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STATE OF ALASKA,

Petitioner,

v.

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

Respondent.

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

Complainant,

vs.

STATE OF ALASKA,

Respondent.

CASE NOS. 94-295-SP
& 94-298-ULP (Consol.)

DECISION AND ORDER NO. 178

This case was heard on May 19, 1994, in Anchorage, Alaska, before a panel of the Alaska Labor Relations Agency, with members Stuart H. Bowdoin and Karen J. Mahurin present and with member Sally A. DeWitt participating by review of the record. Jan Hart DeYoung, hearing examiner, presided. The record closed on May 19, 1994.

Appearances:

Art Chance, labor relations analyst, for State of Alaska; and Don Clocksin, Sonosky, Chambers, Sachse, Miller, Munson & Clocksin, for Alaska State Employees Association/AFSCME Local 52, AFL-CIO.

Digest:

While the parties have engaged in prolonged bargaining, they have not exhausted all prospects of reaching agreement and are not at impasse.

DECISION

The State of Alaska and the Alaska State Employees Association, have been in the process of negotiating a successor agreement for approximately 17 or 18 months. The bargaining sessions have been numerous and the parties have made some progress. The question is whether at this time they have exhausted all prospects of agreement on mandatory subjects of bargaining. The State has said that it has reached its bottom line and believes that additional unassisted bargaining would be fruitless. It therefore has filed a petition with this Agency seeking the appointment of a mediator.

ASEA, on the other hand, believes that impasse has not occurred. When the State declared impasse, ASEA was in the process of electing a new president and changing its bargaining team from 26 members to 5. Thus reconstituted, ASEA represents that it is anxious for an opportunity to return to the bargaining table.

ASEA in its unfair labor practice charge has accused the State of regressive bargaining for making an offer that it withdrew before ASEA had an opportunity to respond. The State's response to the charge is that its representative, in frustration, made a suggestion at the table that the parties consider extending the contract for one year, but did not make an actual offer, which under the ground rules must be in writing.

The State is understandably frustrated at negotiating on 80 days over a period of 17 months with an unusually large union bargaining team of 26 members without reaching agreement. However, the declaration of impasse was ill-timed, coinciding with ASEA action to change its bargaining method and leadership. ASEA has not had an opportunity to put its changes into effect and make good on its representations of counter proposals.

We believe that given the circumstances further bargaining could produce results and that the State's refusal to bargain violated its obligation in AS 23.40.110(a)(5) to bargain in good faith. We also believe that success or failure should be reasonably apparent soon after the parties return to the table. While we do not find impasse now, we believe in light of the parties' long history of bargaining and the State's representations, impasse may not be far off. Thus, we are providing the parties with a finite period of time to negotiate,

and we retain jurisdiction to order the parties to proceed to mediation if they are not successful in the time provided.

Moreover, we do not believe that the State's comments about a roll over of the contract can be fairly characterized as an offer. Finding these comments an offer would be inconsistent with the State's conduct in the negotiations and the ground rules on written proposals. Candid discussion is important in negotiations. So long as parties do not act in bad faith, for example, by intending to confuse or be ambiguous, they must be free to broach ideas and explore solutions. We conclude upon a review of the circumstances in this case that the State did not bargain regressively.

Findings of Fact

1. The Alaska State Employees Association/AFSCME Local 52, AFL-CIO (ASEA), is the certified bargaining representative of the State of Alaska's general government bargaining unit (GGU).

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

3. On November 17, 1992, the parties first met to negotiate and agreed to ground rules. Those ground rules provide, in part (Exh. D.):

> 1. Each team will have a chief spokesperson who will be the only person authorized to bind the bargaining team he/she represents and who shall be responsible for the conduct of his/her team.
>
> 2. No statement shall be considered a valid proposal unless it is presented in written form by the appropriate chief spokesperson. Subjects of negotiation may be considered and discussed individually or in conjunction with other subjects.
>
> 3. Negotiation items that are tentatively agreed will be initiated by the chief spokesperson of each team and will be binding through the conclusion of negotiations or until impasse is reached. Once an item has been tentatively agreed, no further modification will b permitted without the mutual consent of the parties.

