IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

YUKON FLATS SCHOOL DISTRICT, Appellant, vs. STATE OF ALASKA, LABOR RELATIONS AGENCY, Appellee.	)	CASE NO. 3AN-92-3603 CIV

FEB 09 1993

DECISION ON APPEAL

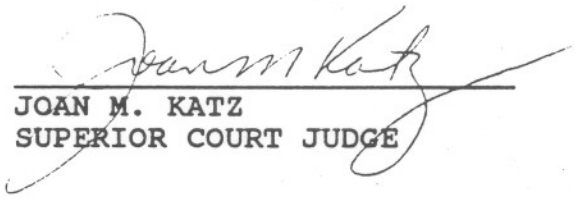
The issue in this case is whether a union proposal regarding the criteria for voluntary teacher transfers is subject to the mandatory bargaining requirements of the Public Employees Relations Act ("PERA"). The court has reviewed the record in the case and the arguments presented. The court agrees with appellant that the particular circumstances of the case call for independent review. However, the court also finds that there is no rational basis for the agency's decision.

The Alaska Labor Relations Agency ("ALRA") decided that voluntary transfer standards had to be negotiated. In reaching this conclusion, ALRA relied exclusively on the relegation of teacher transfers to the negotiable column in the appendix to the Kenai I case (Kenai Peninsula Borough School District v. Kenai Peninsula Education Association, 572 P.2d 416 [Alaska 1977]). Kenai I, however, did not address the contents of any teacher transfer proposals at issue in that case. No distinction was made between substantive and procedural proposals. What Kenai I did do, was establish an underlying balancing test which clearly favors the

District's position here.[1] See, Ridgefield Park Ed. Ass'n. v. Ridgefield Park Bd., 393 A.2d 278 (N.J. 1978).

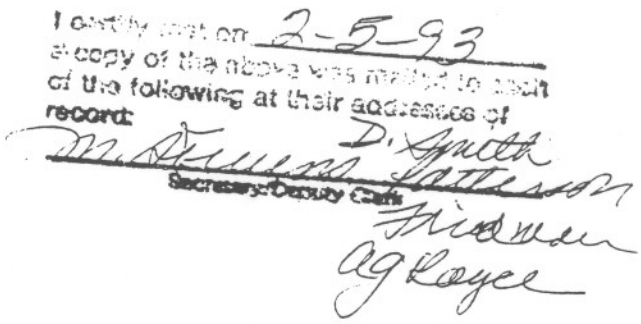
Accordingly, the decision of the ALRA is REVERSED. The analysis set forth in the hearing officer's proposed decision and order is hereby adopted and incorporated by reference. The court holds that the voluntary transfer proposal at issue in this case presented a permissive subject for bargaining, because it dealt with fundamental educational policies, i.e., substantive criteria for voluntary transfers. However, the court does not now decide whether every proposal touching on substantive criteria for transfers would necessarily fall into the permissive category.

Dated at Anchorage, Alaska this 5th day of February, 1993.



JOAN M. KATZ
SUPERIOR COURT JUDGE

I certify that on 2-5-93 a copy of the above was mailed to each of the following at their addresses of record:



Secretary-Deputy Clerk

[1]This test has since been adapted to the division between mandatory and permissive subjects of bargaining under PERA. APEA v. State, Opin. No. 3825, (Alaska Supreme Court, April 3, 1992).

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YUKON FLATS SCHOOL DISTRICT,	)
Complainant,	)
vs.	)
YUKON FLATS EDUCATION ASSOCIATION,	)
Respondent.	)

CASE NO. 91-005-ULP

PROPOSED DECISION AND ORDER

Heard before Jan Hart DeYoung, Hearing Examiner, on March 5, 1991, under authority delegated by the Alaska Labor Relations Board. The record closed on March 5, 1991. This decision and order is proposed under AS 44.62.500(b) for consideration by the board.

Appearances:

Saul R. Friedman, Hedland, Fleischer, Friedman, Brennan & Cooke, for Complainant Yukon Flats School District, and John B. Patterson, Kelly & Patterson, for respondent Yukon Flats Education Association.

Digest:

The subject of teacher transfer raises issues both of educational policy that are the exclusive domain of the school district and of working conditions that are appropriate for

bargaining. The former, which include the standards applied to select a teacher for a position, are permissive subjects of bargaining and the latter, which include the procedures applied, are mandatory.

