

STATE OF ALASKA

LABOR RELATIONS AGENCY

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REC'D SEP 19 1989

BEFORE THE ALASKA STATE LABOR RELATIONS AGENCY

ALASKA STATE EMPLOYEES
ASSOCIATION,

Complainant,

vs.

STATE OF ALASKA,

Respondent.

STATE OF ALASKA,

Complainant,

vs.

ALASKA STATE EMPLOYEES
ASSOCIATION,

Respondent.

ULPC 89-5, 89-6, 89-7 and PET 89-7

ORDER AND DECISION NO. 124

The Alaska State Labor Relations Agency (the "Agency") convened a hearing on August 21-22, 1989 in Juneau, Alaska to consider unfair labor practice charges asserted by the State of Alaska and Alaska State Employees Association ("ASEA"), and to consider whether an impasse existed between the State and ASEA. Chairman C. R. "Steve" Hafling and member Marlene Johnson were present at the hearing and so constituted a quorum. ASEA was represented by counsel Don Clocksin, and

the State was represented by Assistant Attorney General Kathleen Strasbaugh. The Agency having considered the arguments, evidence and testimony of the parties, having reviewed the post-hearing briefs, and having issued a preliminary Order and Decision in this matter on September 8, 1989, renders the following order and decision.

Findings of Fact

1. ASEA represents, as certified bargaining representative, the general government unit ("GGU") of State employees. The GGU does not have a signed collective bargaining agreement with the State. Generally the terms and conditions of the last collective bargaining agreement entered into between Alaska Public Employees Association and the State are in effect during the pendency of negotiations for a new contract between ASEA and the State.

2. ASEA and the State commenced formal negotiations for a collective bargaining agreement in January 1989, and since that time have continued those negotiations through more than 60 days. The State maintains that budgetary restraints effectively set a cap on the State's bargaining position, but the State maintains that a menu of terms can be negotiated. Thus, while the State has not offered increased wages beyond its initial offer, it has offered alternatives in other areas including leave policies, health insurance, and various other mandatory and non-mandatory collective bargaining issues.

3. From January through April 1989, proposals were exchanged with little progress. In April and May 1989, the negotiating team for ASEA and the State reached agreements, which were reduced to Memoranda of Understanding, respecting modifications to the State's health insurance plan applicable to GGU members and respecting a negotiation leave bank policy whereby members of ASEA's negotiating team taking leave to participate in the negotiations could draw wages equal to their salaries from a bank of time donated by other GGU members. The State and ASEA tentatively agreed on a number of other matters including certain overtime, arbitration procedures, complaint resolution, performance evaluation disputes, merit principles and classification reviews. In addition a number of "Letters of Agreement" were signed by the parties concerning non-precedent setting issues such as scheduling, donations of leave and alternative work week policies. Some of these Letters of Agreement were executed before and some were executed subsequent to execution of the Memoranda of Understanding.

4. The Memorandum of Understanding concerning health insurance was executed May 19, 1989, and under that

scenario the State could potentially save \$26-35 per month per employee or over \$200,000 per month upon implementation. The plan provided for slightly reduced health insurance benefits to GGU members. The Memorandum of Understanding respecting the negotiation leave bank was executed May 26, 1989. Each party was executed by putatively authorized representatives of ASEA and the State. Joint Exhibits 19 and 41. Drafts of the Memoranda of Understanding indicated a change in the name of the documents from "Letter of Agreement," "Letter of Understanding" or other designation.

5. The Memoranda of Understanding, upon execution, provided for virtually immediate implementation without necessity of awaiting a fully signed contractual agreement between the parties. Indeed the State maintained that the modified health insurance plan did not constitute the State's final acquiescence to that type of plan, because the State continued to negotiate for a "defined benefits" plan. ASEA also did not presume that the precise parameters of the Memoranda of Understanding would be incorporated into a final collective bargaining agreement.

6. Because the modified health insurance plan reduced benefits to GGU members, and apparently also because certain GGU members were dissatisfied with ASEA negotiations, a number of individual GGU members indicated to State representatives their particular displeasure with the Memorandum of Understanding respecting health insurance. In support of their position, the objecting employees cited ASEA's constitution for the proposition that agreements such as the health insurance Memorandum of Understanding required ratification by the members. ASEA's constitution, Article XI, Section 4 provides:

All collective bargaining agreements and letters of understanding shall be subject to ratification by a simple majority of the affected members voting.