4. The parties met approximately in 25 sessions for a total of 80 days to negotiate a successor agreement. Exh. A.

5. ASEA's bargaining team consisted of 26 or 27 members selected by occupation or geographic region. Initially, the chief spokesperson for ASEA was its business manager and chief executive officer, Jennie Day Peterson. Subsequently, around mid March of 1993, the chief spokesperson of ASEA became Phillip Ray, the director of research and collective

bargaining services for the American Federation of State, County and Municipal Employees (AFSCME). Peterson continued to serve on the bargaining team.

6. Ray's perception when he joined the negotiations was that not much progress had been made. The first couple of months the parties were engaged in a trust building process. He needed to meet frequently with his team and spent much more time caucusing than with the State in negotiations.

7. The State's chief spokesperson at first was labor relations analyst Jim Johnsen. Labor relations analyst Lee Powelson took over in February of 1993, when Johnsen left State employment. Other members of the team included Judy Kidd, from the labor relations staff, Julia Smith, from the Sitka Pioneer Home, and one of a number of human resources managers, from fish and game, corrections, and military and veteran affairs.

8. The parties met frequently, exchanging three or four articles at a time. The negotiations first went slowly, as the parties became familiar and built trust with each other. Because the parties did not make great progress in the beginning, they broke the articles up into sections, which aided agreement.

9. The State's labor relations manager, Dianne Corso, described the State's initial strategy in bargaining by using the analogy of a pie. She stated that the pie could be cut any way but the size of the pie could not change. The State's principal objective was to control personal services costs. The State's goals included addressing overtime by conforming overtime under the contract to eligibility under federal law and addressing health benefits by authorizing the commissioner of administration to change benefits unilaterally or by changing to a union administered health trust. Another State goal was to achieve consistency among the various State bargaining agreements. Corso felt that in 9 of the 11 collective bargaining agreements the State largely had succeeded in meeting its goals.

10. Corso provided the State's proposal on health benefits. She stated that other unions had chosen an employee administered trust involving State contributions to the trust in lump sums, in one, and per employee with employee payments in another. The most recent ASEA proposal on health benefits was the current plan with some changes. ASEA sought to lock in benefits for the three years of the contract. If the premiums were to increase, ASEA proposed to lock in the State's contribution, which Powelson estimated at an 8 per cent increase each year (expressed in dollars). If the increase exceeded 8 per cent, ASEA proposed use of reserves until they were exhausted. At that point ASEA proposed that the employees share costs with the State. The State's offer provided for unilateral changes in the level of benefits to be determined by the commissioner of administration. There was some question whether the State in its proposal would retain discretion to impose employee payments for benefits. Corso did not believe that it did.

11. Another critical term for the State was overtime. The State wanted to pay overtime in accordance with federal law. Bringing the overtime provisions of the contract into line with the federal Fair Labor Standards Act was important because a number of GGU overtime grievances have had a substantial impact on the budgets of a number of State departments. The last written proposal from ASEA on overtime was presented March 24, 1994. Overtime eligible employees, under the proposal, would receive straight time pay for work between 37.5 and 40 hours in a work week and overtime after 40 hours in a work week. Employees would also receive overtime after 8 hours in a work day. Exh. 6.

12. Powelson described the evolution of the State's proposal on wages. The opening offer was that there would be no future escalator and no increase in years two and three of the contract. The State changed its proposal to allow an increase of two per cent on July 1, 1995, and 3 per cent on July 1, 1996. The union, on the other hand, wanted cost of living parity for strike classes (a)(2) and (a)(3) with class (a)(1) employees (involving a one per cent increase).[2] The State's last wage proposal, presented in writing, was made on March 2, 1994. Exh. 3. It provided for a cost of living increase to a maximum of 2 per cent commencing on July 1, 1995, and to a maximum of 3 per cent on July 1, 1996. The union's last proposal, according to Powelson, which he stated was not in writing, was to tie wage increases to the price of Alaska crude.

