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

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

Complainant,

vs.

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

Respondent.

CASE NO. 94-261-ULP

## DECISION AND ORDER NO. 174

This case was heard on January 13, 1994, before the Alaska Labor Relations Agency, with Chair Alfred L. Tamagni, Sr., and Board Member Karen J. Mahurin present and with Board Member Sally A. DeWitt participating by telephone and by review of the record. Hearing Examiner Jan Hart DeYoung presided. The record closed on January 13, 1994.

Appearances:

Alison Reardon, business agent III, for complainant Alaska State Employees Association/AFSCME Local 52, AFL-CIO; and Art Chance, labor relations analyst, for respondent State of Alaska, Department of Administration, Division of Personnel/EEO.

Digest:

The State's obligation to participate in grievance arbitration proceedings under AS 23.40.210 and Article 16 of the parties' collective bargaining agreement is not excused by the circumstance of its having encumbered all of the funds it allocated in its budget to arbitration. Even if the Agency were to recognize a defense of economic necessity to the duty to arbitrate, the evidence does not demonstrate economic necessity in this case. The State's unilateral action constitutes a refusal to bargain in good faith and is an unfair labor practice under AS 23.40.110(a)(5).

DECISION

The Alaska State Employees Association, the bargaining representative of the State's general government unit, brought this unfair labor practice charge against the State because the State refused to schedule any more arbitration proceedings until the next fiscal year, beginning on July 1, 1994. The State's reason for refusing was that it had spent or encumbered its arbitration budget. ASEA's position is that spending all of the funds budgeted for arbitration does not void the obligation. It further claims that the State's preference for incurring penalties to rescheduling a new case when a grievance settles and its refusal to move funds from other budget categories demonstrates bad faith in violation of AS 23.40.110. The State's position is that it has encumbered all of its budget for arbitration and further spending for arbitration would be illegal. It also takes the position that this Agency does not have the authority to require it to expend funds for arbitration.

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. The parties' collective bargaining agreement, dated 1990 -- 1992, expired on December 31, 1992,[1] and they are in the process of negotiating a successor agreement.

3. The expired agreement contains a grievance arbitration provision. Agreement, Art. 16, Exh. 1, at 51--56. It provides in part that the

> parties agree that they will promptly attempt to adjust all grievances arising between them. The Union or the aggrieved employee or employees shall use the following procedure as the sole means of settling grievances, except where alternative dispute resolution and appeal procedures have otherwise been agreed to in this collective bargaining agreement.

Id., Art. 16, § 1A, Exh. 1, at 51. The process has five steps; the fifth step is arbitration. Id., Art. 16, § 1H, Exh. 1, at 52--54.

4. The history of grievance arbitration under the collective bargaining agreement was described by business agent Alison Reardon. Reardon stated that, while the agreement was effective in May of 1990, ASEA did not begin arbitrating disputes under the agreement until the summer of 1990. She also stated that the number of disputes had increased over the life of the agreement.

5. The number of actual grievance arbitration hearings by fiscal year follows:

> FY 1992[2] -- 16 (ASEA); 31 (all units). Exh. AA, at 1.
>
> FY 1993 -- 21 (ASEA); 27 (all units). Exh. AA, at 3.
>
> FY 1994 -- 5 (ASEA); 9 (all units). Exh. AA, at 5.

6. The number of ASEA grievances pending on January 13, 1994, was approximately 85. Of those 85 grievances, 12 involve the discharge of an employee. Exh. 3. In a discharge grievance, back pay is usually at issue. The State's liability for back pay for one year could range between 38 to 60 thousand dollars (with benefits) for an employee making an average salary of between 25 to 40 thousand dollars. See Exh. D, at 10 -- 11. The parties have dismissal grievances dating from mid-1991, Exh. 3, at 1 (Greenway), and labor analyst Art Chance estimated that potential liability in one case if ASEA were to prevail was approximately 90 to 100 thousand dollars.

