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ALASKA COMMUNITY COLLEGES')
FEDERATION OF TEACHERS,)
LOCAL 2402, AFT, AFL-CIO,)
)
Complainant,)
)
vs.)
)
UNIVERSITY OF ALASKA,)
)
Respondent.)
)
<hr style="border-top: 1px solid black;"/>	
CASE NO. 96-427-ULP	

DECISION AND ORDER NO. 210

Digest:

The employer refused to release union negotiators from work duties as the union requested because the union had not paid for substitutes as required under the parties' agreement. Because release from duty was contingent on union payment for the substitutes, the employer did not commit an unfair labor practice.

DECISION

Statement of the Case

Alaska Community Colleges' Federation of Teachers, Local 2404, AFT, AFL-CIO (ACCFT), on July 10, 1995, filed this unfair labor practice complaint under AS 23.40.110(a)(1) and (5) against the University of Alaska. The Alaska Labor Relations Agency investigated the charge. On April 8, 1996, the Agency found probable cause to support charges under AS 23.40.110(a)(1), (3), and (5) and issued a notice of accusation. On April 23, 1996, the University filed its notice of defense, requesting a hearing and moving to defer the complaint to arbitration. ACCFT opposed the motion to defer on May 3, 1996, and on May 9, 1996, the hearing examiner denied the motion. The complaint was heard on September 12, 1996. At the hearing on September 12, 1996, ACCFT moved to disqualify board member Karen J. Mahurin from participating, and on September 13, 1996, panel members Alfred L. Tamagni, Sr., and Robert A. Doyle granted the motion and assigned member Raymond P. Smith to the case. The record closed on September 12, 1996.

Panel: Chair Alfred L. Tamagni, Sr., participating in person, and board members Robert A. Doyle and Raymond P. Smith, participating after a review of the record.

Appearances: William K. Jermain, Jermain, Dunnagan & Owens, P.C., for complainant Alaska Community Colleges' Federation of Teachers, Local 2404, AFT, AFL-CIO; Thomas P. Owens, Jr., Owens & Turner, P.C., for respondent University of Alaska.

Procedure in this case is governed by the Administrative Procedure Act, AS 44.62.330 -- 44.62.630, AS 23.40.130, and 8 AAC 97.340. Hearing examiner Jan Hart DeYoung presided.

Issues

1. Did the University unilaterally change the release provisions in Articles 1.5 or 9.6 of the parties' collective bargaining agreement and thereby violate AS 23.40.110(a)(1) and (5)?
2. Did the University retaliate against ACCFT or its members for disputing the meaning of the release provisions of the collective bargaining agreement and thereby violate AS 23.40.110(a)(1) and (5)?

Summary of the Evidence

A. Exhibits

ACCFT offered the following exhibits, which were admitted into the record:

1. ACCFT arbitration issue statement;
2. University arbitration issue statement;
3. ACCFT/University collective bargaining agreement (Aug. 1992);
4. Agreement, Art. 1, sec. 1.5 (optional release);
5. Agreement, Art. 4, sec. A (grievance definition and procedure);
6. Agreement, Art. 9.6 (release time);
7. R. McGrath, letter to W. Kauffman (June 23, 1992) (exercising release option);
8. S. DeSoer, memorandum to R. McGrath (April 7, 1993) (optional release assessment);
9. R. McGrath, letter to S. DeSoer (April 9, 1993) (ACCFT assessment);
10. S. DeSoer, memorandum to R. McGrath (May 28, 1993);
11. R. McGrath, letter to S. DeSoer (June 3, 1993);
12. University grievance (June 8, 1995);
13. Notes (R. McGrath, June 9);
14. R. McGrath, letter to S. DeSoer (June 24, 1993) (and copy of check for \$5,625);
15. R. McGrath, letter to S. DeSoer (June 25, 1993) (exercising release option);
16. S. DeSoer, memorandum to R. McGrath (June 22, 1994) (assessment);
17. R. McGrath, letter to S. DeSoer (June 27, 1994) (and copy of check for \$5,625);
18. S. DeSoer, memorandum to R. McGrath (July 7, 1994) (assessment);
19. R. McGrath, letter to S. DeSoer (July 8, 1994) (exercising release option);
20. R. McGrath, memorandum to S. DeSoer (Aug. 9, 1994) (designating 5 full time negotiators);
21. University, Management Report (April 1995);
22. S. DeSoer, memorandum to R. McGrath (April 13, 1995);

