STATE OF ALASKA
DEPARTMENT OF LABOR
LABOR RELATIONS AGENCY

FAIRBANKS FIRE FIGHTERS ASSOCIATION, LOCAL 1324, Complainant, v. CITY OF FAIRBANKS, Respondent.	)	Case No. ULP 89-002

DECISION AND ORDER 90-3

This case arises from an unfair labor practice charge filed by the Fairbanks Fire Fighters Association, Local 1324 (Association) against the City of Fairbanks (City) under the Public Employment Relations Act (PERA), AS 23.40.070-.260.

After investigation, the Department of Labor, Labor Relations Agency (Agency) determined that informal methods of conference, conciliation and persuasion were unsuccessful in resolving the complaint and ordered a hearing. The hearing was held in Fairbanks on October 3, 1989, before Agency members Thomas E. Stuart, Jr. and J. R. Carr. The hearing officer was Robert W. Landau, Esq. The Association was represented by Brett M. Wood, Esq. The City was represented by James T. Mulhall, Deputy City Attorney and Director of Personnel and Labor Relations. Each party presented evidence through witness

testimony and documentary exhibits, and made arguments both orally and in written post-hearing briefs.

The Agency, having considered the evidence presented and the arguments of the parties, makes the following findings of fact, conclusions of law, and order in this matter.

FINDINGS OF FACT

1. The Association is the certified collective bargaining representative under PERA for employees of the fire department of the City of Fairbanks.

2. On September 1, 1987, the Association and the City entered into a collective bargaining agreement effective through December 31, 1990.

3. On November 24, 1986, the Alaska Department of Labor's occupational safety and health section issued a safety and health citation to the City's fire department for the failing to adopt standard operating procedures governing the selection and use of self-contained breathing apparatus (SCBA) for fire fighting operations. The Department's regulations in the Alaska General Safety Code set forth the requirements for the establishment and maintenance of a respiratory protection program for fire fighting personnel.

4. Upon receipt of the safety and health citations, the City began to formulate a respiratory protection program to comply with the General Safety Code requirements. The City's

efforts resulted in a document entitled "Fairbanks Fire Department Self-Contained Breathing Apparatus Inspection/ Maintenance Program," which was inserted as an appendix into the fire department's standard operating procedures (SOP) manual. After an exchange of correspondence between fire chief William Shechter and the Department of Labor concerning various aspects of the respiratory protection requirements, the Department ultimately approved the fire department's proposed SCBA program in October 1987.

5. The fire department's SCBA program is comprehensive in its scope, covering such topics as the selection, fitting, inspection, testing and maintenance of respiratory protection equipment. (See Exhibit 2, Appendix B).

6. Section 21 of the SCBA program requires that "all personnel subject to wearing respirators pass annual physical examinations performed by a licensed physician." The physical examination must check for fifteen listed medical diseases or conditions. Section 21 further provides that if any of the listed medical conditions are found, the employee shall not be permitted to wear a respirator unless authorized by the examining physician. Further, if the medical problems cannot be adequately resolved, the fire chief is authorized to take appropriate "employment action." There is no elaboration or explanation of what form the "employment action" might take.

7. Section 5.4 of the current collective bargaining agreement between the City and the Association provides in pertinent part:

> When, in the opinion of the City, there arises specific question as to the physical ability of an employee to perform his normal work assignment, a physical examination may be ordered by the City.

Section 5.3 of the agreement further provides:

> For any employee whose physical condition permanently prevents him from performing his normal work assignments, the City agrees to make a reasonable effort to place him in a classification he can perform within the City fire department employment. If there is not classification in which such an employee can competently and adequately perform the duties of the classification, the employee shall be relieved from duty and laid off or terminated by reason of disability.

The agreement does not specifically address the SCBA program, nor was the program a subject of bargaining during the contract negotiations proceeding the agreement although apparently those negotiations were in progress at approximately the same time the SCBA program was initially being formulated by the City.

8. In a memorandum dated October 17, 1988, to the Association's business agent, the city manager, Brian Phillips, stated as follows:

> In recognition of the medical requirements of the Alaska General Safety Code, Section 01.1302(b)(2) concerning the consequences of fire suppression employees continuing to perform interior structural fire fighting, I am approving Bill Schecter, Fire Chief, and Jim Mullen, Personnel Director, to negotiate

for the city to address these understandable concerns.

Pursuant to the memorandum, at least one meeting and possibly several meetings were held between Chief Schecter, Personnel Director Mullen and Association business agent Hao regarding the proposed medical examinations for fire fighting personnel. The meetings were not considered to be formal bargaining sessions. Despite these meetings, no resolution or agreement was reached regarding the impact of the SCBA program on Association members.

