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Employment and tenure
rights for teachers at
the Alaska Vocational
Technical Center

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In your memorandum dated March 15, 1993, you asked whether teachers at the Alaska Vocational Technical Center (AVTEC) in Seward, Alaska, are covered by AS 14.20 and, specifically, whether the employment and tenure rights granted to teachers under AS 14.20.095-14.20.215 extend to AVTEC teachers and instructors. The issue arises in the context of ongoing contractual negotiations with the Alaska Vocational Technical Center Teachers Association, (AVTECA), the exclusive bargaining agent (by mutual consent) for AVTEC instructors under AS 23.40, the Public Employee Relations Act (PERA). As you indicate, a difference of opinion exists as to whether these statutory tenure and employment rights are mandatory because AS 14.20 is applicable to AVTEC instructors or whether tenure and employment rights are not statutorily required, and are, therefore, open to negotiation in the collective bargaining process.

It is our opinion that teachers and instructors at AVTEC are not "teachers" under AS 14.20.095-14.20.215. Therefore, the employment and tenure rights contained in these statutes do not extend by operation of law to AVTEC teachers. As a consequence, terms and conditions of employment that include subjects covered by these statutes are negotiable with AVTECA outside the limitations stated in these statutes. In short, AVTEC, in negotiating a bargaining agreement with its instructors, is free (so long as it bargains in good faith) to accept, modify, or reject the tenure and other provisions that are set out in the designated statutes.¹

We add this note of caution, however. The conclusion that AVTEC instructors are not "teachers" for purposes of

¹ The employer (AVTEC) must bargain over these issues as they are, under traditional labor law concepts, mandatory subjects of bargaining. The requirement to bargain is, though, entirely different from the issue you pose.

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AS 14.20.095-14.20.215 does not mean that they do not have other rights by virtue of a constitutional provision or another statute that, in some instances, may be similar to rights available to "teachers" under AS 14.20.095-14.20.215. By way of example, AS 14.20.095 prohibits restrictions on a teacher's right to comment and criticize outside school hours. While this statute is not applicable to AVTEC instructors because they are not "teachers" as that term is defined for purposes of this statute, the same or similar protections may be available to AVTEC teachers under the state and federal constitutional provisions regarding freedom of speech. We do not believe tenure rights fall into this category, and it would appear that this caution is applicable to only a few of the subjects covered in the statutes under discussion (other than free speech issues like those encompassed in AS 14.20.095, procedural issues upon dismissal and religious-political affiliation disclosure would be the only other areas of concern). Nevertheless, the caution is to be noted.

LEGAL ANALYSIS

AS 14.20.095-14.20.215 extends to teachers certain rights that are, in effect, legislated terms and conditions of employment. Among these are "tenure rights" as provided under AS 14.20.150-14.20.205. These rights include a right to continued employment within the district (AS 14.20.155), full restoration upon removal of a retirement disability (AS 14.20.165), nonretention only for certain specified reasons (AS 14.20.175(b)), greater procedural rights prior to dismissal or nonretention (AS 14.20.180), and de novo judicial review of adverse dismissal-nonretention decisions (AS 14.20.205). The acquisition of tenure rights is governed by AS 14.20.150. The nontenured teacher is also afforded certain procedural and substantive rights in these statutes, although generally not as favorable as those afforded to tenured teachers. In addition, other terms and conditions of employment are provided to teachers whether or not they are tenured: unrestricted speech outside school hours (AS 14.20.095); duty-free time (AS 14.20.095); prohibition against compelling revelation of religious or political affiliation (AS 14.20.100); a right to reemployment upon inadequate notification of nonretention (AS 14.20.140-14.20.145); transfer rights (AS 14.20.147); and moving expense reimbursement (AS 14.20.148).

