

ALASKA LABOR RELATIONS AGENCY
1016 WEST 6th AVE., SUITE 403
ANCHORAGE, ALASKA 99501-1963
(907) 269-4895
Fax (907) 269-4898

STATE OF ALASKA,)
)
Complainant,)
)
vs.)
)
ALASKA STATE EMPLOYEES ASSOCIATION,)
AFSCME LOCAL 52, AFL-CIO,)
)
Respondent.)
_____)

STATE OF ALASKA,)
)
Petitioner,)
)
vs.)
)
ALASKA STATE EMPLOYEES ASSOCIATION,)
AFSCME LOCAL 52, AFL-CIO,)
)
Respondent.)
_____)

CASE NO. 12-1624-ULP; CASE NO. 12-1625 CBA.

DECISION AND ORDER NO. 302

The Board heard this unfair labor practice charge, and considered the contract enforcement petition, based on the written record, including pleadings, exhibits filed, and briefing. The record for this matter closed on September 22, 2014, when the Board finished deliberations.

Digest: The unfair labor practice charge by the State of Alaska is denied and dismissed. The State's petition to enforce the collective bargaining agreement is denied and dismissed. The State failed to prove that the attempt by the Alaska State Employees Association to use business leave for catastrophic leave was an unfair labor practice violation or a collective bargaining agreement violation.

Appearances: Kent Durand, Labor Relations Analyst for complainant State of Alaska; J. Michael Robbins, Business Agent for respondent Alaska State Employees Association.

Board Panel: Gary P. Bader, Chair; Daniel Repasky and Will Askren, Board Members.

DECISION

Statement of the Case

The State of Alaska filed an unfair labor practice against ASEA, alleging that ASEA's business manager, Jim Duncan, committed an unfair labor practice and contract violation by attempting to use ASEA's business leave as catastrophic medical leave for bargaining unit members. Agency Hearing Officer Jean Ward conducted an investigation and found probable cause to support the alleged violation. ASEA then requested a hearing. At the prehearing conference, the parties agreed to submit joint exhibits and file written closing arguments in lieu of proceeding to an oral hearing.

Issues

1. Did the Alaska State Employees Association fail to bargain in good faith and therefore commit an unfair labor practice violation by attempting to use union business leave as catastrophic leave?
2. Did the Alaska State Employees Association violate its collective bargaining agreement with the State of Alaska by attempting to use business leave for catastrophic leave?

Findings of Fact

1. The State of Alaska (State) is a public employer under AS 23.40 250(7).
2. The Alaska State Employees Association (ASEA) is an organization under AS 23.40.250(5).
3. The State and ASEA had a collective bargaining agreement for the period July 1, 2010, to June 30, 2013. (Joint Exhibit H).
4. Article 26.08 contains provisions for a Union Business Leave Bank. (Joint Exhibit H at 72-73). The business leave bank is funded by a 7.5-hour donation of personal leave from each new bargaining unit member. The bank is administered by the State, which provides monthly balance reports to ASEA.

5. Article 26.08(C)(1) addresses union business leave.¹ It provides in pertinent part:

Withdrawal requests from the Bank will be for purposes of bargaining unit members for absences due to contract negotiations and formulation, meetings, conventions, training sponsored by the Union, attendance at arbitration or other hearings as witnesses for the Union, and other like purposes as may be determined by the Union. Requests for withdrawals from the Bank shall be made only by the Business Manager of the Union or such other person as designated by the Union to the appropriate Department Officer with a copy to the Director of the Division of Personnel and Labor Relations on forms mutually agreed to by the parties. The original leave slip shall be presented to the Union by the bargaining unit member and must accompany all requests for withdrawal from the Bank.

6. Article 26.03(B) addresses catastrophic leave. It provides in subsection 26.03(B)(2) that,

Union catastrophic medical leave requests will be submitted by the Union to the Director of the Division of Personnel and Labor Relations, or designee, within two business days after the end of the pay period for which the leave is requested. The request for a withdrawal from the bank will clearly identify the amount of hours of leave to be donated to the employee. (capitalization in original).

Article 26.03(B) goes on to provide that,

Union Catastrophic medical leave will be used only to the extent that the employee's available annual/sick, personal, emergency, banked medical and donated leave is less than ten hours on the first working day of the pay period, and will only be used to bring the total leave available up to ten hours.

