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CLASSIFIED EMPLOYEES ASSOCIATION, NEA-ALASKA/NEA,
Complainant,
vs.
MATANUSKA-SUSITNA BOROUGH SCHOOL DISTRICT,
Respondent.

CASE NO. 15-1675-ULP

DECISION AND ORDER NO. 309

We heard this unfair labor practice complaint on July 29, 2016, in Anchorage.[1] The parties subsequently filed written closing arguments. The record closed on September 15, 2016, after completion of final Board deliberations.

Digest: The unfair labor practice complaint by the Classified Employees Association, NEA-Alaska/NEA is denied. The Association failed to prove that the unilateral change to the dress code policy by the Matanuska-Susitna Borough School District was a material, substantial, and significant change to bargaining unit employees' terms and conditions of employment.

Appearances: David Theriault, Uniserve Director for complainant Classified Employees Association, NEA-Alaska/NEA; Sarah Josephson, attorney for the Matanuska-Susitna Borough School District.

Board Panel: Jean Ward, Vice Chair; Matthew R. McSorley and Tyler Andrews, Board Members.

[1] This case was consolidated for hearing purposes with *Matanuska-Susitna Education Association, NEA-Alaska/NEA, vs. Matanuska-Susitna Borough School District, Case No. 15-1673-ULP* because the underlying legal issues in each case were identical. However, we issued separate decision and orders to address the unfair labor practice charges in each case. Even considering all the evidence heard during the consolidated July 29, 2016, hearing, the outcome of the cases would not change.

DECISION

Statement of the Case

The Classified Employees Association, NEA-Alaska/NEA (CEA) filed an unfair labor practice complaint against the Matanuska-Susitna Borough School District (District), alleging that the District committed an unfair labor practice violation by changing the District's dress code for bargaining unit employees without bargaining change. The District disputes the allegation. It argues that dress code is not a mandatory subject of bargaining and it has the managerial right and discretion to establish and control the District's dress code. The District also argues that even if dress code is a mandatory subject of bargaining, the Association waived its right to bargain the subject.

Issues

1. Did the District commit an unfair labor practice violation by implementing a written dress code for bargaining unit employees?

2. If the District committed a violation, did the CEA waive the right to bargain the change to dress code policy?

Findings of Fact

1. The Classified Employees Association (CEA) represents the classified employees at the Matanuska-Susitna Borough School District (District).

2. The CEA is a labor organization under AS 23.40.250(5).

3. The District is a public employer under AS 23.40.250(7).

4. The parties have a collective bargaining agreement for the period July 1, 2014 to June 30, 2017. (Exhibit B).

5. The collective bargaining agreement is silent on the subject of dress code.

6. During a meeting of the Matanuska-Susitna Borough School Board[2] in the spring of 2015, Carol Smith, a district teacher and member of the Matanuska-Susitna Education Association (MSEA) bargaining unit, expressed concern about the District's dress code. After discussion, the School Board decided to establish a committee to create a written dress code. District staff subsequently researched the dress code of other Alaska districts and also school districts in other states.

[2] The School Board is a body of seven elected public officials.

7. On July 1, 2015, the District emailed the CEA an invitation to Karen Salisbury, President of the CEA, to attend a committee meeting to discuss dress code policy for district employees. The District's Personnel Support Specialist, Kristin Wouk, stated that the District valued the input of those invited, including the CEA and the MSEA, but participation was voluntary. (Exhibit 3 and Exhibit C).

8. Salisbury had heard there would be a meeting to work on dress code. She testified that her bargaining unit members have a wide diversity of job duties. Because of this, it would be difficult if the District implemented a "one size fits all" policy. She felt such a policy could be detrimental to her employees financially.

9. Katherine Gardner, as the District's Director for Human Resources and Payroll, has oversight of the Human Resources and Payroll departments, but her primary responsibility is human resources. She works with the School Board on matters of policy. She also coordinates the District's hiring process. Regarding collective bargaining, Gardner represents the District in collective bargaining and is chief spokesperson in two of the District's four agreements.

