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ALASKA PUBLIC EMPLOYEES)
ASSOCIATION/AFT LOCAL 4900,)
AFL-CIO,)
)
Complainant,)
)
vs.)
)
STATE OF ALASKA,)
)
Respondent.)
_____)
CASE NO. 94-280-ULP & 94-290-CBA (CONSOL)

DECISION AND ORDER NO. 180

This case was heard on April 13, 1994, before the Alaska Labor Relations Agency, with Chair Alfred L. Tamagni, Sr., and Board Member Karen J. Mahurin. Board Member Sally A. DeWitt did not participate. Hearing Examiner Jan Hart DeYoung presided. The record closed on January 13, 1994.

Appearances:

Joan Wilkerson, southeast regional manager, for complainant Alaska Public Employees Association/AFT Local 4900, AFL-CIO; and Art Chance, labor relations analyst, for respondent State of Alaska.

Digest:

This decision reviews a second labor organization's challenge to the State's refusal to arbitrate grievances under the parties' collective bargaining agreement midway through fiscal year 1994.

DECISION

This Agency previously considered the issue of the State's refusal to schedule arbitration proceedings until the following fiscal year in Alaska State Employees Association/AFSCME Local 52, AFL-CIO (ASEA) v. State of Alaska, Decision & Order No. 174 (April 19, 1994), appeal pending 3AN-94-4342 CI (Super. Ct. May 18, 1994). In that case, the Agency determined,

> 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).

This case involves the same circumstances but the complaining organization is the Alaska Public Employees Association. The APEA filed its complaint in 94-280-ULP, charging the State with failure to bargain in good faith

under AS 23.40.110(a)(5) for refusing to set arbitration hearings and alleging facts similar to the Alaska State Employees Association/AFSCME Local 52, AFL-CIO in its complaint. The APEA, however, also filed a petition to enforce its collective bargaining agreement's arbitration clause in Agency case no. 94-290-CBA.

We find that the State committed an unfair labor practice for reasons stated in decision and order no. 174. We also find that APEA has established a case for enforcement of its agreement under AS 23.40.210.

Findings of Fact

1. The Alaska Public Employees Association (APEA) is the certified bargaining representative of over 1200 employees in the State's supervisory bargaining unit (SU). Stipulation, at 1.

2. The parties' collective bargaining agreement, dated 1990--1992, extended by mutual agreement for July 1, 1993--June 30, 1994, was in effect at all times relevant to these proceedings. Stipulation, at 1.

3. Article 10 of the collective bargaining agreement contains a grievance procedure with binding arbitration as its final step. The agreement provides, in part:

> A grievance shall be defined as any controversy or dispute arising between APEA or an employee or employees and the Employer. Having a desire to create and maintain labor relations harmony, the parties agree that they will promptly attempt to adjust all complaints, disputes, controversies or other grievances arising between them involving questions of interpretation or application of the terms and provision of this Agreement, or any other controversy or dispute having occasion to arise between the parties. If differences or disputes of any kind arise between APEA or the employees covered herein and the Employer, APEA or the aggrieved employee or employees, as the case may be, shall use the following procedure as the sole means of settling said difference, dispute or controversy. It is further agreed that the parties covered herein shall be bound by any written decisions, determinations, agreements or settlements which may be effectuated through this grievance-arbitration procedure and this procedure shall be the sole method of settling disputes, differences or controversies.

Agreement, Article 10, at 24, Exh. 1. Step four of the procedure provides, in part:

> Any grievance which involves the application or interpretation of the terms of this Agreement, or is an appeal from demotion or dismissal of a permanent employee, or an appeal from dismissal of a probationary employee holding permanent status in another classification, which is not settled at Step Three, may be submitted to arbitration for settlement. . . . The parties will meet within ten (10) calendar days after receipt of the request for arbitration to strike names. APEA shall contact the State to strike names.

Id. at 27. This language has not changed significantly over the past several collective bargaining agreements. Stipulation, at 1.

4. In November of 1993, Dianne Corso, labor relations manager for the State, told APEA staff member Dennis Geary that the State had "run out of money" to fund arbitrations and that the Labor Relations section of the Division of Personnel, Department of Administration, would not agree to set any arbitration until the next fiscal year, that is, after June 30, 1994. This fact was confirmed in a letter from Division of Personnel Director Kevin Ritchie, dated January 3, 1994. Stipulation, at 1.

5. At the time of the hearing, APEA had eight grievances awaiting arbitration and anticipated others to follow. Some had been awaiting arbitration since June 3, 1993. Five grievances involve financial losses such as constructive discharge and suspensions. Stipulation, at 2.

6. Generally, once an arbitrator is selected by the parties, it takes one to three months to schedule a hearing, depending upon the schedules of the arbitrator and advocates. Stipulation, at 2.

7. The State has not been required by an arbitrator to pay interest on an arbitration award. Stipulation, at 2.

8. The State has confronted the problem of inadequate funding for arbitration over the past several years and State agents have expressed concern that failure to arbitrate could cause unfair labor practice complaints and litigation. Stipulation, at 2. The State has never before failed to arbitrate grievances and it has never before formally notified collective bargaining representatives that it was insisting upon a lengthy delay in setting grievances for arbitration hearings. Stipulation, at 2.

9. The State has not included arbitration ia a "monetary term" in the past when it has sought legislative authorization and appropriation of the monetary terms of a collective bargaining agreement under AS 23.40.215. Stipulation, at 2.

10. APEA filed its complaint that the State committed unfair labor practices under AS 23.40.110(a)(1), (2), (3), and (5) on January 21, 1994.

11. The Agency concluded its investigation and found probable cause to support the complaint. On February 11, 1994, it issued a notice of accusation against the State.

