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ALASKA STATE EMPLOYEES )  
ASSOCIATION/AFSCME LOCAL 52, )  
AFL-CIO, (T. METLICKA) )  
 )  
PETITIONER, )  
 )  
 )  
STATE OF ALASKA, )  
 )  
RESPONDENT. )

\_\_\_\_\_ )  
CASE NO. 98-763-CBA )

**DECISION AND ORDER NO. 235**

Digest: The Agency will not exercise its discretion to enforce an arbitration clause when the petitioner is seeking to arbitrate an issue that is clearly not arbitrable.

**DECISION**

**Statement of the Case**

On July 1, 1997, the Alaska State Employees Association/AFSCME Local 52, AFL-CIO the "Union," filed a Petition to Enforce Contract with the Alaska Labor Relations Agency. In its petition, the Union alleged that the State of Alaska, the "State," refused to arbitrate a grievance it filed on behalf of Thomas Metlicka, one of the members of the General Government Unit, the "bargaining unit." The Union asks the Agency to order the State to proceed with the arbitration process provided by Article 16 of the collective bargaining agreement. The Union also contends that the State violated the exclusive representation provision of Article 1.03 of the collective bargaining agreement.

The State concedes that it refused to arbitrate but argues that the matter grieved by the Union is not arbitrable. The State asks the Agency to dismiss the Union's petition and order the Union to complete the complaint process provided by Article 15 of the collective bargaining agreement.

**Panel:** Heard on the written record before the Alaska Labor Relations Board, Chairman Alfred L. Tamagni, Sr., and members Robert A. Doyle and Karen J. Mahurin with Hearing Examiner Mark A. Ertischek. The record closed on December 26, 1997.

**Appearances:** Donn Liston, business agent, for petitioner Alaska State Employees Association, AFSCME Local 52, AFL-CIO, and Kent Durand, labor relations specialist, for respondent State of Alaska.

**Issues**

1. Is the dispute in this case appropriate for referral to the parties' contractual grievance procedure?

2. Did the State violate the Exclusive Representation Clause of the collective bargaining agreement?

### Summary of the Evidence

At a pre-hearing conference held before Hearing Examiner Jan Hart DeYoung<sup>1</sup>, the parties stipulated that the Agency would decide the case based on the written record. The written record consists of the Agency case file including the following items filed by the parties:

0. The Petition To Enforce Contract filed on July 21, 1997;
1. A letter from Attorney Paul Dillon to Division Director Beverly Reaume dated March 19, 1997;
2. A letter from Commissioner Boyer to Attorney Dillon dated March 25, 1997;
3. The Respondent Response to Petition to Enforce Contract dated August 5, 1997;
4. The Respondent Amended Response to Petition to Enforce Contract dated September 7, 1997;
5. An Opinion and Award of Arbitrator William H. Dorsey dated May 10, 1996, in the Arbitration between *Public Safety Employees Association and the Department of Public Safety*, State Case 94-A-249, PSEA Grievance 95-006;
6. The Petitioner Response to Respondent Amended Response to Petition to Enforce Contract dated October 10, 1997;
7. A letter from Business Agent Donn Liston to Hearing Examiner DeYoung dated October 16, 1997;
8. The Respondent's Response to Prehearing Order and Notice of Hearing on Written Record dated December 19, 1997, that was filed with the following four exhibits;
9. State Exhibit 1, a memorandum from State Accountant Thomas to Division Director Slagle dated August 27, 1996;
10. State Exhibit 2, a letter from Commissioner Perkins to Senator Duncan dated December 4, 1996;
11. State Exhibit 3, a letter from Division Director Slagle to T. Metlicka dated December 11, 1996;
12. State Exhibit 4, a memorandum from Business Agent Dietrich to All Business Agents dated August 1, 1995;
13. The Petitioner Response to Respondent's Delayed Response to Petitioner's Response to Respondent's Amended Response to Petition to Enforce Contract; and
14. In addition, the Agency will take notice of the Bargaining Agreement between State of Alaska and the Alaska State Employees Association AFSCME Local 52, AFL-CIO covering General Government Unit Employees effective July 1, 1996, the "Collective Bargaining Agreement," (filed with the Agency as required by 8AAC 97.500).

### Findings of Fact

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

1. The State of Alaska, Department of Transportation and Public Facilities, employed Thomas Metlicka, a member of the General Government Unit represented by the Union. The Union is the certified bargaining representative of the general government unit of State of Alaska employees. Items 10, 11, 12, 13 and 15.
2. Between 1993 and 1995 the State assigned Metlicka to work on a project in Sitka, while his home and his duty station remained in Juneau, and paid him per diem during the assignment. Items 10, 11, 12 and 13.
3. On December 11, 1996, Division Director Slagle notified Metlicka that the State of Alaska, Department of Administration, would issue amended W-2's that would include per diem paid during 1993, 1994, and 1995 as income. Item 12.
4. Division Director Slagle explained to Metlicka that the Department of Administration would take that action because it had determined that changes in Internal Revenue Service regulations, regarding the subject of "tax homes," required the State to treat certain per diem payments as taxable compensation. Item 12.
5. Sometime thereafter, Metlicka complained about the Department's action pursuant to Article 15.01 of the collective bargaining agreement. Item 2.