7. Arbitration under the agreement is usually initiated by the filing of a grievance by ASEA. The State and ASEA have agreed to a list of arbitrators. Agreement, Art. 16, § 2, Exh. 1 at 54. When the parties need to select an arbitrator, they toss a coin to determine who strikes the first name on the list. The parties continue to strike names until one arbitrator is left -- the arbitrator for that particular grievance arbitration. The State's refusal to strike names for the selection of an arbitrator prompted the filing of this accusation.

8. The State's refusal to schedule arbitrations because it was out of money was rumored as early as October of 1993. The State first advised ASEA formally that it would not schedule arbitrations due to lack of funds in a letter it sent to each bargaining unit representative on December 30, 1993. Eg., K. Ritchie, letter to J. Day Peterson (Dec. 30, 1993), Exh. A, at 1:

> As you are no doubt aware, State agencies may not expend funds except for the specific purpose for which such funds were appropriated nor may an obligation be incurred for which there are no funds appropriated. At this time all funds appropriated for the services of arbitrators are fully committed to those hearings

already heard and awaiting decision. Accordingly, the State cannot commit to additional hearing dates prior to July 1, 1994. We are anxious to effect the speedy resolution of disputes and are willing to work with your organization to set an arbitration date in this fiscal year as funds may become available, but can make no commitment which will entail an unfunded liability if costs or fees are assessed to the State.

The Department of Administration intends to seek a supplemental appropriation in order to secure adequate funding for the remainder of FY 1994. Regretably, we can offer no assurance when, or even if, such funds will be made available by the Legislature given the State's current revenue forecasts.

The State is willing to establish some form of alternative dispute resolution or review process until additional funding is appropriated. We are willing to discuss any reasonable means of solving our mutual problem.

9. ASEA complains that the refusal to strike arbitrators affects informal settlement of grievances that do not need to proceed to arbitration. Evidence that most cases settle after an arbitration or unfair labor practice hearing is scheduled was not refuted. According to business agent Harriet Lawlor, the State does not seriously discuss settlement before a hearing date is set. Business agent Charles O'Connell stated that the single most important factor affecting settlement of a grievance is the eminence of an arbitration hearing. Business agent Reardon stated that the State's refusal to strike arbitrators has decreased the number of cases that settle.

10. Art Chance, State labor relations analyst, addressed organizational changes that the State was making to respond to the criticism that a real review of a grievance does not occur until the grievance reaches the highest level of management. He addressed reassignment of duties to human resource managers, staff training, expansion of labor relations staff, and other measures. He stated that a State goal is that more substantive action will occur at the department level. Reardon described grievance controls within ASEA to screen employee grievance claims. At one time the controls were informal. A business agent could recommend the withdrawal of a grievance, and the affected unit member could challenge the recommendation. The business manager reviewed the recommendation. ASEA has formalized this review procedure.

11. The collective bargaining agreement provides that the costs of arbitration are to be apportioned "equitably" between the parties by the arbitrator. It further states, "Normally, the losing party shall be expected to pay a higher percentage of such costs." Agreement, Art. 16, § 3C, Exh. 1, at 55.

12. If a grievance is cancelled after the selection of an arbitrator, the arbitrator assesses a fee. The usual arrangement is for the parties to share the cancellation fee, but it can be allocated on the basis of agreement. Exh. 6.

13. On at least one occasion when a grievance hearing was cancelled, the arbitrator was willing to substitute another grievance rather than assess cancellation penalties. The State, however, was unwilling to substitute another case. Exh. 6.

14. In past fiscal years the State has had to contend with inadequate funding for its collective bargaining agreement obligations. In a request for a budget increment in its FY 1992 budget proposal, Exh. B, at 9, the State described a personal services shortfall affecting its handling of arbitrations:

The division is unable to fulfill its contractual and legal obligation to respond to grievances in a timely manner.

