

[Labor Relations Agency Stationery]

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

)

ORDER AND DECISION NO. 72 (a)

The Labor Relations Agency (hereinafter the Agency) issued Order and Decision No. 72 on September 10, 1982. The State of Alaska has petitioned for reconsideration of the Order and Decision, and Pam Marsters and APEA have opposed that Petition. After having read and reviewed the arguments of the parties, the Agency revises its Order and Decision No. 72 with the following Decision, Findings of Fact and Conclusions of Law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner Pam Marsters and APEA filed a grievance in mid-February, 1981 demanding Ms. Marsters be flex staffed to

an Investigator II position retroactively to December 1980, thereby giving her a substantial pay increase for the period December 1, 1980 to date. The grievance procedures set forth in the parties' collective bargaining agreement (the "Agreement") was followed. The relief requested by petitioner was denied at Step One, however relief was granted at Step Two by Patrick Sharrock, Ms. Marsters' Division Director. Petitioner noted by letter some 30 days after that decision that it recognized that the State was not going to honor the decision of the Division Director. Some 60 days after the award of the Step Two decision, the Director of Personnel formally refused to honor the agreement granting relief. The refusal was based on the State's contention that the Division Director had no authority to grant the retroactive pay and make the award which he did at Step Two because that authority had been removed under Personnel Rule 2.06.0. The petitioner filed its petition for enforcement with

the Agency. The State opposed the petition and asked the Agency to dismiss it and to defer resolution of the matter to the grievance procedures outlined in the Agreement; specifically, by commending a new grievance procedure contending that the State's refusal to honor the Division Director's Step Two decision as the basis for the grievance. 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 this position one year, and that she filed a proper grievance, that the Division Director granted the relief at Step Two of the grievance procedure, and that the State did not implement the Division Director's decision. The Agency determined that the Step Two decision should stand for the reasons set forth in Order and Decision No. 72.

2. The Agreement, among other things, provides that:

A grievance shall be defined as any controversy or dispute arising between APEA or employees and the Employer. having a desire to create and maintain labor relations harmony, the parties agree that they will promptly attempt to adjust all complaints, disputes, controversies or other grievances arising between them involving questions of interpretation or application of the terms and provisions of this agreement, or any other controversy or dispute having occasion to arise between the parties. If differences or disputes of any kind arise between APEA or the employees covered herein and the Employer, APEA or the aggrieved employee or employees, as the case shall be, shall use the following procedure as the sole means of settling said difference, dispute or controversy. It is further agreed that the parties covered herein shall be bound by any written decisions, determinations, agreements or settlements which may be effectuated through the grievance-arbitration procedure and this procedure shall be the sole method of settling disputes, differences or controversies. [Emphasis added]

Agreement, Art. X, Sec. 1. The grievance procedure sets forth five steps, culminating in the fifth step of arbitration. The Agreement comports with AS 23.40.210 in that

The Agreement shall include a grievance procedure which shall have binding arbitration as its final step.

3. The role of the Agency with respect to the Agreement is set forth in AS 23.40.210 as
Either party to the Agreement has a right of action to enforce the Agreement by petition to the Labor Relations Agency
[Emphasis added]

The Agreement which APEA seeks to enforce through its petition provides for a grievance procedure culminating in arbitration on issues relating to the interpretation of the Agreement, or any other matters, as set forth above.

4. The question of whether or not a division director's Step Two award binds the State regardless of the division director's authority to make that award is a question of interpreting the Agreement. Step One envisions settlements by an aggrieved employee's supervisor, and specifically provides the State with the right to overturn that settlement. Step Two by contrast does not provide a specific means whereby the State can overturn the division director's decision. A listing of

instances where certain actions can occur leads to a presumption that that list is exclusive, and more instance ought not to be inferred. 2A Sands, Sutherland on Statutory Construction, Sec. 47.23 (expressio unius est exclusio alterius). On the other hand, however, the Agreement does not directly state that a division director's decision will be binding. Indeed, Step Two provides simply that the division director "receiving the written appeal. . . shall respond in writing to the employee and/or the APEA representative within 10 working days after receipt of the appeal". Whether or not that response in writing is a delegation by the State to the division director of all authority to a decision is a question of interpretation.

5. The question of whether the Division Director's decision itself was ultra vires or beyond his authority to make is itself a question of interpreting the Agreement. The State has contended that particular personnel rules limit the authority of a division director to make decisions relating to retroactivity. The State's assertion that Personnel Rule 2.06.0 restricts that authority is not convincing, but nevertheless does raise a question of interpretation. That personnel rule cited provides:

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 "director" referred to in said rule is the Director of Personnel, and the effective dates. which are spoken of. appear in the context of the personnel rule taken as a whole to refer only to a date which triggers orders for payment. Just as legislation may provide for an effective date, but also provide that on that effective date, the legislation will be retroactive, so also could the effective date of an allocation action permit retroactive effect. Nothing in the personnel rule appears to conclusively prohibit a retroactive award. Application of the personnel rule contended as governing by the State is an issue requiring review of the management rights entrusted to the State pursuant to the Agreement (Art.. 5) and the application of the Agreement to flex-staffing which is not specifically mentioned in the Agreement (Art. 35, Conditions Not Specifically Covered [by agreement]). These are issues relating to the interpretation of the Agreement.

