ALASKA LABOR RELATIONS AGENCY

3301 EAGLE STREET, SUITE 208

P.O. BOX 107026

ANCHORAGE, ALASKA 99510-7026

907-269-4895

FAX 907-269-4898

PUBLIC SAFETY EMPLOYEES)

ASSOCIATION,)

)

)

PETITIONER,)

)

vs.)

)

STATE OF ALASKA,)

)

RESPONDENT.)

_____)

Case No. 00-1035-CBA

DECISION AND ORDER NO. 253

Digest: The Agency will order the parties to arbitrate the arbitrability of their dispute where their collective bargaining agreement contains a broad clause granting jurisdiction over the arbitrability issue to the arbitrator, and no other contract clause creates an exception for the dispute at issue.

Appearances: James Gasper, attorney for the Public Safety Employees Association (PSEA); and Kent Durand, labor relations analyst for the State of Alaska (State).

Panel: Aaron Isaacs, Jr., Dick Brickley, and Raymond Smith.

DECISION

Statement of the Case

On March 22, 2000, the Public Safety Employees Association (PSEA) filed a petition to enforce the parties' collective bargaining agreement (CBA). PSEA asks this Agency to compel the parties to arbitration. It contends the grievance filed in this matter is subject to the grievance-arbitration procedures in the CBA. The State disputes PSEA's contention. The State argues that the dispute over the interview process is not a subject of the parties' agreement; therefore, the request for arbitration should be denied.

This dispute was heard on July 19, 2000. The Agency assigned this case to Hearing Examiner Mark Torgerson to hear alone. This matter was decided based on the evidence submitted and the testimony of witnesses at the hearing. The record closed on August 4, 2000, after the parties resolved a dispute over Hearing Exhibit B. [1]

Issues

1. Is the grievance filed by PSEA, over the method in which the promotional process was conducted for assistant superintendent, subject to the grievance-arbitration procedures in the parties' contract?

2. If so, should we compel the parties to arbitration?

Findings of Fact

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

1. The Public Safety Employees Association is recognized as the exclusive bargaining representative for the Correctional Officers bargaining unit. State/ASEA Agreement (1996-1999), PSEA Exhibit 2 at 1.

2. PSEA and the State of Alaska entered into a collective bargaining agreement for the period July 1, 1996, to June 30, 1999. *Id.* at 68

3. Article 16.01(A) of the agreement contains the parties' grievance procedure, which provides for arbitration as its final step.[2] It states as follows:

A grievance shall be defined as any controversy or dispute involving the application or interpretation of the terms of this Agreement arising between the Union or an employee or employees and the Employer. The parties agree that they will promptly attempt to adjust all grievances arising between them. The Union or the aggrieved employee or employees shall use the following procedure as the sole means of settling grievances, except where alternative dispute resolution and appeal procedures have otherwise been agreed to in this collective bargaining agreement, in which case the applicable alternative procedure shall be the exclusive appeal process available to the employee or employees.

Id. at 29.

4. Article 6 of the agreement is a nondiscrimination and affirmative action clause. We find it relates to selections and appointments, as well as promotions of members. It states in Article 6.01A:

The parties agree not to discriminate in employment and membership and will use all due diligence to ensure that bargaining unit members are selected, appointed and *promoted* from among the most qualified, not on the basis of race, color, religion, national origin, age, sex, physical handicap, marital status, pregnancy, parenthood, political affiliation or belief, or union affiliation, or otherwise as specified in law. (emphasis added).

Id. at 6.

5. The agreement addresses promotions in Article 4, Management Rights. It states in pertinent part:

It is recognized that the Employer retains the right to manage its affairs, to determine the kind and nature of work to be performed and to direct the work force except as otherwise provided in this Agreement. All of the functions, rights, powers and authority not specifically modified or abridged by the express terms of this Agreement are the sole and exclusive prerogative of the Employer. Such functions, rights, powers and authority include, but are not limited to:

1. Recruit, examine, select, *promote*, transfer and train personnel of its choosing, and determine the times and methods of such actions[.] (emphasis added).

Id. at 4-5.