10. Gardner testified that the attire issue has arisen from time to time when administrators mentioned concerns about staff attire. The School Board's desire for establishing a written policy was the result of the teacher raising the issue that there was no written policy.

11. Gardner said that the School Board was concerned that there were no official teacher guidelines that existed. The School Board wanted to have written guidelines for employees to follow.

12. Gardner testified that attire issues are not a pervasive concern at the District. She estimated that at least once a year, principals must address concerns about attire.

13. Salisbury decided to send a representative from the CEA to attend the dress code meeting. Chris Sawyer, a secretary at Big Lake Elementary School, attended on behalf of the CEA.

14. The dress code committee meeting was held on August 4, 2015, and attended by Gardner, Sawyer, Lisa Donnally from the MSEA, Rob Picou, Matt Tieford, and Carol Smith, the teacher who had raised concerns at the School Board meeting.

15. Ms. Sawyer testified that Ms. Gardner "ran the meeting." She said the meeting was informal. Sawyer recalled that Gardner told the attendees that the purpose of establishing a code was to clarify attire guidelines. Sawyer further recalled that Gardner said the written code would be similar to the student dress code. Sawyer testified that committee members listed what they wanted the dress code to include. She felt like committee members were "all listened to."

16. After the meeting, Gardner drafted a dress code policy. She testified that when they set up the guidelines, they generally used the requirements established for students. She emailed the guidelines to the committee participants and asked for feedback, but got none.

17. Karen Salisbury testified that before school even started, she had already heard that employees were told they would be prohibited from wearing jeans, which they had worn previously.[3] Salisbury said she got clarification, and the employees went ahead and just wore what they had worn previously.

18. Salisbury is concerned that, because the District covers a large area and many schools, the principals at these various schools will apply different, inconsistent interpretations to the dress code policy.

19. On September 16, 2015, the School Board unanimously adopted Board Policy (BP) 4156.5, "attire guidelines." (Exhibit Q). This policy gave "[t]he Superintendent or designee [authority to] establish reasonable guidelines requiring staff to maintain a neat and clean appearance that is appropriate for the workplace setting and for the work being performed." The guidelines are contained in Administrative Regulation (AR) 4156.5. (Exhibit O).

20. On September 27, 2015, Gardner sent Walters a response to the demand-to-bargain letter he had sent to Paramo. (Exhibit O). Gardner reiterated the District's position that "AR 4156.5 does not constitute a unilateral change in working conditions such that bargaining is mandated. As such, it does not intend to enter bargain [sic] over the substance or implementation" of the regulation.

21. Gardner, the District's Executive Director for Human Resources and Payroll, testified at hearing that the District is willing to bargain the impact of the District's implemented dress code policy.

22. There were no CEA witnesses who testified about the specific effect of the written dress code on them. April Maloney is a teacher at Tanaina Elementary School. She has taught there for several years. She first became aware of the dress code change after the summer break when librarian and co-worker Carol Smith told all the staff at the school about the dress code changes. According to Maloney, Smith told employees these changes included no blue jeans except for outside activities. Maloney asserted that Smith was acting at the direction of the school principal.[4]

[3] Chris Sawyer also heard that some principals were telling employees they could no longer wear jeans.
[4] The guidelines do not prohibit the wearing of jeans. Katherine Gardner testified that Smith was apparently telling employees what the new guidelines were before the School Board even passed them. Gardner said it was not appropriate for Smith to enforce the guidelines. If she had concerns, she should go to her principal.

23. Maloney testified she normally spends about $100 for clothes at the beginning of the school year, but in 2015 she said she spent $500 in anticipation of complying with the dress code. She testified she had to replace blue jeans and "legging-like" pants with skirts.

24. Soon after the policy was put into place, Ms. Maloney began experiencing issues related to the dress code. She began to receive anonymous notes (copies of the written dress code policy) suggesting her dress attire did not meet the dress code requirements. The copies of the dress code policy did not highlight any parts that would give Maloney an idea of what was being conveyed. Maloney had conversations with the school principal, who initially told her that she did not see any problems with Maloney's dress and that she was not breaking the dress code. The principal asked her to bring her the anonymous notes. However, later she "was talked to" almost daily no matter what she wore. She would ask the principal how she was breaking the dress code, and the principal would tell her 'I'm not sure but I keep hearing about it; so you need to be more careful.' She said she received notes from the principal from second semester on.

