

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

PUBLIC SAFETY EMPLOYEES)
ASSOCIATION,)

)
PETITIONER,)

)
vs.)

)
STATE OF ALASKA,)

)
RESPONDENT.)

_____)
Case No. 00-1029-CBA

DECISION AND ORDER NO. 255

Digest: 1. Legal indemnification is a mandatory subject of bargaining.

2. AS 23.40.210 requires that all collective bargaining agreements include a grievance procedure that culminates in binding arbitration. AS 23.40.210 does not require that all mandatory subjects of bargaining must be subject to the parties' grievance-arbitration procedure.

Appearances: James Gasper, attorney for the Public Safety Employees Association; Kent Durand, labor relations analyst for the State of Alaska.

Panel: Robert Doyle, Karen Mahurin, and Aaron Isaacs, Jr.

DECISION

Statement of the Case

The Public Safety Employees Association (PSEA) filed a petition to enforce its collective bargaining agreement (CBA) with the State of Alaska (State). PSEA asks this Agency to find that legal indemnification is a mandatory subject of bargaining, that under AS 23.40.210, all mandatory subjects of bargaining must be subject to the grievance arbitration process in the parties' collective bargaining agreement, and that Article 36 of the parties' collective bargaining agreement is therefore illegal insofar as it excludes legal indemnification from the grievance-arbitration process. The State disputes PSEA's assertion. It argues, among other things, that the parties agreed in negotiations to exclude legal indemnification from the grievance-arbitration process, and AS 23.40.210 does not prohibit this exclusion.

The board panel heard this dispute on August 1, 2000. Hearing Examiner Mark Torgerson presided. This matter was decided based on the evidence submitted and the testimony of witnesses at the hearing. The record initially closed on August 1, 2000. However, before the panel could complete deliberations, Acting Chair Blair Marcotte resigned from the agency Board. In subsequent deliberations, the remaining members Robert Doyle and Karen Mahurin deadlocked. The record was reopened to notify the parties that Acting Chair Aaron Isaacs, Jr. would join the panel and assist in resolution of the petition. The parties were given the opportunity to object to Mr. Isaacs sitting on the panel, under AS 44.62.450(c). (April 20, 2001, letter). The record then closed again on May 7, 2001.

Issues

1. Is legal indemnification, under Article 36 of the parties' collective bargaining agreement, a mandatory subject of bargaining?
2. Does AS 23.40.210 require that all mandatory subjects of bargaining must be subject to the grievance-arbitration procedure in the parties' collective bargaining agreement, or they are otherwise illegal? Alternatively, can a party waive the right, during contract negotiations, to have the grievance-arbitration procedure applicable to a mandatory subject?

Findings of Fact

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

1. The Public Safety Employees Association (PSEA) is recognized as the exclusive bargaining representative for the Correctional Officers bargaining unit. (State/ASEA Collective Bargaining Agreement (1996-1999), Joint Exh. 3, at 1.)
2. PSEA and the State of Alaska (State) entered into a collective bargaining agreement for the period July 1, 1996, to June 30, 1999. *Id.* at 68.
3. Article 16.01(A) of the agreement contains the parties' grievance procedure, which provides for arbitration as its final step. It states as follows:

A grievance shall be defined as any controversy or dispute involving the application or interpretation of the terms of this Agreement arising between the Union or an employee or employees and the Employer. The parties agree that they will promptly attempt to adjust all grievances arising between them. The Union or the aggrieved employee or employees shall use the following procedure as the sole means of settling grievances, except where alternative dispute resolution and appeal procedures have otherwise been agreed to in this collective bargaining agreement, in which case the applicable alternative procedure shall be the exclusive appeal process available to the employee or employees.

Id. at 29.

4. Article 36 of the agreement addresses legal indemnification, that is, those situations when the State decides if it will defend a bargaining unit member sued in civil court. It states at Article 36(A):

If the employer determines that a bargaining unit member did not engage in conduct beyond the scope of the bargaining unit member's authority or which constituted willful misconduct or gross negligence in the performance of the bargaining unit member's duties, upon request the employer agrees to provide for the legal defense of the bargaining unit member in any civil legal action brought against the bargaining unit member as a result of the performance of the bargaining unit member's duties.

Id. at 70.

5. Article 36(B) requires the employee to make a timely request that the State provide legal services. If the request is

untimely, the State is relieved of any obligation under the Article. Id.