DECISION

Upon consideration of the briefs, arguments, testimony and other evidence presented, the hearing examiner proposes the following findings of fact and conclusions of law.

Proposed Findings of Fact

1. The Yukon Flats School District and the Yukon Flats Education Association's collective bargaining agreement was due to expire on June 30, 1989. Tr. at 21. In May the parties began negotiations. They negotiated for 12 days during four different sessions. Tr. at 22.

2. The Association sought to include in the new agreement a teacher transfer provision similar to one in the existing agreement. The idea of a preference for existing district staff to transfer to vacant positions had been in the parties' agreement since 1976. Tr. 66. The language proposed for the new contract first appeared in the parties' agreement in the 1987 -- 1989 contract. Id.

3. Other districts have provisions in their contracts granting teachers rights to transfer on the basis of seniority, such as the Yukon-Koyukuk and Alaska Gateway school districts. Tr. 68. Other districts, such as the North Slope Borough School District, do not have such provisions in their agreements. Tr. 72.

4. The teacher transfer provision the Association proposed states:

> Voluntary Transfer and Reassignment. Yukon Flats teachers will be given preference over new hires when applying for vacant or new positions in the District. If two or more teachers apply for the same vacancy, the position shall be granted to the teacher with the greater seniority from the exact date of hire. In the event of equal seniority, the assignment will be determined by lot.
>
> The District will advertise in the District first for a period of no less than nineteen (19) days, prior to advertising outside of the District. The District will assume all moving and transportation expenses. During the summer the District will contact all teachers about any vacancies or new positions.

Complainant's exhibit 2.

5. The District's initial position was that it had no intention of including teacher transfer in the agreement because it was a management right. Tr. 27. However, the District countered with the following proposal:

> Voluntary Transfer/Reassignment. A teacher may request a voluntary transfer/reassignment for the next school year. Said request must be submitted to the superintendent by April 30 of current school year and must identify the desired site and position.
>
> The District will post known vacancies in each school by April 1.

Complainant's exhibit 3.

6. The Association's last proposal before the filing of the accusation states:

> Transfer and Reassignment
> A. Definitions.

a. A reassignment shall refer to change in teaching duties at a school site.
b. A transfer shall refer to a change in teaching site or itinerant status.

B. Voluntary Transfers.
1. Yukon Flats teachers, when applying for a vacancy, will be given preference for vacant or new positions in the District. When two or more teachers apply for the same vacancy the following criteria will be used:

1. length of service with the District
2. length and type of teaching experience
3. appropriate certification
4. recommendation by LSAC

2. A teacher may request a voluntary transfer/reassignment for the next school year. Said request must be submitted to the superintendent by April 30 of the current school year and must identify desired sites and positions listed in order of preference. These requests will be kept on file until September 15th of the school term for which the transfer was requested.

During the summer the District will contact a teacher with a transfer request on file about a vacancy at the site requested, providing the teacher has notified the District of a phone contact number and mailing address.

Complainant's exhibits 4 & 6.

7. The District's last proposal, submitted on August 6, 1989, states:

Transfer/Reassignment
A. With respect to this article, a reassignment shall mean a change in teaching duties at one's school site and a transfer shall mean a change in one's teaching site (village) or itinerant status.

B. Voluntary transfer/reassignment.
1. A written request for a voluntary transfer/reassignment for the next school term must be in the superintendent's office by

> April 1. The request must be specific as to school site and teaching assignment. These requests will be kept on file until September 15 of the school term for which the transfer/reassignment was requested.
> 2. During the summer the district will contact a teacher with a transfer request on file regarding a vacancy at the site requested, provided that the teacher has filed with the district his/her summer telephone number and mailing address.

Complainant's exhibit 7.

8. The District in a letter advised the Association that it took the position that the provision interfered with its right of hire and assignment because it required the District to fill open positions from the rank of current teachers before selecting candidates from outside the district irrespective of training or qualifications. J. Elliott, letter to M. Eininger (July 10, 1990), at Complaint, exhibit B.

9. The Association responded that it disagreed and intended to present its position at advisory arbitration. G. Pierce, letter to J. Elliott (July 19, 1990), at Complaint, exhibit C.