At current funding levels the division is often forced to divert resources from the contractually mandated grievance-arbitration process to meet negotiations' needs. Reinstitution of an arbitration requirement with the General Government Unit has exacerbated an already serious problem.

Thus, in the past the State has moved funds allocated for one purpose to another to meet budget shortfalls.

15. In fiscal year 1993 the State responded to underfunding in its arbitration budget allocation by asking arbitrators to delay the arbitration decision until after fiscal year 1994, rather than by delaying the arbitration proceeding itself.

16. Chance estimates that each day in an arbitration hearing costs $3,500.00 and the average arbitration is about $6,000.00. Arbitration expenses generally are funded by the Department of Administration in the contractual component of its budget reporting unit Division of Personnel/EEO. The division is responsible for the costs of adjudication, travel, and per diem.

17. The Department of Administration can ask other departments for funds for arbitration but the other departments cannot be required to provide them. Id. In at least one case the department involved in a grievance did pay the costs of arbitration.

18. In contrast to the costs of arbitration, which are borne by the Department of Administration, the payment of any arbitration award against the State is usually borne by the employing department. Payment of arbitration awards is not at issue in this case.

19. The Department of Administration's arbitration budget follows:

> **FY 1992** -- **31.2** (budget line 73100, professional services); in a contractual component of 51.2; from a total division budget of 843.7. Exh. B, at 7 & 15.
>
> **FY 1993** -- **29.2** (budget line 73100, professional services); in a contractual component of 49.2; from a total division budget request of 918.3. Exh. C, at 5 & 14.
>
> **FY 1994**[3] -- **99.8** (allocated for arbitration expenses in line 73100 from a total for professional services of 106.8); in a contractual component of 416.1, from a total division budget request of 4,122.9. Exh. D, at 14.

20. Professional services make up a large part of the contractual component. Other significant allocations in the contractual component are telephone services and data processing chargebacks. See Exhs. B, at 15; C, at 14; & D, at 14.

21. FY 1994 budget documents indicate a substantial increase in the allocation for arbitration services. The number of hearings obtained with those funds is much lower than the number of hearings conducted in FY 1993. See finding of fact no. 5 (comparing 27 hearings in FY 1993 with 9 hearings in FY 1994).

22. In the professional services allocation to date in FY 1994, the State has expended funds in the amount of 62.[4] The State has also encumbered 48 for anticipated liability for costs in pending arbitrations. 30 of the 48 has been encumbered for the State's share of the expenses in the interest arbitration for the Public Safety Employees Association bargaining unit.[5] The department currently is projecting a deficit of 34 for FY 1994. Of the total contractual component the State has expended 209.2 and encumbered 243.5 of its 416.1 budgeted as of December 30, 1993 for a projected shortfall of 36.7. Exh. H, at 1.

23. The State has pending a request to the legislature for funds to supplement its FY 1994 budget -- a "supplemental." Exh. E. Of the request of 147.59, 46.8 would be for arbitration expenses. Id. The testimony was that a total of 107 was allocated for arbitration expenses. The request for arbitration expenses in the supplemental is based on a win/loss ratio of 50 percent. Exh. E.

24. The State has never reported arbitration expenses to the legislature as a monetary term under AS 23.40.215.

25. ASEA filed its complaint that the State committed unfair labor practices under AS 23.40.110(a)(1),(2), and (5) on October 22, 1993.

26. The Agency concluded its investigation on November 8, 1993, finding probable cause supported the complaint, and on November 8, 1993, it issued a notice of accusation against the State.

27. On December 17, 1993, the State filed a notice of defense, requesting a dismissal of the charges or, in the alternative, a full hearing before the Alaska Labor Relations Board.

28. On January 13, 1994, the Agency heard the matter and the parties presented testimony and other evidence. The record closed on January 13, 1994.