6. Article 16.03 describes the arbitrator's authority. Subsection 16.03(A) addresses arbitrability issues. It provides:

Questions of arbitrability shall be decided by the arbitrator. The arbitrator shall make a preliminary determination on the question of arbitrability. Once a preliminary determination has been made that the matter is arbitrable or if such preliminary determination cannot reasonably be made, the arbitrator shall then proceed to hear the merits of the dispute.

Id. at 31.

7. Charles Stevenson is a Correctional Officer II at the Fairbanks Correctional Center. His position is in the correctional officers' bargaining unit, represented by the Public Safety Employees Association (PSEA). He applied for the position of Assistant Superintendent at the Center. This position is in the supervisory bargaining unit, represented by the Alaska Public Employees Association. He interviewed for this position on September 27, 1999. He was not selected for the position, which would have been a promotion for him.

8. Brad Wilson is a business agent for PSEA. He has held that position since January 1997. One of his job duties is to process grievances on behalf of members. He filed a grievance on behalf of Stevenson, and he processed it through all steps in accordance with Article 16 of the parties'

collective bargaining agreement. The grievance alleges Stevenson was denied a fair opportunity to participate in the interview process for the promotion to Assistant Superintendent. Specifically, the November 12, 1999, grievance states: "Grievant was disadvantaged during the interview process for Assistant Superintendent for Fairbanks Correctional Center. The grievant was forced to interview at what would be his 3:30 am in the morning on short notice." (Exh. 3-2). Wilson said Stevenson's normal work shift is the night shift, 7:00 p.m. to 7:00 a.m.

9. The State denied the grievance. Its response, completed on November 15, 1999, by Ronnie E. Epperson, Superintendent of the Fairbanks Correctional Center, asserts there was no violation of "any negotiated contract." It goes on to state: "This individual was given equal consideration for his response to the questions asked. The concept of good faith and fair dealing was applied. When we contact individuals working at other job sites, whether employed by the Department of Corrections or elsewhere, the time of the interview is at the discretion of those conducting the interview due to limitations of their own time due to internal as well as external commitments." (Exh. A-1). In a December 22, 1999, response, the State asserted: "The subject of promotion into the position of Assistant Superintendent in the Supervisory Unit is not a 'dispute over the application or interpretation of the terms' of contract covering employees in the Correctional Officers' Bargaining Unit as required by Article 16." (Exh. 3-4).

10. The grievance progressed through step four pursuant to Article 16 of the parties' collective bargaining agreement. The State denied the grievance at each step. The State contended the issue grieved was unrelated to a "cognizable term" of the collective bargaining agreement. The State also asserted it could not interfere with the right of APEA to represent its employees in a separate bargaining unit. Further, it stated judicial precedent favored its position.

11. PSEA demanded arbitration under the parties' agreement. PSEA asserted that the grievance "alleges that the Preamble and Article 6.01" of the parties' agreement were violated, that the dispute raises an issue of substantive arbitrability, and that under Article 16.03A of the agreement, such disputes must be submitted to an arbitrator." (Exh. 5, March 16, 2000, letter to Greg Elliot from James Gasper). The State refused the demand. It responded that "[t]he issue being grieved does not involve any cognizable term of the collective bargaining agreement between the State of Alaska and the [PSEA]. In addition, the remedy . . . involves terms and conditions of employment covered by a collective bargaining agreement to which the Association is not . . . a party." (emphasis in original). (Exh. 4, March 14, 2000, letter to James Gasper from Gregory A. Elliot).

12. Gregory Elliot has been a labor relations specialist with the State since January 2, 2000. He worked on the Stevenson grievance. He decided to deny the grievance after consulting his boss, Sharon Barton, Director of the Department of Administration, Division of Personnel. They agreed that the issue was external to the parameters of the parties' collective bargaining agreement.

13. Ronnie Epperson interviewed applicants for the Assistant Superintendent position. He said Stevenson interviewed at 3:30 p.m. Epperson said Stevenson had requested an interview on his regular day off, but Epperson denied the request. He said the position had been vacant for quite some time. Instead, he set aside the last hour of the last day of interviews for Stevenson. Epperson said Stevenson withdrew from the interview process, citing several reasons, including a lack of sleep prior to the interview process.

