[Labor Relations Agency Stationery]

BEFORE THE ALASKA STATE LABOR RELATIONS AGENCY

ALASKA PUBLIC EMPLOYEES, ASSOCIATION	)
Complainant,	)
vs.	)
STATE OF ALASKA,	)
Respondent.	)

ULPC 87-6

ORDER AND DECISION NO. 110

SUBJECT:ARBITRABILITY OF CLASSIFICATION SCHEME; UNFAIR LABOR PRACTICE CHARGE

The State Labor Relations Agency (the "Agency") convened hearings on July 22, 1987 and August 12, 1987 to consider issues remaining in an unfair labor practice complaint brought by the Alaska Public Employees Association ("APEA") against the State of Alaska ("State") relating to a renegotiated collective bargaining agreement between APEA and the State. At each of the hearings Chairman C. R. "Steve" Hafling and members Ben Humphries and Marlene Johnson were present and so constituted a quorum. APEA was represented by General Counsel John Gaguine, Esq. and William K. Jermain, Esq. The State was represented by Bruce Cummings, Director of the Division of Labor Relations. APEA and the State, on mutual agreement, presented their arguments through written briefs and rebuttal briefs without oral argument. The Agency having

considered the arguments of the parties and deeming itself sufficiently advised, renders the following order and decision dismissing the remaining unfair labor practice charge filed by APEA.

Findings of Fact

1. APEA is collective bargaining representative for general government and designated supervisory employees in the classified service of the State of Alaska. APEA's collective bargaining agreement with the State expired on June 30, 1987, and after substantial negotiations APEA and the State on July 21, 1987, tentatively agreed upon the terms and conditions of a new collective bargaining agreement.

2. During the course of the negotiations, APEA filed Unfair Labor Practice Charge 87-6 alleging multiple counts of error by the State. A hearing was scheduled on these matters in Anchorage for July 22, 1987. Given tentative approval of the collective bargaining agreement on July 21, 1987, the parties agreed that the unfair labor practice charges would be dismissed without prejudice except with respect to an allegation contained on page 5 of the complaint:

> Respondent has refused to consider binding grievance arbitration for classification disputes, instead refusing to depart from existing language.

By agreement of the parties, the issue was addressed through briefs, and the Agency considered the matters at the hearing scheduled August 12, 1987, in Juneau, Alaska.

3. As set forth in the remaining unfair labor practice charge, the State refused to provide for a grievance procedure with arbitration as the last grievance step for classification disputes. This position is consistent with the position actually adopted in previous APEA-State collective bargaining agreements. Arbitration is the final step in grievance procedures and that final step is provided with respect to numerous other areas referenced in past collective bargaining agreements and the tentatively-approved one.

4. Examples of classification disputes would be controversies where the State's classification of a job, by description, by assignment of functions, and assignment of a pay range, is challenged by APEA. The wages attributed to a pay range, however, are negotiated, as are job conditions and the like. This distinction exists in comparing Article 24 (Wages with Article 19 (Classification) in the expired APEA agreement.

5. No evidence was presented to suggest that the State was asserting an anti-union animus or was taking, in bad faith, the position that classification disputes were not subject to binding grievance arbitration. Rather the State contended that classification disputes were not of a type which required submission to binding arbitration under the law, an issue disputed by APEA. The State conceded that it could voluntarily agree to the submission of classification disputes to binding arbitration, but it elected not to do so in the negotiation process. The obligation, in fact, to provide for binding arbitration is based apparently upon a difference of opinion by APEA and the State as to whether or not applicable statutes require binding arbitration as to classification disputes.

Conclusions of Law

1. The Agency has jurisdiction to hear and consider complaints regarding unfair labor practice charges described in AS 23.40.110 and is authorized and charged with responsibility to make appropriate orders concerning such complaints pursuant to AS 23.40.140.

2. AS 23.40.llO(a) provides in pertinent part:

A public employer or agency of a public employer may not

(l) interfere, restrain or coheres an employee in the exercise of the employee's rights guaranteed in AS 23.40.080...

(5) 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.

3. The Public Employment Relations Act requires that a collective bargaining agreement must be executed in writing and that it must, among other things, provide for a grievance procedure. AS 23.40.210 provides:

Upon the completion of negotiations between an organization and a public employer, if a settlement is reached, the employer shall reduce it to writing in the form of an agreement. The agreement may include a term for which it will remain in effect, not to exceed three years. The agreement shall include a pay plan designed to

provide for a cost-of-living differential between the salaries paid employees residing in the state and the employees residing outside the state. The plan shall provide that the salaries paid, as of August 26, 1977, to employees residing outside the state shall remain unchanged until the difference between those salaries and the salaries paid employees residing in the state reflects the difference between cost of living in Alaska and living in Seattle, Washington. 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.