6. Article 36(C) gives the State the right to determine "which attorney shall represent the bargaining unit member." Id.

7. Article 36(D) provides that if the State concludes the employee did not act beyond the scope of the employee's authority or in a manner that constituted willful misconduct or gross negligence, the State agrees to pay the employee's usual rate of pay plus per diem necessary to prepare the case for negotiation or trial. The State also agrees to pay any judgment "rendered against the (employee) if the State has provided legal services" on behalf of the employee, "pursuant to this Article." Id.

8. Article 36(E) gives the State discretion to defend the employee under the article, "with reservation." If the State does defend the employee, and a court finds that the employee acted beyond the scope of his or her authority or with willful misconduct or gross negligence, "then the [State] has no liability whatsoever to the bargaining unit member or any other person as a result of such determination." Article 36(E) adds that when this occurs, the employee is responsible for the associated judgment, costs and fees. Id.

9. Article 36(F) addresses applicability of the grievance-arbitration process contained in the parties' agreement. It states in relevant part: "Consistent with past practice, decisions of the Employer pursuant to this Article shall not be subject to the grievance-arbitration procedures." Id. at 71.

10. Two correctional officers, members of the PSEA bargaining unit, were disciplined for incidents involving prison inmates. In separate civil court actions, each was sued by the inmates for damages allegedly resulting from the work incidents.

11. The State investigated the allegations to determine whether to represent the officers in civil court, pursuant to contract Article 36. In letters to the two correctional officers, the Attorney General's office notified them that the State would not provide legal representation or otherwise defend them in civil court. It concluded from its investigation that the officers had committed willful misconduct or gross negligence in performing their work duties related to the incidents. (PSEA Exh. 1, attachments 6 and 11.)

12. PSEA filed grievances on the officers' behalf, requesting in part that the State indemnify the officers in the lawsuits. (PSEA Exh. 1, attachment 7.) The State returned the grievances to PSEA without accepting them. Citing to Article 36F of the parties' agreement, the State contended that the issue of legal indemnification (whether the State would represent the employees in the lawsuit) was not subject to the parties' grievance/arbitration process. The State notified PSEA that, based on its investigation under Article 36, it would not indemnify these officers. (PSEA Exh. 1, attachment 13.)

13. PSEA filed a petition to enforce the contract. (January 14, 2000, petition.) According to the petition, the parties' contract provides for final and binding arbitration of all contractual disputes. The petition further asserts: "The contract also expressly prohibits the filing of grievances where the issue of indemnifying state employees is concerned. Art 36F. Under Alaska law, no mandatory subject may be excluded from the grievance arbitration mandated by AS 23.40.210(a). . . ." PSEA requested that the Agency enforce the grievance arbitration clause and issue a declaration "that the contract language prohibiting grievance review of the State's determination as to indemnification is invalid, and should be stricken from the contract as illegal language contrary to AS 23.40.210(a)."

14. In its response to the petition, the State contends that "[a]s a matter of Public Policy, the cost and initiation of litigation is exclusively within the control of the Office of the Attorney General (AS 23.40.250(9) and AS 44.23.020) and therefore is not subject to control and review by a third party." (State's March 10, 2000, response.) The State's response also asserts that employee indemnification is a permissive subject of bargaining and may therefore be excluded from the grievance-arbitration process. Alternatively, the State argues that even if employee indemnification is a mandatory subject of bargaining, the parties may agree, as they did in their collective bargaining agreement, "to exclude employee indemnification provisions from the grievance/arbitration procedure."

ARGUMENTS

In its Prehearing Statement, PSEA argues that "decisional law holds that mandatory subjects of bargaining cannot be excluded from the grievance procedure by contract waiver." (PSEA prehearing statement at 1.) PSEA contends that in this case, the State violated the parties' collective bargaining agreement "by refusing to process the grievances . . . over the State's refusal to indemnify those Correctional Officers in lawsuits brought by inmates" PSEA concludes that "[c]ontract language precluding grievances of indemnification decisions is therefore illegal, void under Alaska law, and not binding on the parties." (Id. at 1-2.)

In its hearing brief, PSEA contends that 1) PERA (23.40.210) mandates that collective bargaining agreements have a grievance procedure that culminates in final and binding arbitration; 2) *Hemmen v. State*, 710 P.2d 1001 (Alaska 1985), held that a collective bargaining agreement cannot waive the right to grieve to arbitration any mandatory subject of bargaining, "[t]hus, to the extent Article 36F excludes legal indemnification determinations of the State from grievance arbitration, it is void;" and 3) legal indemnification in Article 36F is a mandatory subject of bargaining (PSEA brief at 5.)