9. Thereafter, on January 18, 1989, Chief Schecter issued Station Memorandum 89-S251, which was intended to be a mandatory directive implementing Section 21 of the SCBA program containing the new requirements concerning physical examinations of fire fighting personnel. The memorandum noted that if an employee's medical examination disclosed a medical condition listed among the fire department's criteria, "the employee may be subject to termination pursuant to applicable union contract provisions should a certificate of fitness not be obtained."

10. In a letter to Chief Schecter dated January 20, 1989, Bill Hao objected to Station Memorandum 89-S251 on the basis that no collective bargaining had taken place regarding the directives contained in the station memorandum.

11. During the same period of time that the fire department was formulating its SCBA program, Chief Schecter was also engaged in a general revision of the fire departments

standard operating procedures. The SOP's essentially constitute the basic working rules, regulations and procedures of the fire department. Chief Schecter stated his belief that the SOP's, including the SCBA program, were a matter of management prerogative under the collective bargaining agreement and could be implemented on a mandatory basis without collective bargaining with the Association. Business agent Hao disagreed, noting that on at least one prior occasion, the City and the Association had successfully negotiated a change in the standard operating procedure concerning the use of back-up lines during fire fighting operations.

12. In a complaint dated March 24, 1989, the Association formally accused Chief Schecter of an unfair labor practice. The complaint states:

> The Fire Chief is rewriting the Standard Operating Procedures (SOP) for the fire department and is having members of the FFFA bargaining unit review and comment on them. However, these particular members are not official representatives of the FFFA.
>
> Included in the rewriting of the SOP's is one dealing with Self-Contained Breathing Apparatus (SCBA). The FFFA has already submitted to the Fire Chief a written disagreement with this particular SOP.
>
> This action by the Fire Chief is a violation of, but not limited to, Alaska Statutes, Title 23, Chapter 40, Section 23.40.070(2); Section 23.40.110(a)(5); and Section 23.40.250(1).

Attached to the complaint letter was a one-page document outlining the Association's "Disagreement with the Standard Operating Procedure for Self Contained Breathing Apparatus and Station Memorandum 89-5251."

13. During his revision of the standard operating procedures, Chief Schecter circulated drafts for comment to various members of the Association's bargaining unit. However, there was no indication that those bargaining unit members were official representatives of the Association or that their comments were sought as a formal response from the Association.

CONCLUSIONS OF LAW

1. The Agency has jurisdiction to hear and decide complaints of unfair labor practices described in AS 23.40.110 and is authorized to issue appropriate orders concerning such complaints pursuant to AS 23.40.140.

2. The Association is a certified employee "organization" and the City is a "public employer" within the meaning of PERA, and both the Association and the City are subject to the labor relations authority of the Department of Labor, AS 23.40.250.

3. AS 23.40.070 requires that public employers, among other things, "negotiate with and enter into written agreements with employee organizations on matters of wages, hours, and other terms and conditions of employment." AS 23.40.110(a)(5) requires

that a public employer may not "refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit ...."

4. AS 23.40.250(1) defines "collective bargaining" as

> ... the performance of the mutual obligation of the public employer or the employer's designated representatives and the representative of the employees to meet at reasonable times, including meetings in advance of the budget making process and negotiate in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or negotiation of a question arising under an agreement ....

5. AS 23.40.250(8) defines the "terms and conditions of employment" as

> the hours of employment, the compensation and fringe benefits, and the employers 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.

6. As a threshold matter, the Association and the City disagree about the scope of this unfair labor practice proceeding. The Association argues that its complaint is not limited to the SCBA program but is broadly directed at the entirety of the fire department's proposed revisions of its standard operating procedures. The City contends that the Association's complaint is limited to the adoption of the SCBA program specifically. While there is a reference in the Association's unfair labor practice complaint to Chief Schechter's revision of the SOP's, it is apparent that the main

thrust of the complaint concerns the adoption of the SCBA program. Attached to the complaint is a statement of the Association's specific disagreements with the SCBA program and the implementing Station Memorandum 89-S251; no other sections of the revised SOP's are referenced. Moreover, at the hearing virtually all the testimony was directed to the SCBA program and there was only passing discussion of the general revision of the SOP's. Based on the present record, therefore, we do not believe that the general revision of the SOP's has been adequately raised or presented in this proceeding and we decline at this time to make any specific findings or conclusions as to mandatory or permissive subjects of bargaining in those revisions apart from the SCBA program.