23. S. DeSoer, memorandum to R. McGrath (May 4, 1995) (assessment for 1994-1995 academic year of \$83,839);
24. R. McGrath, letter to S. DeSoer (May 31, 1995) (copy of check for \$3,795.06);
25. S. DeSoer, memorandum to R. McGrath (June 7, 1995);
26. S. DeSoer, letter to J. Stredicke (American Arbitration Association) (May 31, 1995);
27. S. DeSoer, memorandum to Chancellor Gorsuch (June 9, 1995);
28. K. Hebert, letter to S. DeSoer & R. McGrath (June 14, 1995);
29. S. DeSoer, memorandum to R. McGrath (June 21, 1995);
30. R. McGrath, letter to K. Hebert (June 25, 1995);
31. R. McGrath, letter to S. DeSoer (June 26, 1995);
32. Notes (June 26, 1995);
33. K. Hebert, letter to S. DeSoer & R. McGrath (June 28, 1995);
34. Chancellor Gorsuch, memorandum to S. Norrell (June 15, 1995);
35. S. Norrell, memorandum to W. Miller (June 26, 1995);
36. W. Miller, memorandum to A. Kuhner & B. Spurr (June 28, 1995);
37. W. Miller, memorandum to Chancellor Gorsuch (June 28, 1995);
38. G. Park, memorandum to L. Kelley (July 6, 1995);
39. B. Spurr, memorandum to R. Crawford, B. Harville, J. Petraitis (June 26, 1995);
40. A. Kuhner, memorandum to R. Crawford (June 29, 1995);
41. S. DeSoer, memorandum to R. McGrath (June 26, 1995);
42. R. McGrath, letter to S. DeSoer (July 7, 1995) (designating officers);
43. W. Jermain, letter to J. DeYoung (July 10, 1995);
44. ACCFT, charge against employer (July 10, 1995);
45. W. Jermain, letter to J. DeYoung (July 12, 1995);
46. S. DeSoer, memorandum to W. Miller & G. Park (July 12, 1995);
47. S. DeSoer, letter to K. Hebert (July 14, 1995);
48. K. Hebert, letter to S. DeSoer & R. McGrath (July 17, 1995);
49. W. Jermain, letter to J. DeYoung (July 18, 1995);
50. R. McGrath, letter to S. DeSoer (Sept. 15, 1995) (tendering payment of \$8,000 for the cost of substitutes for the 1995 negotiating team);

51. S. DeSoer & R. McGrath, letter of agreement (Sept. 27, 1995);
52. R. McGrath, letter to S. DeSoer (Nov. 17, 1995);
53. J. Stredicke, letter to S. DeSoer & R. McGrath (Dec. 1, 1995);
54. S. DeSoer, letter to J. Stredicke (Dec. 4, 1995);
55. S. DeSoer, memorandum to R. McGrath (Jan. 23, 1996);
56. S. DeSoer, memorandum to Chancellor Gorsuch (Jan. 22, 1996);
57. R. McGrath, letter to S. DeSoer (Jan. 25, 1996);
58. R. McGrath, letter to S. DeSoer (Jan. 31, 1996);
59. S. DeSoer, memorandum to R. McGrath (Feb. 2, 1996);
60. S. DeSoer, letter to Myers (FMCS) (Mar. 8, 1996);
61. R. McGrath, letter to S. DeSoer (Mar. 14, 1996);
62. Issue statement;
63. Chancellor Gorsuch, memorandum to S. DeSoer & R. McGrath (May 21, 1996) (level 2 grievance decision);
64. S. DeSoer, memorandum to R. McGrath (May 24, 1996);
65. S. DeSoer, memorandum to R. McGrath (June 3, 1996);
66. S. DeSoer, memorandum to R. McGrath (May 24, 1996);
67. R. McGrath, letter to Chancellor Gorsuch (June 4, 1996);
68. Post-arbitration brief of ACCFT (July 8, 1996);
69. University of Alaska's Arbitration (July 8, 1996);
70. Errata to Post-arbitration brief of ACCFT (July 11, 1996);
71. Supplemental Post-arbitration brief of ACCFT (August 7, 1996);
72. T. Owens, memorandum to C. LaCugna (July 25, 1996);
73. In re. University of Alaska and Alaska Community Colleges' Federation of Teachers, Local 2404, AFT, AFL-CIO, Opinion and Award (Aug. 21, 1996) (LaCugna);
74. K. Geariety, letter to R. McGrath (Aug. 22, 1996);
75. J. Johnsen, letter to R. McGrath (Aug. 23, 1996); and
76. W. Jermain, letter to J. Ward (Aug. 25, 1995).