The term "teacher" as it is used in these statutes is defined by AS 14.20.215(6) to mean:

an individual who, for compensation, has primary responsibility to plan, instruct and evaluate learning of elementary or secondary school

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students in the classroom or an equivalent setting and also includes individuals holding other positions as determined by the department by regulation.²

Our understanding is that AVTEC is an adult post-secondary educational center that offers vocational/technical education and training (or retraining) to Alaska residents in a number of different vocational specialties.³ We find no specific enabling statute or regulation regarding AVTEC. Instead, AVTEC was created by the Department of Education pursuant to its general statutory duty under AS 14.07.020(a)(12) to provide "opportunities in the areas of vocational education and training". AVTEC is administered, and exists, as a separate Division within the Department of Education. AVTEC teachers are exempt employees of the Department of Education. AS 39.25.110(7).

Since AVTEC is an adult postsecondary educational program, its teachers or instructors would appear to be excluded from a definition of the term "teacher" that focuses on involvement with "elementary or secondary school students" as does the definition contained in AS 14.20.215(6). This conclusion is further supported by AS 14.03.060, which defines elementary and secondary schools as follows:

(a) An elementary school consists of grades kindergarten through grade eight or any appropriate combination of grades within this range.

(b) A secondary school consists of grades seven through 12 or any appropriate combination of grades within this range. The establishment of one or two grades beyond the 12th grade is

² This definition was adopted by the legislature, effective July 1, 1992, as part of a bill providing for limited certification of teachers in certain areas of expertise upon the request of a local school board or regional educational attendance area. Sec. 3, Ch. 76, SLA 1992. Prior to the 1992 rewrite, the definition of "teacher" focused on teaching, counseling, and administrative positions for which a certificate was necessary. See former AS 14.20.215(6).

³ AVTEC and its responsibilities are described in some detail in its FY 1993 Budget Request to the legislature and also in the 1993 - 1994 AVTEC Catalog. Both of these documents were reviewed in connection with this memorandum.

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optional with the governing body of the school district.

On its face, then, the statutory language clearly excludes AVTEC instructors from the category of "teachers" to whom the provisions of AS 14.20.095-14.20.215 apply.

The statutory definition of teacher for purposes of AS 14.20.095-14.20.215 does contain supplementary language that would include "individuals holding other positions as determined by the department by regulation." AS 14.20.215(6). If the statutory definition is read as a whole, as it must be, this language would allow regulatory enlargement of the term "teacher" so as to include, for instance, positions that do not primarily or directly involve "the responsibility to plan, instruct and evaluate learning" but would still apparently require involvement at the elementary or secondary school level.

The Department has promulgated a regulation regarding the definition of the term "teacher." This regulation, 4 AAC 12.900(13), appears to confine itself to a definition of teacher for purposes of certification and not for purposes of tenure and other rights detailed in AS 14.20.095-14.20.215. But, even if this regulation is viewed as an expansion on the definition of teacher for purposes of AS 14.20.095-14.20.215, it still does not encompass AVTEC instructors. The regulation provides as follows:

"[T]eacher," as used in AS 14.20.010 and this chapter, means a person who for compensation, instructs or teaches students in any grade from kindergarten - 12th grade, and who is not supervised by another person in the same room, classroom, or other location; the term includes an administrator who supervises a teacher or an educational program provided by a teacher, a provider of special education and related services who is not regularly supervised by another person in the same room, classroom, or other location, and a school counselor, nurse, or psychologist, the term does not include a student teacher authorized under 4 AAC 30.020, a volunteer not working for compensation, or an administrator, such as a business manager, who does not supervise students or teachers.

This regulatory definition broadens the term "teacher" so as to include specific positions with responsibilities that might not normally be viewed as 'teaching' responsibilities but the inclusive group is still one that operates in the elementary-

secondary context.