14. Dianne Corso is Human Resources Manager for the Department of Corrections. Among other things, she testified there is nothing in the PSEA contract that addresses being well rested for a job interview.

DISCUSSION

Should we order this dispute to arbitration under the grievance-arbitration procedure in the parties' contract?

We first address an arbitrability issue raised by PSEA. It contends that the agreement requires that the parties submit "any and all arbitrability challenges to the arbitrator." (PSEA brief at 4). It argues that under the parties' agreement, "the arbitrator is conferred with exclusive authority to determine if the grievance may proceed." (*Id.* at 7). The State disagrees, arguing that "substantive" arbitration issues are properly before the Agency. We will first address this Agency's jurisdiction to make arbitrability determinations.

Article 16.03 describes the arbitrator's authority. Subsection 16.03(A) addresses arbitrability issues. It provides:

Questions of arbitrability shall be decided by the arbitrator. The arbitrator shall make a preliminary determination on the question of arbitrability. Once a preliminary determination has been made that the matter is arbitrable or if such preliminary determination cannot reasonably be made, the arbitrator shall then proceed to hear the merits of the dispute.

We have addressed arbitrability in several decision and orders. We have found authority, in AS 23.40.210, to address arbitrability. This statute grants this agency enforcement authority over parties' collective bargaining agreements: "The agreement shall include a grievance procedure which shall have binding arbitration as its final step. Either party to the agreement has a right of action to enforce the agreement by petition to the labor relations agency." This statute supports resolving disputes through the grievance-arbitration procedure. In this regard, this Agency has consistently concluded that parties should resolve their disputes through their contractually agreed-upon process. For example, we stated: "This Agency's policy is to promote arbitration by deferring to arbitration in appropriate cases." *Alaska Public Employees Association v. Alaska State Housing Authority*, Decision and Order No. 133 (May 29, 1991). See also *Anchorage Education Ass'n v. Anchorage School District*, Decision and Order No. 128 (Dec. 10, 1990), *Alaska Public Employees Ass'n & Thompson v. Alaska*, Order & Decision No. 69 (Oct. 23, 1981); and *Fairbanks*

Fire Fighters Ass'n, Local 1324 v. City of Fairbanks, DOLLRA Decision & Order No. 90-4 (April 11, 1990).

We have previously distinguished the NLRB's lack of authority to enforce grievance-arbitration clauses from this Agency's statutory authority to do so under AS 23.40.210. In Decision and Order No. 133, we noted that "[u]nlike this Agency the NLRB does *not* have authority to enforce collective bargaining agreements. Enforcement of collective bargaining agreements and enforcement of arbitrator awards are not handled by the board but instead are handled by federal district court. *E.g., National Labor Relations Board v. CNC Plywood Corp*., 351 F.2d 224 (9th Cir. 1965)." (D&O 133 at 5).

In *Fairbanks Fire Fighters Association, Local 1324, IAAF, v. City of Fairbanks*, Decision and Order No. 142 (July 15, 1992), we discussed this agency's enforcement authority as it relates to arbitration:

The appropriate exercise of the Agency's authority to enforce the agreement in most cases will be to give full effect to the grievance procedures by compelling a reluctant party to arbitration.

The Agency's authority to enforce the agreement under AS 23.40.210 can be analogized to the courts' authority under Section 301 of the Labor Management Relations Act. Under Section 301 the United States Supreme Court defined a relationship that recognizes arbitration as the principal mechanism to resolve disputes arising under the bargaining agreement. [3]

Decision and Order No. 142 at 7. (citations omitted).

We cautioned, however, that this Agency should not substitute itself for the parties' dispute resolution process, including the authority given to the arbitrator under the parties' grievance-arbitration procedure. "Those procedures, required in AS 23.40.210 to be a part of every agreement bargained under PERA, are a core element of PERA's labor relations scheme to provide a rational method for the parties to resolve their disputes." *Id.*

We went on to cite a United States Supreme Court case that stressed the importance of the grievance-arbitration process as a central part of the collective bargaining process:

[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for all their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement. . . . The grievance procedure is, in other words, a part of the continuous collective bargaining process.