10. The Association declared impasse on October 22, 1989. Tr. 22. A wide range of articles was negotiated to impasse, including salaries, association leave, and just cause provisions and the provisions raised in this accusation. Tr. 53 - 54. The parties went into mediation on November 30, 1989, December 1, 1989, and February 12, 13, and 14, 1990.

11. On July 27, 1990, the District filed an unfair labor practice accusation against the Association, claiming that the Association failed the duty to bargain in good faith under AS 23.40.110(c)(2) by conditioning bargaining over mandatory issues on a permissive subject -- teacher transfer.

12. On October 2, 1990, the District amended its accusation to add a claim that a proposed maintenance-of-standards provision was a permissive subject of bargaining. The provision that was proposed would continue unspecified conditions of employment, including both mandatory and permissive subjects of bargaining, that existed at the time of negotiations. By insisting on the provision, the District argued, the Association violated the duty to bargain in good faith. The parties have now agreed that the maintenance-of-standards provision may not cover matters that the parties are not required to negotiate. Tr. 12. The accusation on this issue, therefore, is moot and will not be addressed.

13. The Alaska Labor Relations Agency under AS 44.62.380 served the amended accusation on the Association on October 5, 1991, requiring the filing of a notice of defense.

14. The Association filed its notice of defense, denying the substance of the accusation and claiming that transfer generally and involuntary transfer specifically are negotiable and that the "particular proposal now advanced by YFEA" is not

nonnegotiable. The Association further denied that the maintenance-of-standards proposal was nonbargainable. Reply to Amended Unfair Labor Practice Accusation (Oct. 18, 1990).

15. Subsequent to the filing of the accusation, the Association initiated discussions to expand the criteria for teacher transfer to include subjects other than seniority. Tr. 34. The Association's final position on the negotiability of teacher transfer states:

> [A]s a bargaining floor we will agree a person applying for transfer to a vacant position to have any right to the position must be qualified under the circumstances. . . . In general, we believe you are entitled to insist as a policy matter on a qualified teacher. But we also believe beyond basic qualifications the issues become matters which interest the teachers at least as much as the school district and are therefore negotiable.

J. Patterson, letter to S. Friedman (Jan. 29, 1991).

16. The District's position remains that bargaining the substantive criteria used to make professional judgments exceeds its obligation to negotiate in good faith. Tr. 35.

17. The District, when exercising its professional judgment to assign teachers, would consider training and experience, recommendations, present and past immediate supervisors, evaluations, recommendations, references (Tr. 39), program needs, community wishes, and mix of experience on the teaching team. Tr. 41.

18. The teachers' interest in transfer is the impact of the assignment on their working and, particularly in remote Alaska,

their living conditions. In the Yukon Flats School District, school size varies from one to 16 teachers. There are vast differences in the living and working conditions in the various communities. An assignment in Fort Yukon, for example, would mean access to easy transportation to Fairbanks, cable television, running water, and the availability of a broader range of social activities. Professional opportunities would be present such as courses at the university extension and the fellowship of other teachers. Tr. 49 - 50. These opportunities are not available in some of the villages where schools are located. Id.

19. The Association at the hearing offered the affidavit of Mary Ann Eininger. Respondent exhibit 1. The District objected to its admission on the basis that it did not have the opportunity to cross-examine the witness. On that basis, admission was denied. Tr. 78 & 79.

Discussion

Any discussion of teacher bargaining in Alaska must begin with an examination of Kenai Peninsula School District v. Kenai Peninsula Education Ass'n, 572 P.2d 416 (Alaska 1977) (Kenai I). Kenai I addressed the proper subjects of bargaining under AS 14.20.550 and concluded with a list of negotiable and nonnegotiable subjects of bargaining. Teacher transfer is listed as a negotiable subject. Id. at 424.

The Alaska Supreme Court in Kenai I establishes that educational policy belongs to the elected and appointed officials

in the school district. The court narrowly construes the scope of bargainable issues. Id. at 421. While acknowledging that it lacks expertise in this area, the court used a test to divide issues between those that were negotiable and those that were not. If the subject deals more with the economic interests of employees and less with educational goals and methods, it is negotiable. Id. at 422. The court found that wages, hours, and leave clearly fell within the employees' economic interests. On the other hand, it found that curriculum clearly fell within educational policy.