Additionally, particularly with respect to tenure rights, the statutes consistently refer to the "district" to describe the context in which tenure rights arise, attach, and continue. AS 14.20.150 (acquisition of tenure rights); AS 14.20.155 (effect of tenure rights); AS 14.20.160 (loss of tenure rights); AS 14.20.165 (restoration of tenure rights). The strong link between these statutory tenure rights and employment by a school district belies a construction of the tenure statutes that would extend tenure rights to teachers who are not employed by a district. AVTEC is not a school district nor is it part of a school district. See AS 14.11.135(3); AS 14.12.010 and AS 14.12.170.⁴ As noted previously, it is a division within the State Department of Education.⁵ With respect to most of the other (nontenure) provisions of AS 14.20.095-14.20.215, the term "employer" is used to identify the entity upon which an obligation or limitation is imposed in favor of teachers. AS 14.20.140(b) (notification of nonretention for nontenured teachers); AS 14.20.145 (automatic reemployment -- "employer" and "district" used); AS 14.20.158 (continued contract provisions -- "employer" and "district" used); AS 14.20.175(a) (nonretention of nontenured teachers); AS 14.20.180 (procedure and hearing on dismissal or nonretention). "Employer" is defined as "the school board or superintendent that appoints the teacher." AS 14.20.215(3). Since "school board" means the board of a school district, AS 14.60.010(8), and neither "school board" nor "superintendent" includes the appointing authority for AVTEC

⁴ These statutes define a school district as a first-class city in an unorganized borough (city school district), an organized borough (borough school district), and the areas outside the previous two (regional educational attendance areas).

⁵ In this regard a comparison with Mt. Edgecumbe High School is instructive. It, too, is a school operated by the Department of Education and the state Board of Education, i.e., it is not a school district or part of a school district. AS 14.16.010-14.16.080. Although it is a secondary school and, therefore, its teachers fall under the definition of "teacher" in AS 14.20.215(6), it was obviously determined by the legislature to be necessary to specifically legislate that Mt. Edgecumbe High School would be treated as a "school district" under AS 14.20.095-14.20.215 in order to secure statutory tenure rights for its teachers. AS 14.16.050(a)(3)(B). This approach is consistent with and supports the conclusion that statutory tenure rights require employment in and by a school district (or special legislation like that enacted in the case of the Mt. Edgecumbe High School).

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teachers (the Department of Education), the same conclusion follows: AVTEC teachers are not employed in the context in which these statutory obligations or limitations arise.

In a previous opinion by this office we also distinguished AVTEC teachers when we concluded that, unlike certificated school district employees, they were not covered by the negotiating provisions of former AS 14.20.550-14.20.610 (repealed, sec. 10, ch. 1, SLA 1992). 1979 Inf. Op. Att'y Gen. (Feb 7; 663-78-0774). Rather, in our opinion, AVTEC instructors were exempt state employees (not school district employees) under AS 39.25.110 and were entitled to negotiate terms and conditions of employment under the broader provisions of the Public Employment Relations Act (PERA), AS 23.40.070-23.40.260. Since that time the legislature has amended PERA, and at the same time repealed AS 14.20.550-14.20.610, in order to bring school district employees under the collective bargaining provisions of PERA. It must be assumed that the legislature is aware of the distinctions it has created by law; and in retaining or creating these distinctions, such as that between elementary-secondary teachers and postsecondary teachers in AS 14.20.095-14.20.215, or in erasing a distinction by bringing both under PERA, intends these specific results.

In the pertinent legislative history, we find no clear expression of legislative intent on the question presented other than the statutory language itself. The legislature apparently determined that postsecondary educators, like AVTEC instructors and University of Alaska teachers, receive sufficient protection through the collective bargaining process (PERA) and do not need extra, mandated protections such as those extended to elementary-secondary teachers under AS 14.20.095-14.20.215. The difference in treatment may well be explained by the fact that the overwhelming majority of elementary and secondary school teachers work for a large number of independent employers (the school districts) where the need for basic protections that are predictable and consistent is greatest. Along these same lines, the issues that arise in an educational environment that deals with children (elementary or secondary schools) and that may have an impact on job security for teachers are, arguably, significantly different, and more immediate, than the issues that affect teacher job security in the adult educational environment; thus, the need for statutory protection is not considered as important in the adult educational environment.

If you have any additional questions about these issues please feel free to refer them to us.