The University agreed to the admission of the exhibits offered by ACCFT and did not offer any additional exhibits.

B. Testimony

The ACCFT presented the testimony of Ralph McGrath, President of ACCFT.

The University presented the testimony of Stevan R. DeSoer, former Assistant Vice-President for Employee Relations.

C. Agency case file. 8 AAC 97.410.

Findings of Fact

The panel, by a preponderance of the evidence, finds the facts as follows:

1. The Alaska Community Colleges' Federation of Teachers, Local 2404, AFT, AFL-CIO (ACCFT), is the certified bargaining representative of a unit of instructional staff at the University of Alaska.
2. The ACCFT and the University are in the process of negotiating a successor agreement to the May 8, 1992 -- June 30, 1994, collective bargaining agreement, which still governs their relationship. Exh. 3.
3. Article 1.5.B. of the agreement addresses the release of union negotiators from their work duties at the option of ACCFT, Exh. 4 (emphasis added):

Faculty Members who serve as negotiators shall be excused without prejudice from class duties as necessary during the course of negotiations. A University approved substitute shall be provided by the Faculty Member or the Union. Faculty Members serving as negotiators may be released from their entire professional assignment during negotiations, provided that the Union pays the cost of University approved substitutions.

4. Article 9.6 of the agreement contains both optional and mandatory release time, Exh. 6 (emphasis added):

A. The Union President shall receive a release of six (6) credit hours or equivalent. The Union President's employment contract may at the Union's option be reduced by an additional six (6) credit hours or equivalent at the Union's expense without prejudice.

B. The Union Treasurer's employment contract may at the Union's option be reduced by three (3) credit hours or equivalent without prejudice.

D. The Statewide Grievance Chairperson shall receive a release of six (6) credit hours or equivalent without prejudice.¹

E. The Union shall receive five (5) three (3) credit hour or equivalent releases for use in conducting business under Article 11.

F. The Union shall notify the University at least sixty (60) days prior to the beginning of a semester as to the Faculty Members who are to receive releases.

G. Reductions in appointments made at the Union's option under this Article shall impose upon the Union the obligation to pay the cost of University approved substitutes for the optional time so reduced.

5. Under the provisions of the parties' 1992-1994 agreement, ACCFT President Ralph McGrath advised the University in writing in June of 1992 of the names of ACCFT's officials and its exercise of optional release time. Exh. 7 (optional for officers under 9.6.A & B only).

6. In April of 1993 the University assessed \$16,336 for the "total replacement cost" of the substitutes required to cover the optional release time for the 1992-1993 academic year. Exh. 8.

7. McGrath immediately disputed the amount, taking the position that the agreement required ACCFT to pay \$25.00 an hour for each hour of class time, for a total of \$5625 in 1992-1993. Exh. 9.

8. In June of 1994 and 1995, ACCFT continued to request optional release time. Exh. 15 (1993) (optional for officers only); Exh. 19 (1994) (optional release time for officers in 9.6.A & B and for negotiators under 1.5.B). ACCFT continued to tender payment for the costs it computed to be due. Exhs. 14 & 17. The University continued to bill ACCFT at the rate it assessed. Exhs. 16 & 18.
9. On June 8, 1995, the University filed a grievance at step 3 of the grievance procedure for a determination of the requirements of the optional release provisions of the agreement and to collect the amount owed by ACCFT. Exh. 12.
10. On June 9, 1995, DeSoer announced that the University would not release faculty members under the optional release provisions of Articles 1.5.B. and 9.6 or under the mandatory release provisions of Article 9.6. Exh. 27.
11. On July 12, 1995, DeSoer revised his decision on the release of faculty members and advised that the University would honor the mandatory releases under Article 9.6 of the agreement and that the four named officers should each receive a six-credit reduction in workload and the fifth should receive a three-credit reduction. Exh. 46. He further advised that the University would continue to deny the optional releases unless ACCFT paid its arrearage. Id.
12. On September 15, 1995, McGrath requested in writing that the union's negotiating team be released from their duty assignment and tendered payment of \$8,000, as the union computed the cost of substitutes. Exh. 50. McGrath stated the negotiators felt the impact of the denial of release time. One negotiator, for example, had a full-time workload in Bethel.
13. The parties agreed on September 27, 1995, to handle the University's grievance by proceeding to Chancellor Gorsuch at level two. Exh. 51.
14. Chancellor Gorsuch heard the grievance on April 25, 1996, and issued his decision on May 21, 1996. He concluded that the University's claims for payment for the 1992-1993 and 1993-1994 contract years were untimely; that the claim for payment for 1994-1995 was timely; and that the agreement's procedures for union initiated grievances were reasonable for a University initiated grievance. On the substantive issues, the Chancellor concluded that "costs" in the agreement meant full reimbursement of the University's actual replacement costs but found that the University did not properly credit ACCFT for mandatory releases under 9.6.A and 9.6.B. Exh. 63.
15. Both parties appealed Chancellor Gorsuch's decision. Exhs. 65 & 67.
16. The grievance proceeded to arbitration. Arbitrator Charles LaCugna issued his decision, dated August 21, 1996. He found that the University timely filed its grievance and that the contract language to pay "the cost of University approved substitutes" in Articles 1.5.B and 9.6.G meant the union was required to pay the actual cost of the substitute replacing the time released to the union. Exh. 73, at 33. The arbitrator awarded the University \$66,569.94, and ordered ACCFT to pay the costs of arbitration. Id., at 35 & 36.
17. The parties negotiated only one time while the dispute on release time was pending. The negotiating session was an intensive, one week session. The University released the negotiators from their work duties during the session, and it absorbed the expense.
18. After the arbitrator's decision, the University advised ACCFT that it would release the employees under the optional release time provisions in the agreement.
19. Because ACCFT cannot control the costs of its optional release time, ACCFT has declined to exercise any optional release time under the agreement for the 1996-1997 academic year.

