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DISTRICT NO. 1 MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO)
)
Complainant,)
)
vs.)
)
STATE OF ALASKA,)
)
Respondent,)
)
CASE NO. 03-1218-ULP

DECISION AND ORDER NO. 272

The board heard this dispute on December 1, 2004, in Juneau. The Board based its decision on the evidence admitted and testimony presented during the hearing. The record closed on December 1, 2004. Hearing Examiner Mark Torgerson presided.

Digest: The Marine Engineers Beneficial Association failed to prove that the State of Alaska committed an unfair labor practice by bargaining in bad faith when the State discussed contract negotiations and when the State agreed to meet with the union.

Appearances: Ben Goldrich, business agent for Complainant Marine Engineers Beneficial Association (MEBA); Nancy Sutch, Labor Relations Analyst for the State of Alaska (State).

Panel: Gary Bader, Chair; Randall Frank and Dennis Niedermeyer.

DECISION

Statement of the Case

MEBA filed an unfair labor practice complaint against the State for failure to bargain in good faith. MEBA contends that the State violated AS 23.40.110(a)(5) and

(a)(1) when 1) the State's designated negotiator asserted that the State would not negotiate with MEBA until it reached agreement with a "real union," and 2) the State met MEBA in negotiations when the parties orally agreed that they would not meet again unless the State was ready to present a new offer in negotiations. MEBA requests that we find the State committed an unfair labor practice and that we order the State to cease and desist from these acts, to bargain in good faith, and to reimburse MEBA for the travel costs associated with the February 26, 2004, meeting. The State argues that it has bargained in good faith.

Issues

1. Did the State's negotiator commit an unfair labor practice by allegedly declaring that the State was not willing to sign a collective bargaining agreement with MEBA unless and until the State of Alaska entered into an agreement "with a real union?"

2. Did the State commit an unfair labor practice by agreeing to meet with MEBA on February 26, 2003, after the parties agreed that unless the State had a new offer, the State would not request additional negotiating sessions?

3. If the State of Alaska committed an unfair labor practice, what is the remedy?

4. Should this dispute be rendered moot?

Findings of Fact

The panel, by a preponderance of the evidence, finds the following facts:

1. MEBA is recognized as the exclusive bargaining representative for marine engineers employed by the Alaska Marine Highway System (AMHS).

2. The State of Alaska employs marine engineers represented by MEBA, throughout the State's ferry system.

3. The parties' collective bargaining agreement was effective from July 1, 2000, to June 30, 2003. (Jt. Exh.1). The parties subsequently signed a "rollover" agreement that extended the contract for an additional year. In January 2004 the parties commenced negotiations for a new agreement.

4. The parties met in late January 2004, in the Governor's conference room in Juneau. MEBA's chief spokesperson was Bud Jacque, Executive Vice President for MEBA, District 1. The State's designated

spokesperson was David Stewart, Deputy Director of the State Division of Personnel.[1]

5. During the January meeting, the parties did not exchange written proposals. They did discuss proposals generally. This session was more in the nature of "meet and consult." (Chip Parr testimony).

6. During the January meeting, the State informed MEBA of its initial offer. Jacque knew that the State's initial offer was a one-year "rollover" of the previous contract, with a 0% salary increase and an additional $75 per month State payment toward employee medical costs. Jacque pointed out to State negotiators that AMHS employees do not receive merit or cost-of-living increases but other State employees do receive these increases. With this in mind, MEBA offered to take a cost-of-living increase. The meeting ended without any agreement.

7. Jacque is responsible for negotiating all contracts on the West Coast, including Hawaii. He has negotiated contracts with the State since 1993. During the January meeting, Jacque and the State's chief spokesperson, David Stewart, verbally agreed that unless the State had something new to offer, the State would not contact MEBA to arrange additional negotiating sessions. Jacque did not want to travel back to Alaska in the winter unless the State was willing to implement a cost-of-living adjustment for the marine engineers working for AMHS. Jacque told Stewart to contact MEBA if the rollover was their firm offer, and MEBA negotiators would discuss the rollover with their membership. Jacque recalled the State saying that if the State called MEBA, there would be something else on the table.

8. In February 2004, Ben Goldrich, MEBA's Business Agent in Juneau, contacted Stewart to schedule a bargaining session. Goldrich asked if the parties could meet. Jacque has a busy schedule with limited availability. Goldrich must schedule Jacque's meetings far in advance of the meetings. Jacque does not make regularly scheduled visits to Juneau. Goldrich was aware that Jacque said something to the effect 'don't bring me back unless there is movement.' There was no other reason for Jacque to be in Juneau other than for contract discussions.

