MEMORANDUM

State of Alaska
Department of Law

TO: Gary Bader
Chairperson
Personnel Board

DATE: October 10, 1996

FILE NO: 663-97-0097

TELEPHONE NO: 465-2123

SUBJECT: Jurisdiction of the Personnel Board

FROM: Sarah J. Felix
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INTRODUCTION

At the August 29, 1996, meeting of the State Personnel Board (board), you requested a written opinion regarding the board•s jurisdiction to hear employee grievances where the employee is covered by a Collective Bargaining Agreement (CBA) which includes a grievance procedure.[1]

This inquiry is fact-specific, requiring analysis of the grievance procedure set out in the applicable CBA. Therefore, we will limit our advice to consideration of the CBA covering the employees who are now seeking grievance hearings before the board.

FACTS

[1] Pursuant to a request by the Department of Administration, a staff member of the Attorney General•s Office acts as counsel to the board. I currently perform this duty.

The employees who requested hearings before the board are members of the General Government Unit (GGU). These employees are covered by a CBA effective July 1, 1996, until June 30, 1999. Article 16 of the CBA sets out the grievance-arbitration process. Article 16 defines •grievance• as •any controversy or dispute involving the application of the terms of this Agreement arising between the Union or an employee or employees and the Employer.•[2] Article 16 also provides that the grievance procedure is the •sole means of settling grievances.• The grievance process includes four steps ending in arbitration. Article 15 of the CBA sets out the complaint process for matters not included in the definition of grievances set out in Article 16. Under Article 15.01 A, the complaint process is the •sole means of settling complaints.• Recourse to the Commissioner of Administration is the final step in the complaint process.

The CBA also contains dispute resolution mechanisms for specific matters, including classification, and performance evaluation. Article 17 of the CBA provides that it is the •sole and exclusive method for settling any dispute concerning classification matters.• Article 17 provides for first step review through the departmental personnel office, and second step

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[2] We note that the GGU - CBA covers terms including: union recognition and representation; union representatives and activities; union security; management rights; management committees; emergency personnel; nonpermanent appointment; recruitment and examination; employment status; layoff; contracting out; notice of discipline and discharge; complaint resolution process; grievance-arbitration; classification review; performance evaluations and incentives; health and security; legal trust fund; wages; overtime and premium pay; meal and relief periods; holidays; leave; correctional officers; shift assignment; equipment and clothing; safety and health; travel; per diem and moving; state owned/controlled housing; parking; protection of rights; examination of records; educational advancement and training; legal indemnification; conclusion of collective bargaining; savings and separability; superseding effect of this agreement; legislative action; printing of the agreement; and duration of agreement.

review through the Director of the Division of Personnel. Article 18 similarly provides for the sole and exclusive method for resolving disputes concerning personnel evaluations.

In Article 39, entitled •superseding effect of this agreement,• the GGU-CBA provides:

> If there is any conflict between the terms of the Agreement [CBA] and any Personnel Memoranda or rules of the merit system, the terms of this Agreement shall supersede those memoranda or rules in their application to the bargaining unit.

(Emphasis added.)

Apparently, the employees requesting hearings before the board have already pursued, or are in the process of pursuing, their grievance-arbitration or complaint remedies under the GGU-CBA. The employees• grievances do not concern termination from employment, demotion, or suspension in excess of thirty days.[3]

SHORT ANSWER

We conclude that the board does not have jurisdiction to hear employee grievances where the employee is covered by the GGU-CBA.

AUTHORITIES AND ANALYSIS

State Statutes

The two principle sets of statutes implicated by this opinion request are the State Personnel Act (AS 39.25.010, *et seq.*), and the Public Employees Relations Act (PERA) (AS 23.40.070-23.40.260). We note that both the State Personnel Act (Act) and PERA provide procedures for resolving grievances.

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[3] The employee•s grievances fall into two categories: (1) denial of timely access to register resulting in failure to promote or be hired into other jobs; and (2) classification disputes resulting in working out of job class.

The Act provides for a hearing before the State Personnel Board for employee grievances concerning dismissal, demotion, or suspension.[4] Also, an administrative regulation under the Act appears to extend this hearing right to employee grievances concerning matters relating to the employee•s position, working conditions, or employment conditions.[5] In contrast, PERA, in AS 23.40.210, provides that the CBA •shall include a grievance procedure which shall have binding arbitration as its final step.•

Issue

The issue presented in this memorandum is whether GGU employees may use the two procedures for resolving employee grievances: 1) a hearing before the board under the Act, and 2) grievance-arbitration or grievance short of arbitration under the CBA.

Statutory Construction

We believe that a court would first attempt to construe the Act and PERA to avoid a conflict between the grievance procedures set out in these two sets of statutes.