7. The GGU members indicated they would file suit against the State if it implemented the Memorandum of Understanding on health insurance. The State was advised by counsel that it would potentially be liable for unspecified damages in the event of such a suit.

8. The State's bargaining team was distressed to receive the challenges, and as a consequence met with ASEA representatives regarding the issues. ASEA representatives informed the State orally and in writing that ASEA's constitution did not require ratification of interim agreements such as the Memoranda of Understanding because the intent and meaning of the ASEA constitution provided only that a

collective bargaining agreement and letters of understanding thereafter needed to be ratified. ASEA informed the State in writing that the ASEA Executive Council also interpreted the ASEA constitution in this way. ASEA did not provide a letter of opinion from counsel nor was ASEA willing, as the State demanded, to provide an indemnification to the State for any claims and costs that might arise as a consequence of threatened suit against the State respecting implementation of the health insurance plan. ASEA objected to the State's inquiry into ASEA "internal procedures."

9. During the process of negotiating the terms and conditions of the Memoranda of Understanding, the State asked for and received assurances from ASEA that Don Wasserman had authority to so execute the agreement for ASEA. The State disputed Wasserman's authority, not on the apparent grounds of improper appointment as a negotiator, but respecting his authority to sign binding documents ostensibly requiring ratification as a pre-requisite to enforceability. ASEA's negotiators had proper authority.

10. The State declined to implement the Memoranda of Understanding asserting that a condition precedent to implementation was employed ratification and that, until ratification, ASEA's own constitution precluded implementation. As a direct consequence ASEA filed ULPC 89-5 against the State seeking reversal of the State's refusal to implement the Memoranda of Understanding. ULPC 89-5 also alleged that the State's negotiations process had been in bad faith.

11. Shortly after ASEA filed ULPC 89-5, the State's Director of Labor Relations Bruce Cummings announced that the State would not participate in further negotiations with ASEA during the pendency of that charge. ASEA filed ULPC 89-6 contending that Director Cummings' declaration was itself an unfair labor practice. The State subsequently filed ULPC 89-7 asserting that ASEA had committed unfair labor practice charges through the misrepresentation of its officers' authority to negotiate and respecting the position taken by ASEA regarding implementation of the Memoranda of Understanding.

12. Despite existence of the unfair labor practice charges, the State and ASEA continued to negotiate, but on August 17, 1989, the State declared that the negotiations were at impasse in the State's view and requested the Agency's assistance in appointing a mediator. The Agency denominated this request as PET 89-7. ASEA amended ULPC 89-5 to add as a further count a charge that the State's declaration of impasse was an unfair labor practice charge.

13. ASEA and the State continued to meet through the week preceding the hearing in this matter, and even after the State's declaration of impasse engaged in further conversation on at least minor matters. The parties were not making specific progress on discrete mandatory collective bargaining issues such as wages, although the evidence indicates that on the subject of health insurance benefits, ASEA had made proposals orally, which were not rejected by the State, regarding creation of a health insurance trust as a compromise alternative. Inasmuch as many of the mandatory elements in the bargaining process were inextricably intertwined, movement on an issue such as health insurance, one of the most volatile and controversial among the mandatory issues of collective bargaining, could well lead to movement on other mandatory issues. At the hearing, the parties also indicated that further discussions, albeit (in the State's view) respecting relatively minor or non-mandatory subjects of bargaining, would be considered even after the hearing.

Conclusions of Law

1. The Agency has jurisdiction to hear and consider complaints regarding unfair labor practice charges described in AS 23.40.110, and is authorized and charged with responsibility to make appropriate orders concerning such complaints pursuant to AS 23.40.140. National Labor Relations Board precedent, where applicable, is to be given deference by the Agency pursuant to 2 AAC 10.440(b).

2. The Agency has jurisdiction to consider existence of an impasse pursuant to its authority to hear appeals pursuant to AS 23.40.160(a). The declaration of impasse is a critical issue with respect to certain classes of State employees given that impasse is a pre-condition to appointment of a mediator and a step prior to strike action by employees or unilateral imposition of terms and conditions by an employer as recognized in APEA v. State, ___ P.2d ___, Op. No. 3442 (Alaska, June 30, 1989).