Conclusions of Law

1. The State of Alaska is a public employer under AS 23.40.250(7) and this Agency has jurisdiction under AS 23.40.110 to consider this matter.

2. Complainant has the burden to prove each element of its claim by a preponderance of the evidence. 8 AAC 97.350(f).

3. 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, including but not limited to the discussing of grievances with the exclusive representative.

4. Generally, changes to the terms of an agreement without bargaining are violations of the duty in AS 23.40.110(a)(5) to bargain in good faith. Alaska State Employees Ass'n v. State, Decision & Order No. 158, at 15 (May 14, 1993), appeal pending Super. Ct. 3AN-93-6218 (filed July 7, 1993). The expiration of the parties' agreement does not change this general rule. During negotiations of a successor agreement, many of the terms of the former agreement apply until a new agreement is reached or management implements new terms following impasse. As stated in Alaska State Employees Ass'n v. State, Decision & Order No. 158, at 15 (May 14, 1993) (citing Litton Financial Printing Div'n v. NLRB, 111 S. Ct. 2215, 2221, 137 L.R.R.M.(BNA) 2441, 2444-2445 (1991)),

> An employer's unilateral change in a term or condition of employment before the parties reach an impasse in negotiations is generally an unfair labor practice even if the parties' agreement has expired.

5. This Agency already has determined that the grievance arbitration provisions in Article 16 of the former agreement do continue to apply to the parties. Alaska State Employees Ass'n v. State, Decision & Order No. 158, at 14.

6. Grievance arbitration is a mandatory term that must be negotiated. AS 23.40.210 specifically requires that a grievance procedure culminating in arbitration must be a part of every contract. Obviously, its negotiation must be considered mandatory. In addition, arbitration has a long history as a mandatory subject of bargaining. See 1 Patrick Hardin, The Developing Labor Law 885 & n. 192 (3d ed. 1992), citing NLRB v. Montgomery Ward & Co., 133 F.2d 676, 12 L.R.R.M.(BNA) 508 (9th Cir. 1943).

7. The State argues that grievance procedures are not terms and conditions of employment and therefore are not mandatory items for bargaining. The basis for the argument is the definition of "terms and conditions of employment" which excludes from the definition and from mandatory bargaining the "general policies describing the function and purposes of a public employer." AS 23.40.250(9). This exception insures that management retains discretion over those policies directly affecting the purpose of the public employer. The defect in this argument is that grievance procedures are not a management function that must be outside of the bargaining process. Under the plain language of AS 23.40.210, grievance procedures must be a part of that process. We reject the argument that grievance procedures are not a mandatory item of bargaining.

8. Because grievance arbitration is a mandatory item for bargaining, failure to comply with a grievance arbitration term could be a breach of that agreement and a unilateral change to it. WJA Realty, 308 NLRB No. 100, 141 L.R.R.M. (BNA) 1063 (1992).

9. The State's position, however, is that its obligation extends only to arbitrate within the limits of available staff and funding.[6] This is basically an economic defense to the contract.

10. In the private sector, the National Labor Relations Board does not recognize economic necessity as a defense to a charge of failure to comply with a collective bargaining agreement. Zimmerman Painting, 302 NLRB No. 135, 137 L.R.R.M.(BNA) 1156 (1991).

11. Ordinarily, relevant decisions of the National Labor Relations Board will be given great weight in determining what

constitutes an unfair labor practice under AS 23.40.110. 8 AAC 97.240(b). The question is whether there is any reason to depart from NLRB precedent on the issue of an economic defense to a breach of a collective bargaining agreement. One reason might be the legislative restrictions on spending that are absent in the private sector. The legislature controls the State's purse through the Executive Budget Act.