13. The fourth of the big issues separating the parties was the issue of coverage of nonpermanent employees in the unit. The issue was one that was being litigated and ASEA spokesperson Ray, at least, believed this issue would ultimately be resolved in court.

14. Ray's general feeling coming out of the March 14 and 15, 1994, session of bargaining was that the parties were trying to telescope the next round of bargaining. The parties had tentatively agreed to half of the articles under review and had a long way to go. He felt that they were at a serious stage in the negotiations and were trying to juggle all of the different pieces around the major items. The major items in dispute at this point in bargaining included the article on health benefits. ASEA wanted to restore benefits eliminated when benefits were last changed and to maintain those benefits for the duration of the contract. Another issue was wages. The State had not offered a wage increase for the first year, but offered a cost of living increase of two per cent for the second year and three per cent for the third year, which was basically a prospective increase only and did not provide an increase for the time period ASEA had not had a COLA adjustment, approximately 30 months. ASEA was seeking a COLA increase for the second and third years of the agreement. Another issue in contention was overtime. ASEA's final position for overtime was overtime as provided to the private sector under State law -- overtime after 8 hours in a day and 40 hours in a week. Another significant issue was coverage of nonpermanent employees.

15. The parties' last session in negotiations was on March 24 and 25, 1994. Ray believed the parties were making progress. On March 24 the State presented a proposal in writing addressing Article XX, correctional officers. Leave for the correctional officers, among other things, was a significant matter in dispute. Exh. 1. About 800 -- 1000 employees are correctional officers and affected by this issue. ASEA made a counter proposal on overtime pay (Exh. 6), travel, per diem, and moving expenses(Exh. 7). It also presented a package proposal. Exh. 8. This package evidently was not presented in writing.[3]

16. The parties again met on March 25. Customarily the ASEA secretary treasurer took detailed minutes of meetings on a lap top computer. The minutes for March 25 were lost when the computer "ate the disk."

17. Initially on March 25 Ray asked the State for its promised proposals. The State presented a new proposal on the employees at Kulis Air Force Base, which the parties discussed. The dispute involved the shift work schedule for these crash and rescue employees. Exh. 2. ASEA did not formally respond to this proposal. Although the parties discussed proposals during this bargaining session, the State did not formally accept or reject any

of them. Exh. 5. According to Ray, it was generally customary for the parties to respond formally to a written proposal.

18. The State spokesperson, Powelson, then asked a series of questions about the major issues in contention -- wages, overtime, and health benefits. Powelson asked if ASEA accepted the State's position on each item. Ray answered no, indicating that he had counter proposals. Ray believed that certainly additional counters could be made on all these offers, specifically stating that he was prepared to recommend that ASEA make a counter offer on health benefits. He laid out the ASEA numbers on health benefits and let the State look at them. If their numbers were close, business manager Peterson believed the parties would be closer to agreement. An area of movement, for example, could be for the State to agree to lock in health benefits for three years. ASEA had wanted a prescription card restored with an approved deduction for single and family coverage. The State in its last offer would retain unilateral control over benefits the second and third years of the contract. If ASEA could obtain a locked in position for three years, Ray stated that ASEA could be flexible on the benefits. Peterson concluded from observing the state representatives taking notes and their facial expressions that they were interested.

19. Powelson said that Ray said nothing in response to his questions that indicated ASEA would make changes that the State could accept.

20. After asking whether ASEA could agree to the State's position on the major areas of dispute, Powelson, in front of the full ASEA bargaining team, asked if ASEA would be willing to roll over the contract. Powelson said he raised the idea as a result of his frustration with the lack of progress in the negotiations. He remembered that ASEA did not express a great deal of interest in the idea. Powelson did not believe that by making this statement he had communicated a formal proposal. He believed a position change of this magnitude would have to be made in writing.