25. Maloney said she did the best she could to comply with what she "had been told," because the employees did not receive any written information for two months. She felt like no matter what she wore, she was found out of compliance. For example, she was told that she could no longer wear slacks she was wearing because they could be viewed as leggings. She asserted that they were the same style of slacks that all of her co-workers were wearing.[5] She said it got to the point that she was measuring straps on her blouses before she went into work.

26. Maloney felt like she was being singled out, bullied and harassed by her co-workers. She went to the principal for help but received no support.

27. Gardner testified that the School Board established the guidelines so administrators and staff could rely on them for what "minimum expectations" would be. The guidelines were basically meant "to memorialize what already existed, in a format that people could access."

28. Gardner reiterated that dress attire issues are not a pervasive problem in the District. There is no widespread issue with employees dressing inappropriately.

29. Gardner acknowledged that a principal at an elementary school wrongly told staff that jeans were not allowed. When Gardner heard this, she contacted the principal and told her that jeans would not be prohibited under the written attire guidelines.

30. Gardner asserted that the written guidelines conformed to what District employees were already wearing, with the exception of a few employees.[6]

[5] She testified that she was told she could not wear the slacks because her "panty line" was showing.
[6] Upon questioning from the Agency Board Members, Gardner agreed she would follow up on the issues raised by teacher April Maloney.

Analysis

1. Did the District commit an unfair labor practice violation by implementing a written dress code for bargaining unit employees?

The CEA argues that the District committed an unfair labor practice violation because school dress code is a mandatory subject of bargaining and the District unilaterally implemented a dress code policy without negotiating the issue. The District, on the other hand, contends that dress code for district staff is not a mandatory subject and is instead subject to managerial discretion. Therefore, the District argues, it is not required to negotiate the issue. Further, the District asserts that the CEA waived the right to bargain dress code when it sent a representative who participated on the committee that created a dress code.

The parties are required to bargain over mandatory subjects of bargaining. We first address the issue of whether dress code, as presented here and based on the facts in this case, is a mandatory subject of bargaining. The stated purpose of the Public Employment Relations Act (PERA) is to give public employees "the right to share in the decision-making process affecting wages and working conditions . . . ." AS 23.40.070. PERA requires "public employers to negotiate with and enter into written agreements with employee organizations on matters of wages, hours and other terms and conditions of employment." AS 23.40.070(2).

In *State v. Public Safety Employees Ass'n*, 93 P.3d 409 (Alaska 2004), the Alaska Supreme Court described mandatory subjects of bargaining:

> The duty to bargain over what are often called "mandatory" subjects of bargaining arises from the requirement that the state and the union negotiate collectively over "wages, hours, and other terms and conditions of employment." The "terms and conditions of employment" include "the hours of employment, the compensation and fringe benefits, and the employer's personnel policies affecting the working conditions of the employees." Mandatory subjects of bargaining have traditionally been defined as those subjects most closely related to the "economic interests of employees."

Id. at 413-414. (Citations omitted).

However, AS 23.40.250(9) excludes from mandatory subjects of bargaining those "general policies describing the function and purposes of a public employer." A bargaining subject that is not deemed mandatory is "permissive," and the parties may, but are not required to bargain permissive subjects. The Alaska Supreme Court analyzed the challenges of determining whether a bargaining subject is mandatory or permissive:

> It is often difficult to characterize an issue as either mandatory or permissive. The practical challenges of this process were elucidated in *Alaska Public Employees*

> *Ass'n v. State*, a case in which we considered whether job classifications and salary range assignments were mandatory subjects of bargaining. Because of the close relationship between the job classification plan and the state merit principle, we held that job classification should be exempt from bargaining. With respect to the assignment of positions to salary ranges, we determined the issue to be a permissive subject of bargaining—one on which state employees could be heard at the state's discretion—but not a mandatory subject of bargaining under existing state salary programs. In reaching this conclusion, we adapted the test for negotiability set out in *Kenai I*,[7] creating instead a "division between mandatory and permissive subjects of bargaining in cases, such as this one, where the government employer's or public policy prerogatives significantly overlap the public employees' collective bargaining prerogatives." Under this modified test, "a matter is more susceptible to categorization as a mandatory subject of bargaining the more it deals with the economic interests of employees and the less it concerns the employer's general policies."