3. AS 23.40.110 provides in pertinent part:

(a) A public employer or an agent of a public employer may not...

(2) dominate or interfere with the formation or existence or administration of an organization;...

(5) refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit, including but

not limited to the discussing of grievances with the exclusive representative...

(c) A labor or employer organization or its agents may not...

(2) refuse to bargain collectively in good faith to the public employer, if it has designated in accordance with the provisions of AS 23.40.070 - 23.40.260 as the exclusive representative of employees in an appropriate unit.

4. Collective bargaining, as defined in AS 23.40.250(1) means:

...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 and the execution of a written contract incorporating an agreement reached if requested by either party, but these obligations do not compel either party to agree to a proposal or require the making of a concession...

Collective bargaining is thus required to be undertaken in good faith, but neither the State nor ASEA is compelled to agree to the terms and conditions presented by the other party, provided that the discussions have been engaged in with good faith to amicably resolve the differences. Order and Decision No. 113 (1988).

5. Mere surface bargaining is inappropriate. Here, however, the evidence does not compel a conclusion that the State has engaged in mere surface bargaining. The State has taken an adamant position regarding wages and certain other mandatory conditions, but has indicated a disposition to accept a menu of contractual terms designed to reach a certain budget level such that, for example, if wages are reduced health insurance benefits might be increased. Such bargaining is not in and of itself unlawful or in violation of AS 23.40.110(a) or outside the scope of appropriate actions under the term "collective bargaining" as defined. White v. NLRB, 255 F.2d 564 (5th Cir. 1958) ("... while the [NLRB] cannot force an employer to make a concession on any specific issue or to adopt any particular position, the employer is obligated to make some

reasonable effort in some direction to compose his differences with the union... [emphasis in original]".

6. The State's actions respecting negotiations have not demonstrated anti-union animus, but rather have demonstrated hard bargaining tactics. A demonstration of anti-union animus respecting negotiation is an element of proving, as an unfair labor practice charge, failure to engage in good-faith negotiations. General Electric Co., 150 NLRB No. 36 (1964). ASEA has not borne the burden of proof imposed upon it under 2 AAC 10.430.

7. That the State declared an impasse and that it declared it would be unwilling to participate in further negotiations during pendency of ULPC 89-5 were positions mooted by subsequent acts. The State has engaged in negotiations with ASEA on meaningful issues following both the declaration that it would no longer negotiate the following filing of ULPC 89-5 or following its August 17, 1989 declaration of impasse. Inasmuch as ASEA participated in these negotiations and particularly inasmuch as ASEA generated some interest on the part of the State in a health insurance trust fund concept, ASEA's ability and rights to participate in meaningful collective bargaining have not been chilled.

8. The State has not raised a frivolous argument, as a matter of contract interpretation and agency law, in contending that ASEA's constitution precludes the immediate implementation of the Memoranda of Understanding. These Memoranda of Understanding are distinct from mere tentatively agreed upon terms subject to a final collective bargaining agreement, inasmuch as they operate as separate contracts with immediate effect upon the parties. Applicable case law by the National Labor Relations Board stands squarely for the proposition that the employer is without standing, in all but the rarest of instances, to enquire into the ratification procedures of a union contract with respect to implementing the terms and conditions of collective bargaining agreements. Newtown Corporation, 280 NLRB No. 38 at 351 (1986), Martin J. Barry Co., 241 NLRB No. 148 at 1011 (1979), Electra-Food Machinery, 241 NLRB No. 194 at 1232 (1979), enfd. 621 F.2d 956 (9th Cir. 1980). As such, the State's refusal for the reasons advanced to implement executed Memoranda of Understanding alleging impropriety on the part of the union constitutes an unfair labor practice.

