d 1184, 144 L.R.R.M.(BNA) 2444 (Pa. 1993). It also can arise in the context of distributing work in a "double-breasted"[3] operation. See e.g., Road Sprinkler fitters Local Union No. 669 v. National Labor Relations Board, 676 F.2d 826, 110 L.R.R.M.(BNA) 2125 (D.C. Cir. 1982). The court in that case states,

> The allocation of work to a bargaining unit is a "term and condition of employment," and an employer may not unilaterally attempt to divert work away from a bargaining unit without fulfilling his statutory duty to bargain.

Id., 831, 110 L.R.R.M.(BNA) at 2128.

7. In these cases the work is shifted from one unit to another, often unrepresented, group of employees, with the motive to reduce expenses by avoiding the collective bargaining agreement. The motive that can be inferred to the State in this case is cost savings as well; although rather than shifting the work to unrepresented employees, the State shifted the work to another represented employee. The State apparently had a need to cut costs or believed the site's need for security had diminished. It elected to eliminate the security and safety position and those duties were shifted to the other employee on the site, the position responsible for maintenance and operation of the facility.

8. Although the State's assignment of the work arises in a different context, we will examine the principles discussed in case law addressing an employer's reassignment of unit work without bargaining.

9. While it is generally true that an unfair labor practice results if work is moved unilaterally to persons outside of a bargaining unit, there is no ULP if the work was not performed exclusively by unit employees and the employer did not depart significantly from past practice. AFSCME Council 13 v. Pennsylvania Labor Relations Board, 616 A.2d 135, 139, 143 L.R.R.M.(BNA) 2043, 2044 (Pa. 1992); see generally 1 Patrick Hardin, The Developing Labor Law 899 (3d ed. 1992) ("unilateral changes in classifications or duties which are not material, substantial, and significant are not unlawful"). A key question is whether a change in the employer's established practice of allocating work diverted work away from the unit to nonunion employees, or as in this case, to nonunit employees. Road Sprinkler Fitters Local Union No. 669 v. National Labor Relations Board, 676 F.2d 826, 110 L.R.R.M.(BNA) 2125.

10. In this case the work was not performed exclusively by RCPSO unit members. Even when Kreitzer worked at the Cold Bay Airport, some of the security and safety work was performed by Dias in the labor, trades, and crafts unit. In addition, the employer has not departed significantly from past practice. It has reduced its work force and, due to the remoteness of the work site, it shifted a part of the work out of the unit. The State continues to assign RCPSO members to the site to perform security on a short term basis, which shows that security and safety work remains very much RCPSO unit work. The State in this case has not transferred work out of the unit to a lower wage work force to avoid obligations in a collective bargaining agreement.

11. Past practice, including who performed the work in the past, however, is not the only matter considered when an employer is charged with a ULP for diverting work from the unit. A collective bargaining agreement may reserve matters to management discretion or set forth specifically those changes that require negotiations. Relevant in this case would be the terms in the agreement covering the composition of the unit, management rights, integration, and layoff.

12. The contract terms, items bargained in negotiations, and established practice must be examined to determine whether the State was required to bargain before shifting work from the RCPSO unit. It may be, as in some cases, the effect of the decision to transfer work, rather than the decision itself, is the item that must be negotiated. For example, while a decision to subcontract may be reserved in a collective bargaining agreement to management discretion, the effect of the decision on the unit must be negotiated. Independent School District No. 88 v. School Service Employees Union, Local 284, 503 N.W.2d 104, 143 L.R.R.M.(BNA) 2911 (Minn. 1993) (arbitrator construing management rights clause found that decision to subcontract was an inherent management right but effects of decision were negotiable).

13. Matters of contract interpretation are generally within the province of arbitrators under the grievance arbitration clause. See Timken Roller Bearing Co. v. N.L.R.B., 161 F.2d 949, 20 L.R.R.M.(BNA) 2204 (6th Cir. 1947) (discussed

in 1 Patrick Hardin, supra 702-705). We believe that this matter should have been raised as a grievance.

14. Because the answer to the question whether work has been impermissibly assigned outside of the unit will depend in part on the construction of the contract and the interpretation of contract terms, PSEA could have raised the dispute under the agreement's grievance arbitration clause. Finding of fact no. 9. See Radioear Corp., 214 N.L.R.B. 362, 87 L.R.R.M.(BNA) 1330 (1974); Independent School District No. 88 v. School Service Employees Union, Local 284, 503 N.W.2d 104, 143 L.R.R.M.(BNA) 2911 (Minn. 1993). See generally, Frank Elkouri & Edna Elkouri, How Arbitration Works 547-552 (4th ed. 1985) (discussing grievances about assignment of work outside of the bargaining unit).

