[LABOR RELATIONS AGENCY STATIONERY]

January 8, 1979

ORDER AND DECISION NO. 39 IN A MATTER OF AN UNFAIR LABOR PRACTICE CHARGE BY DANIEL DENARDO AGAINST ALASKA PUBLIC EMPLOYEES ASSOCIATION AND THE STATE OF ALASKA

FINDINGS OF FACT

(1) Section 23.40.110, Unfair Labor practices, of the Public Employment Relations Act of the State of Alaska reads in pertinent part as follows:

> "(b) Nothing in this chapter prohibits a public employer from making an agreement with an organization to require as a condition of employment
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> (1) membership in the organization which represents the unit on or after the 30th day following the beginning of employment or on the effective date of the agreement, whichever is later; or
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> (2) payment by the employee to the exclusive bargaining agent of a service fee to reimburse the exclusive bargaining agent for the expense of representing the members of the bargaining unit." (Emphasis added.)

(2) The bargaining agreement in question expired on December 31, 1976; the following agreement was signed on May 2, 1977, and by its terms, was retroactive to January 1, 1977.

(3) This kind of time frame is the rule rather than the exception in Alaska public bargaining because of the exigencies of legislative sessions and the budgetary process.

(4) Mr. Patrick L. Hunt, Director, State of Alaska's Division of Personnel/Labor Relations, advised Mr. Patrick Murphy in a letter dated July 21, 1978, that, "To the best of my know-

ledge, APEA was never advised that the contract was extended or cancelled. Most of the provisions of the agreement were in fact continued." Provisions of the agreement which remained in effect between January 1, 1977 and May 2, 1977 included the grievance procedure and a dues checkoff.

(5) Negotiations were actively continued during this period and APEA actively engaged in bargaining on behalf of members of the unit concerned.

(6) The chronology of events leading to the termination of Mr. DeNardo on April 21, 1978, was as follows:

June 1, 1976. Mr. DeNardo requested that his name be removed from the automatic payroll deduction list for APEA dues, as he planned to make his payments directly to APEA.

June 1, 1976-August 29, 1977. Mr. DeNardo paid no dues during this period, but received a reminder on April 26, 1977, and a notice that failure to pay dues would result in termination on August 15, 1977. The August letter referred to $208.00 in back dues.

August 30, 1977. Mr. DeNardo paid $192.00 to the APEA Anchorage office. His receipt stated that this amount covered dues owed from January through December, 1977, as did the APEA ledger (DeNardo Exhibit No. H-l).

September 1, 1977- January 30, 1978. Mr. DeNardo paid no dues during this period. He received notices of dues owed on September 21, 1977 and January 19, 1978.

January 31, 1978. Mr.DeNardo paid $16.00 to APEA, and received a receipt which stated that this amount covered dues for January, 1978.

March 2, 1978. Mr. DeNardo paid APEA $16.00, and received receipt stating that this amount covered dues for February, 1978. On March 22, 1978 Mr. Hunt notified Mr. DeNardo, by letter that non-payment of dues owed would result in his termination on April 21, 1978.

April 17, 1978. Mr. DeNardo paid APEA $16.00, and received receipt noting that this amount covered dues for March, 1978.

On April 21, 1978, Mr. DeNardo was terminated.

(7) At a hearing of the Labor Relations Agency on October 10, 1978, it was suggested that in order to mitigate potential liability to the respondent and losses by the complainant, that Mr. DeNardo be put back to work without prejudice to his pending charge. This was done.

(8) On October 19, 1978, Mr. DeNardo paid APEA $112.00, and received a receipt which noted that this amount was in payment of back dues.

CONTENTIONS OF THE PARTIES:

The State of Alaska:

No brief was filed by the State of Alaska in this matter.

Alaska Public Employees Association:

The APEA argues first that Mr. DeNardo appears to be claiming that he owes dues for neither the period of June, 1976-December, 1976, nor for the period January 1, 1977-May 2, 1977.

The Association contends that Mr. DeNardo voluntarily paid dues of $192.00 on August 31, 1977, to cover the period January 1, 1977 through December 31, 1977, and he cannot now be allowed to claim that he owed no dues during part of this year (January 1, 1977-May 2,1977).

The Association contends that Mr. DeNardo owed dues during the period January 1, 1977-May 2, 1977, because the agreement between the parties was never expressly terminated. The Association contends that notice of intention to modify or amend the agreement does not constitute express termination, and cites several cases to support its contention. The Association points out that the agreement signed May 2, 1977 was retroactive to January 1, 1977 in effect, except as to "new substantively different provisions".

The Association argues that there is no evidence that Mr. DeNardo paid his dues under protest.

