

ALASKA LABOR RELATIONS AGENCY

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ALASKA STATE EMPLOYEES)
ASSOCIATION, AFSCME LOCAL 52,)
AFL-CIO,)
))
PETITIONER,)
))
vs.)
))
STATE OF ALASKA,)
))
RESPONDENT.)
_____)

Case No. 00-1040-CBA

DECISION AND ORDER NO. 254

Digest: The Agency will not compel the parties to arbitration over the firearms policy at the Department of Corrections. The Alaska Supreme Court has held that establishment and implementation of firearms policy for probation and parole officers is the statutory responsibility of the Commissioner of Corrections.

The Agency will compel the parties to arbitration over documents related to psychological testing of probation and parole officers, and whether those documents are "secret files" under Article 34 of the collective bargaining agreement, or are properly excluded from personnel files.

Appearances: J. Michael Robbins, Business Agent for the Alaska State Employees Association (ASEA); and Kent Durand, Labor Relations Specialist for the State of Alaska (State).

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

DECISION

Statement of the Case

The Alaska State Employees Association (ASEA) filed a petition to enforce the parties' collective bargaining agreement (CBA). ASEA asks this Agency to compel the parties to arbitration. It contends that the State's change in its firearm policy for probation and parole officers is subject to the grievance-arbitration procedures in the CBA. The State disputes ASEA's contention. The State argues that the state law and Alaska Supreme Court precedent support its contention "the decision of who shall carry a firearm and under what conditions is one that by law is committed to the discretion of the Commissioner" of Corrections. (State's December 6, 2000, Reply Brief for Hearing on the Record). Therefore, it asks us to deny the request for arbitration.

The parties agreed to submit this dispute for decision based on the written record. This matter was decided based on the evidence submitted and arguments of the parties. The record closed on December 7, 2000, after the parties submitted reply briefs.

Issues [1]

1. Should we address ASEA's allegation that the State committed an unfair labor practice by failing to allow discovery during the grievance process?
2. Should we compel the parties to arbitration over the State's revision in its firearm policy for probation and parole officers?
3. Should we compel the parties to arbitration on whether the documents related to psychological testing of probation and parole officers are subject to the requirements of Article 34 of the collective bargaining agreement?

Findings of Fact

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

1. The Alaska State Employees Association (ASEA) is recognized as the exclusive bargaining representative for the Probation Officers in the general government unit.
2. ASEA and the State of Alaska entered into a collective bargaining agreement for the period from July 1, 1996, through June 30, 1999. (Joint Exh. 1).
3. Article 16.01(A) of the agreement contains the parties' grievance procedure, which provides for arbitration as the 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 25.

4. Article 4 of the agreement describes "Management Rights:"

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;
2. Develop and modify class specifications, assign the salary range for each classification, and allocate positions to those classifications;
3. Assign and direct the work; determine the methods, materials and tools to accomplish the work; designate duty stations and assign personnel to those duty stations;
4. Reduce the work force due to lack of work, funding or other cause consistent with efficient management;
5. Alter its operations or service;
6. Discipline, suspend, demote or dismiss employees for just cause; and
7. Establish reasonable work rules; assign the hours of work and assign personnel to shifts of its designation.

Id. 4-5.

5. Two probation/parole officers, Carl Brown, Jr., and Dean Fritz, have been employed by the State of Alaska, Department of Corrections (Department). Brown and Fritz have worked in this capacity since 1984 and 1996, respectively. (Exh. 1 & 2).

6. Under established policy, the Department had allowed probation officers to carry firearms. Some officers carried firearms but others did not. Brown carried a firearm on the job for more than 18 years. In 1999, the Department revised its firearms policy. Under the revised policy, probation officers would be allowed to carry firearms only if they passed a psychological examination administered by the Department.
7. Brown and Fritz took the examination but did not pass it. The State thereafter prohibited them from carrying firearms while performing their duties.
8. Brown wrote the psychologist who conducted the examination on behalf of the State and requested that he send "the MMPI Profile computer interpretation and original answer sheet, as well as all other pertinent information" to a psychologist of Brown's choice for an evaluation of the test results. (Exh. 6). The psychologist for the State, Paul Turner, Ph. D., replied that he was instructed by the Department of Corrections to direct all inquiries to that Department. (Exh. 7). Both Brown and Fritz requested copies of the psychological examination, the results of the examination and the testing psychologist's recommendations. The State refused to provide them with these documents or with any other related information. (Exh. 1 & 2).
9. On April 8, 1999, ASEA filed a grievance on behalf of Brown, Fritz, and other probation and parole officers. The grievance was filed under Article 16 of the parties' collective bargaining agreement. In an April 6, 1999, letter, Business Agent Donn Liston asserted: "We believe these changes jeopardize the personal safety of persons who have the right to carry weapons in the course of their duties. It is in violation of recognized Past Practice; Article 4, management rights, Article 10, discipline without just cause, Article 34.03 Secret Files, and any others that may apply." (Joint Exh. 3-7).
10. The State denied the grievance at all steps. In a letter to Business Agent Mike Robbins on March 24, 2000, Sharon Barton, Director of the Division of Personnel asserted that after "further examination," the State concluded the matter was "outside the ambit of the grievance/arbitration process and that the grievance will not be processed further. Barton added that the dispute was not grievable for the following reasons: "The State concludes that a Probation Officers' privilege of carrying a firearm does not involve a term and condition of employment, but rather implicates an essential function and purpose of a public employer [See AS 23.40.250(9)]. As such, the dispute involves a permissive subject of bargaining and is not cognizable under any express terms of the Agreement."
11. On April 17, 2000, ASEA filed a petition to enforce the collective bargaining agreement.
12. In its response to ASEA's petition, the State requested that the petition be dismissed.