7. Jim Duncan is the Executive Director of ASEA. On August 1, 2012, he emailed Nikki Neal, Director of the Department of Administration, Division of Personnel and Labor Relations, and Kate Sheehan,² Deputy Director, a request to use leave from the union Business Leave Bank for catastrophic medical leave:

As you are aware Article 26.03 of our contract provides for the establishment of a Catastrophic Medical Leave Bank. The funding source for the bank is the transfer of 15 hours from a member's medical leave bank on termination. Unfortunately, we are finding that this funding source is not adequate and we are becoming unable to address the needs of our members when they require catastrophic leave.

¹ The "bank" is a Union Business Leave Bank. Both Article 26.08 and Article 25.09 address the Union Business Leave Bank. Our determination addresses Article 26.08.

² Kate Sheehan was appointed Director sometime in 2014. See Finding of Fact 19 and Joint Exhibit H.

This is an issue I intend to bring to the bargaining table but the need is now. I would like to propose a LOA [letter of agreement] with an expiration date of June 30, 2013 that would allow the use of BL [business leave], on my approval, for catastrophic leave. I would like to discuss this with you.

8. On August 2, 2012, Sheehan responded that she was out of the office most of the week but would respond the following week. (Exhibit A at 3).

9. That same day, Duncan replied to Sheehan. He said he had not heard from Neal despite numerous efforts. He told Sheehan that waiting until next week was "problematic" because bargaining unit members needed catastrophic leave right away. He added that, "[Business Leave] is our members[']", and the Union's leave, and my short term proposal should not be a problem if there is an interest helping our members – your employees." (Exhibit A at 3).

10. Neal responded to Duncan's email a little over an hour later. (Exhibit A at 2-3). She said there was no intent to ignore his messages. She added that the State was not willing at that time to enter into Duncan's proposed LOA, and, "[a]s you are aware, negotiations will be commencing soon and that is the more appropriate forum to make decisions with regards to catastrophic leave. As currently negotiated, there has always been knowledge by both parties that the bank is not one that will continue in perpetuity. Any changes will need to be made while considering the entire agreement, not through a LOA." (Exhibit A at 3).

11. Two hours later, Duncan responded to Neal that he was "disappointed, but not surprised by your response that the State is not willing to consider an interim agreement that would expire on June 30, 2013 to ensure that members in need because of an unexpected illness will not be able to be kept in pay status to continue Health Insurance Coverage." (Exhibit A at 2). Duncan added that his proposal would not cost the State any increased amount because the funding source of the Union Business Leave bank was ASEA's bargaining unit members. Duncan acknowledged that the parties agreed in the prior (2010) contract's negotiations that changes needed to be made to the catastrophic leave article. He also pointed out that the parties had discussed and exchanged proposals but were unable to agree to any changes. (Exhibit A at 2). Duncan said he would instruct his staff to tell ASEA's members that the State "refused to consider how to extend the program so they can maintain Health Insurance." (Exhibit A at 2).

12. On August 6, Neal responded that it was "unfortunate you are choosing to take the position outlined [in Duncan's previous email]. As you are aware, both parties to a contract must live within the terms of the agreement unless it is amended." (Exhibit A at 1). Neal admitted that the parties had previously entered into contract amendments, but they are not required to do so. She then asserted that ASEA had previously refused to sign letters of agreement that would have benefited members, but she would never disparage Duncan or his staff to their members. Finally, she said that, "While I agree that may have an impact on our employees, it is a consequence of not being at work and exhausting leave entitlements." She said other programs like the Family Medical Leave Act (FMLA), donated leave, etc., may help. (Exhibit A at 1).

13. Duncan replied on August 7 that for various reasons, the programs Neal mentioned, such as FMLA, won't help the bargaining unit members because of their stringent requirements. He

reiterated that his proposal to use a Letter of Agreement to use the business leave bank on a short-term basis would not have the restrictions of the other programs. (Exhibit A at 1).

14. The parties' dispute over the catastrophic/business leave issue escalated in subsequent emails. (Exhibit C). After the State informed ASEA that the catastrophic leave bank balance was 52.28 hours as of July 31, 2012, Kathleen Pruitt from ASEA emailed Mindy Jones from the State on August 9 and asked whether ASEA's earlier request, and August 3 memorandum from Jim Duncan to Nikki Neal, to use business leave for catastrophic leave was "good." (August 9, 2012, email from Kathleen Pruitt of ASEA to Mindy Jones at the State Department of Administration; Exhibit C at 3).