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[4] AS 39.25.170, entitled •hearings and appeals upon dismissal, demotion or suspension• provides, in pertinent part:

> (a) An employee in the classified service who is dismissed, demoted, or suspended for more than 30 working days in a 12-month period shall be notified in writing by the employer of the action and the reason for it and may be heard publicly by the personnel board and may be represented by counsel at the hearing. In order to be heard, the complainant shall request a hearing within 15 days of dismissal, demotion or suspension.

The procedures for implementing AS 39.25.170 are set out more fully in 2 AAC 07.440.

[5] 2 AAC 07.435(b)(5) entitled •procedure for all grievances other than dismissal, demotion or suspension over 30 days• provides:

> (5) if the employee is not satisfied by the action of the commissioner of administration under (3) and (4) of this subsection, the employee may appeal to the personnel board within five days after receiving the report of the commissioner of administration; the personnel board will, in its discretion, hear and decide the appeal or will, in its discretion, appoint a qualified hearing officer to hear the appeal.

> Where a reasonable construction of a statute can be adopted which realizes the legislative intent and avoids conflict or inconsistency with another statute this should be done.

Hafling v. Inlandboatmen•s Union of the Pacific, 585 P.2d 870, 875 (Alaska 1978). In *Hafling*, the court construed PERA along with an earlier-enacted statute on marine highway employees. The court harmonized the two statutes and found no conflict. We believe that the grievance provisions of the Act and the arbitration provisions of PERA can be similarly harmonized to avoid implementation of costly and potentially conflicting duplicate grievance procedures.

We can harmonize the two sets of statutes because the grievance procedures set out in PERA are construed •in pari materia• (upon the same matter or subject) with the grievance procedures set out in the Act. *Hafling* at 877.

> Prior statutes relating to the same subject matter are to be compared with the new provision; and if possible by reasonable construction, both are to be so construed that effect is given to every provision in all of them.

Id. at 877. The court in *Hafling* at 878 explains that statutes should be harmonized where possible:

> All statutes relating to the same subject matter should be read together as a whole, in order that a total scheme evolves which maintains the integrity of each act and avoids ignoring one or the other. [Cites omitted.] With this goal in mind, PERA and AS 23.40.040 can be effectively harmonized to further the legislative purpose of establishing uniform procedures for public employee collective bargaining and to protect the policies the legislature thought important in enacting PERA.

We can harmonize PERA and the Act by reading the two statutes together and finding that there are two grievance procedures covering two groups of employees. One, there is the grievance procedure negotiated under PERA in a CBA that covers employees in a collective bargaining unit. Two, there is the grievance procedure under the Act which covers employees who are not bargaining unit members, and who are not covered by a CBA. Thus, there is no conflict between PERA and the Act on grievance procedures. Instead, there are two grievance avenues, one for employees covered by a CBA, and one for employees who are not covered by a CBA. Therefore, GGU employees would not have recourse to grievance hearings before the board, and the board would not have jurisdiction to conduct such hearings.

Also, we should not imply that grievance procedures under the Act are an exception to PERA. •The general rule is that exceptions to the operation of a statute are not to be implied, particularly where there is an express exception clause.• *Hafling* at 875. This conclusion is reinforced by the fact that there is an express exception clause in PERA (AS 24.40.075) which does not except grievance procedures under the Act from PERA. Had the legislature intended to exempt grievance procedures under the Act from PERA, it could have included an express exemption. *Hafling* at 876.

This is the conclusion reached by the Kansas Supreme Court. In *State v. Public Employees Relations Bd*., 894 P.2d 777, 783 (Kan. 1995), the court analyzed the Kansas Civil Service Act and Public Employee-Employer Relations Act (PEERA) statutes to determine whether terms of a CBA under PEERA took precedence over the Civil Service Act. The court found that the terms of the CBA took precedence, reasoning, in part that:

> PEERA was enacted after the Civil Service Act. The legislature did not include that agreements reached under PEERA would be subordinate to civil service regulations and subject to unilateral changes at the discretion of the Secretary of Administration.

Similarly, PERA (1972) was enacted after the State Personnel Act (1960) in Alaska, and the Alaska legislature did not indicate that agreements under PERA are subordinate to the State Personnel Act. Whereas, the legislature did specify in AS 23.40.075 that a CBA may not include terms contrary to

1. the re-employment rights for injured state employees under AS 39.25.158; or

2. the re-employment rights of the organized militia under AS 26.05.075.

Therefore, one could forcefully argue that the legislature did not intend for grievance procedures under the Act to supersede grievance resolution terms in a CBA negotiated under PERA.