12. On March 15, 1994, APEA filed a petition to enforce its collective bargaining agreement, and the Agency consolidated the petition with the previously filed unfair labor practice charge on March 22, 1994.

13. On March 17, 1994, the State filed a notice of defense, stating that refusal to implement a contract is not an unfair labor practice and requesting a dismissal of the charges or, in the alternative, a full hearing before the Alaska Labor Relations Board. The State also responded to APEA's petition to enforce by stating that inability to agree to an arbitration date before July 1, 1994, did not violate the parties' agreement.

14. On April 5, 1994, APEA moved to amend the unfair labor practice charge to include language that, "The employer has failed to 'bargain in good faith' under this collective bargaining agreement, violating AS 23.40.110(a)(5), by refusing to set arbitration hearings until after June 30, 1994."

15. The parties filed prehearing briefs and exhibits, and on April 7, 1994, the parties filed cross motions for summary judgment and stipulated facts.

16. On April 13, 1994, the Agency heard argument on the stipulated facts and the record closed that same day.

Preliminary Matter

The unopposed motion by APEA to amend its complaint in the unfair labor practice charge filed on April 5, 1994, is hereby granted.

Conclusions of Law

1. The State of Alaska is a public employer under AS 23.40.250(7) and the Alaska Public Employees Association is an employee organization under AS 23.40.250(5). This Agency has jurisdiction under AS 23.40.110 and 23.40.210 to consider these consolidated cases.

2. APEA as the complainant and petitioner in these consolidated cases has the burden to prove each element of its claims by a preponderance of the evidence. 8 AAC 97.350(f).

3. **Unfair labor practice charge.** 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. This Agency found that the State violated the requirement of good faith in AS 23.40.110(a)(5) by refusing to schedule arbitrations and arbitrate during fiscal year 1994 in Alaska State Employees Association/AFSCME Local 52, AFL-CIO

(ASEA) v. State of Alaska, Decision & Order No. 174 (April 19, 1994), appeal pending 3AN-94-4342 CI (Super. Ct. May 18, 1994). That decision controls here and we conclude that the State violated AS 23.40.110(a)(5) when it refused to schedule arbitrations under its collective bargaining agreement with APEA. See also Association of Pennsylvania State College University Faculties v. Commonwealth of Pennsylvania, 373 A.2d 1175, 1178-1179, 95 L.R.R.M.(BNA) 2771, 2773 (Pa. 1977).

5. **Petition to enforce collective bargaining agreement.** AS 23.40.210 provides in part,

> The agreement shall include a grievance procedure which shall have binding arbitration as its final step. Either party to the agreement has a right of action to enforce the agreement by petition to the labor relations agency.

To implement the right of a party to enforce the agreement, the Agency adopted 8 AAC 97.510 and 8 AAC 97.520, which provide procedures for hearing petitions to enforce a collective bargaining agreement.

6. The contract in this case plainly provides for arbitration of grievances. The parties have agreed to "promptly attempt to adjust grievances" and the grievance arbitration procedures in the agreement are the "sole means of settling said difference, dispute or controversy." Agreement, Article 10, at 24. Arbitration is the fourth step of the parties' grievance procedure. It is mandatory for grievances involving interpretation of the agreement, appeals from the dismissal or demotion of a permanent employee, or appeals from the dismissal of a probationary employee holding permanent status in another classification, which is not settled at step three. Id. at 27. See finding of fact no. 3.

7. We find the delay in scheduling arbitrations a refusal to arbitrate and a breach of the obligation set forth in article 10 of the agreement. See Textile Workers v. Lincoln Mills, 353 U.S. 448, 40 L.R.R.M.(BNA) 2113 (1957) (landmark case specifically enforcing an arbitration clause under Section 301 of the Labor Management Relations Act).

8. The State defends against enforcement of the grievance arbitration provisions on a number of grounds. First, it argues that the arbitration provisions of the agreement are not enforceable because they were not referred to the legislature for approval as a monetary term of the collective bargaining agreement under AS 23.40.215 and 23.40.250(4). State, prehearing brief, p. 6. We rejected the argument that legislative approval was required under AS 23.40.215 for an arbitration provision, which is already mandated by AS 23.40.210. Alaska State Employees Association/AFSCME Local 52, AFL-CIO (ASEA) v. State of Alaska, Decision & Order No. 174, at 10-11.

9. The State also argues that the Executive Budget Act would prohibit specific enforcement of the arbitration clause. We also rejected this argument in Alaska State Employees Association/AFSCME Local 52, AFL-CIO (ASEA) v. State of Alaska, Decision & Order No. 174, at 9-10.

10. The State's principal defense against enforcement of the arbitration clause is lack of funds. Even if lack of funds excuses performance of a contract obligation, the evidence in the record does not support the conclusion that the State lacked sufficient resources to fund this expense. See State Prehearing brief, p. 7., n. 7, in which the State says that it has in the past obtained funds from sources other than its budget line for arbitration. Alaska State Employees Association/AFSCME Local 52, AFL-CIO (ASEA) v. State of Alaska, Decision & Order No. 174, at 10.

11. Because no valid defenses prohibit enforcement of the collective bargaining agreement, specific enforcement is required.

ORDER

1. The State committed an unfair labor practice charge against the Alaska Public Employees Association/AFT Local 4900, 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 10 of the State and APEA collective bargaining agreement, and the State is ordered to take affirmative action to comply with its obligations under the agreement, AS 23.40.110(a)(5), and AS 23.40.210; 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. 180 in the matter of Alaska Public Employees Association/AFT Local 4900, AFL-CIO v. State of Alaska, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 25th day of November, 1994.

Victoria D.J. Scates

Administrative Clerk III

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

Joan Wilkerson, APEA

Art Chance, State

Signature