Id., citing to *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581, 46 L.R.R.M.(BNA) 2416, 2419 (1960), quoted in 1 Charles J. Morris, The Developing Labor Law 914-915 (2d ed. 1983).

Warrior & Gulf is one of the Supreme Court's *Steelworkers* trilogy cases: *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 L.R.R.M. (BNA) 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 L.R.R.M. (BNA) 2416; and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 L.R.R.M. (BNA) 2423 (1960). In *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 121 L.R.R.M. (BNA) 3329 (1984), the Court elaborated on arbitrability and the *Steelworkers* cases. In *AT&T Technologies*, the issue concerned whether the parties intended to arbitrate layoffs predicated on a "lack of work" determination by AT&T. The Supreme Court explained the principles announced in the *Steelworker* trilogy and elaborated on arbitrability. It noted that the first principle from the *Trilogy* is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." 475 U.S. 643 at 648. (citation omitted).

Secondly, "the question of arbitrability--whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.* at 649.

The third principle is that, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether 'arguable' or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but *as the parties have agreed*, by the arbitrator." (emphasis added). The Supreme Court added that courts "have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is a particular language in the written instrument which will support the claim." *Id.* at 650.

Finally, the Court stated:

> [W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. (citations omitted). Such a presumption is particularly applicable where the clause is as broad as the one employed in this case which provides for arbitration of 'any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder . . . .' In such cases, '[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.' (citation omitted).

Id. at 650. (citations omitted).

The Court questioned whether arbitrators should decide their own jurisdiction: "The willingness of parties to enter into agreements that provide for arbitration of specified disputes would be 'drastically reduced,' however, if a labor arbitrator had the "power to determine his own jurisdiction . . . ." *Id.* at 651, citing to Cox, *Reflections Upon Labor Arbitration*, 72 Harv.L.Rev. 1482, 1509 (1959). In addressing the specific appeal, the Court held that the Seventh Circuit Court of Appeals erred in ordering the parties to arbitrate the arbitrability question. "It is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicated on a 'lack of work' determination by the Company." Then, if the agreement so provides, it is for the "arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement." *Id.* at 651.

In a concurring opinion, Justice Brennan pointed out that the 7th Circuit Court of Appeals did precisely what the Supreme Court had disapproved of in *Warrior & Gulf* -- "it read Article 9, a general Management Functions clause, to make arbitrability depend upon the merits of the parties' dispute. As *Warrior & Gulf* makes clear, the judicial inquiry required to determine arbitrability is much simpler. The parties' dispute concerns whether Article 20 of the collective-bargaining agreement limits management's authority to order layoffs for reasons other than lack of work. The question for the court is 'strictly confined,' (citation omitted) to whether the parties agreed to submit disputes over the meaning of Article 20 to arbitration."

A federal district court has pointed out that the Supreme Court in *Warrior and Gulf* focused on the parties' contract language in determining the extent of the arbitrator's authority. In *Johnson v. United Food and Commercial Workers, International Union Local No. 23*, 828 F.2d 961, 964; 127 L.R.R.M. (BNA) 3018 (1987), the court cited to *Warrior & Gulf* in holding that the parties may voluntarily decide to resort to arbitration as an alternative form of dispute resolution. "Because an arbitrator's jurisdiction is rooted in the agreement of the parties, they may agree to submit even the question of arbitrability to an arbitrator." *Id.*, 828 F.2d at 964, citing to *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583, n.7, 80 S. Ct. 1347, 1353 n.7, 4 L.Ed.2d 1409 (1960); *George Day Constr. Co. v. United Bhd. of Carpenters and Joiners of America, Local 354*, 722 F.2d 1471, 1474-75 (9th Cir. 1984). [4] In *AT &T Technologies*, the Supreme Court put it this way: "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies*, 475 U.S. at 649, citing to *Warrior & Gulf*, 363 U.S. at 582-583, 80 S.Ct, at 1352-1353. (Other citations omitted).