12. The Executive Budget Act, AS 37.07.010 -- 37.07.130, sets forth the limits on spending. It shows that the State has substantial discretion to anticipate its needs and propose a budget request. After the legislature funds the budget, within the limits of the appropriation, the State can transfer funds between allocations in a component of a budget upon approval of the office of management and budget. AS 37.07.080(e) & (f). Thus, if expenditures are different than anticipated, the department could transfer funds between allocations in its contractual component. The department may cross component lines, but must first obtain the approval of legislative budget and audit. If funding proves inadequate during a fiscal year, the State can seek a supplemental appropriation. AS 37.07.100.

13. While the Act does impose limitations on State spending, it does provide a certain amount of flexibility to adjust the budget after appropriation if expenditures are not precisely as anticipated. For example, in the past, the State has used funds allocated for grievance arbitration for negotiations. Finding of fact no. 14; Exh. B, at 9.

14. The record in this case is notable for the absence of any evidence of State efforts to locate and transfer funds to meet its arbitration needs. Absent also is evidence of any effort to work with ASEA on alternatives to arbitrations. The evidence does show a lack of flexibility to utilize reserved arbitration times rather than incur penalties. The unilateral all or nothing approach by the State indicates bad faith. Some effort toward fulfilling its obligations would be a step toward demonstrating the good faith required under AS 23.40.110(a)(5). While there may be a point where it is impossible for the State to perform under the agreement and some defense of economic necessity would be appropriate, that point has not been reached in this case.

15. If the State were to reach a point where it could not comply with its obligations because it had in good faith exhausted all available options to locate funds, it would still be required to negotiate with the bargaining unit on the changes to the bargained terms. Otherwise, the changes would be unilateral changes to a mandatory term of the agreement. WJA Realty, 308 NLRB No. 100, 141 L.R.R.M.(BNA) 1063 (1992).

16. The State has argued that fulfilling its arbitration obligations would require a violation of the law and it is up to this Agency to determine the source of funds for fulfilling its obligations. It has not supported its argument with facts or statute or precedent. The practical problems of the State's contractual and statutory obligations are its responsibility and this Agency will not accept its challenge to identify a source of funds for arbitration.

17. The State also argues AS 23.40.215 in its defense. It argues that, by failing to present the arbitration term of the ASEA collective bargaining agreement to the legislature as a monetary term under AS 23.40.250(4) subject to legislative approval under AS 23.40.215, the term was not binding. AS 23.40.215 requires the department to submit monetary terms to the legislature for approval. The State's argument, restated, is that by violating a requirement to obtain legislative approval, it has invalidated a provision in the agreement that the legislature compelled to be in the agreement under AS 23.40.210. This result does not appear to further the objective of AS 23.40.215 and it violates the obvious purpose of AS 23.40.210 of requiring a dispute resolution procedure in every State collective bargaining agreement. Moreover, the State has not provided any basis to question its earlier interpretation that "monetary term" as defined in AS 23.40.215 does not include such incidental costs of administering the contract as arbitration expenses.

18. In sum, the State has violated the requirement of good faith in AS 23.40.110(a)(5) by refusing to schedule arbitrations and arbitrate during fiscal year 1994.

19. This Agency has the authority to enforce the requirements of AS 23.40.110. The State's argument that the Agency does not have the authority to order relief is contrary to the express language of AS 23.40.140, which provides,

> If the labor relations agency finds that a person named in the written complaint or accusation has engaged in a prohibited practice, the labor relations agency shall issue and serve on the person an order or decision requiring the person to cease and desist from the prohibited practice and to take affirmative action which will carry out the provisions of AS 23.40.070--23.40.260. [Emphasis added.]

Thus, the Agency has express authority to order the State to arbitrate as required in Article 16 of its agreement with ASEA, to remedy an unfair labor practice under AS 23.40.110(a)(5).

20. In its complaint ASEA also maintains that the State's conduct violates AS 23.40.110(a)(1) & (2). Subsection (a)(1) prohibits interference with rights under PERA. ASEA did not develop its argument under subsection (a)(1) and we do not address it here.