PSEA argues that indemnification is a "mandatorily negotiable" subject of bargaining. PSEA acknowledges that "[r]efusal to indemnify is clearly within management's prerogative," but then argues that "it is not . . . an unfettered discretionary prerogative." PSEA adds: "And because such discretion is not absolutely vested in the Attorney General's authority, it is mandatorily negotiable, [and] PSEA urges the Agency to so find." (PSEA brief at 14.) PSEA contends that, implied in *Hemmen* is the "rule of law that all mandatory subjects may be grieved to final and binding arbitration." (PSEA brief at 14-15.)

The State disputes PSEA's arguments. It claims that the parties, "through the collective bargaining process, expressly agreed to exclude certain disputes and controversies from the grievance procedure. One mutually agreed to exclusion is Article 36-Legal Indemnification." (State brief at 1.)

Regarding PSEA's argument that all negotiated mandatory subjects in an agreement must provide for review through the grievance-arbitration process, the State responds: "To suggest that as a matter of law all negotiated mandatory subjects of bargaining in a contract be subject to the grievance-arbitration procedures is contrary to the strong policy favoring enforcement of the agreement and thus requiring the parties to honor their agreement." (State brief at 3.)

The State contends that the Board need not determine whether legal indemnification is a mandatory subject of bargaining in this case, because "even if legal indemnification is a mandatory subject, the parties negotiated it and agreed to exclude decisions about it from the grievance-arbitration procedures." (State brief at 5.) The State points out that the Alaska Supreme Court has found that the Attorney General is "empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the states' litigation which he thinks is best. This discretionary control over the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases." (State brief at 6, citing to *State of Alaska v. First National Bank of Anchorage*, 660 P.2d 406, 420-21 (Alaska 1982).)

The State disagrees that *Hemmen* stands for the proposition that a collective bargaining agreement cannot waive the right to grieve to arbitration any mandatory subject of bargaining, and that the exclusion of legal indemnification from the grievance-arbitration process is therefore illegal under PERA. The State believes this is not the holding of *Hemmen*. "The present matter does not involve a contract term that allows a grievance over legal indemnification. Rather, the contract forecloses grievance and arbitration under Article 36 from the grievance and arbitration procedure in its entirety. A grievance over the Attorney General's decision under Article 36 is not allowed and is waived as a matter of contract. Furthermore, there were no corollary Attorney General powers to be considered by the Court in *Hemmen*." (State brief at 7.)

DISCUSSION.

1. Is legal indemnification, under Article 36 of the parties' collective bargaining agreement, a mandatory subject of bargaining?

We agree with PSEA that legal indemnification is a mandatorily negotiable subject of bargaining. Other states have so found. See, e.g., *In the Matter of Patrolmen's Benevolent Association of Newburgh, New York, Inc.*, 18 Off. Dec. of N.Y. Pub. Employ. Rel. Bd., 18 NYPER 3065 (1985) (union's demand to negotiate over indemnification -- legal insurance -- was deemed a demand to negotiate over a form of compensation and was a mandatory subject of negotiation); and *In the Matter of Union County and Union County PBA Locals 199 and 199A*, 25 New Jersey Pub. Employee Rep. 30141 ("Both federal and state courts have held that an agreement to provide officers with a defense, to reimburse them for the cost of attorneys who successfully defend them, and to indemnify them against judgments covers mandatorily negotiable terms and conditions of employment.")

In *Kenai Peninsula Borough School Dist. V. Kenai Peninsula Educ. Ass'n*, 572 P.2d 416 (Alaska 1977), the Alaska Supreme Court applied a balancing test in determining whether a subject of bargaining was mandatory or permissive. The court stated that in general, "a matter is more susceptible to bargaining the more it deals with the economic interests of employee and the less it concerns professional goals and methods." *Id.* at 422. See also *Alaska Public Employees Ass'n v. State*, 831 P.2d, 1245, 1251 (Alaska 1992) ("a matter is more susceptible to categorization as a mandatory subject of bargaining the more it deals with the economic interests of employees and the less it concerns the employer's general policies"). We find that public employees would have strong economic interests in legal representation from their public employer as a result of getting sued for a work-related function. They should have the right to bargain over such an issue.

2. Does AS 23.40.210 require that all mandatory subjects of bargaining must be subject to the grievance-arbitration procedure in the parties' collective bargaining agreement, or they are otherwise illegal? Alternatively, can a party waive the right, during contract negotiations, to have the grievance-arbitration procedure applicable to a mandatory subject?