Discussion

I. Did the University unilaterally change the release provisions in Articles 1.5 or 9.6 of the parties' collective bargaining agreement and thereby violate AS 23.40.110(a)(1) and (5)?

This unfair labor practice charge began with a dispute over the meaning of the optional release provision of the parties' agreement. Article 1.5.B. of the agreement allows the union to obtain a release from professional duties of faculty members who serve as negotiators during bargaining. Exh. 4. Article 9.6 provides for release of union officials for union business and includes both mandatory and optional release provisions. Exh. 6.

The parties disputed the Union's repayment obligation for the optional release time. The University maintained that the agreement required ACCFT to reimburse the University's actual costs, and the ACCFT argued that the agreement required it to pay the hourly rate of \$25.00 for each hour of classroom time requiring a substitute. The dispute proceeded to arbitration, and the arbitrator determined that the contract language required ACCFT to pay the University's actual expenses. The arbitrator's decision on this issue controls. The parties have accepted this decision, and the question how the cost is computed is not before the Agency.

ACCFT's complaint in this case concerns the University's handling of the dispute over the meaning of the repayment language. In June of 1995, while the dispute on ACCFT's payment for previous years was pending, the University refused to release ACCFT's negotiators from their teaching duties. The University took the position that, because ACCFT was not paying the cost of the substitutes, it was not performing its part of the bargain under Articles 1.5.B and 9.6.B and the University was not required to release the faculty members from their professional assignments. ACCFT argues that such "self-help" is a unilateral change to the contract term and an unfair labor practice. ACCFT argues that the University was required to comply with Articles 1.5.B and 9.6.A and B while the dispute was pending with the arbitrator.

The University, on the other hand, interprets the contract language differently. It argues that its obligation to release the faculty members is conditional on the payment of their costs. If the ACCFT does not perform the condition, *i.e.*, payment of the costs of the substitute, the University is not obligated to release the faculty member. If the University's interpretation of the language is correct, its refusal to release the negotiators was not a departure from or a change to the language in the agreement.

An employer will violate AS 23.40.110(a)(5) if the employer changes terms in a collective bargaining agreement addressing mandatory subjects of bargaining without first allowing an opportunity for the union to bargain. University of Alaska Classified Employees Ass'n v. University of Alaska, Decision & Order No. 169 (Dec. 28, 1993). The issue of paid time for employees to conduct union business is a mandatory subject of bargaining, and the breach of a contract term addressing union business leave is a unilateral change of that term and an unfair labor practice. N.L.R.B. v. BASF Wyandotte Corp., 798 F.2d 849, 123 L.R.R.M.(BNA) 2320 (5th Cir. 1986).

However, by failing to perform a contingent obligation, an employer does not change the agreement if the contingency has not occurred. There is no obligation unless the contingency first occurs. N.L.R.B. v. St. Louis Cordage Mills, 424 F.2d 976, 74 L.R.R.M.(BNA) 2018, 2020 (8th Cir. 1970); see Kennedy Associates, Inc. v. Fischer, 667 P.2d 174, 180 (Alaska 1983) (contingent on satisfaction of buyer). As Arbitrator LaCugna construed the parties' agreement, ACCFT had not paid the University the amount due under the agreement. Thus, the key question is whether the University's obligation to release faculty members was conditional on this payment.