21. State bargaining team member Julia Smith expressed surprise that Powelson had raised the question of a roll over. She remembered a short discussion about it. Her impression was that it was an idea that was discussed but dropped.

22. Ray testified that the ASEA bargaining team took the roll over discussion seriously as an offer put forward for exploration and expected a written offer to follow. He asked a couple of questions but ASEA did not respond to the "offer" during the bargaining session.

23. After the discussion on extending the contract, Powelson reiterated the State's position on the key issues, followed by a statement that negotiations were no longer productive. Exh. E, at 5. Powelson raised the question of availability to meet with a mediator. It seemed to Ray that the State was asking a series of prepared questions. Powelson, however, stated he had discussed the subject of impasse earlier with his bargaining team but not with his principals. Ray discussed availability for meeting but did not agree that the parties were at impasse. Id., at 9.

24. Corso testified that the State was at its bottom line on three issues and there could be no contract if the parties could not agree to the State's proposals on health benefits, wages, and overtime. Any proposal to be acceptable to the State would have to meet these objectives.

25. Ray stated that its strategy in bargaining was not to delay or stall and that ASEA was not at its bottom line on March 25.

26. The bargaining session had concluded around 3 p.m. on March 25. ASEA adjourned into caucus. The bargaining team had questions about the details of a roll over of the contract. Ray was directed to follow up and discover whether nonpermanent employees would be included in a roll over and the effect on health benefits.

27. After Powelson returned to his office from the bargaining session, he worked with labor relations analyst Art Chance on a press release announcing impasse. He presented the draft to the commissioner of administration, who made some changes. The press release was then forwarded to the media support center. It was then around 4:30 or 5:00 p.m.

28. As directed by his bargaining team, Ray telephoned Powelson to address his team's questions, seeking clarification on the terms of extending the existing contract. According to Ray, Powelson did not "withdraw the offer" during their conversation. Powelson stated that during their telephone conversation he reiterated his statement that the parties were at impasse. Powelson again talked with Ray about mediation dates. He says Ray responded that he was unsure whether his team was in agreement that they were at impasse. Powelson stated that he had understood from their conversation that Jennie Day Peterson was to get back with him after polling the membership on the question of impasse. After hearing nothing, Powelson contacted Peterson, who said she did not know she was to poll members and get back with him.

29. About an hour after the negotiation session had adjourned, Peterson stated she was surprised to be contacted by Jacqueline Estes from the media. Estes asked Peterson about the State's declaration of impasse. Peterson said she responded that they could not be at impasse as they were still discussing the State's last offer. Brian Akre from the Associated Press and Pete Karan from KGNO in Juneau also inquired about an impasse. Karan provided Peterson with a copy of the State's press release on impasse. The press release shows that it was issued from the media support center telecopier at 5:35 p.m. Exh. 10.

30. The press release had been issued from the Office of the Commissioner of Administration on March 25, 1994, declaring that ASEA and the State has reached impasse in their negotiations It set forth the State's history of the parties' negotiations. Specifically, the press release states, in part (Exh. 10):

> Negotiations for the state of Alaska and the union representing the 8,000-member General Government Unit reached impasse in contract talks this afternoon.
>
> The major areas of disagreement were wages, overtime and health insurance, Commissioner of Administration Nancy Bear Usera said today. . . .

31. After obtaining the press release, at about 5 or 5:30 p.m., ASEA's representatives left to get their bags to go to the airport and home.

32. On March 29, 1994, the State filed a petition for appointment of a mediator, representing that impasse or deadlock existed between the State and ASEA and asking the Agency to request a mediator from Federal Mediation and Conciliation Services under 8 AAC 97.270(b).

33. After the session adjourned Ray and Richard Seward of ASEA staff had been working to draft language for a one-year roll over of the contract.