15. Sheehan responded for the State that Duncan's memorandum request did not comply with the business leave provisions of the parties' collective bargaining agreement and that ASEA's attempt to use business leave as catastrophic leave "violates the agreement." (Exhibit C at 1).

16. After further email exchanges, bantering, and finger-pointing, the State filed an unfair labor practice charge and a contract enforcement petition against ASEA. (August 30, 2012, Unfair Labor Practice Charge, and Petition to Enforce Contract).

17. The Agency commenced investigation of the unfair labor practice charge (ULP) and also scheduled a prehearing conference, for November 27, 2012, in the collective bargaining enforcement petition (CBA) but on November 21, 2012, ASEA filed a motion to dismiss the State's CBA. The parties filed briefing and the Agency denied the motion to dismiss on April 29, 2013. The CBA case was then put in abeyance pending determination of the ULP investigation.

18. On September 30, 2013, Hearing Officer Jean Ward found probable cause to support an alleged violation by ASEA. The Agency scheduled another prehearing conference for November 20, 2013. When the parties failed to file prehearing statements, the Agency contacted them and learned that the parties were in settlement discussions. Those discussions ultimately failed. The parties eventually agreed to submit the case for determination on the written record, which closed when the Board completed deliberations on September 22, 2014.

19. The parties' 2010 to 2013 agreement provided that upon an employee's separation from state service a maximum of 15 hours of the employee's medical leave shall transfer to the union's catastrophic medical leave bank. When the parties negotiated a new collective bargaining agreement for the period July 1, 2013, to June 30, 2016, they increased that maximum donation to 45 hours. (See Article 26.03(B)(1) of both agreements.) (Exhibit H). In addition, the parties signed a Letter of Agreement (LOA), effective May 14, 2014. (Exhibit G, Letter of Agreement signed by Kate Sheehan and Jim Duncan). This LOA provides that \$250,000 would be transferred from the Union's Business Leave Bank to the Emergency Leave Bank, created in Article 26.13 of the parties' collective bargaining agreement. The LOA is in effect through December 31, 2016.

ANALYSIS

1. Did the Alaska State Employees Association fail to bargain in good faith and therefore commit an unfair labor practice violation by attempting to use union business leave as catastrophic leave?

We first address the State's assertion that ASEA committed an unfair labor practice violation by attempting to use union business leave for catastrophic leave. AS 23.40.110(c)(2) provides: "A labor or employee organization or its employees may not refuse to bargain collectively in good faith with a public employer, if it has been designated in accordance with the provisions of AS 23.40.070 -- 23.40.260 as the exclusive representative of employees in an appropriate unit."

In *Fairbanks Fire Fighters Association, Local 1324, IAFF, vs. City of Fairbanks*, Decision and Order No. 256, at 9-10 (October 17, 2001), we stated that in the context of collective bargaining,

Good faith has been described as "an open mind and a sincere desire to reach an agreement" and "a sincere effort . . . to reach a common ground." I Patrick Hardin, *The Developing Labor Law*, at 608 (3d ed. 1992), quoting *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 12 L.R.R.M.(BNA) 508 (9th Cir. 1943), and *General Elec. Co.*, 150 NLRB 192, 194, 57 L.R.R.M.(BNA) 1491 (1964), enforced 418 F.2d 736, 72 L.R.R.M.(BNA) 2530 (2d Cir. 1969), cert. denied, 397 U.S. 965, 73 L.R.R.M. (BNA) 2600 (1970). In *Hotel Roanoke*, 293 NLRB 182, 184 (1989), the Board stated: "In determining whether a party has bargained in bad faith, the Board looks to the totality of the circumstances in which the bargaining took place. *Port Plastics*, 279 NLRB 362, 282 (1986); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). The Board looks not only at the parties' behavior at the bargaining table, but also to conduct away from the table that may affect the negotiations. *Port Plastics*, 279 NLRB at 382."