In another context, though, the Alaska Supreme Court has determined that PERA may supersede a provision of the Act. In *Walt v. State*, 751 P.2d 1345, 1351 (Alaska 1988), the

Court rejected a public employee•s attempt to bring a tort action based on AS 39.25.160(f)[6] for wrongful discharge against the state, reasoning

> AS 39.25.160(f), in the factual context of this litigation, has been superseded by . . . PERA . . . and the CBA. The former authorized unions for state employees; the latter recognized APEA as the exclusive employee bargaining agent and incorporated the standard of just cause for employee discipline.

Similarly, the Court in *Walt*, at p. 1353 ruled:

> The legislature has found it appropriate to set up an administrative system for handling employee/employer problems for employees covered by collective bargaining agreements or administratively adopted personnel rules. AS 23.40.070-260 (Public Employees Relations Act); AS 22.20.037 (judicial employees• merit system); AS 39.25.010-39.26.020 (State Personnel Act). Whether it is appropriate to provide a constitutional cause of action in addition to the administrative remedies available should be for the legislature to determine. This court will not imply the existence of such a cause of action.

While the *Walt* case is not squarely on point, it is one instance in which the court construed the Act and PERA, and determined that PERA superseded the Act.

We also note that in the event that a court were to determine that PERA and the Act could not be harmonized, that our office has addressed the issue of the effect of a term in a CBA which conflicts with a statute. In two prior opinions, we have determined that the terms of the CBA would prevail over contrary terms in statute. *See* 1980 Inf. Op. Att•y Gen. (Feb. 28, 366-439-80)(Hiring and layoff provisions of CBA may be applied contrary to provisions of

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[6] AS 39.25.160(f) provides, in relevant part:

> In addition, action affecting the employment status of an employee in the classified service, including appointment, promotion, demotion, suspension, or removal, may not be taken or withheld for a reason not related to merit.

AS 39.25.150(23) which prescribe a preference for veterans); and 1977 Inf. Op. Att•y Gen. (Jan. 4)(CBA takes precedence over state statute, insofar as working conditions, such as holiday provisions, are concerned). We also note that the GGU• CBA expressly provides that its terms supersede contrary terms in the state personnel rules. *See* Article 39, set out above.

Due Process

In addition to the above statutory construction analysis we believe that a court could analyze the issue by determining whether the employees• remedies under the CBA are the employees• exclusive remedy for grievances. Under this approach, the court would examine whether the CBA remedies satisfy due process. If the court determines that the remedies under a CBA are adequate, these remedies will be the employees• exclusive remedy, and the board will not have jurisdiction to conduct grievance hearings.

Authorities from Other Jurisdictions on Due Process

This question has been resolved in other jurisdictions to find that the CBA provides the exclusive employee grievance remedy. There is a summary of the practices in other jurisdictions set out in 2 H.H. Perritt, Jr., *Employee Dismissal Law and Practice*, (3d ed. 1992), at 42:

> If public sector employees were allowed to utilize both contractual arbitration and statutory civil service procedures to test the wrongfulness of terminations, an inefficient duplication of remedies and potentially conflicting decisions in the same cases could result. This problem can be avoided by applying election-of-remedies or waiver concepts . . . .
>
> A final decision under a statutory procedure may bar subsequent resort to grievance procedures, *but an employer or employee should not be permitted to avoid a collective bargaining grievance procedure merely because the dispute is covered by civil service laws*.

(Emphasis added.)

The treatise cites the case *Antinore v. State*, 49 A.D.2d 6, 371 N.Y.S.2d 213, *aff•d* 358 N.E.2d 268 (N.Y. 1976) as an example of the exclusivity of bargained-for arbitration procedures. The court in *Antinore* noted that there was a New York state law permitting an arbitration clause to supersede state civil services procedures. In contrast, there is no •superseding• provision in Alaska law. This difference may not be significant in light of the underlying reasoning in *Antinore*. The court in *Antinore* concluded that permitting the arbitration procedures to supersede state civil service procedures would not deprive the employee of due

process because an employee may waive due process rights if the waiver is not against public policy. The court noted that orderly labor relations could be disrupted by requiring civil service procedures in addition to bargained-for procedures. The court also cited the public policy in favor of arbitration because of its simplicity and rapidity. The court held that the employee waived his statutory rights to civil service review by reason of the arbitration clause.

In contrast, the court in *Tedesco v. City of Stamford*, 610 A.2d 574, 582 n. 19 (Conn. 1992) determined that • while other jurisdictions have held that the provisions of the Collective Bargaining Agreement constitute a waiver of an employee•s right to due process, we do not so hold.• However, the court in *Tedesco* at p. 582 nonetheless held that the grievance procedure set out in the CBA provided the employee with due process. The court qualified its holding at n. 19 by noting that:

> We do not hold that the existence of grievance procedures in a collective bargaining agreement automatically satisfies an employee•s right to due process.