34. Ray states he then telephoned Powelson on March 30 to address agreement and, failing agreement, to address extending the contract. Powelson made it clear during this conversation that there could be no roll over. He did this before ASEA had an opportunity to respond to a roll over. The parties did discuss nonpermanent employees, overtime, wages, and health benefits, and asked whether the legislature would have to ratify a roll over. Ray thought he was negotiating the terms of a roll over. Powelson concluded the discussion by stating there was no roll over proposal. Powelson's version of their conversation is similar. He stated that Ray asked, "so it is off the table?" and that he had responded, "we have looked at the option and there is nothing in it for the State." Powelson stated that one of the problems with extending the existing contract was the cost to the State of not addressing the overtime issue. Another problem was that the parties would return to the bargaining table in five months without having made progress.

35. Powelson's summary of the status of the parties' negotiations is set forth in exhibit B. It shows agreement in 20 articles. The letters "EE/BUM" mean that the parties agreed except for issues regarding nonpermanent employees. "EE" stands for employee and "BUM" for bargaining unit member. The parties each had outstanding proposals that had not received a formal response. Issues that remain unresolved include maintenance and cure, the Family Medical Leave Act provision (Exh. 5, at [not paginated]), corrections (Exh. 1), leave (Exh. 4), the preamble (Exh. 5), and union security (Exh. 5). The last changes were agreed to on March 15. The State had not responded to written proposals that ASEA had made on March 24, 1994, in areas of overtime (Exh. 6) and travel, per diem, and moving (Exh. 7). ASEA's March 24 package proposal, which addressed such issues as leave, overtime, union security, registers, and nonpermanent employees, also had not received a response. Exh. 8.

36. Powelson represented that the State would consider a proposal from ASEA but that ASEA has not actually presented one.

37. Ray believed the time was a pivotal one for ASEA -- the members were going into a convention in only two weeks, were electing a new president, and were designating a new bargaining team. Business manager Peterson elaborated that two referendums were out to ASEA voters to reduce the size of the negotiating team, ballots were to be counted the next week, changes were being made in the bargaining team structure, and half of the executive board was up for election. There would also be a change in the members of the bargaining team, which had been composed of the executive board. In addition, the election for the position of union president was pending. In sum, the union was in transition.

38. The time was a critical one for the State as well. The time was the last real opportunity to submit an agreement to the legislature for action before its May adjournment. Exh. 10.

39. On April 4, 1994, alleging that the State had declared impasse publicly at the same time an offer was being presented and then had withdrawn the offer without intervening negotiations, ASEA filed a complaint that the State committed unfair labor practices under AS 23.40.110(a)(1),(2), and (5).

40. On April 6, 1994, the State filed a motion to consolidate ASEA's complaint with its petition to appoint a mediator. It also answered the allegations in the complaint and moved to dismiss it.

41. On April 13, 1994, the Agency concluded its investigation on the complaint. It found that the complaint was supported by probable cause and issued a notice of accusation against the State. The notice denied the motion to dismiss and stated that it would be handled as a notice of defense to the complaint.

42. On April 14, 1994, this Agency conducted a prehearing conference at which it scheduled a hearing on the State's petition and ASEA's complaint on May 19 and 20, 1994. On April 20, 1994, the Agency issued an order consolidating the two matters for hearing.

43. Ray did not communicate again with the State after the March 30 telephone conversation with Powelson until a meeting in Juneau on April 27, 1994. Ray met with the commissioner of administration and state bargaining representatives. His goal was to get bargaining back on track. Mano Frey, executive president of Alaska AFL-CIO and business manager and secretary of Laborers Local 341, also attended. Ray had several objectives for the meeting. One was to identify the issues, and a second was to communicate his belief that there was much to be done at the bargaining table. At the meeting Ray set forth ASEA's position on key issues and the State set forth its position. Ray did not recall whether a roll over of the contract was discussed, but State representatives recalled that it was not. Ray does remember that the four "big" issues were discussed.