21. Subsection (a)(2) prohibits an employer from dominating or interfering with the formation, existence, or administration of an organization. In support of its argument that the State violated AS 23.40.110(a)(2), ASEA maintains that the State's conduct interferes with the administration of ASEA because the union appears ineffective to its members if it cannot obtain procedures under the agreement. These facts do not state a violation of subsection (a)(2), which prohibits an employer from unlawful domination or assistance to a labor organization. Subsection (a)(2) was intended to prohibit company unions. ASEA has not alleged any kind of State control over ASEA, and therefore has not alleged conduct violating subsection (a)(2). See generally, 1 Patrick Hardin, supra 288-333.

22. ASEA made an additional argument that the refusal to arbitrate discriminates against union members because personnel board proceedings remain available to nonunion State employees. Section (a)(3) prohibits an employer from discriminating in regard to terms or conditions of employment to encourage or discourage union membership. ASEA did not allege a violation of AS 23.40.110(a)(3) in its complaint and the Agency did not in its investigation find probable cause to believe that a violation of (a)(3) had occurred. See Amended Charge Against Employer (Oct. 21, 1993) & Notice of Preliminary Finding of Probable Cause (Nov. 8, 1993). We therefore decline to address the issue.

23. In its prehearing argument ASEA states it seeks as relief interest on all arbitration awards delayed as a result of the State's conduct. Prehearing Argument p. 9 (Jan. 4, 1994). We decline to interfere with the discretion and more appropriate jurisdiction of the arbitrator to determine a proper award in any particular arbitration.

ORDER

1. The State committed an unfair labor practice charge against the Alaska State Employees Association/AFSCME Local 52, AFL-CIO, under AS 23.40.110(a)(5);

2. The State is ordered to cease and desist from its refusal to arbitrate grievances under Article 16 of the State and ASEA collective bargaining agreement, and the State is ordered to take affirmative action to comply with its obligations under the agreement and AS 23.40.110(a)(5), including but not limited to immediately on the effective date of this decision commencing in good faith to proceed with arbitration under Article 16 of the parties agreement for pending grievances that the State has to date refused to arbitrate on the basis that it had expended its funds for that purpose; and

3. 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

Alfred L. Tamagni, Sr., Chair

Sally A. DeWitt, Board Member

Karen J. Mahurin, 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 No. 174 in the matter of Alaska State Employees Association/AFSCME Local 52, AFL-CIO v. State of Alaska, Department of Administration, Division of Personnel and EEO, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 19th day of April, 1994.

Victoria D.J. Scates

Clerk IV

This is to certify that on the 19th day of April, 1994, a true and correct copy of the foregoing was mailed, postage prepaid to

Alison Reardon, ASEA

Art Chance, State

Signature

1For those bargaining unit members ineligible to strike and classified under AS 23.40.200 as class (a)(1) employees, the agreement expired on April 30, 1993. Agreement, Art. 42, § B, Exh. 1, at 117.

2The State's fiscal year runs from July 1 through June 30 of the following year. Thus, fiscal year 1992 runs from July 1, 1991, through June 30, 1992.

3It is harder to compare FY 1994 with previous years because in that year the labor relations budget reporting unit was combined with the personnel/EEO reporting unit to reflect the consolidation of the divisions of labor relations and personnel/EEO.

4The numbers are stated in thousands of dollars. Thus, 48 represents 48 thousand dollars.

5This arbitration is not a grievance arbitration proceeding. Interest arbitration is the substitute for the impasse tools of strike and unilateral implementation for those employees in units prohibited from striking under AS 23.40.200. This Agency ordered the parties to interest arbitration in State of Alaska v. Public Safety Employees Ass'n, Decision & Order No. 159 (April 22, 1993).

6One must question the wisdom of a system that for the lack of several thousand dollars for the professional services of an arbitrator allows the State to incur a potential liability in the tens of thousands of dollars for each of the dozen or so dismissal grievance cases pending.