

[Labor Relations Agency Stationery]

PAM MARSTERS and APEA)
 Petitioner,)
) Petition 82-1
vs.)
)
STATE OF ALASKA)
 Respondent)
_____)

ORDER AND DECISION NO. 72

Petitioner filed a grievance in mid-February, 1981, demanding Ms. Marsters be flex-staffed to an Investigator II position retroactively to December 1980, thus giving her a substantial pay increase. The grievance procedure set forth in the parties' collective bargaining agreement was followed. Relief was denied at Step 1; however, relief was granted at Step 2 by Patrick Sharrock, Ms. Marsters' division director. Some sixty (60) days later, the Director of Personnel refused to honor the agreement granting relief. This refusal was based on Personnel Rule 2.06.0, which states:

The effective date of any allocation action taken by the director shall normally be the sixteenth of the month following the date on which he took the action unless he specifies another.

The State argued this Personnel Rule pre-empts any division director from granting retroactive pay, and therefore Mr. Sharrock had no authority to grant the relief. It asked the Agency to dismiss the Petition for Enforcement, deferring the resolution of the matter to the parties' grievance arbitration procedure under the collective bargaining agreement.

The Agency heard the case on May 7, 1982, and post-hearing briefs were filed. The State stipulated that Ms. Marsters did good work for the State, was in a flex-staff position, was not promoted after holding the position one year, and filed a grievance; that the division director granted relief at Step 2 of the grievance procedure; and the State did not implement the division director's decision.

Petitioner held that the Agency has jurisdiction over this dispute pursuant to AS 23.40.430; and that Personnel Rules are superseded by the collective bargaining agreement (Article 34 of the collective bargaining agreement).

Flex-staffing is a common practice and thus part of the collective bargaining agreement even though not expressly included. Petitioner presented testimony from other personnel who had been flex staffed and granted retroactive pay. Petitioner argued that the collective bargaining agreement had a final and binding grievance procedure at Step 2, and that settlement reached at Step 2 cannot be overturned.

The State argued that, based on the Personnel Rules, Mr. Sharrock exceeded his authority to grant the retroactive relief. State held the Agency should defer to the legislatively enacted phrase mandating binding arbitration as the final step of any grievance; and APEA should have filed a grievance against the State for not following the collective bargaining agreement negotiated by the parties. The Agency will take jurisdiction of this case. The parties initiated and followed the grievance process set forth in the collective bargaining

agreement. The relief sought was granted by the proper person at Step 2. The State failed to acknowledge the relief: approximately sixty (60) days after the relief was granted, it asked Petitioner to restart the grievance procedure at Step 1. AS 23.40.230 is a clear statute requiring the parties to negotiate a grievance procedure with binding arbitration as the final destination. If either party fails to follow the agreement, the Agency is the court of first appeal. The Agency does not interpret AS 23.40.230 as mandating every grievance must go through binding arbitration before coming to the Agency. If this were so, any settlement of a grievance prior to binding arbitration could be retracted and a grievance procedure restarted at Step 1. The Agency views such retractions as an alleged breach of contract analogous to the breach of an arbitrator's decision. Thus the Agency disfavors the State's position that the breach of a grievance settlement necessitates the filing of another grievance.

The Agency is also perplexed with the State's argument that an arbitrator should decide the timeliness of the APEA appeal to Step 3. Although legal precedent supports this position, such a stance disregards the fact that almost sixty (60) days elapsed between the time Mr. Sharrock made his decision and when the State unilaterally attempted to void the settlement.

If this grievance were not settled at Step 2, APEA would have had fifteen (15) working days to move to Step 3. The Agency sees no reason why the State should be held to a less restrictive standard.

The final issue is Mr. Sharrock's authority to grant the relief. Without appropriate authority, a settlement cannot be reached. The authority

issue raised by the State does not concern whether Ms. Marsters should have been granted a flex-staff position. Rather, the Personnel Rule cited by the State in refusing to implement the settlement relates only to the effective date of promotion. The Agency fails to see any evidence presented by the State that Mr. Sharrock made an incorrect decision by granting Ms. Marsters a new position. The sole issue is whether Ms. Marsters receives her new wages or benefits retroactively. The Agency feels Ms. Marsters' relief should be retroactive. Individuals who are terminated and then reinstated are uniformly granted retroactive pay. Much precedent exists for the granting of retroactive pay when the State has not promoted an employee in timely fashion. If Ms. Marsters should have been flex staffed in December, why should she not be reinstated retroactively?

The State desires here that an employee wait four months to receive her proper higher position, and then denies her the appropriate accompanying benefits. Such a posture contravenes the purposes of the collective bargaining act.

State's contention that a division director could make a totally unjustified and irresponsible granting of relief is well-taken. The State should not be bound by all grievance procedure settlements when the actual authority to settle is not present. Section 34 of the collective bargaining agreement cannot be read to encompass all actions of a division director; nor can the Personnel Rules be read in a manner which defeats the purpose of AS 23.40. Ample labor relations law shows that parties' past conduct plays an integral role in the collective bargaining agreement. The Agency

finds that in the past State has retroactively reinstated individuals who were flex-staffed, and accordingly granted them retroactive wages and benefits.

THEREFORE the Agency finds the following:

1. Ms. Pam Marsters requested she be flex-staffed to an Investigator II position retroactive to December 1980, the time she qualified for flex staffing.
2. Mr. Patrick Sharrock, Ms. Marsters' division director, granted the relief sought on March 24, 1981.
3. The State failed and refused to implement the relief granted.
4. The State presented no valid reason why the relief granted was improper, nor why Ms. Marsters should not be given wages and benefits retroactive to December 1980.

THEREFORE the Agency ORDERS:

1. Ms. Marsters be reinstated retroactively to December 1980.
2. Parties are to meet and confer no later than September 30, 1982, to determine what date in December Ms. Marsters should have been flex staffed, and determine what benefits are due her.
3. Parties must report to this Agency no later than October 30, 1982, as to whether the dispute has been settled and relief granted.
4. If a dispute remains as to what relief Ms. Marsters be granted, parties must notify the Agency immediately and be prepared to have the Agency hear the case no later than fifteen (15) days after notification.

DATED this 10th day of September, 1982

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

SIGNED: _____
Morgan Reed, Member

SIGNED: _____
Ronald M. Henry, Member

[Signatures of Hafling and Henry on File]