Labor Relations Agency Stationery]

LOCAL 71, LABORERS TRADES )
AND CRAFTS, )
)
Petition 82-7 )
vs. )
)
STATE OF ALASKA, )
)

ORDER AND DECISION NO. 74

On October 22, 1982, Local 71 filed an unfair labor practice and petition for enforcement of arbitration according to 2 ACC 20.141. Local 71 accused the State of violating AS 2.40.110 by their unlawful conduct in the Carol Lawrence arbitration case. Ms. Lawrence's grievance were "resolved" through three decisions by an arbitrator, Roger Tilbury, of Portland, Oregon.

The arbitration involved two grievances. Both involved the alleged breach of the State's contract and Local 71's seniority system. Lawrence was first on the seniority list, she was overlooked for three positions.

The first fact situation was September 2, 1981, when a vacancy arose. Lawrence was not contacted and her position went to Dana Durham. Lawrence said she was home; management said reasonable efforts were made to contact her and she was not home. This grievance was denied and is not in dispute before the Agency.

The second grievance happened on September 3rd when two

more vacancies arose. Lawrence once again was not contacted and the positions went to Kent and Hettman. The arbitrator found in Order and Decision No. 1 that Kent and Hettman reported to work six (6) days later, September 9th. He found the State could have mailed Lawrence a letter during the six-day interim period. He decided the State did not make reasonable efforts to contact Ms. Lawrence in the six-day period and lapse of time was crucial to his decision. Therefore, he decided to grant grievance No. 2.

On June 1, 1982, the first arbitration award held that "Ms. Lawrence should be paid her normal compensation for the period she would have worked beginning with the date when Thomas Kent and James Hettman went to work on September 9, 1981 (whichever reported first) until the time of September 11, 1981, when Ms. Lawrence actually went to work." The arbitrator retained jurisdiction for thirty (30) days in the event either side wanted clarification or found any conclusions or underlying impressions were incorrect.

On July 2, 1982, Messers. Stewart and Baffone, the representatives of the State and LTC stipulated that Kent and Hettman went to work on September 3, 1981. The importance of this date is obvious. If the Kent or Hettman started work September 3rd, the same urgent circumstances of the preceding day, and grievance No. 1 were present. The arbitrator was

hesitant to find the State supervisor had not diligently tried to contact Lawrence, the arbitrator based his decision on the six-day interim period. This Agency realizes that another arbitrator could have decided both cases for Lawrence on the same facts, all depending upon the weight he gave each witnesses testimony. However, this arbitrator in this hearing placed particular emphasis on the supposed six-day interim.

Five (5) days after receipt of the July 2, 1981 stipulation, the arbitrator amended the date on the last page of his opinion from September 9th to September 3rd. He wrote the parties and asked them to simply tear off the back page of their opinion and put in the new page. The method of amending the opinion made the opinion inherently ambiguous as pages 8 and 10 of the opinion referred to Kent and Hettman going to work on or about September 9, 1981.

The second Order and Decision was received by the parties on or about July 12th. On July 20th, Mr. Stewart unilaterally wrote the arbitrator a letter addressing the inconsistencies and asking for a complete review. His letter addressed the matter of giving LTC an opportunity to respond, his letter was not overbearing. A third amended opinion was issued July 29th without input of Mr. Baffone or Local 71.

Mr. Stewart's testimony was that he sent

a carbon copy of his July 20th letter to Mr. Baffone and Local 71. His testimony was that he did not send it certified mail. Mr. Baffone's testimony was that Stewart's letter was never received. Baffone was outraged that unilateral contact was made with the arbitrator. LTC made attempts to have the third Order and Decision set aside. Such efforts consisted of letters and a conference call which was arranged by the arbitrator. The arbitrator, Stewart, and Baffone, took part in the conference call. Mr. Baffone did not have Mr. Stewart's July 20th letter prior to the conference call, there was no procedure arranged for the discussion of topics at the conference call. There was no orderly proceedings or leave for supplementing the record after the conference call. LTC has asked us to uphold the arbitrator's second Order and Decision and/or to find an unfair labor practice on the State's unilateral contact with the arbitrator.

There are two basic lines of reasoning that would allow us to same. The first of which is that the arbitrator allowed a thirty-day (30) lag time for motions for reconsideration. Stewart's letter dated July 20th was therefore longer than the thirty (30) days from the June 1st decision.

The Agency will not decide this substantive dispute on a mere timeliness argument. Timeliness requirements can be waived in the interest of justice. The arbitrator made a

cosmetic change in rendering his second Order and Decision. The equities would lie in favor of LTC's argument except for the inconsistency of the Order with the rationale.

The second reason is more substantive in nature. The reasoning is based on the Code Of Professional Responsibility For Disputes, the Spielberg doctrine and AS 09.43.010 et seq.

The Code is used by the National Academy of Arbitrators, American Arbitration Association and Federal Mediation and Conciliation Service. Post Hearing conduct is covered in Chapter 6 and is set forth below:

> Chapter 6 (d) (l) No clarification or interpretation of an award is permissible without the consent of both parties. (2) Under an agreement which permit or require clarification or interpretation of an award an arbitrator must afford both parties an opportunity to be heard.

This Agency has adopted the Spielburg Doctrine as set forth by the National Labor Relations Board. In 1955, the Board set forth criteria for a deferral for arbitration's awards. Spielburg Manufacturing Co., 112 NLRB 1080 36 LRRM 1152. The standards require that "(1) The proceedings be fair and regular; (2) All of the parties agree to be bound; and (3) The decision not be repugnant to the purposes and policies of the act."