Id. at 414-415. (Citations omitted).

When a public employer refuses to negotiate a mandatory subject of bargaining, it commits an unfair labor practice: "[A] public employer or an agent of a public employer may not refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in the appropriate unit…." AS 23.40.110(a)(5). Additionally, "[a] public employer or an agent of a public employer may not interfere with, restrain, or coerce an employee in the exercise of the employee's rights . . . ." AS 23.40.110(a)(1). "Prior to impasse, and absent necessity, a compelling business justification, or contractual provisions to the contrary, the [employer] violates AS 23.40.110(a)(5) and (a)(1) by implementing a unilateral change to a mandatory subject of bargaining…." *Alaska State Employees Association, AFSCME Local 52 AFL-CIO vs. State of Alaska, Department of Administration, Division of Personnel/EEO*, Decision and Order No. 246 at 1 (Dec. 16, 1999).

The Alaska Supreme Court provided a general balancing test, noted above, for determining whether an issue of public education was negotiable in collective bargaining between a teacher's union and the local government under AS 14.20.550 – 6.10 (mediation and negotiation in public education employment). *Kenai Peninsula Borough School District v. Kenai Peninsula Education Association*, 572 P.2d 416 (Alaska 1977), (*Kenai I*). Subsequent to *Kenai I*, the Supreme Court applied this balancing test to a different issue: a dispute over classification and pay plans. *Alaska Public Employees Association v. State*, 831 P.2d 1245 (Alaska 1992). The Court wrote, "[w]e now adapt the *Kenai I* balancing test…. between mandatory and permissive subjects of bargaining in cases such as this one, where the government employer's constitutional, statutory, or public policy prerogatives significantly overlap the public employees' collective bargaining prerogatives." (*Id*. at 1251). The Court further decided that "a matter is more

[7] *See Kenai Peninsula Borough School District v. Kenai Peninsula Education Association*, 572 P.2d 416 (Alaska 1977), (*Kenai I*).

susceptible to categorization as a mandatory subject of bargaining the more it deals with the economic interests of employees and the less it concerns the employer's general policies." (*Id.* at 1251). Finally, the Court concluded that the "contrast between the state's strong, specific, express mandate to act and the employees' more diffuse, general, limited entitlement to bargain is important in our balance of the competing interests[.]" (*Id*. at 1252).

But, as evinced by the Supreme Court, the analysis does not stop there. *Alaska Public Employees Association*, 831 P.2d 1245 (Alaska 1992). Only invoking a balancing test between the employees' collective bargaining prerogatives and the public employer's policy prerogatives yields the proper result. (*Id*. at 1251).

There are no opinions from Alaska that analyze a dress code issue. We could not find a substantial number of opinions from other jurisdictions that analyze dress code in the context of bargaining. The CEA argues that we should find that school dress code is a mandatory subject pursuant to a dress code determination by the National Labor Relations Board (NLRB) in *Salem Hospital Corporation*, 360 NLRB 85, 199 L.R.R.M. 1351 (2014) (*Salem*). In *Salem*, the acute care hospital maintained a dress code policy for at least ten years, and a personal appearance and discipline policy.

Then, the hospital revised its policies without giving the union an opportunity to bargain the revisions. The revised policy assigned color-coded uniforms to each different department, provided dress code rules to all employees, and included a four-step disciplinary process that was a substantial change from previous disciplinary policy.

The NLRB affirmed the Administrative Law Judge's finding that the hospital committed an unfair labor practice violation by unilaterally changing its dress code and discipline policies. The NLRB analyzed relevant law:

> Employers have a duty to bargain in good faith with union representatives about mandatory subjects of bargaining, which generally include uniform requirements and workplace attire. . . To be unlawful, however, there must be evidence that the unilateral change was a "material, substantial, and significant" change to employees' terms and conditions of employment. . . . Whether a change rises to that level is determined "by the extent to which it departs from the existing terms and conditions affecting employees. . . ."