6. The State is not bound by the errors of its officers (i.e., the Division Director here) as a general principal of law. In re Stephenson, 511 P.2d 136, 143 (Alaska 1973). Nevertheless, is the State has fully delegated that authority and bound itself to the decisions of such an officer by contract, the State may be bound. In this instance, whether the State has so delegated its authority so as to be bound by decisions of its

officers regardless of their impact is itself a question of interpreting the Agreement. Clearly, a contract entered into by the State cannot permit an officer to violate the law. King v. Alaska State Housing Authority, 512 P.2d 887 (Alaska 1973) Whether there, has been such a violation, or whether statutes (implemented by regulation or rule) so limit the authority of a director to make a decision are questions of interpreting the Agreement.

7. Whether or not Ms. Marsters is entitled to a retroactive increase in pay by operation of whatever provisions or practices apply to flex-staffing, even though flex-staffing is not an issue specifically described within the Agreement, is both a question of interpreting the Agreement (i.e., applying Art. 35 relating to "Subjects not Covered by the Agreement") and is an issue which is subject to the grievance procedure. See, grievance-procedure quoted in paragraph 1 above.

8. The refusal of the State to be bound by Step Two findings of its Director is an issue which is a subject of grievance procedure.

9. This suit is ripe for arbitration. The State has moved to have the case taken to immediate arbitration: The

Agency finds it useless to have the parties go back through Steps Three and Four of the grievance procedure before going to an arbitrator.

As of this time, the State has presented no reason to the Agency why the director (as defined by Personnel Rule 206.0) did not order Marsters appropriate benefits retroactively reinstated after she was flex-staffed by Mr. Sharrock. Assuming Mr. Sharrock did not have the proper authority to grant benefits retroactively to Marsters, a reason should be forthcoming as to the State's refusal to grant the retroactive relief. One of the purposes of collective bargaining is to orderly settle disputes. The parties past practices can be an establishment of the parties contract. See How Arbitration Works Elkouri BNA Books, 3d Ed., p.p, 408-11. Evidence has been presented to the Agency that other individuals, employed by the State, have taken their flex-staff and retroactive benefit questions to the grievance procedure and have been granted retroactive benefits.

Since this case has come to the Agency in this light, the Agency wants the Marsters' dispute decided by an arbitrator in one setting as soon as possible. The decision of the arbitrator should reach the ultimate question of "Is Petitioner entitled to any retroactive salary or benefits?" issue of whether Sharrock

had the requisite authority to decide Ms. Marsters' retroactive relief.

10. Where the outcome of an administrative process is pre-ordained, reviewing agencies such as courts have determined that the primary jurisdiction normally afforded the administering agencies may be set aside and the administrative remedies (which consist of grievance procedures in this instance.) may be deemed exhausted. To hold otherwise would have been useless and wasteful for the appellant. See, American Fed. of Government Emp., Local 1668 v. Dunn, 561 F.2d 1310 (9th Cir. 1977).

11. Pursuant to the terms of the Agreement, exhaustion of Steps One through Four of the grievance-arbitration process result in arbitration of the issue. Here, where the cumulative result of the process was the determination disfavorable to the petitioner as to retroactivity, it is reasonable to assume that arbitration was the next step.

12. In an instance where disagreements over the interpretation of the Agreement exist and the parties have agreed that the arbitrator will be the ultimate arbitor of such interpretive questions, the Agency will interrupt the arbitration process and act as the interpreter of the Agreement only in those instances

where one party or the other has acted in clear bad faith and where the decision of the arbitrator must so unnecessarily favor one party that: referral to the arbitrator is wholly unnecessary. Here, neither, party has been shown to act in bad faith, but each party has simply taken different positions in the application and interpretation of the Agreement

ORDER AND DECISION

Enforcement of the Agreement in this instance requires, an Order and Decision that the parties submit the issues relating to the interpretation and application of the Agreement noted herein to arbitration. The correction should include the question of authority of Mr. Sharrock and the ultimate question as to whether Ms. Marsters. should be granted her retroactive benefits. The Agency will. retain its jurisdiction pursuant to its powers of enforcing the Agreement solely for the purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not with reasonable promptness after the issuance of this decision either been resolved by amicable settlement or submitted properly to arbitration or (b) the arbitration procedures have not been fair and regular or have reached a result which is

repugnant to the Public Employment Relations Act (AS.23.40.070-260).

DATED this 19th day of November, 1982

LABOR RELATIONS AGENCY

SIGNED:

C. R. "Steve" Hafling, Chairman
ALASKA LABOR RELATIONS AGENCY

SIGNED:

Morgan Reed, Member

SIGNED:

Ronald M. Henry, Member

[Signatures of Hafling and Henry on File]