Many subjects, however, raise issues involving both the teachers' economic interests and educational policy. Id. Teacher transfer seems to be one of these. Certainly the teachers have an interest in their duty assignment, particularly in remote Alaska where living conditions can vary widely between schools within a district. On the other hand, a district's interests in assigning teachers involve issues of educational policy such as educational program needs and level of teaching experience. The court in Kenai I does not discuss teacher transfer in its decision except to list it as negotiable. Teacher transfer was not one of the specific subjects presented to the court on appeal. Id.

When the court issued Kenai I, labor relations in the school districts was governed by the education code. At that time teachers did not have the right to strike. The impasse procedures were mediation and advisory arbitration. AS 14.20.570 & AS 14.20.580.

In 1990 the legislature adopted chapter 180, SLA 1990, which for two years applies the Public Employment Relations Act (PERA) to labor relations in the school districts. Bargaining rights under PERA are enforced through unfair labor practice charges. AS 23.40.110. When considering unfair labor practice charges, the labor relations agency gives great weight to decisions of the National Labor Relations Board. 2 AAC 10.250(c). The NLRB divides bargaining subjects into three categories: mandatory, permissive, and illegal subjects of bargaining. National Labor Relations Board v. Borg-Warner, 356 U.S. 342, 42 L.R.R.M. (BNA) 2034 (1958).

Mandatory subjects must be bargained and may even be bargained to impasse. Reaching impasse as a general rule allows use of self-help remedies, such as unilateral implementation of employment terms by the employer or a strike by the employees. Permissive subjects may be bargained only if the parties consent. A party may not insist on a permissive term to impasse.

Under the National Labor Relations Act, as amended, transfer generally has been considered a mandatory subject of bargaining. As one treatise states, "Seniority, promotions, and transfers have long been recognized as mandatory subjects of bargaining." I C. Morris, The Developing Labor Law, at 802 - 803, 804 (2d ed. 1983).

The question is whether the move to PERA should change the result in Kenai I. Put another way, should the expansion of

impasse procedures require a different breakdown between negotiable and nonnegotiable subjects?

An examination of the two statutes does not reveal a difference that would justify requiring school districts to bargain over issues of educational policy. AS 14.20.550 provides:

> Negotiation with certificated employees. Each city, borough and regional school board, shall negotiate with its certificated employee in good faith on matters pertaining to their employment and the fulfillment of their professional duties.

This apparently broad language was construed by the court in Kenai I to exclude subjects of educational policy from bargaining. PERA's language is actually narrower. PERA requires public employers to "negotiate with and enter into written agreements with employee organizations of matters of wages, hours and other terms and conditions of employment." AS 23.40.070(2). PERA defines "collective bargaining" to mean, among other things, negotiating "in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." AS 23.40.250(1).

Nothing in PERA's language justifies expanding negotiation rights to require bargaining to impasse over educational policy. However, bargaining on educational policy should not offend public policy where complete discretion whether to bargain rests with the district as it would if the subject were a permissive subject of bargaining. Classification of the subjects listed in Kenai I as nonnegotiable as permissive subjects under PERA seems the appropriate outcome. This gives the employee

organizations the opportunity to make proposals and communicate their concerns but leaves discretion to negotiate, and thus responsibility for educational policy, completely with the districts. Those subjects where the primary issue is the economic well being of the employees, which Kenai I lists for the most part as negotiable, would be mandatory subjects of bargaining. With these changes, Kenai I should continue to provide guidance over a subject's negotiability.

Returning to the issue in this case, teacher transfer, application of the list in Kenai I is troublesome. The testimony in this case demonstrates that the subject does not solely involve teachers' economic interests. The needs of the school and the students and the educational program, questions of educational policy, also are involved.