In I John E. Higgins, Jr., *The Developing Labor Law*, pp. 915-16 (6th ed. 2012), the totality of the conduct standard was further explained:

The "totality of the conduct" is the standard by which the "quality" of negotiations is tested. Thus, even though some specific actions, viewed alone, might not support a charge of bad faith bargaining, a party's overall course of conduct in negotiations may reveal a violation of the Act. Conversely, in viewing all of the relevant circumstances, the Board may overlook certain "misconduct" in an effort to preserve the bargaining process. (quotations in original).

As indicated above in the *Port Plastics* opinion, the duty to bargain is a duty placed on both parties during the bargaining process. Higgins states:

The duty to bargain is a bilateral one, however, so that where both parties have been equally dilatory, or comparably guilty of unlawful bargaining, there may be no foundation for a finding of bad faith. Similarly, where the union has broken off negotiations and made no further request for bargaining, or has failed to request the employer to bargain, the Board has refused to find bad faith on the part of the dilatory employer.

I John E. Higgins, Jr., *The Developing Labor Law*, p. 950 (6th ed. 2012).

Applying that standard to the particular facts of this case, we do not find that the State proved all the elements of its claim by a preponderance of the evidence. Although it is evident from a reading of the parties' agreement that catastrophic leave and business leave are two separate types of leave altogether, a mere attempt by one party, without more, to use business leave for catastrophic leave is just that – a unilateral attempt, not a change. Thus no violation occurred. Even if this attempt was deemed misconduct, we would find it is isolated misconduct. Moreover, it is understandable that a union business manager would explore all alternatives in order to retain a medical benefits policy for union members.

It is unfortunate that the parties' communication on this issue had deteriorated to the point that the facts above unfolded as they did, but these unfortunate events occur in the give and take of collective bargaining. Regardless, we find that ASEA's unilateral attempt, by itself, does not rise to the level of evidentiary support needed to find by a preponderance of the evidence that a violation occurred under AS 23.40.110(c)(2).

2. Did the Alaska State Employees Association violate its collective bargaining agreement with the State of Alaska by attempting to use business leave for catastrophic leave?

In a separate pleading that was subsequently consolidated with the above unfair labor practice case, the State argues that ASEA violated the parties' collective bargaining agreement by attempting to use business leave for catastrophic leave, in direct violation of articles in the parties' agreement. Essentially, the State asks this Agency to find that ASEA committed a contract violation by requesting that the State allow it to use business leave as catastrophic leave.

AS 23.40.210 provides in relevant part: "Either party to the agreement has a right of action to enforce the agreement by petition to the labor relations agency." In this case, we find that there is nothing to enforce. Business leave was not used for catastrophic leave. While the knowing attempt and request to do so flies in the face of the wording of the contract, we do not find that this alone constitutes evidence of a contract violation under AS 23.40.210. Based on the specific facts here, we deny the State's petition.

CONCLUSIONS OF LAW

1. The State of Alaska is a public employer under AS 23.40.250(7). The Alaska State Employees Association is an organization under AS 23.40.250(5).

2. This agency has authority to investigate alleged violations under AS 23.40.120, and jurisdiction to determine whether a violation was committed under AS 23.40.110.

3. As complainant, the State of Alaska has the burden to prove each element of its claim by a preponderance of the evidence. 8 AAC 97.340 and 350(f).

4. Under the facts of this case, the State failed to prove each of the elements of its unfair labor practice claim by a preponderance of the evidence.

5. Under the facts of this case, the State failed to prove by a preponderance of the evidence that a contract violation occurred.

ORDER

1. The unfair labor practice complaint filed by the State of Alaska is denied and dismissed.

2. The petition by the State of Alaska to enforce the collective bargaining agreement is denied and dismissed.

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, personally serve each employee affected. 8 AAC 97.460.

ALASKA LABOR RELATIONS AGENCY

Gary P. Bader, Chair

Daniel Repasky, Board Member

Will Askren, 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 mailing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of *State of Alaska vs. Alaska State Employees Association, AFSCME Local 52, AFL-CIO*, Case Nos. 12-1624-ULP and 12-1625-CBA, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 8th day of October , 2014.

Margie Yadlosky
Human Resource Consultant I

This is to certify that on the 8th day of October, 2014, a true and correct copy of the foregoing was mailed, postage prepaid to:

Kent Durand, State of Alaska
J. Michael Robbins, ASEA

Signature