44. A critical factor in determining whether the remarks made about rolling over the contract were a formal offer or not is the manner in which the parties negotiated. ASEA's position is that proposals were presented first conceptually and followed up in writing. Business manager Peterson said that had been true since the beginning of bargaining. Both Ray and Peterson testified that they considered oral statements seriously. Both Peterson and Ray felt that as spokesperson for the ASEA bargaining team each had the authority to bind the negotiating team. The recourse of the membership would be the vote in a contract ratification election. Ray believed that the parties followed the ground rules, but as the parties' comfort level increased, it became common for a proposal to be made and discussed orally before it was reduced to writing. Ray believed that any proposal made in view of the full committee should be considered a very serious proposal.

45. The State's position, in contrast, was that the parties strictly complied with the ground rules. The State's bargaining position and strategy were not set by the bargaining team. Dianne Corso and the commissioner of administration in conjunction with other members of the steering committee established bargaining objectives. The bargaining team implemented those objectives. Team members worked on a consensus model, sharing drafts and information with other State negotiators to achieve consistency in the different State contracts under negotiation. After a proposal was reduced to writing and reviewed, it was presented in bargaining.

46. In bargaining the State would make and distribute copies of its proposal and walk the ASEA bargaining team through it. The draft of the proposal would identify any deletions and additions to existing language.

47. Powelson stated there was a need to talk outside of a written proposal to explore areas for agreement. Powelson believes that to make progress it is essential to explore possibilities. Mano Frey stated his opinion that difficult negotiations could benefit from sidebar meetings. Powelson agreed that the rules were different when he spoke with Ray in the hall or on the telephone than they were in a meeting with the full bargaining team, but he also stated that "what ifs" were not binding and were not formal proposals. However, Powelson stated that, until something was in writing, there could be no agreement because there could be no certainty that the parties had a meeting of the minds.

48. Powelson stated the union was ever reluctant to reduce matters to writing. Powelson would ask the union to confirm a proposal in writing. He would not always get confirmation, but instead would hear some excuse, such as the typist's lack of time for typing or the team's reluctance to go to the trouble of putting a proposal in writing unless the State first expressed interest.

49. On May 19, 1994, the Agency heard the matter and the parties presented testimony and other evidence. The record closed on May 19, 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 and 23.40.190 to consider these consolidated cases.

2. The moving party in each case has the burden to prove each element of its claim by a preponderance of the evidence. 8 AAC 97.350(f).

The Request for Mediation.

3. The Public Employment Relations Act provides for mediation after a deadlock in negotiations. AS 23.40.190 provides:

> If, after a reasonable period of negotiation over the terms of a collective bargaining agreement, a deadlock exists between a public employer and an organization, the labor relations agency may appoint a competent, impartial, disinterested person to act as a mediator in any dispute either on its own initiative or on the request of one of the parties to the dispute. The parties may also select a mediator by agreement or mutual consent. It is the function of the mediator to bring the parties together voluntarily under such favorable auspices as will tend to effectuate settlement of the dispute, but neither the mediator nor the labor relations agency has any power of compulsion in mediation proceedings.

4. If the parties cannot agree to a mediator, the Agency exercises its authority to appoint a mediator in AS 23.40.190 by requesting a mediator from the Federal Mediation and Conciliation Services. 8 AAC 97.270(b) provides:

> If, in accordance with AS 23.40.190, the labor relations agency finds that negotiations between a public employer and an employee representative have reached an impasse, the agency will request a mediator appointed by the Federal Mediation and Conciliation Services.

5. Neither PERA nor the regulations adopted under PERA define impasse or deadlock. The terms were previously considered in Alaska State Employees Ass'n v. State of Alaska, SLRA Order and Decision No. 124 (Sept. 14, 1989), in which this Agency's predecessor stated:

> A finding of impasse requires a determination that meaningful progress is not likely to be made on mandatory subjects of bargaining. In this situation, at least as to health insurance benefits, some progress was conceivably on the table to be discussed at the time of the hearings in this matter. Despite the State having declared impasse, it nevertheless left open the doors for further discussion, and evidenced a desire to continue negotiation on matters which could, in the Agency's belief, lead to movement in potential resolution of the differences between the parties. APEA v. State, [776 P.2d 1030 (Ak 1989)], citing Saunders House v. NLRB, 719 F.2d 683, 688 (3d Cir. 1983).