9. A union member might have been able to challenge ASEA's implementation of an agreement without ratification pursuant to its own constitution, but even a union member's own claim is subject to a heavy burden. A union member in making a challenge must demonstrate that the union's own interpretation

of its agreement (as ASEA has interpreted its own agreement here) must be "patently unreasonable". Newell v. IBEW, 789 F.2d 1186, 1189 (5th Cir. 1986); Stelling v. IBEW, 587 F.2d 1379, 1388-89 (9th Cir. 1978). The State as employer has a general incapacity to raise a similar challenge, and as such must bear an even higher burden of proof. As a legal matter, while ASEA's own interpretation of its constitution may be open to argument, its own interpretation is not patently unreasonable as represented in the hearing before this Agency, and the ultimate propriety of its interpretation is not appropriately before this Agency. Newtown Corp., supra; Stelling, supra at 1388;

10. The fact that the State felt threatened by potential lawsuits by GGU employees unhappy with ASEA's Memorandum of Understanding on health insurance is not a defense to the State's action in this situation. The State could have, for example, negotiated for an indemnification clause, although a demand for indemnification is an unfair labor practice (Arlington Asphalt Co., 49 LRRM 1831 (1962), enfd. 318 F.2d 550 (4th Cir. 1963)). Or the State could have sought an acceptable opinion of counsel prior to entry into the Memorandum of Understanding. However, the State did not do so, and after having executed the agreement, its refusal to implement for the reasons cited constitutes an unfair labor practice charge.

11. The Agency has authority under AS 23.40.140 to "issue cease and desist orders barring prohibiting practices, and to order affirmative action which will carry out the provisions of the Public Employment Relations Act." Alaska Community Colleges Federation of Teachers Local No. 2404 v. University of Alaska, 669 P.2d 1299, 1305 (Alaska 1983).

12. A finding of impasse requires a determination that meaningful progress is not likely to be made on mandatory subjects of bargaining. In this situation, at least as to health insurance benefits, some progress was conceivably on the table to be discussed at the time of the hearings in this matter. Despite the State having declared impasse, it nevertheless left open the doors for further discussion, and evidenced a desire to continue negotiation on matters which could, in the Agency's belief, lead to movement in potential resolution of the differences between the parties. APEA v. State, supra at slip op. p. 10 citing Saunders House v. NLRB, 719 F.2d 683, 688 (3d Cir. 1983).

13. In order to accommodate the parties' desire for early determination on the issues, the Agency set a deadline for the filing of post-hearing briefs, and on September 8, 1989 issued a preliminary order and decision.

14. ASEA failed to timely serve the State with a pre-hearing notice of defense allowed under AS 44.62.380 or its post-hearing brief. Since the notice of defense is not obligatory and preceded a hearing where all issues were aired and the post-hearing briefs were simultaneous, ASEA's omission is not to be condoned but nevertheless constituted harmless error in this instance.

Order and Decision

1. The State and ASEA shall recommence negotiations as soon as possible, with a caveat to the parties that in the event reasonable progress is not achieved respecting these negotiations within a period of thirty (30) days from September 18, 1989 (a date apparently set for voluntary resumption of negotiations between the parties), the Agency will be disposed, in the absence of convincing reasons to the contrary, to find the existence of an impasse in the negotiations between ASEA and the State;

2. The State shall promptly take all steps reasonably necessary to make affected employees whole regarding negotiation leave bank withdrawals in a manner consistent with the Memorandum of Understanding entered into between ASEA and the State concerning said leave bank dated May 26, 1989;

3. The State and ASEA shall implement its Memorandum of Understanding dated May 19, 1989 respecting a revised health insurance plan as expeditiously as possible;

4. The State shall cease and desist from asserting alleged ratification obligations arising under ASEA's constitution as a defense to implementing executed Memoranda of Understanding with ASEA;

5. This order and decision sets forth in writing the rationale for the preliminary order and decision rendered by the Agency on September 8, 1989 in Anchorage, Alaska and delivered that day to counsel for the parties.

DATED this 14 day of September, 1989.

STATE LABOR RELATIONS AGENCY

THIS IS TO CERTIFY THAT ON THIS 18th DAY
OF SEPT, 1989, A TRUE AND CORRECT
COPY OF THE FOREGOING WAS ~~HAND DELIVERED~~
MAILED, POSTAGE PREPAID, TO

D. Clocksin (ASEA) - K.
Stratton (AGO) - JAB
WOHLFORTH, ARGETSINGER, JOHNSON & BRUCHT

By C. R. "Steve" Hafling
C. R. "Steve" Hafling
Chairman