7. Under federal labor relations law, it is well established that when an employer implements or changes work rules or safety practices, it must first engage in collective bargaining regarding the proposed rules or changes. In the leading case of NLRB v. Gulf Power Co., 384 F.2d 822 (5th Cir. 1967), the court held that a public utility's unilateral revision of its safety rules and practices handbook without bargaining on the changes with its employees' union was a violation of its obligation to bargain in good faith and thus constituted an unfair labor practice under the National Labor Relations Act. The court specifically rejected the employer's contention that it had an exclusive, non-delegable legal responsibility to provide a

safe and healthful work place and that it therefore had the sole authority for promulgating safety rules and practices. See also NLRB v. Miller Brewing Co., 408 F.2d 12 (9th Cir. 1969) (issuance of new plant rules are a mandatory subject of bargaining under the NLRA); Solano County Employees Association v. County of Solano, 186 Cal. Rptr. 147 (Cal. App. 1982) (public employer's safety rules are a mandatory subject of bargaining under California public employment relations law).

8. There are few Alaska cases discussing the distinction between mandatory and permissive subjects of bargaining under PERA or similar laws. In Kenai Peninsula Borough School District v. Kenai Peninsula Education Association, 572 P.2d 416 (Alaska 1977), the Alaska Supreme Court ruled that matters of "educational policy" were not mandatory subjects of bargaining but that issues having a direct impact on the "economic well-being" of individual employees must be negotiated pursuant to the public school teacher collective bargaining laws in AS 14.20. The court acknowledged the difficulty of distinguishing between negotiable and non-negotiable issues and urged the legislature to provide more specific guidance on what issues should be bargainable. Id. at 423. In an appendix to its opinion, the court identified negotiable and non-negotiable items of bargaining between teachers and school boards. Id. at 424. However, even as to matters of "educational policy" which are not negotiable, the court expressed its view that there was an

implicit obligation in Alaska law that the parties "meet and confer" regarding policy issues. Id. at 423.

9. In Alaska Community Colleges' Federation of Teachers, Local No. 2404 v. University of Alaska, 669 P.2d 1299 (Alaska 1983), the Alaska Supreme Court was presented with the issue of whether the University's unilateral imposition of new "work rules" governing its relations with bargaining unit members without prior discussion or bargaining with the union was an unfair labor practice under PERA. At the administrative level, the Alaska Labor Relations Agency (ALRA), a different body from this agency, had determined that such unilateral imposition of new work rules was an unfair labor practice. The ALRA, however, declined to decide whether any particular issue in dispute was a mandatory or permissive subject of bargaining. Prior to a decision by the Superior Court on appeal, the parties reached a new collective bargaining agreement. The Superior Court ruled that it was error for the ALRA not to distinguish between mandatory and permissive subjects of bargaining in its remedial lorder but declined to remand the matter to the Agency since a new contract had been reached. The Supreme Court affirmed the Superior Court's ruling on this question but shed little additional light on the distinction between mandatory and permissive subjects of bargaining. 669 P.2d at 1303-05.

10. With respect to the SCBA program, the City argues that no part of the program is a mandatory subject of bargaining

because it was imposed on the City as a legal requirement by the Department of Labor through the Alaska General Safety Code requirements for respiratory protection. There is no question that the Fairbanks Fire Department is required to comply with applicable provisions of Alaska safety and health laws and regulations. It does not necessarily follow, however, that the manner of compliance or the resulting impact on the working conditions of employees is not a proper subject of bargaining. For example, General Safety Code Section 01.0403(b)(10) prohibits persons from being assigned tasks requiring the use of respirators unless it has been determined that they are "physically able to perform the work and use the equipment." To comply with this requirement, the fire department may properly require its employees to undergo regular physical examinations. However, such issues as the timing and frequency of the examinations, the selection of physicians, the allocation of the costs of the examinations, and the consequences of an employee's failure to pass the examination, all have a direct and significant impact on employees and must be negotiated through collective bargaining except where the applicable laws or regulations specifically prescribe the manner of compliance.

ll. Where safety laws or regulations explicitly prescribe the manner of compliance, we do not believe that employers and employee organizations have the discretion to deviate from such requirements. For example, with respect to the

required physical examinations, General Safety Code Section 01.0403(b)(10) states that "[t]he local physician shall determine what health and physical conditions are pertinent." We interpret this provision to mean that neither the Fire Department nor the Association, either unilaterally or by agreement, may establish the relevant medical criteria except on an advisory, nonmandatory basis; the final, binding decision is in the hands of the examining physician.

12. Where, however, a public employer is given discretion as to how it may comply with a particular safety or health requirement, we believe that such matters must be negotiated with employee organizations where they have a direct impact on the economic interests of employees or on their working conditions. As indicated by the Alaska Supreme Court in the Kenai School District case, "a matter is more susceptible to bargaining the more it deals with the economic interests of employees and the less it concerns professional goals and methods." 572 P.2d at 422. Issues that are "so closely connected with the economic well-being" of individual employees, i.e. affecting salaries, number of hours worked or amount of leave time, should be collectively bargained. Id.