The decision does not elaborate on factors to be considered to determine whether meaningful progress is likely to made on mandatory subjects of bargaining.

6. The regulations provide that

> Relevant decisions of the National Labor Relations Board and federal courts will be given great weight in the decisions and orders made under this chapter and AS 23.40.070 -- 23.40.260 . . . .

8 AAC 97.450(b).

7. The principal NLRB case addressing impasse is Taft Broadcasting Co., 163 NLRB 475, 64 L.R.R.M.(BNA) 1386 (1967). That case states,

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Id., at 478, 64 L.R.R.M.(BNA) at 1388. See generally 1 Patrick Hardin, The Developing Labor Law 692--696 (3d ed. 1992).

8. The determination of impasse or deadlock is essentially factual, depending on the circumstances of the parties' bargaining.

9. In this case the facts show that the parties negotiated over an extended period of time. While the parties took strong positions, the evidence shows sincere effort to reach agreement, at least until the declaration of impasse. The evidence did not suggest intentional delay or deliberate bad faith by either party. Although progress was slow, it was proceeding. ASEA seems to have expected that the changes in bargaining team structure would promote successful bargaining. Ray stated that, at least initially, he spent far more time with his team in caucus than he did with the State in bargaining. We can infer from the size of the team some difficulty in communication and progress. It is easy to imagine that a reduction in the size of the bargaining team from 26 to 5 members would promote bargaining. Whether these events were communicated to the State does not appear in the record.

10. The legislature's time schedule could have been a factor in the State's declaration of impasse. The legislature, which adjourns in May, must approve or disapprove monetary terms under AS 23.40.215. In late March, offers were outstanding on both sides. ASEA was promising counteroffers, for example, in health benefits. The parties do not appear at this point in time to be deadlocked on the principle issues of wages, overtime, and health benefits. Moreover, there are a number of other issues, such as the narrower issues concerning Kulis Air Force Base employees or correctional officers, where there appears to be room for movement and agreement. At minimum the parties should be able with additional bargaining to narrow the issues in dispute.[4] These facts, the stated intention of ASEA to make counteroffers, and the changes ASEA was in the process of making all support the conclusion that the State's declaration of impasse was premature.

The Unfair Labor Practice Charges.

11. ASEA has charged violations of AS 23.40.110(a)(1), (2), and (5), which provide that a public employer may not

> (1) interfere with, restrain, or coerce an employee in the exercise of the employee's rights guaranteed in AS 23.40.080;
>
> (2) dominate or interfere with the formation, existence, or administration of an organization; . . .
>
> (5) 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.

12. The ASEA maintains that the State engaged in regressive and bad faith bargaining. The charge of regressive bargaining is based on the proposal and then withdrawal of an "offer" to extend the parties' agreement for a one-year period. To determine whether the State has engaged in regressive bargaining in violation of the duty to bargain in good faith requires an examination of the totality of the circumstances. See generally 1 Patrick Hardin, supra at 617.

13. The evidence does suggest a fundamental difference in the parties' bargaining styles. The parties differed in the level of their adherence to the ground rules. The State's bargaining style was a formal one. The State's organizational structure lends itself to a more formal style in the development, refinement, and presentation of bargaining proposals. The State also adhered rather strictly to the ground rules; Powelson expressed some frustration when ASEA did not. ASEA's spokesperson Ray, on the other hand, remembers that the parties became more relaxed about the ground rules as bargaining progressed. ASEA stated verbal offers often preceded written offers. Neither bargaining strategy seems to have been devised or implemented in bad faith. The State's style was to present proposals formally. The State's position that Powelson's comment about extending the contract for one year was to explore an idea and not to make a formal proposal is credible and consistent with the manner in which the State conducted bargaining. Powelson's reiteration of the State's final position on the principal four issues separating the parties supports this conclusion as well. The totality of the circumstances does not demonstrate that the State acted in bad faith when its representative proposed a one-year contract extension in one meeting and in a later meeting said the one-year extension was not available. At least until the State declared impasse, the State had engaged in serious, strong negotiation with the aim of reaching agreement.