9. Stewart recollected that Goldrich called shortly before the 26th to schedule the meeting and added Jacque would be in town anyway on the 26th. Goldrich is not sure who set up the meeting but imagines he suggested the meeting.

10. Stewart told Goldrich that the State had no new offer to put on the table, but the State would be willing to meet anyway. Goldrich does not recall Stewart saying

[1] Stewart held this position for 4 1/2 years before accepting employment with the State of Washington. He testified telephonically from San Diego, California.

that the State did not have much to talk about but was willing to meet.[2] If he had heard Stewart say this, he "absolutely" would have let Jacque know.

11. The State did not initiate the February 26, 2004, negotiating session.

12. The parties met on February 26, 2004, in an office at the MEBA facilities in Juneau.

13. During the February 26 meeting, the State provided MEBA with a written offer. The State also offered "me too" language: if another union gets an offer different than the offer the State is giving to MEBA, the parties could renegotiate those aspects of the contract.

14. Jacque, MEBA's chief negotiator, rejected the State's offer immediately. Jacque was upset because he felt that the State met in negotiations despite having nothing new to offer. He felt this was contrary to the parties' agreement not to meet unless one party had something new to offer.

15. Jacque was so upset he tore up the memorandum giving Stewart authority to negotiate on behalf of the State. Jacque thought he had torn up the State's offer. Jacque did not like the way he was treated by the State. He had expected a new offer from the State. Alternatively, Jacque would like the State to fax an offer to him if the offer in February was the same as the offer in January. This could have saved MEBA transportation and other related costs.

16. Jacque was also upset because of something he thought he heard Stewart say during the February meeting. He thought he heard Stewart say something to the effect that the State would have to check in with some "real unions." Jacque believes Stewart was making reference to some of the larger bargaining units of the State. Jacque recalled Stewart saying that the State troopers bargaining unit (Public Safety Employees Association) had reached agreement with the State.

17. Stewart did not recall specifically what he said regarding an agreement with a "real union." However, he recollected that the parties were discussing contract agreements, and the phrase may have come up in a conversation regarding the State teacher unions.[3] Stewart recalled Jacque asserting that the State would not get signatures,

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[2] Although Ben Goldrich represented MEBA, and Nancy Sutch represented the State in this proceeding, we required their testimony. AS 23.40.160. Our regulation 8 AAC 97.355(b) provides: "An individual may not be a representative an a witness in the same proceeding." Goldrich was listed as a witness on MEBA's witness list, and attorney Joseph Geldhof originally represented MEBA. However, Mr. Geldhof was unable to attend the hearing due to other business-related matters, and Goldrich took over in as MEBA's representative. We felt it important to question Ms. Sutch too, as she attended the February 26, 2003, meeting between the parties. In order to get Goldrich's and Sutch's testimony, we waived the above regulatory requirement under 8 AAC 97.480: "If the labor relations agency finds that strict adherence to a regulation in this chapter will work an injustice, the agency will, in its discretion, relax or waive the requirements of that regulation."

[3] Stewart was chief spokesperson for the three State marine unions and the three State teacher unions.

or agreement, from any union on the State's offer -- that the State would be lucky to get a signature. Stewart told Jacque that at least one other union had already accepted the offer. Stewart does not recall the term "real union" coming up during the meeting. He said the term "real union" may have cropped up during the discussion, but he meant no reference to MEBA.

18. Chipper Parr, Human Resource Specialist for the State Division of Personnel, took notes for the State at the February 26 meeting. He does not recall Stewart using the term "real union."

19. MEBA did not make an oral or written offer at the meeting but Stewart recalled MEBA representatives suggested the State's negotiators should talk to the Governor and indicate the level of support the Governor received in the gubernatorial campaign, and that this support warranted different consideration than the State's current offer.

20. The parties signed a one-year "rollover" agreement on May 20, 2004.

ANALYSIS

1. Did the State's negotiator commit an unfair labor practice by allegedly stating that the State was not willing to sign a collective bargaining agreement with MEBA unless and until the State of Alaska entered into an agreement "with a real union?"

AS 23.40.110(5) requires a public employer "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." Moreover, "[c]onduct that violates AS 23.40110(a)(5) can also interfere with rights protected under AS 23.40.110(a)(1)." *Alaska Community Colleges' Federation of Teachers, Local 2402, AFT, AFL-CIO v. University of Alaska,* Decision and Order No. 191 at 8 (Sept. 26, 1995) *aff'd* 3 AN-95-9083 CI (Alaska Super. Ct. September 26, 1995).