Each collective bargaining agreement must withstand constitutional examination. The *Tedesco* court at p. 582-583 noted that federal courts in the 3rd, 7th, and 11th circuits, as well as Pennsylvania and Wisconsin state courts, have found that CBA grievance procedures satisfied due process rights.

Caselaw in Alaska on Due Process

The courts in Alaska use a sliding scale to analyze due process issues. As a threshold matter, for due process to be implicated •there must be a deprivation of a liberty or property interest sufficient to warrant constitutional protection.• *Gates v. City of Tenakee Springs*, 822 P.2d 455, 461-462 (Alaska 1991). •Once such an interest is established, the procedural safeguards required are determined by a balancing of the private and public interests involved.• *Id*. at p. 462. The balancing analysis used by the Alaska courts is as follows:

> Identification of the specific dictates of due process generally involves consideration of three distinct factors: the private interest affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used; the probable value, if any, of additional or substitute procedural safeguards; and, finally, the government•s interest, including the fiscal and administrative burden that additional or substitute procedure requirements would entail.

Keyes v. Humana Hosp. Alaska, Inc., 750 P.2d 343, 353 (Alaska 1988). It is well established in Alaska that government employees generally have a property interest in their jobs and,

therefore, due process requires a pre-termination hearing. *Storrs v. Municipality of Anchorage*, 721 P.2d 1146, 1147-1148 (Alaska 1986).

There are three ways by which the court could analyze the due process issue to find that the remedies under a CBA satisfy due process, and that employees were, therefore, precluded from obtaining a hearing before the board. One, the court could determine that the employees had waived their due process rights by entering into a CBA that provided for arbitration of grievances and a complaint process. *See Storrs*, at 1150; and *Wright v. Black*, 856 P.2d 477, 480 (Alaska 1993).[7] Two, the court could determine that the arbitration and complaint process set out in the CBA provided the employee with due process. *See City of Fairbanks Mun. Util. System v. Lees*, 705 P.2d 457, 459-460 (Alaska 1985).[8] Three, if for some reason the employee was unable to use the grievance or complaint process, such as the union refusing to go forward with the employee•s grievance, then the employee could bring an action in Superior Court and receive due process in the court action. This is explained in *Casey v. City of Fairbanks*, 670 P.2d 1133, 1138 (Alaska 1983):

> Because the Working Agreement does not permit Casey to unilaterally initiate arbitration proceedings, Casey•s due process rights can be satisfied

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[7] *Storrs*, at 1150, provides:

> [A] post termination adversarial hearing [in this case, a grievance procedure leading to binding arbitration] may satisfy the requirements of Alaska•s Due Process clause when a collective bargaining agreement waives the constitutionally mandated pre-termination adversarial hearing. Such a substitution of a post-termination hearing for a pre-termination hearing is permissible •so long as the negotiated agreement provides fair, reasonable, and efficacious procedures by which employer-employee disputes may be resolved.•

The *Storrs* court cites *Antinore v. State of New York*, 49 A.D.2d 6 (N.Y. 1976), mentioned hereinabove, in support of its conclusion.

Wright at 480, provides:

> By consenting to certain procedures, or by failing to object to others, a party may waive those rights which are arguably encompassed within due process guarantees.

[8] In *Lees*, the Court noted that arbitration is regarded as a substitute for court proceedings and that parties resort to arbitration to resolve disputes in a quicker and less costly way than litigation.

> only by permitting Casey to maintain an independent action against the City of Fairbanks for breach of contract.

Under *Casey*, the employee•s due process rights are protected because the employee retains the right to bring an action in Superior Court against the employer for breach of contract.[9] *See also Storrs*, at 1150; and *Pederson-Szafran v. Bailey*, 837 P.2d 124 (Alaska 1992).

Thus, the GGU employees• grievance remedies under the GGU-CBA satisfy the requirements of due process. Therefore, these remedies are the employees• exclusive remedy for grievances, and the board would not have jurisdiction to conduct grievance hearings.

Conclusion

Based on the foregoing, we conclude that the board does not have jurisdiction to hear employee grievances where the employee is covered by a CBA which provides for an exclusive dispute resolution procedure.

SJF:clh

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[9] The employee must first exhaust administrative remedies under the CBA, absent extraordinary circumstances such as futility of exhaustion. (*Cozzen v. Municipality of Anchorage*, 907 P.2d. 473, 476 (Alaska 1995); if CBA allows an employee to pursue grievances, and the union refuses to pursue grievances, the employee must do so before bringing action in Superior Court.)