The Alaska Supreme Court addressed arbitrability in *Public Safety Employees Ass'n v. State of Alaska*, 799 P.2d 315, 324 (Alaska 1990) (*PSEA 1990-2*). In that case, PSEA and the State negotiated for a new collective bargaining agreement but eventually reached impasse. After the impasse, the State announced it would also reclassify employees under management prerogatives, and it contended any challenge to this reclassification should be resolved through a unit clarification petition. PSEA grieved the reclassification of the trooper recruits. The State rejected the grievance. Because it considered an appeal futile, PSEA did not advance the grievance. [5] Instead, it filed an unfair labor practice charge.

Our predecessor Agency excused PSEA's failure to comply with the grievance procedure and found the State committed an unfair labor practice. In reversing this decision, the Alaska Superior Court held that "administrative agencies and courts should support grievance and arbitration agreements by declining jurisdiction [over unfair labor practice disputes] until that [arbitration] procedure has been exhausted." 799 P.2d at 317. The Alaska Supreme court reversed the superior court. The court held that the Agency need not adhere to contractual grievance mechanisms as a mandatory prerequisite to exercising jurisdiction over unfair labor practice charges. The court held that under the circumstances of the case, the Agency's refusal to defer to the grievance/arbitration process was justified. "The Agency should not be prohibited in such circumstances from taking jurisdiction to decide whether the State has committed an unfair labor practice. . . ." 799 P.2d at 323. [6]

We cited *PSEA 1990-2* in *Alaska State Employees Ass'n, AFSCME Local 52, AFL-CIO, v. State of Alaska*, Decision and Order No. 235 (March 19, 1998). There the union (ASEA) filed a grievance over the amount of per diem the employer paid an employee while away from his duty station. The State denied the grievance, contending it was not a contract matter but was an Internal Revenue Service matter. ASEA petitioned to compel the parties to arbitration. In dismissing the petition, the Agency panel cited to *PSEA 1990-2*, stating that this Agency "is not required to order the arbitration of claims that are not arbitrable." (Decision and Order No. 235 at 4). In reviewing *PSEA 1990-2*, we find it applicable to disputes where a labor organization has both a pending grievance and an unfair labor practice charge against an employer. Under *PSEA 1990-2*, the Agency may decide whether to hear the unfair labor practice or to first defer to the arbitration process. In this case, there is no pending unfair labor practice charge.

The Alaska Supreme Court also addressed arbitrability in *Anchorage Police Department Employees Ass'n v. Municipality of Anchorage*, 938 P.2d 1027 (Alaska 1997) (*APDEA 1997*). One of the issues in *APDEA 1997* was whether the Municipality's Employee Relations Board (ERB) and the court should be deciding issues of arbitrability, or "should such issues be resolved by the arbitrators themselves?" 938 P.2d at 1028. The court

affirmed the superior court and the ERB, finding that it "is authorized and required to resolve the threshold issue of arbitrability." The decision did not specify whether the ERB was authorized to determine arbitrability, or whether this threshold issue was left solely to the courts.

This Agency recently addressed arbitrability in *Fairbanks Fire Fighters Ass'n v. City of Fairbanks*, Decision and Order No. 244 (June 8, 1999). The Fire Fighters asked this Agency to compel the parties to arbitration. Citing to *APDEA 1997*, the City of Fairbanks disputed this Agency's jurisdiction. In ordering the parties to arbitration, we noted we previously had taken jurisdiction to decide arbitrability issues. (Decision and Order No. 244 at 5). We concluded that the broad grievance/arbitration articles covered the issues in dispute. [7]

The City appealed to the Alaska Superior Court. In *City of Fairbanks v. State of Alaska*, 4FA-99-1551 CI (May 4, 2000), the Honorable Mark Wood held that this Agency's determination to take jurisdiction was "entirely contrary to *State v. Public Safety Employees Ass'n*, 798 P.2d 1281, 1285 (Alaska 1990) [*PSEA 1990-1*], which states that arbitrability questions are for courts to resolve unless the parties clearly and unmistakably provide otherwise." However, the superior court went on to find this Agency's error in taking jurisdiction was harmless, as the issues in dispute were arbitrable. [8]

We have compared the grievance-arbitration language in the City of Fairbanks/Fire Fighters agreement (Decision and Order No. 244) with the language in the State/PSEA agreement. Although we found the former agreement contained broad arbitration language, it did not contain clear, unmistakable arbitrability language in like that the State/PSEA agreement: "Questions of arbitrability shall be decided by the arbitrator." (Exh. 2, Article 16.03A, State/PSEA collective bargaining agreement).