13. Another area of dispute regarding the SCBA program concerns the maintenance and testing responsibilities under the program. Such maintenance and testing requirements, to the extent that they are explicitly prescribed by law, are exempt

from bargaining. However, the employment consequences of implementing such requirements, in our view, are mandatory subjects of bargaining. Examples of such mandatory subjects include the selection of the SCBA maintenance officer, the amount of time devoted to this function, and the payment of any additional compensation or benefits for performing the maintenance duties.

14. The City argues that Sections 5.3 and 5.4 of the current agreement already provide a sufficiently flexible procedure to determine what "employment action" may result in the event an employee fails a physical examination. These provisions, however, do not specifically refer to the SCBA program nor is there any evidence from the parties' negotiations that these provisions were intended to apply to physical examinations required by the SCBA program. Under these circumstances, it cannot be said that the Association "clearly and unmistakably" waived its right to bargain over the employment impact of a failure to pass a physical examination which we have determined to be a mandatory subject of bargaining.

15. The City further argues that the "management rights" clause in Section 3.1 of the agreement permits the City to "direct its working forces" and "manage and control" City business. This type of clause, however, is a standard provision in many collective bargaining agreements and does not reflect a

waiver of the Association's right to bargain over issues directly affecting the wages, hours, and working conditions of employees.

16. Having concluded that certain aspects of the SCBA program are mandatory subjects of bargaining under PERA, we next address whether collective bargaining in fact took place. From the evidence it is apparent that at least one and possibly several informal meetings took place between representatives of the City and the Association concerning the medical examinations required under the SCBA program. The City concedes in its brief that "no formal and issue-specific bargaining took place at a time when the parties had in mind the application of the SCBA provisions of the AGSC [General Safety Code]." City's post-hearing brief at 10. The City goes on to argue that various provisions in the existing agreement are sufficiently flexible to cover the employment consequences of the implementation of the SCBA program. However, the fact that certain provisions in the collective bargaining agreement could be applied to the SCBA program does not relieve the City of its legal responsibility to bargain in good faith over mandatory subjects raised by the adoption of the new program. In bargaining, the parties may well agree to rely on provisions in the existing contract to deal with certain aspects of the SCBA program, but the point is that the Association was not given the opportunity to bargain over the implementation of the program. We do not doubt Chief Schecter's good faith belief that he was not obligated to negotiate over the

SCBA program and we recognize his informal attempts to obtain comments from individual employees concerning the program. Nonetheless, the evidence clearly demonstrates that there was no collective bargaining under PERA with respect to the implementation of the SCBA program.

17. As a result of the City's failure to bargain over the impact of the SCBA program on the wages, hours, and working conditions of its employees, we conclude that it has committed an unfair labor practice under AS 23.40.110(a)(5).

ORDER

Based on the foregoing findings of fact and conclusions of law, we hereby decide and order as follows:

1. The City of Fairbanks Fire Department has committed an unfair labor practice by refusing to bargain collectively in good faith with the Fairbanks Fire Fighters Association, Local 1324, regarding implementation of the Self-Contained Breathing Apparatus program in Appendix B of the Fire Department's standard operating procedures and implemented through Station Memorandum 89-5251.

2. The City of Fairbanks Fire Department is ordered to cease and desist from any further refusal to bargain in good faith with the Association regarding the effect of the SCBA program on wages, hours and working conditions including, but not limited to, such issues as:

(a) the selection, additional

working hours, and additional compensation for the SCBA maintenance officer; (b) the frequency, timing, and cost of the required physical examinations, and the selection of physician to perform such examinations; and (C) the nature of any "employment action" which may result from an employee's failure to pass the physical examination.

3. Station Memorandum 89-S251 shall be rescinded until such time as the parties reach agreement on the contents of the memorandum or reach a bargaining impasse under PERA.

4. The parties are directed to "meet and confer" regarding the remainder of the SCBA program as well as the proposed draft revisions to the Fire Department's standard operating procedures.

5. The Agency reserves continuing jurisdiction in this matter to consider any further alleged violations of PERA.

DATED this 21st day of February, 1990.

DEPARTMENT OF LABOR,
LABOR RELATIONS AGENCY

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Thomas E. Stuart, Jr., Member

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J.R. Carr, Member

[Seal of the Department of Labor
Affixed and Signatures on File]

APPEAL PROCEDURES

An Agency order may be appealed through proceedings in Superior Court brought by a party in interest against the Agency and all other parties to the proceedings before the Agency, as provided by the Rules of Appellate Procedure of the State of Alaska.

An Agency order becomes effective when filed in the office of the Agency, and unless proceedings to appeal it are instituted, it becomes final on the 31st day after it is filed.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of the Decision and Order in the matter of Fairbanks Fire Fighters Association, Local 1324, Complainant, and the City of Fairbanks, Respondent, Case Number ULP F89-002, dated and filed in the office of the Labor Relations Agency in Anchorage, Alaska, this 22nd day of February, 1990.

_____Clerk
[Signature On File]