The Association contends, that even assuming for the purpose of argument that Mr. DeNardo did not owe dues for the period of January 1, 1977-May 2, 1977, he was lawfully terminated because he owed $112.00 in back dues for the period June 1976-December 1976. The amount owed for the period January 1, 1977-May 2, 1977 is $64.00.

The Association argues that the union security provisions under the two agreements are identical, and that the State did not vary its actions toward this provision at any time. Therefore, contends the Association, this clause has been treated by the parties as a direct continuation of the clause in the earlier agreement.

The Association responded to several points made by Mr. DeNardo during the hearing of October 10, as follows:

(1) 30 day grace period. The Association points to the language of Section 1, Article 9 of both agreements, which provide for one 30-day grace period, which begins immediately following

the date of hire. Mr. DeNardo has been working since 1975, and is clearly entitled, argues the Association, to only one 30-day grace period.

(2) APEA Records. The Association points out that its records are audited each year by several groups which include an outside C.P.A. firm. In addition, the Association contends that Mr. DeNardo has introduced no evidence which shows that his records were erroneous.

(3) State of Alaska liability. The Association contends that the State of Alaska has no liability in this matter, as it acted properly in terminating Mr. DeNardo. The Association summarizes by stating that a union seeking to enforce a union security provision against an employee has an obligation to deal fairly with that employee. Such fairness includes notice to the employee, who may then take steps to protect his job. The Association argues that it has dealt fairly with Mr. DeNardo, as evidenced by its correspondence with him.

Daniel DeNardo, Complainant:

Mr. DeNardo argues that there are important legal distinctions between the obligations of members of the Association and non-members, such as himself.

Mr. DeNardo contends that he did in fact protest payment of his dues on August 30, 1977, and points to Exhibit C, attached to his brief to support this contention.

Mr. DeNardo also argues that, since his reinstatement he has been required to pay $112.00, which represents "fees doubly assessed against the expired contract period 1975-1976." This amount, contends Mr. DeNardo, represents a fine, and discharge based on a

failure to pay fines is unlawful, according to decisions of the NLRB. In addition, Mr. DeNardo argues that the acceptance by the union of dues prohibits the union from demanding the employee's discharge.

Mr. DeNardo argues that the APEA request to negotiate a new agreement, dated September 16, 1976 forestalled automatic renewal of the 1975-1976 agreement, and therefore, that agreement expired on December 31, 1976. Mr. DeNardo cites several cases to support this contention.

Mr. DeNardo contends that the effective date of the current agreement was May 2, 1977, rather than January 1, 1977, and there fore, there was a four month period in which no agreement was in effect between the parties. (January 1, 1977-May 2, 1977.) Since there was no agreement in effect during this period, there could be no obligation on the employees to pay dues. Mr. DeNardo cites a number of cases to support this argument. Mr. DeNardo contends that he has, then, overpaid dues in the amount of $64.00 for this period, and this overpayment was protested by him.

Mr. DeNardo argues that the payment he made in August, 1977 was misapplied by APEA. He contends that this payment was applied to the "expired 1976 contract period". Such an application, argued Mr. DeNardo ignores Federal case law and NLRB decisions.

Mr. DeNardo argues that he is entitled to a 30-day grace period, because of his status as a non-member of the Association. This period, contends Mr. DeNardo, began the day the new agreement was signed, May 2, 1977.

Mr. DeNardo contends that his discharge was caused by faulty record-keeping on the part of the Association. He refers to several

exhibits attached to his brief to support this contention.

In summary, Mr. DeNardo contends that he has overpaid his agency fees, as he had no obligation for such fees during the period January 1, 1977-May 2, 1977, and for a period of 30 days after May 2, 1977.

CONCLUSIONS:

Mr. DeNardo argues that the acceptance of his dues by the Association prohibits his discharge for failure to pay dues. The cases cited to support this argument are very different factually from the situation at hand. For example, Colgate-Palmolive Co., 51 LRRM 1177, involved an employee who became delinquent on June 12. By July 13 of the same year, she had received notice of the union's request for termination. She went to the union office on July 15, and paid all dues owed, plus assessed fines. It was found that under these circumstances, which included the fact that the employer had knowledge of the union's acceptance of the total amount owed, her discharge was unlawful. In F.J. Burns Draying, Inc., 46 LRRM 1531, which was also cited by Mr. DeNardo, the union had not only accepted from the employee in question the total amount owed, but had formally notified him that he was to be reinstated. The union then decided that notification had been "in error", and attempted to have the reinstatement blocked. In neither case is the situation similar to Mr. DeNardo, who has received a variety of notices informing him of the amount owed, after he had made a partial payment. He was well aware of the Association's statement of the total, unlike the situation in the cases cited.