In discussing arbitrability in *PSEA 1990-1*, the Alaska Supreme Court stated:

> In general, this [the notion that courts make arbitrability determinations] is true. *However, arbitration is a creature of contract law; parties contract to have their disputes resolved by an arbitrator. They ought to be able to contract to have their disputes about arbitrability so resolved.* In fact, "[t]he determination of arbitrability is often left by the parties to the arbitrator. There are sound reasons for this. [For example,] [t]he delay and expense of court proceedings are avoided." F. Elkouri & E. Elkouri, How Arbitration Works 216 (4th ed. 1985). In view of these considerations, the federal rule is that arbitrability is a question for the courts "[u]nless the parties clearly and unmistakably provide otherwise." *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986). We adopt this rule under Alaska law.

798 P.2d at 1285. (emphasis added). Thus, the Alaska Supreme Court, in *PSEA 1990*-1, adopted the federal rule on arbitrability. We will now apply that rule to this case; that is, we will examine the State/PSEA contract to determine if the parties have "clearly and unmistakably" agreed to have the arbitrator decide the issue of arbitrability.

Before we do that, however, we will first address whether we have jurisdiction to enforce the grievance-arbitration provisions of collective bargaining agreements. We believe that AS 23.40.210 grants this Agency jurisdiction to enforce all aspects of parties' collective bargaining agreements, including disputes that arise over arbitrability provisions in the agreements. AS 23.40.210 gives parties a "right of action to enforce" agreements by petitioning this Agency. (See discussion at pp. 5-7). Requiring the parties to go to another forum to enforce the grievance-arbitration provisions in their agreement would result in uncertainty over the proper forum, inefficiency, and unnecessary fragmenting of the enforcement right provided under section 210. Moreover, a finding that we do not have jurisdiction to enforce grievance-arbitration contract provisions, would carve out an exception to section 210's general statutory grant of jurisdiction in this Agency to enforce all aspects of collective bargaining agreements. Accordingly, we conclude that we have jurisdiction to decide whether to order the parties to arbitration under their contract.

We turn now to the question of whether the parties have "clearly and unmistakably" agreed in their contract to have the issue of arbitrability decided by the arbitrator. PSEA claims that its demand for arbitration is proper under the terms of the parties' collective bargaining agreement because the agreement vests the arbitrator with authority to make all arbitrability decisions. PSEA argues that the "evidence on this issue is susceptible of no other interpretation." (PSEA Prehearing Brief at 6).

PSEA also contends that a question of substantive arbitrability exists, and that the contractual language does not permit the State to refuse to submit any grievance to arbitration by arguing that the grievance does not involve a "cognizable term" of the contract. PSEA argues that "[i]f the State objects to the grievance, it does so based on the scope and content of the grievance, which goes to its merit. To argue that the grievance may simply not go forward gives the State the power to unilaterally modify the contract in a way the contract doesn't permit." (PSEA Prehearing Brief at 4). PSEA asserts that the contract grants the arbitrator "exclusive authority to determine if the grievance may proceed." (*Id.* at 6-7)

The State argues that the hiring and promotion procedure is not part of the collective bargaining agreement and is therefore not subject to the provisions of Article 16 relating to grievance-arbitration. It contends that promotion of employees outside the PSEA bargaining unit is not a mandatory subject of bargaining and is thus not subject to arbitration. The State asserts that Article 16 of the agreement applies only if there is a "dispute over the application or interpretation of the terms" of the agreement covering employees in the PSEA bargaining unit. The State contends PSEA has not identified a "cognizable term in the contract that can be applied or interpreted a contract violation" in this instance. (State Response to Prehearing Order at 3).