Other jurisdictions have addressed this subject but are inconsistent. Oregon has found negotiation over the criteria the district uses to assign teachers and the timing of appointment were permissive subjects and concluded that only posting of the vacancy was a mandatory subject of bargaining. Gresham Grade Teachers Ass'n v. Gresham Grade School district, 5 P.E.C.B.R. 2771 (May 1980), at Complainant's hearing brief, exhibit 2 (Feb. 25, 1991). See Springfield Education Ass'n v. School District, 547 P.2d 647, 92 L.R.R.M. (BNA) 2583, 2584 (Ore. App. 1976), modified, 549 P.2d 1141, 92 L.R.R.M. (BNA) 2694 (Or. App. 1976), rev. denied, 276 Or. 211 (1976)(teacher transfer is permissive). In Maine, teacher

transfer procedures are mandatory subjects but the standards to be applied are prohibited subjects and may not be bargained. The reason is that a statute gives authority over standards exclusively to superintendents. Board of Directors v. Maine School Administrative District No. 36 Teachers Ass'n, 428 A.2d 419, 422 n.4 (Me. 1981)(Me. Rev. Stat. Ann tit. 20, § 161(5)). At the opposite end of the spectrum is Iowa, which does allow the negotiation of criteria in addition to procedures for teacher transfer. Saydel Education Association v. Public Employees Relations Board, 333 N.W.2d 486, 488-489, 117 L.R.R.M. (BNA) 3134, 3136 (Iowa 1983). Iowa Code § 20.9 specifically includes "transfer procedures" on the list of mandatory subjects for negotiations. Because the statutes construed are different, the case law is not particularly helpful.

However, it seems obvious that allowing negotiation of criteria to impasse would encroach on the District's ability to assess program needs when making assignments. On the other hand, it appears equally obvious that the mechanics of applying that criteria, that is, procedures, would not. See Board of Education v. NEA Goodland, 785 P.2d 993, 997, 134 L.R.R.M. (BNA) 2723, 2726 (Kan. 1990) (addressing the negotiability of evaluation criteria and evaluation procedures and distinguishing between managerial policy and the mechanics of applying that policy).

By deciding that these criteria are not negotiable, we do not mean to minimize the importance of the issue to the teachers.

Many subjects that have a substantial impact on teachers concern educational policy. Springfield Education Ass'n v. School District, 547 P.2d 647, 92 L.R.R.M. (BNA) 2583. However, we believe the analysis in Kenai I is at odds with the conclusion that transfer criteria must be bargained. We conclude that it is a permissive, rather than a mandatory, subject of bargaining. Therefore, the Association may not bargain to impasse over it.

It is appropriate to address at this point the parties' obligations to bargain when a permissive subject has been raised. A proposal including permissive subjects of bargaining does not relieve the parties' obligation to bargain on mandatory subjects. The District may not refuse to bargain, for example, because a permissive subject has been raised. It has an obligation to bargain over those parts of a provision that are mandatory subjects of bargaining. In this case the District has the obligation to bargain over procedural aspects of transfer. On the other hand, because the Association may not insist on permissive subjects to impasse, it may not raise the issue of the criteria for transfer at advisory arbitration.

Proposed Conclusions of Law

1. The labor relations agency has jurisdiction over this matter under Sec. 1, Ch. 180, SLA 1990. AS 23.40.110.

2. Teacher transfer contains both mandatory and permissive subjects of bargaining. The procedures the District follows to consider filling a vacancy are mandatory subjects of

bargaining. The criteria or standards the District uses to select a teacher for a particular position involve educational policy and are permissive subjects of bargaining.

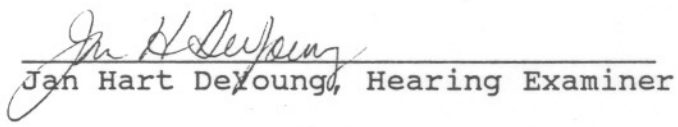
3. Permissive subjects may not be bargained to impasse and may not be presented at advisory arbitration.

PROPOSED ORDER

The parties are ordered to return to the bargaining table and negotiate in good faith on those aspects of teacher transfer that are mandatory subjects of bargaining.

Date: October 30, 1991

THE ALASKA LABOR RELATIONS AGENCY

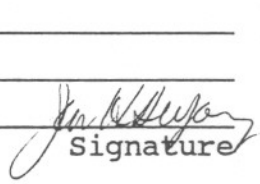


Jan Hart DeYoung, Hearing Examiner

This is to certify that on the 30th day of October, 1991 a true and correct copy of the foregoing was mailed, postage prepaid to

Saul R. Friedman

John Patterson



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