Mr. DeNardo contends that there was in fact no agreement in

effect during the period January 1, 1977-May 2, 1977. He cites several cases to support this argument. As the Association notes in its brief, several of the cases cited by Mr. DeNardo deal with the circumstances under which a contract will or will not bar an election. Contract-bar rules are extremely complex, and rigidly adhered to: they deal with a very select and narrow set of circumstances and are not relevant to the situation at hand. Mr. DeNardo recognizes this fact on page 6 of his brief, when he is analyzing the effect of notice to modify on the termination of an agreement.("...prevents its renewal for contract-bar purposes...") (Emphasis added.)

Both parties cited cases supporting their contention that the agreement had or had not been extended during the period of negotiations. Both parties submitted various pieces of correspondence to support their arguments. The evidence is fairly evenly divided between the two points of view, until it is noted that the cases cited were decided under the National Labor Relations Act, which contains no provision similar to that of Section 23.40.110 of the Alaska Public Employment Relations Act, which states that nothing in that Act shall prohibit

> "a public employer from making an agreement with an organization to require as a condition of employment
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> . . .
>
> payment by the employee to the exclusive bargaining agent of a service fee to reimburse the exclusive bargaining agent for the expense of representing the members of the bargaining unit." (Emphasis added.)

Such an agreement was clearly made. Both the 1975-76 and 1977-79 agreement use identical language in the provisions covering the agency shop.

The cases cited under the National Labor Relations Act are concerned with enforcing the Taft-Hartley amendments to prevent illegal union shop provisions, and deals in no way with the agency shop. The APERA does contain the language cited above, to repeat:

> ". . .payment by the employee . . . to reimburse the exclusive bargaining agent for the expense of representing the members of the bargaining unit." (Emphasis added.)

There is no question that the Alaska Public Employees Association was continuing during the period of January 1, 1977-May 2, 1977 to represent employees in the unit and is entitled to be reimbursed for the expense of doing so.

Mr. DeNardo contends that he is entitled to a thirty-day period, after the signing of the agreement on May 2, 1977, before dues were owed and payable. The language of both agreements is clearly contrary to this argument. The agency shop provision states that: "Payment of APEA dues or agency fees shall commence within thirty (30) days after the date of hire." Mr. DeNardo states in his brief that he has been employed by the State of Alaska since 1974. The thirty-day grace period applies to newly-hired employees. Mr. DeNardo cites several cases in support of his argument, but appears to have misread the findings of those cases. For example, Paragon Products revolved around the circumstances under which a contract containing a union-security provision would act as a bar to an election. It was found that a contract with a clearly illegal union security provision would not act as such a bar. Such an illegal provision would be one which "specifically withholds from incumbent nonmembers or new employees the statutory 30-day grace period." (134 NLRB 663). This does not mean that statutory 30-day grace periods are to be given

to nonmember employees each time a new contract is signed, as Mr. DeNardo appears to interpret it. It means that an agreement which states on its face that nonmember employees and/or newly hired employees shall not be given a thirty-day grace period before union dues are owed, will not act as a bar to an election.

Mr. DeNardo appears to be arguing that the dues which he owed under the 1975-76 agreement (June 1976-December 1976) can no longer be paid by him. This is the only interpretation possible from his argument as to the misapplication of his dues. As the Association points out in its brief, such a position is untenable. Mr. DeNardo cites no support for his argument that the new agreement has somehow eradicated his obligation to pay dues owing from the previous year.

According to Mr. DeNardo's apparent calculations, during the period June, 1976-March, 1978, he is responsible for dues covering only nine of those twenty-one months. This is because of his deductions of one thirty-day grace period; four months when in his opinion no agreement was in effect, and dues were not owed; and the seven months in 1976, which he no longer was liable for because the agreement terminated on December 31, 1976.

According to our calculations, with his payment of $112.00, on October 19, 1978, Mr. DeNardo has now paid his obligations to APEA through March 1978, and is therefore no longer in arrears. At the time of his termination, however, he was substantially behind in his payments.

ORDER AND DECISION NO. 39

It is determined that Daniel DeNardo was terminated for cause on April 21, 1978, and was rehired in October, 1978, as a new employee, upon payment of delinquent agency shop fees. Since he was discharged for just cause, the relief he requests is denied, specifically as listed below:

a. rights, benefits and privileges of employment, other than those which would accrue to any new employee;

b. back wages, plus interest for the period of termination;

c. legal expenses.

SIGNED: _____
C.R. "Steve" Hafling, Chairman

SIGNED: _____
Ronald M. Henry, Member

SIGNED: _____
Morgan Reed, Member

[SIGNATURES ON FILE]