Id., 360 NLRB 95 at 2. (citations omitted).

The NLRB affirmed the Administrative Law Judge's finding that the new color-coded system "rendered useless most, if not all, of the employees' scrub inventories containing other colors and styles." The employer apparently recognized the initial monetary cost of the new policy because it provided three free uniforms to ease the transition to the new code, but the NLRB found that employees would inevitably need to purchase replacement scrubs. Although the hospital had always required employees to buy their own scrubs, most employees already

owned multiple sets of scrubs before the policy change. Most of these scrubs did not comply with the new color coding system.

The hospital also banned hoodies, sweatshirts, and fleece jackets under the new policy. Previously, it was common for employees to wear them. To comply with the new dress code policy, employees had to purchase coordinating solid or print warm-up jackets if they wanted to stay warm. The NLRB found this change also had a significant financial impact on the bargaining unit employees.

Finally, the NLRB in *Salem* found an independent reason to affirm the judge's finding of a violation: the hospital's revised disciplinary policy. Under the prior policy, employees were simply sent home when they were found to violate the dress code. The hospital never handed down any discipline. By contrast, the new code contained a specific disciplinary process and there was no discretion for determining noncompliance. "Employees therefore faced a heightened prospect of discipline under the new dress code. The addition of this disciplinary process alone is sufficient to establish that the new dress code differed materially, substantially, and significantly from the past dress code." *Id.*, 360 NLRB 95 at 3.

Here, the CEA argues that it suffered a material, substantial, and significant impact in the District's dress code policy change, pursuant to *Salem*. It contends that since the NLRB did not place a threshold amount to the "number of employees who needed to be affected" by the dress code change, and if "requiring employees to wear uniforms triggered a finding of financial impact," then we should find a significant financial impact even if only one employee had to spend $500. (CEA's Post-Hearing Brief at 5).

The District responds that, unlike *Salem*, there is no substantial impact on the employees at the District:

> There is no substantial impact . . . on District employees. The attire guidelines do not require replacement of one's entire work wardrobe . . . . It is reasonable to expect that employees affected by the guidelines already own some clothing for personal use that is acceptable under the guidelines. This case [between the CEA and the District] does not involve an actual uniform that employees must buy, like color-coded scrubs.

(District's Post-Hearing Brief at 5).

In another dress code decision, the NLRB addressed a change in dress code policy at an acute care hospital in Michigan. *See Crittenton Hospital*, 342 NLRB No. 67, 342 NLRB 686, 175 L.R.R.M. (BNA) 1283 (2004). The hospital changed the policy by prohibiting employees such as registered nurses (RNs), who provided hands-on care to patients, from wearing acrylic or artificial nails. Under prior policy, fingernails were limited to 1/8 inch past the tip of a finger, and the use of acrylic and decorated nails was "strongly discouraged." *Id.*, 342 NLRB at 686.

An administrative law judge found that the hospital unlawfully failed to notify and bargain with the union over the change in dress code policy (the nails). The NLRB reversed the judge on this issue, stating:

> [T]he judge reasoned, among other things, that apparel rules were a mandatory subject of bargaining under Board law. While we do not dispute this precedent, not all unilateral changes in bargaining unit employees' terms and conditions of employment constitute unfair labor practices. The imposed change must be a "material, substantial, and significant" one. [citations omitted]. "A change is measured by the extent to which it departs from the existing terms and conditions affecting employees." *Southern California Edison Co.*, 284 NLRB 1205 fn. 1 (1987), enfd. Mem. 852 F.2d 572 (9th Cir. 1988).[8]

Crittenton Hospital, 342 NLRB at 686.