4. The 1987 tentative agreement prepared pursuant to AS 23.40.210 is a culmination of negotiation relating to collective bargaining including negotiations "with respect to wages, hours and other terms and conditions of employment." "Terms and conditions of employment" means, pursuant to AS 23.40.250(8),

hours of employment, the compensation and fringe benefits, and the employer's personnel policies affecting the working conditions of the employees; but does not mean the general policies describing the function and purposes of a public employer.

5. The gist of APEA's claim is that classification is a mandatory subject of a contract, and as such requires, pursuant to AS 23.40.210, binding grievance arbitration as a final step. However, an analysis of AS 23.40.210, the definition of AS 23.40.250(8), the purposes of the Public Employment Relations Act, and other provisions of law including the State Personnel Act at AS 39.25, indicates that classification within the context used by the State in this matter is not a mandatory subject of bargaining. This is so because AS 23.40.250(8) excludes from mandatory collective bargaining subjects, those "general policies describing the function and purposes of a public employer." Those roles include the constitutional obligation of the employer to maintain a merit system, as amplified in AS 39.25.010, and the public policy duty to maintain a rational integrated system of classification. The last clause in AS 23.40.250(8) amplifies the retention by the State of those roles retained by the employer. See, for example, Cox and Dunlop, 63 Harv. L. Rev. 389, 401-405 (1950).

6. The exclusion of a subject from mandatory collective bargaining does not mean that the State is prohibited from bargaining in that area. The State in addition to mandatory subjects can voluntarily agree to submit other subjects to arbitration. AS 23.40.200(e). Clearly, the legislature recognized that there were indeed subjects which were non-mandatory and not required to be submitted to arbitration pursuant to AS 23.40.210, given authority to enter voluntarily into arbitration of other subjects under AS 23.40.200 (e).

7. APEA cites the Alaska Supreme Court case of Hemmen v. State Department of Public Safety, 710 P.2d 1001 (Alaska 1985), as authority for the proposition that classification schemes must be subject to grievance arbitration. Hemmen involved a collective bargaining agreement where binding arbitration was described as the final step in all grievances "except for those grievances involving involuntary transfers". 710 P.2d at 1003. The court concluded that involuntary transfer disputes were necessarily of a type to be included in an agreement and, therefore, subject to binding arbitration. The issue of involuntary transfers, however, far more clearly falls within the definition of "terms and conditions of employment" as defined in AS 23.40.250(8), and its exclusion was deemed by the court to be in violation of AS 23.40.210. The Hemmen decision, however, does not take the next step of requiring that all conceivable subjects be submitted to binding arbitration, but only that all grievable issues be submitted to binding arbitration. Id. This is consistent with other decisions of the Alaska Supreme Court where guidance is afforded with respect to employee classification as a non-mandatory subject. In the Kenai Borough School District cases, the court held that substantive matters of public policy were not mandatory subjects of policy. Kenai Peninsula Education Association v. Kenai Peninsula Borough School District, 628 P.2d 568 (Alaska 1981); Kenai Peninsula Borough School District v. Kenai Peninsula Education Association, 572 P.2d 416 (Alaska 1979). While the Supreme Court considered the provisions of AS 14.20 rather than the provisions of AS 23.40, the provisions relating to collective bargaining agreements regarding teachers in AS 14.20 identify policy issues (i.e., issues fundamentally reserved to the employer) as non-mandatory subjects, just as does AS 23.40.

8. The State's action has been characterized as an unfair labor practice. In fact, the issue as to inclusion of the desired provision is one of interpretation of the law, and there is no evidence that bad faith exists. It may, however, be contended that the State's insistence -- if wrong -- could amount to a deprivation of employee's rights guaranteed under AS 23.40, a practice prohibited by AS 23.40.110.

Order and Decision

Based on the foregoing findings of fact and conclusions of law, the Agency unanimously orders and decides that:

1. The State did not engage in an unfair labor practice by refusing to agree upon a provision in the tentatively agreed collective bargaining agreement between APEA and the State that submitted classification disputes to grievance arbitration.

2. Classification and classification disputes are not mandatory subjects of bargaining, provided that the term "classification" is not so broadly construed as to include mandatory subjects such as wages and "terms and conditions of employment" as defined in AS 23.40.250(8). While the State might voluntarily agree to include grievance arbitration as a final step in resolving classification disputes, the law does not compel the State to ultimately agree to such a voluntarily negotiable item.

3. The count remaining in APEA's unfair labor practice charge and addressed in this decision is dismissed, and the Agency recognizes APEA's request to dismiss without prejudice the other issues of the unfair labor practice charge pending ultimate resolution of its tentatively agreed upon collective bargaining agreement with the State.

4. This written decision sets forth the rationale for a decision reached by the Agency following the August 12, 1987 hearing.

DATED this 26 day of August, 1987.

STATE OF ALASKA LABOR RELATIONS AGENCY

By_____
C. R. "Steve" Hafling, Chairman

[Signature on File]