We disagree with PSEA that mandatory subjects of bargaining cannot be excluded from the grievance procedure by contract waiver or that it is illegal to waive a mandatory subject of bargaining such as legal indemnification. We also disagree with its assertion that AS 23.40.210 requires that all mandatory subjects of bargaining be subject to a grievance-arbitration procedure. In other words, PSEA suggests that either party may submit a dispute over a mandatory subject of bargaining to arbitration whenever it decides to do so, regardless of any other agreement of the parties.

We construe *Hemmen* differently than does PSEA. We agree that the *Hemmen* court did hold that under AS 23.40.210, grievance procedures must include binding arbitration as the final step. Clearly, that is what section 210 requires. But the decision does not state anywhere that this law also requires binding arbitration for all mandatory subjects of bargaining. The specific holding in *Hemmen* states: "We conclude that the objective of AS 23.40.210 is to ensure that all contracts subject to the statute contain such a [grievance] procedure, and that binding arbitration be included as the final step of all grievance procedures. Consequently, we hold that the agreement's exclusion of grievances involving involuntary transfers from binding arbitration violates AS 23.40.210." 710 P.2d at 1000-01. In fact, nowhere did the *Hemmen* court use or refer to the term "mandatory subject."

We construe *Hemmen* as follows: In contract disputes in which a grievance procedure applies, AS 23.40.210 requires binding arbitration as the final step of the procedure. (emphasis added). But *Hemmen* does not state that all mandatory subjects of bargaining must have a grievance procedure; nor does it state that any contract provision stating otherwise is illegal. The problem the court had with the particular contract provision in *Hemmen* was--the agreement provided for a grievance procedure for involuntary transfers of police officers--but the agreement excluded binding arbitration from the final step of the transfer procedure. In other words, the union could file a grievance over an involuntary transfer, but the contract language prohibited it from taking the transfer dispute to arbitration. The court essentially held that if a matter was subject to the contract's grievance procedure, arbitration must be the final step in that matter's resolution.

The dispute before us can be distinguished from *Hemmen* because in this case, the State and PSEA agreed in negotiations to entirely exclude legal indemnification decisions by the State (the decisions the State makes under Article 36) from the grievance-arbitration procedure. In *Hemmen*, by contrast, involuntary transfer disputes were included in the grievance steps prior to arbitration, but excluded from the arbitration process. Further, the court did not address the mandatory or permissive nature of involuntary transfers. However, we believe that although a subject of bargaining may be mandatorily negotiable, it does not follow that that subject must then be mandatorily arbitrable.

PSEA has not pointed to any case or law that prohibits a party from agreeing in negotiations to waive the right to grieve a mandatory subject of bargaining, and we could find none. However, in *Capitol Steel and Iron Company*, 89 F.3d 692, 152 L.R.R.M. (BNA) 2791 (1996), the United States Court of Appeals for the 10th Circuit stated: "It is also well established that unions can waive their right to bargain over wages or other mandatory bargaining subjects. Robert A. Gorman, *Basic Text on Labor Law*, 466 (1976). Such a waiver is often expressed by means of an explicit collective bargaining agreement provision like the present one. *Id.* at 469." Moreover, the waiver must be "clear and unmistakable." *Allison Corporation*, 330 N.L.R.B. No. 190, 2000 WL 559853 (2000). In this case, we find that PSEA clearly waived its right to file grievances regarding matters related to Article 36, legal indemnification.

We believe that if we were to find in PSEA's favor, one ramification would be that all mandatory subjects of bargaining in collective bargaining agreements must be subject to a grievance-arbitration procedure, and any exclusion or waiver of a mandatory subject from the grievance-arbitration process would be illegal. This would establish troublesome precedent for labor relations. For example, Article 4, the parties' management rights clause, references some mandatory subjects of bargaining, such as layoff. The parties contractually agreed in the clause that the employer has the right to reduce its labor force. While some aspects of layoff can be grieved, the decision whether to layoff or not is currently at management's discretion. However, granting PSEA's petition would mean that layoff (reduction in force) would be subject to binding arbitration regardless of the rights granted management under Article 4, as agreed by the parties. Rather than promoting the harmonious and cooperative relations envisioned by the Alaska Legislature in its "Declaration of policy", a decision in PSEA's favor would result in increased litigation because other public employees and employers may have agreed to exclude mandatory subjects of bargaining from the grievance-procedure.