We are not convinced by the State's arguments regarding hiring and promotion. Aspects of promotion are addressed in the collective bargaining

agreement. We are not required to rule on the potential merits of the underlying claims. The parties' agreement does not grant us authority to do so. When the parties have vested the arbitrator with the authority to decide procedural and substantive arbitrability, the arbitrator decised whether a party violated the contract. (See discussion at pp. 7-8).

We agree with PSEA that the matter is arbitrable. We conclude that the parties have "clearly and unmistakably" agreed in their contract to have the issue of arbitrability decided by the arbitrator. However, we do not believe the issue in this case turns on a question of substantive or procedural arbitrability. The parties' contract contains a broad arbitration clause; it grants jurisdiction in the arbitrator to decide the issue of arbitrability. The clause does not distinguish substantive or procedural arbitrability. We conclude that by agreeing to this contractual provision, the parties intended to let the arbitrator decide both the merits of their disputes and the preliminary matters regarding the arbitrability of the disputes. Accordingly, we conclude that the parties must submit this dispute to arbitration.

CONCLUSIONS OF LAW

1. The State of Alaska is a public employer under AS 23.40.250(7), and the Public Safety Employees Association is an organization under AS 23.40.250(5).

2. This Agency has jurisdiction under AS 23.40.210 to consider this dispute over enforcement of the parties' grievance/arbitration provisions in their collective bargaining agreement.

3. As petitioner, PSEA has the burden to prove each element of its case by a preponderance of the evidence.

4. PSEA has proven by a preponderance of the evidence that the parties have clearly and unmistakably agreed by contract to vest the arbitrator with authority to determine the arbitrability of this dispute. Additionally, the parties have given the arbitrator the authority to determine the merits of the dispute, if the arbitrator decides that the dispute is arbitrable, or that a preliminary determination on arbitrability cannot be made.

ORDER

1. The petition by the Public Safety Employees Association is granted. The parties are ordered to arbitration in accordance with this decision.

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

ALASKA LABOR RELATIONS AGENCY

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Aaron Isaacs, Jr., Acting Chair

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Raymond Smith, Board Member

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Dick Brickley, Board Member

APPEAL PROCEDURES

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

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the order in the matter of *PUBLIC SAFETY EMPLOYEES ASSOCIATION vs. STATE OF ALASKA*, Case No. 00-1035-CBA, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 25th day of April, 2001.

Earl Gibson, Jr.

Administrative Clerk III

This is to certify that on the 25th day of April, 2001, a

true and correct copy of the foregoing was mailed,

postage prepaid, to

James Gasper, PSEA

Kent Durand, State of Alaska

Signature

[1] At the hearing, PSEA objected to the admissibility of Exhibit B. This matter was not resolved at the hearing. Subsequently, the hearing examiner wrote the parties and scheduled written argument. The State then withdrew the exhibit from the record.

[2] Subsections 16.01(B) through (H) outline the procedures for the grievance process, including those steps needed to get to arbitration.

[3] This view is consistent with that of our predecessors. See, e.g., *Fairbanks Fire Fighters Ass'n v. City of Fairbanks*, DOLLRA Decisions and Order No. 90-4 (April 11, 1990); and *United Transportation Union Local 1626 v. Alaska Railroad Corporation*, Order and Decision No. RR-2 (July 30, 1986).

[4] In *Antioch Building Materials Co.*, 323 N.L.R.B. 73, 155 L.R.R.M. (BNA) 1041 (February 25, 1997), Chairman Gould, in a concurring opinion stated that the Third Circuit's conclusion in *Johnson* "is compatible with Justice White's opinion in AT&T to the effect that the parties may indeed submit the issue of arbitrability to the arbitrator." *Id.* at 75 (citations omitted).

[5] Previous action by the State in other grievances led PSEA to conclude further action would be futile.

[6] The court also pointed out that it had previously rejected the argument that the availability of arbitration precludes statutory remedies.

[7] See D7O No. 244 at 8.

[8] This case is currently pending in the Alaska Supreme Court.