15. The Alaska Supreme Court recognizes this Agency's discretion to hear an unfair labor practice charge or defer it to arbitration when jurisdiction of a dispute is shared. See Public Safety Employees Ass'n v. State of Alaska, 799 P.2d 315, 135 L.R.R.M.(BNA) 3137 (Alaska 1990). To support the parties' resolution of their own disputes, the Agency has adopted a policy generally preferring deferral to the contract remedies in the grievance arbitration clause in the agreement. Lower Kuskokwim Education Ass'n, NEA-Alaska v. Lower Kuskokwim School District, Decision & Order No. 172 (Mar. 2, 1994); Fairbanks Fire Fighters Ass'n, Local 1324, IAFF v. City of Fairbanks, Decision & Order No. 142 (Aug. 7, 1992) (Agency will not substitute for an arbitrator but will enforce an agreement by compelling arbitration).

16. In this case the parties' agreement has expired. However, the grievance arbitration clause, which is required by AS 23.40.210 to be in every collective bargaining agreement, continues in effect during negotiations of a successor agreement. Alaska State Employees Ass'n, AFSCME Local 52, AFL-CIO v. State of Alaska, Decision & Order No. 158 (May 13, 1993), appeal dismissed 3 AN 93-6218 Civ. (Mar. 31, 1994).

17. In this case PSEA has not pursued a grievance under the agreement and has taken the position that the time limit for filing a grievance in the agreement, 30 days after the occurrence of the event, has passed. Agreement, Art. § 3, Exh. 1, at 17. However, continuing violations, such as the denial of work, can be considered to repeat daily and each day can constitute a new occurrence. Frank Elkouri & Edna Elkouri, supra 197 & n. 211.

18. Although the Agency supports the parties in their effort to reach agreement, it cannot allow the parties to decide that it is in their mutual interest to bypass arbitration in favor of proceedings before the Agency. Parties may have motives for choosing unfair labor practice proceedings over arbitration such as cost or available arbitral defenses that may be inconsistent with the Agency's policies, such as its policy on deferral.

19. The kind of issues and evidence presented in this case, detailed testimony on the work performed at Cold Bay in and outside of class specifications, layout of the facility, and calculation of individual employee expenses, such as moving expenses, are more typically presented in arbitration proceedings. Questions of contract interpretation, such as management rights and zipper clauses, are issues over which arbitrators have greater experience. It is particularly appropriate that they be decided in arbitration. Radioear Corp., 214 N.L.R.B. 362, 87 L.R.R.M.(BNA) 1330 (1974) (N.L.R.B. willingness to defer questions of contractual waiver to arbitration is discussed in 1 Patrick Hardin, supra 705.)

20. Because of the issues of contract interpretation, we exercise our discretion to defer to arbitration in this case. Anticipating that there may be disputes before an arbitrator assumes jurisdiction, we reserve jurisdiction and do not dismiss this action.

ORDER

1. The parties are referred to arbitration to raise their dispute;

2. Any disputes on arbitration procedures should be presented to the arbitrator in the manner the arbitrator directs; and

3. The Agency reserves jurisdiction in the events either that problems arise as the parties move to arbitration or the matter is not finally resolved in that proceeding.

THE ALASKA LABOR RELATIONS AGENCY

Stuart H. Bowdoin, Board Member

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 Public Safety Employees Ass'n v. State of Alaska, Department of Transportation and Public Facilities, case no. 93-180-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 25th day of April, 1994.

Victoria D. Scates

Clerk IV

This is to certify that on the 25th day of April, 1994, a true and correct copy of the foregoing was mailed, postage prepaid, to

Art Chance, State

James Gasper, PSEA

Signature

1On July 1, 1990, these responsibilities transferred to the Alaska Labor Relations Agency. Executive Order No. 77 (Jan. 8, 1990).

2Effective July 22, 1993. Before July 22, 1993, 2 AAC 10.430 addressed burden of proof, and also assigned it to the complainant.

3A "double-breasted" operation is a two-sided enterprise having union and nonunion companies to handle union and nonunion business.