In *Fairbanks Fire Fighters Association, Local 1324, IAFF, vs. City of Fairbanks*, Decision and Order No. 256, at 9-10 (October 17, 2001); reversed 4FA-01-2607; *aff'd*, *Fairbanks Fire Fighters Association v. City of Fairbanks*, 48 P.3d 1165 (Alaska 2002).[4] we stated that, in the context of collective bargaining,

> Good faith has been described as "an open mind and a sincere desire to reach an agreement" and "a sincere effort . . . to reach a common

[4] The Superior Court reversed the Agency's ruling that it had the power to rule on the issue of arbitrability but then determined that the disputed issue was nonetheless arbitrable. The Alaska Supreme Court reversed the Superior Court's ruling and affirmed the Agency's conclusion that the Agency has authority to rule on arbitrability.

> ground." I Patrick Hardin and John E. Higgins, Jr., *The Developing Labor Law*, at 608 (3d ed. 1992), *quoting NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 12 L.R.R.M.(BNA) 508 (9th Cir. 1943), and *General Elec. Co.*, 150 NLRB 192, 194, 57 L.R.R.M.(BNA) 1491 (1964), *enforced* 418 F.2d 736, 72 L.R.R.M.(BNA) 2530 (2d Cir. 1969), *cert. denied*, 397 U.S. 965, 73 L.R.R.M. (BNA) 2600 (1970). In *Hotel Roanoke*, 293 NLRB 182, 184 (1989), the Board stated: "In determining whether a party has bargained in bad faith, the Board looks to the totality of the circumstances in which the bargaining took place." *Port Plastics*, 279 NLRB 362, 382 (1986); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

In determining whether a violation occurred, we will review both parties' conduct at and away from the negotiating table, not just the conduct of the party charged with a violation. Decision & Order No. 256 at 10. *See also Matanuska-Susitna Education Association, NEA-Alaska vs. Matanuska-Susitna Borough School District*, Decision and Order No. 268 at 6 (August 30, 2004).

After reviewing the record and testimony, we find that MEBA has failed to prove by a preponderance of the evidence that the State violated AS 23.40.110. Under the totality of the circumstances, we find it likely that MEBA's negotiators misunderstood Stewart's statement. But even if Stewart said what MEBA thought he said, Stewart's statement, without more, would be insufficient by itself to constitute surface bargaining. Hardin and Higgins state:

> [I]n viewing all of the relevant circumstances, the Board may overlook certain "'misconduct" in an effort to preserve the bargaining process. In *Logemann Brothers Co.*[5], for example, the Board refused to consider statements by the employer's negotiators to the effect that it would be "their agreement" or none at all and "it is this contract or none," as evidencing a refusal to bargain in good faith. The Board stated, "Although some statements by negotiating parties may show an intention not to bargain in good faith, the Board is especially careful not to throw back in a party's face remarks made in the give-and-take atmosphere of collective bargaining."[6]

1 The Developing Labor Law at 795.

Applying the above analysis, we find that whatever Stewart said, by itself, was a relatively minor slip in the parties' quest to reach agreement. Under the totality of circumstances standard, we conclude that MEBA failed to prove by a preponderance of the evidence that negotiator David Stewart's statement during the February 26, 2004, meeting, constituted a violation of AS 23.40.110(a)(5) and (a)(1). Therefore, the State

[5] 298 NLRB 1018, 134 LRRM 1251 (1990).
[6] *Id.* at 1021

did not commit an unfair labor practice. MEBA's complaint under this charge will be dismissed.

2. Did the State commit an unfair labor practice by agreeing to meet with MEBA on February 26, 2004, after the parties agreed that unless there were new offers, the State would not request additional negotiating sessions?

MEBA contends that the State bargained in bad faith by meeting with MEBA on February 26, 2004, because the State had nothing new to offer. MEBA alleges surface bargaining. In Hardin and Higgins, *The Developing Labor Law* at 802-03, the authors describe surface bargaining:

> When examination of the "totality" of a party's conduct during bargaining discloses that the forms of negotiation have been employed to conceal a purpose to frustrate or avoid mutual agreement, the party is said to have engaged in "surface bargaining." Any single factor, standing alone, is usually insufficient to support such a conclusion, but its "persuasiveness grows as the number of issues increases."