The Board's criteria for fairness and regularity are

the equivalent of due process.

This Agency finds that arbitrator Tilbury's activities in the post-hearing stage of this proceeding do not meet the standard of fair conduct and due process. LTC was never given the opportunity to present their reasons why the third Order and Decision was improper.

Mr. Stewart has admitted that if he were the arbitrator in this case, that he would have re-opened the hearing and allowed each party to submit a brief on the issues. (See TR p.85-6).

Mr. Tilbury understood from Mr. Stewart's letter that he should review Order and Decision No. 2 and issue a new Order and Decision. The State even admits that they would have moved to vacate the award of Order and Decision No. 2, because it was internally inconsistent and wrong. (See TR. P. 30).

LTC cited AS 09.43.010 as the authority for this Board to act. In that Statute, the court is defined as the Superior Court of the State of Alaska. See AS 09.43.170. Furthermore, the entire Uniform Arbitration Act does not apply to a labor management contract unless it is incorporated into the contract by reference or its application is provided for statute. Labor management disputes are expressly excluded from Alaska's Arbitration Act by the terms of AS 09.43.010, Nizinski v. Golden Valley Electrical Assoc., 509 P.2d 280 (Alaska 1973)

and Alaska State Housing v. Riley Pleas, Inc., 586 P.2d 1244 at 1248 (Alaska 1978). The dispute dos involve a labor-management contract, this Agency has reviewed the contract and the Uniform Arbitration Act is not incorporated into the contract by reference. Section 4, Ch. 113 SLA 1972 provided:

> This Act is applicable to organized boroughs and political subdivisions of the State, home rule or otherwise, unless the legislative body of the political subdivision, by ordinance or resolution, rejects having its provisions apply.

Political subdivision is defined in AS 33.30.200(4) as a borough, city, town, village or other area of local government in the state.

The State of Alaska, in and of itself, is not a political subdivision and this Agency does not solely rely upon the grounds set forth in AS 09.43.010 et seq. in reaching its decision. Relevant common law, and Federal law, (Title 9 U.S. Codes Section 10 and 11), have been reviewed by this Board before their decision has been rendered.

In Nizinski, supra, the Alaska Supreme Court addressed the issues of fraud and gross error. The Supreme Court found:

> "The arbitor was selected in an impartial manner, appellant was given notice of the arbitration proceedings and an opportunity to be heard.

> The record of the arbitration proceeding indicated that it was conducted in a fair and reasonable manner with each side given ample opportunity to present their position.

Nizinski, p. 283-84

The common law, Uniform Arbitration Act (AS 09.43.010-09.43.180) and Federal law are basically the same. An arbitration award may be vacated whenever (a) the award was procured by corruption, fraud or undue means; (b) where there was evident partiality or corruption of the arbitrators; (c) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. (Emphasis added.); and (d) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matters admitted was not made.

This Board finds that the arbitrator conducted a hearing in violation of AS 09.43.050(2); which is similar to U.S. Code Title 9, Section 10(c) by not allowing Mr. Baffone and LTC an orderly and properly scheduled opportunity to object to the third award. The arbitrator's receipt of an ex parte request to review the award was a clear breach of the Code of Professional Responsibility For Labor Management Disputes, Ch. 6,

Section d(2).

The parties collective bargaining contract is one that incorporates an arbitor being selected from the United States Federal Mediation and Conciliation Service. Such arbitors are governed by the Code of Conduct of the Code of Professional Responsibility. The conduct of the hearing should be consistent with the Code of Conduct. See Totem Marine & Tug & Barge v. North American Towing, 607 F.2d 649 (5th 1979) n.4 at 652.

Ex parte communications are allowed by the Code in Ch. 5, Section c(2) when "An arbitrator is certain that a party refusing or failing to attend a hearing has been given adequate notice of the time, place, and purposes of the hearing." The conference call was for the purposes of clarifying the dispute Mr. Baffone should have been given NOTICE of the purposes of the hearing, and an opportunity to reply after he discovered the July 20th letter.

This Board does not normally wish to meddle in arbitrations, which should be conducted with a minimum of court interference. This Board knows the strong public policy statements of the Alaska Supreme Court in that regard, as made in Nizinski, supra, the Anchorage Medical & Surgical Clinic v. James, 555 P.2d 1320 (Alaska 1976), and virtually every other arbitration decision reported by the Alaska Supreme

Court. However, in light of the facts of this case, we must.

This Board finds that:

(1) LTC was not given a fair opportunity to present counter-arguments and objections to Mr. Tilbury's third Order and Decision;

(2) The third Order and Decision was issued as a result of ex parte communication between the State and Mr. Tilbury;

(3) That after the discovery of the ex parte communication, Mr. Tilbury should have allowed LTC an opportunity to present evidence in support of its arguments;

(4) Ex parte receipt of evidence by an arbitrator constitutes prejudicial misbehavior on behalf of the arbitrator.

We, therefore, VACATE the AWARD issued on Grievance No. 2, the only grievance which is before this body, without prejudice, to the resubmission of the dispute of the parties before a new arbitrator in accordance of the terms of the collective bargaining contract.

DATE: JAN 6, 1983 _____
C. R. "Steve" Hafling,

DATE: JAN 6, 1983 _____
Ronald M. Henry

DATE: _____ _____
Morgan Reed

[Signatures of Hafling and Henry on File]