Another ramification of finding in PSEA's favor would be the effect on the Attorney General's discretionary control over state-related litigation. In this case, the Attorney General's decision whether to indemnify, in lawsuits where state employees are represented by a labor organization, would be subject to an arbitrator's review and decision. In situations involving a bargaining unit member whose contract contains a legal indemnification clause, the discretion would ultimately lie with the arbitrator.

If we were to find in PSEA's favor, based on its arguments, we would be concluding that Article 36(f) does not mean what it says: in effect we would be telling the parties that despite agreeing to exclude legal indemnification and all its aspects from the grievance-arbitration process, they must nevertheless utilize that process when the labor organization decides to dispute the State's decision regarding legal indemnification. Further, we find we would be unduly interfering with the parties' contractual agreement they hammered out through the collective bargaining negotiation process. Such interference would run contrary to the Alaska Legislature's declaration of policy, that "it is the public policy of the state to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government." AS 23.40.070. In *Corporacion De Servicios Legales De Puerto Rico*, 289 N.L.R.B. 612, 1988 WL 213791 (1988), the National Labor Relations Board noted it often strikes an accommodation among three competing interests: "the freedom of an employer and a union to enter into a collective-bargaining relationship, the stability of bargaining relations once established, and employee freedom of choice—all of which underlie the Act's ultimate goal of fostering industrial peace." In this case, we find the parties freely entered into an agreement that excluded legal indemnification from the grievance-arbitration process. We believe we should let that agreement stand.

We conclude that Article 36 of the parties' collective bargaining agreement excludes legal indemnification from the grievance-arbitration process. Further, AS 23.40.210 does not prohibit parties from negotiating and agreeing to waive or exclude specified mandatory subjects or aspects of those subjects from that process. It does require that all collective bargaining agreements contain a grievance procedure that "shall have binding arbitration as its final step," nothing more and nothing less. In other words, if a grievance procedure applies in a dispute, that procedure must culminate in binding arbitration.

For these reasons, we conclude that PSEA's petition to enforce its collective bargaining agreement with the State of Alaska, to find Article 36 illegal, is denied and dismissed.

CONCLUSIONS OF LAW

1. The State of Alaska is a public employer under AS 23.40.250(7), and the Public Safety Employees Association is an organization under AS 23.40.250(5).
2. This Agency has jurisdiction under AS 23.40.210 to consider this dispute over enforcement of the parties' grievance/arbitration provisions in their collective bargaining agreement, and to consider whether Article 36F is illegal.
3. As petitioner, PSEA has the burden to prove each element of its case by a preponderance of the evidence.
4. PSEA has failed to prove by a preponderance of the evidence Article 36F is illegal.
5. AS 23.40.210 requires that all collective bargaining agreements include a grievance procedure that culminates in binding arbitration. AS 23.40.210 does not require that all mandatory subjects of bargaining must be subject to the parties' grievance-arbitration procedure. *Hemmen v. State*, 710 P.2d 1001 (Alaska 1985), holds that if the parties have agreed to submit a contract dispute to their grievance procedure, then binding arbitration must be included as the final step of that procedure.
6. Legal indemnification is a mandatory subject of bargaining.

ORDER

1. The petition by the Public Safety Employees Association is denied and dismissed.
2. The State of Alaska shall 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

Aaron Isaacs, Jr., Acting Chair

Robert A. Doyle, Board Member

CONCURRING OPINION OF MEMBER KAREN MAHURIN

After considerable review of the issue in this matter, I agree with the result of the majority. I do believe, however, that an employer should indemnify its employees against lawsuits related to their performance on the job. However, the employer is not required to indemnify, or may limit its indemnification responsibility, when the parties agree to waive it under their collective bargaining agreement. Here, PSEA clearly waived indemnification protections in those situations outlined in Article 36 of the parties' agreement.

Karen Mahurin, Board Member

APPEAL PROCEDURES

This order is the final decision of this Agency. Judicial review may be obtained by filing an appeal under Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of filing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the order in the matter of PUBLIC SAFETY EMPLOYEES ASSOCIATION vs. STATE OF ALASKA, Case No. 00-1029-CBA, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 25th day of July, 2001.

Earl Gibson, Jr.
Administrative Clerk III

This is to certify that on the 25th day of July, 2001, a true and correct copy of the foregoing was mailed, postage prepaid, to
James Gasper, PSEA
Kent Durand, State of Alaska

Signature