The State could very well have thought that MEBA was going to offer something new on February 26, 2003. There is meager evidence in the record about the scheduling of the February meeting, and any exchanges regarding the parties' expectations for that meeting. Goldrich is unsure if he initiated the call to set up the meeting but he imagines he could have. Stewart believes Goldrich called to schedule a meeting. The only other evidence regarding their conversation was Stewart's comment that the State essentially had nothing new to offer.

At the February 26 meeting, Stewart did present a written offer to MEBA. Apparently MEBA made no such offers but instead, abruptly ended the meeting after Jacque tore up Stewart's written negotiating authority.

Jacque testified that if Goldrich had not received a new offer, Jacque was sure Goldrich would have told him. Goldrich testified that if Stewart had told him the State had no new offer, Goldrich would absolutely have passed the information along to Jacque. However, Goldrich also testified that the State does not tell him in advance what its positions will be in upcoming negotiating sessions. Further, there was no testimony that Jacque, Goldrich, or any other MEBA representative received word from the State that the State would be presenting a new offer on February 26.

Our review of the evidence supports a finding that the parties agreed that the State would not request further bargaining unless it had a new offer. We have found that the State did not request the February 26 bargaining session; MEBA did. Therefore, we find under the totality of the circumstances that MEBA failed to prove that the State committed surface bargaining regarding the scheduling or holding of the February 26 meeting. MEBA's complaint under this charge will be dismissed.

3. If the State of Alaska committed an unfair labor practice, what is the remedy?

Because MEBA did not prevail, we need not craft a remedy.

4. Should this dispute be rendered moot?

The State argues that regardless of the outcome of the underlying dispute, we should declare this matter moot and dismiss MEBA's complaint. The State contends that the dispute in this matter was settled when the parties consummated an agreement in May 2003.

We have previously held that we will dismiss an unfair labor practice charge as moot when a grievance resolution eliminates an unfair labor practice. *Mid-Kuskokwim Education Ass'n v. Kuspuk School District*, Decision and Order No. 156, at 9 (March 8, 1993). A claim is moot where it has lost its character as a present, live controversy. *Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191 (Alaska 1995). The proponent must demonstrate that there is no live controversy. "The law considers a disputed claim to be moot when its resolution would not result in any actual relief, even if the claiming party prevailed." *Alaska Center for Environment v. Rue*, 95 P.3d 924, 929 (Alaska 2004).

We have already dismissed MEBA's complaint. At any rate, we find this matter is not moot. The Alaska Supreme Court has found a claim moot when "it is no longer a present, live controversy and the party bringing the action would not be entitled to relief, even if it prevails. Mootness can also occur when 'a party no longer has a personal stake in the controversy and has, in essence, been divested of standing." *Fairbanks Fire Fighters Association, Local 1324 v. City of Fairbanks*, 1148 P.3d 1165, 1167 (2002). **. . .** In this case, MEBA requested costs associated with its time and travel to the February 26 meeting. Although we have not previously decided whether to award such benefits, it is possible, if MEBA had prevailed, that we could have awarded the requested costs. Therefore, MEBA may have been entitled to relief if it prevailed.

CONCLUSIONS OF LAW

1. The Marine Engineers Beneficial Association is an organization under AS 23.40.250(5), and the State of Alaska is a public employer under AS 23.40.250(7).

2. This Agency has jurisdiction under 23.40.110 to determine whether the State of Alaska committed an unfair labor practice.

3. As complainant, MEBA must prove each element of its case by a preponderance of the evidence.

4. MEBA failed to prove by a preponderance of the evidence that the State of Alaska committed an unfair labor practice as alleged.

5. This case is not moot.

ORDER

1. The unfair labor practice complaint filed by the Marine Engineers Beneficial Association against the State of Alaska is denied and dismissed.

2. The State of Alaska shall post a notice of this decision and order at all work sites where members of the bargaining unit affected by the decision and order are employed or, alternatively, serve each employee affected personally. 8 AAC 97.460.

ALASKA LABOR RELATIONS AGENCY

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Gary Bader, Chair

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Randall Frank, Board Member

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Dennis Niedermeyer, Board Member

APPEAL PROCEDURES

This order is the final decision of this Agency. Judicial review may be obtained by filing an appeal under Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of filing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the order in the matter of the *District No. 1 Marine Engineers Beneficial Association, AFL-CIO vs. State of Alaska*, Case No. 03-1218-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 25th day of February, 2005.

_____
Sherry Ruiz
Administrative Clerk III

This is to certify that on the 25th day of February, 2005, a true and correct copy of the foregoing was mailed, postage prepaid, to:
Ben Goldrich, MEBA
Nancy Sutch, State of Alaska

_____
Signature