The NLRB concluded that its General Counsel "failed to show that the . . . change in dress code policy prohibiting RNs from wearing acrylic/artificial nails was material, substantial, and significant. The NLRB found that the dress code change was not a material departure from prior policy. The NLRB added that the General Counsel failed to present evidence of how the nail change affected or would affect the RNs' terms and conditions of employment. Finally, the NLRB reasoned that because acrylic or artificial nails had already been strongly discouraged, "it is reasonable to conclude that the RNs did not use them and, thus, this dress code change would not be significant to them." *Crittenton Hospital*, 342 NLRB at 686. The NLRB concluded that the General Counsel failed to prove by a preponderance of the evidence that the hospital violated the National Labor Relations Act. *Id.* at 687.

Applying the above cases, we find, like the NLRB did in *Salem* and *Crittenton Hospital*, that the CEA failed to prove by a preponderance of the evidence that the dress code policy, put into writing by the District, was a material, substantial, and significant change from prior policy. We find that prior to implementation of the written dress code policy, the District previously had an unwritten dress code policy in place. Employees were expected to dress appropriately and professionally. Under the new, written policy, some changes were made, such as the prohibition against leggings, but we find that the CEA failed to show that these changes materially affected bargaining unit employees' wardrobes previously worn under the unwritten policy, or that there was a material, significant effect to the employees as a result of the change.

The CEA did not present evidence or testimony supporting a finding that the dress code policy changes implemented by the District affected employees in a material, substantial, and significant fashion from prior policy. There was only testimony at the hearing that the change in policy affected one employee, April Maloney, a teacher represented by the MSEA. Ms. Maloney testified she purchased $400 more in clothing than she customarily bought each fall, in order to

[8] This Agency gives great weight to relevant decisions of the National Labor Relations Board and the federal courts. 8 AAC 97.450(b).

comply with what she perceived were the new dress code requirements. However, despite investing additional expense to buy what she thought would help her comply with the new policy, she was still subjected to pestering about her dress. In other words, her purchase of extra clothing did not affect her compliance with the new dress code policy.[9]

Even if we consider Maloney's testimony, we conclude that the CEA failed to prove that, by a preponderance of the evidence presented here and under the facts of this case, the District committed an unfair labor practice violation when it instituted a written dress code policy.

2. If the District committed a violation, did the CEA waive the right to bargain the change to dress code policy?

We have concluded in this case that the CEA failed to prove by a preponderance of the evidence that the dress code established by the District had a substantial, material effect on bargaining unit employees. Because we have determined that the CEA failed to prove all the elements of its claim by a preponderance of the evidence, we need not address the issue of waiver.[10]

CONCLUSIONS OF LAW

1. The Classified Employees Association, NEA-Alaska/NEA is an organization under AS 23.40.250(5).

2. The Matanuska-Susitna Borough School District is a public employer under AS 23.40.250(7).

3. This Agency has jurisdiction to consider the complaint filed by the Classified Employees Association, NEA-Alaska/NEA under AS 23.40.110.

4. As complainant, the Classified Employees Association, NEA-Alaska/NEA has the burden to prove each element of its claim by a preponderance of the evidence. 8 AAC 97.340 and 350(f).

5. The Classified Employees Association, NEA-Alaska/NEA failed to prove by a preponderance of the evidence that the Matanuska-Susitna Borough School District committed an unfair labor practice under the facts presented in this case.

[9] It appeared from Maloney's testimony that she was being singled out and treated inconsistently in her attempts to comply with the written dress code.

[10] In its testimony, and in hearing documents, the District agreed to negotiate the effects of the dress code changes. We assume that if the parties have not already conducted these negotiations, future effects negotiations will occur.

ORDER

1. The unfair labor practice complaint filed by the Classified Employees Association, NEA-Alaska/NEA is denied and dismissed in accordance with this decision.

2. The Matanuska-Susitna Borough School District is ordered to 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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Jean Ward, Vice Chair

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Tyler Andrews, Member

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Matthew R. McSorley, 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 mailing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of *Classified Employees Association, NEA-Alaska/NEA vs Matanuska-Susitna Borough School District*, Case No. 15-1675-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 12th day of December, 2016.

_____
Margaret L. Yadlosky
Human Resource Consultant

This is to certify that on the 12th day of December, 2016, a true and correct copy of the foregoing was mailed, postage prepaid, to:
David Theriault, Classified Employees Association
Sarah Josephson, Mat-Su Borough School District

_____
Signature