With these principles in mind, we examine the two contract terms governing release of faculty members. The language in the agreement governing negotiators in Article 1.5.B supports the University's argument. The language is conditional. It states that the University must perform "provided that" the ACCFT pays its costs. The obligation is made contingent on the union's payment.

In contrast, the language in Article 9.6.G, which governs optional release for the union president and treasurer is stated as mutual conditions. None of the words that commonly denote a contingency appear in this section, such as "if," "however," "provided that," or "upon the condition that." Article 9.6.G "imposes upon the Union the obligation." We conclude Article 9.6.G does not create a contingency that must be performed before the University's performance, *i.e.*, release of the ACCFT officer, is due.

We conclude that the University was not obligated to release the negotiators, but would have been required to release the president and the treasurer under Article 9.6.A and B upon notification by ACCFT that it was exercising that option.

The University's refusal in 1995 to grant the release of any faculty members from work duties was announced before the union made any request. The absence of a request, however, is significant. The ACCFT did provide the information needed for the mandatory releases, Exh. 42, and did attempt to exercise its option to release its negotiators from their duties. It tendered payment for the negotiators' substitutes in advance, which it computed under its method, however, rather than under the University's. Exh. 50. The principal goal of the union appears to have been the release of its negotiating team. Exh. 76. It did not request optional release time for the president or treasurer under Article 9.6.A or B. Because ACCFT did not offer or arrange to pay the actual costs of the substitutes for its negotiators under Article 1.5.B, the University was not required to provide for their release from their duty assignments. Moreover, because ACCFT did not exercise its option for additional release time for the president and for release time for the treasurer under Article 9.6.A and B, the University was not required to provide it.

We find that the University neither breached its obligations nor unilaterally changed the agreement in violation of AS 23.40.110(a)(5) and (a)(1).

II. Did the University retaliate against ACCFT or its members for disputing the meaning of the release provisions of the collective bargaining agreement and thereby violate AS 23.40.110(a)(3)?

ACCFT also maintains that the University refused to provide optional release time as a reprisal against ACCFT for the position it took in the grievance, citing 1 Patrick Hardin, The Developing Labor Law 1031 & n. 127 (3d ed. 1992). However, the evidence does not support a causal relationship between the grievance and the University's refusal to release the negotiators from their duties. The two events occurred contemporaneously. The University filed its grievance one day before it announced it would not be releasing the faculty members. The University appears to be making good on its threat to pursue alternate means of collection rather than retaliating against ACCFT for nonpayment. More important, however, is the absence of any discrimination. The University has not singled any particular employees out for different treatment to discourage or encourage union membership. There is no violation of AS 23.40.110(a)(3).

Conclusions of Law

1. The University of Alaska is a public employer under AS 23.40.250(7) and the Alaska Community Colleges' Federation of Teachers, Local 2404, AFT, AFL-CIO is a labor organization under AS 23.40.250(5). This Agency has jurisdiction under AS 23.40.110 to consider this complaint.
2. Paid work time to perform union duties is a mandatory subject of bargaining.
3. The University did not unilaterally change the terms of the parties' collective bargaining agreement and did not violate AS 23.40.110(a)(5) and AS 23.40.110(a)(1).
4. The University did not retaliate against ACCFT for a position it took under the agreement or in a grievance or otherwise discriminate against ACCFT and did not violate AS 23.40.110(a)(3).

ORDER

1. Because the University of Alaska did not commit unfair labor practices as alleged by ACCFT in the complaint in this matter, the complaint is DISMISSED; and
2. The University 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, Chair

Robert A. Doyle, Board Member

Raymond P. Smith, Board Member

APPEAL PROCEDURES

An Agency decision and order may be appealed through proceedings in superior court 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 ALASKA COMMUNITY COLLEGES' FEDERATION OF TEACHERS LOCAL 2402, AFT, AFL-CIO v. UNIVERSITY OF ALASKA, Case No. 96-427-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 7th day of November, 1996.

Victoria Scates

Administrative Clerk III

This is to certify that on the 7th day of November, 1996, a true and correct copy of the foregoing was mailed, postage prepaid to

William K. Jermain, ACCFT

Thomas P. Owens, Jr., University

Signature

1Article 9.6 does not contain a subsection C. Exh. 3, at 10.