14. The parties must in bargaining be able to engage in candid discussions and to explore solutions before being locked into a formal offer. So long as a party does not act in bad faith, for example, by intending to mislead or confuse the other party, such discussion should be appropriate.

15. This Agency has held that vague, contradictory, and confusing statements about a party's position can be an unfair labor practice. Totem Ass'n of Educational Support Personnel v. Anchorage School District, Decision & Order No. 150 (Dec. 3, 1992). In that case various written options had been proposed and communications concerning them were inconsistent and confusing. Id., at 2-3. The State's action in this case is consistent with raising an issue for exploration, and later rejecting it before proposing it as an offer. The evidence does not show that the roll over of the contract was raised to mislead or confuse ASEA.

16. When a misunderstanding or a dispute develops in bargaining, such as the dispute in this case over whether the State had formally offered to extend the contract for one year, it is appropriate to turn to the ground rules for direction. The ground rules in this case clearly provide for offers to be made in writing. Because the extension was not offered in writing it was not an "offer."

17. Nevertheless, the State, by declaring impasse prematurely, has refused to bargain and thus has not acted in good faith under AS 23.40.110(a)(5).

18. In its complaint ASEA also maintains that the State's conduct violates AS 23.40.110(a)(1) and (2). Subsection (a)(1) prohibits interference with rights under PERA. Subsection (a)(2) prohibits an employer from dominating or interfering with the formation, existence, or administration of an organization. ASEA did not develop either argument and we do not address them here.

ORDER

1. The State of Alaska and the Alaska State Employees Association, AFSCME Local 52, AFL-CIO have not reached impasse or deadlock in their negotiations for a successor agreement and a referral to Federal Mediation and Conciliation Services under AS 23.40.190 and 8 AAC 97.270(b) is premature. The State's petition to appoint a mediator is DENIED.

2. While we do not find that the State of Alaska has engaged in regressive bargaining in bad faith, we do find that the State has violated AS 23.40.110(a)(5) by refusing to bargain. The Alaska State Employees Association, AFSCME Local 52, AFL-CIO charge under AS 23.40.110(a)(5) is GRANTED, and the State is ordered under AS 23.40.110(a)(5) to cease and desist from its refusal to bargain and to bargain with ASEA for a period of approximately 60 days, until Monday, August 15, 1994.

3. We do not dismiss the State's petition to appoint a mediator, but reserve jurisdiction to refer the parties to mediation in the event they reach impasse.

4. 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

Sally A. DeWitt, Board Member

Karen J. Mahurin, Board Member

Member Mahurin concurring:

I concur in the decision and order in this case with one reservation. I am concerned that the inflexible bargaining position of the State of Alaska, see finding of fact no. 24, may be inconsistent with the duty under AS 23.40.110(a)(5) to bargain with an open mind and the goal of reaching agreement. While I would add this point to the decision, I do concur with the balance of the decision and with the order to negotiate.

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 Decision and Order No. 178 in the matter of STATE OF ALASKA v. ALASKA STATE EMPLOYEES ASSOCIATION/AFSCME LOCAL 52, AFL-CIO, CASE NO. 94-295-SP AND ALASKA STATE EMPLOYEES ASSOCIATION/AFSCME LOCAL 52, AFL-CIO v. STATE OF ALASKA, CASE NO. 94-298-ULP (CONSOL.), dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 15th day of June, 1994.

Victoria D. J. Scates

Clerk IV

This is to certify that on the 15th day of June, 1994, a true and correct copy of the foregoing was mailed, postage prepaid, to

Don Clocksin, 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.

2As classified for purposes of strike eligibility under AS 23.40.200.

3The substance of these proposals is set forth in Exh. 8, but ASEA apparently did not present them in written format.

4Whether this is possible in light of a ground rule that releases the parties from the tentative agreements is an interesting question that we do not need to address. Exh. D.