6. On March 17, 1997, Metlicka's attorney notified the State that Metlicka intended to convert his complaint to a grievance and proceed pursuant to step 4 of the grievance procedure provided by Article 16 of the collective bargaining agreement. Item 2.
7. On March 25, 1997, the State informed Metlicka's counsel that only the Union could invoke the grievance procedure because the Union was the exclusive representative of the bargaining unit's members. Item 3.
8. Subsequently, the Union notified the State that it desired to convert Metlicka's complaint to an Article 16 grievance, as permitted in Article 15.03 of the Collective Bargaining Agreement. Item 7, p. 2.
9. On July 17, 1997, Labor Relations Specialist Millhorn informed the Union that the State declined to start the collective bargaining agreement's arbitration procedures by striking for arbitrators. Item 5, p. 2.
10. On July 18, 1997, the Union began this administrative proceeding by filing its Petition to Enforce Contract. Item 1.

### **Conclusions of Law**

1. The State is an employer subject to the Public Employment Relations Act, "PERA," AS 23.40.070 - 260.
2. The Union is the exclusive representative of the members of the bargaining unit of which Metlicka is a member and is an employee organization under AS 23.40.250(5).
3. Alaska's Public Employment Relations Act, AS 23.40.070 et seq., guarantees the right of public employees to organize labor organizations and to bargain collectively with public employers. AS 23.40.210 says that every collective bargaining agreement must "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."
4. Pursuant to AS 23.40.210, the Alaska Labor Relations Agency has jurisdiction to determine the Union's petition to enforce a provision in the collective bargaining agreement between the Union and the State.
5. As petitioner, the Union has the burden of proving its case by a preponderance of the evidence. 8 AAC 97.350(f).
6. AS 23.40.210 created a legislative policy in favor of settling disputes regarding collective bargaining agreements through arbitration process. However, "AS 23.40.210 does not require exhaustion of contractual grievance or arbitration procedures in every case, but instead vests the Agency with a measure of discretion to determine whether to decline jurisdiction." *Public Safety Employees Ass'n v. State of Alaska*, 799 P.2d 315, 324 (Alaska 1990). In particular, the Agency is not required to order the arbitration of claims that are not arbitrable.
7. A labor arbitrator is responsible for interpreting and applying the terms of a collective bargaining agreement. Article 16.01.A of the collective bargaining agreement between the parties to this proceeding defines a grievance as "any controversy or dispute involving the application or interpretation of the terms of this agreement." Item 15, p. 29.
8. The petitioner in this case did not submit a copy of the grievance it is seeking to arbitrate or cite the contract provisions it wants the arbitrator to interpret or apply. On its face, the petitioners' claim would require an arbitrator to determine whether the State properly interpreted the Internal Revenue Regulations regarding the tax treatment of certain expense reimbursement. Irrespective of how an arbitrator interprets the relevant regulations, the employee can only resolve his tax dispute with the Internal Revenue Service, not the State. Since the petitioner is not seeking to have an arbitrator interpret or apply a provision of its collective bargaining agreement, the issue it raises is clearly not arbitrable.
9. Moreover, neither the Agency nor an arbitrator can resolve the tax law issues the union wants to grieve. In *Alaska Public Employees Ass'n v. Alaska State Housing Authority*, the Agency considered an issue similar to the issue at the heart of this case. In that case, the parties settled a grievance but failed to address the issue of tax withholding. The Union requested the Agency to determine whether the back pay called for in a grievance settlement was subject to withholding taxes. The Agency said "Determining withholding would take this Agency beyond its expertise in labor

relations and into questions of tax law that it is ill-equipped to handle." *Alaska Public Employees Ass'n v. Alaska State Housing Authority*, Decision & Order No. 133, at 9 (June 19, 1991).

10. The Agency deferred the decision in *Alaska Public Employees Ass'n v. Alaska State Housing Authority* to arbitration, so an arbitrator could decide the intentions of the parties who negotiated the settlement. The decision is distinguishable from the case at hand. In *Alaska Public Employees Ass'n v. Alaska State Housing Authority*, the arbitrator only had to address the parties' agreement. The arbitrator could not conclusively resolve whether the settlement was taxable income or whether the Internal Revenue Service would assess penalties for failing to withhold taxes from the proceeds.

11. When Metlicka sought to invoke the grievance provision provided by Article 16 of the Collective Bargaining Agreement, the State informed Metlicka's attorney that only the union could pursue Metlicka's grievance. The State asserted that the union was the exclusive representative of the bargaining unit. Thus, the State did not breach the terms of the Exclusive Representation clause of the Collective Bargaining Agreement.

### **ORDER**

1. The Alaska State Employees Association's petition to enforce the collective bargaining agreement is DENIED.
2. 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 AAC97.460.

ALASKA LABOR RELATIONS AGENCY

Alfred L. Tamagni Sr., Chair

Robert A. Doyle, Board Member

Karen J. Mahurin, Board Member

<sup>1</sup> Jan Hart DeYoung's employment with the Agency ended on November 14, 1997.