DISCUSSION

I. Should we address ASEA's allegation that the State committed an unfair labor practice by failing to allow discovery during the grievance process?

ASEA alleges the State committed an unfair labor practice by failing to provide information requested by Brown regarding his psychological test. Specifically, ASEA contends Brown requested validation on why he failed the evaluation, but the State provided no documentation. (ASEA November 28, 2000, Opening Brief at 9). ASEA alleges this refusal to provide information "was a denial of basic fairness and due process in the course of these proceedings." ASEA argues that the State's "failure to respond in good faith to [ASEA's] grievance . . . violates AS 23.40.110. However, ASEA has not filed an unfair labor practice charge with this Agency.

In addition, an unfair labor practice charge cannot be considered as part of a petition to enforce the collective bargaining agreement. There are different requirements for filing an unfair labor practice charge. For example, the charge must be sworn and notarized, whereas the CBA petition has no such requirement. Moreover, 8 AAC 97.230 requires that an unfair labor practice charge be investigated and that informal resolution be attempted if probable cause is found. There is no similar requirement for collective bargaining agreement enforcement petitions. Therefore, we will not decide whether the State committed an unfair labor practice that is raised as part of a collective bargaining agreement enforcement petition.

II. Should we grant ASEA's petition to compel the parties to arbitration under the grievance-arbitration procedure in the parties' contract?

A. Should we compel the parties to arbitration over the State's revision in its firearms policy for probation and parole officers?

AS 23.40.210 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. [\[3\]](#)

We find ASEA petitioned this Agency under AS 23.40.210 to enforce the grievance-arbitration provisions of its collective bargaining agreement with the State of Alaska. We therefore take jurisdiction to decide whether to enforce those provisions and order the parties to arbitration over the issues in dispute.

ASEA argues that the State's firearms policy for probation and parole officers "is a safety issue and therefore constitutes a policy affecting

the working conditions of the employees. . . .Such a personnel policy is a condition of employment and therefore the subject of collective bargaining." (Union's Reply Brief at 5). The State, on the other hand, contends that the carrying of a firearm by probation or parole officers has never been "referenced" in the parties' collective bargaining agreement, "nor has it ever been a condition or requirement for employment to work as [a] probation officer" (Respondent's Brief for Hearing on the Record at 3).

We believe we have jurisdiction to enforce the grievance-arbitration provisions of a collective bargaining agreement. AS 23.40.210. This enforcement would include ordering the parties to arbitration if appropriate. However, we find that the issue over firearms policy does not require an arbitrator's analysis for resolution. We find this issue has been addressed by the Alaska Supreme Court in *State v. Alaska Public Employees Association*, 644 P.2d 236 (Alaska 1982) (*APEA-1982*).

In *APEA-1982*, the Commissioner of the Department of Health and Social Services established a firearms policy "concerning the carrying of concealed firearms by Probation-Parole officers, which restricts the carrying of firearms to very limited circumstances." 644 P.2d at 637. Seventeen probation-parole officers challenged the policy in Alaska Superior Court. The court found the policy Commissioner's "restrictive" and "useless," among other things, and the court created its own firearms policy and ordered the Commissioner to implement it.

The Alaska Supreme Court reversed the superior court's decision. The supreme court reasoned as follows:

In our view it is the Commissioner, not the superior court, who is charged with the responsibility for the day-to-day operation of the probation service. The methods and equipment to be used by probation officers fall within the ambit of this responsibility. Merely because probation officers are officers of the court and subject to its authority by virtue of AS 33.05.030 does not mean that the court has administrative authority over them. The court may direct individual probation officers to perform appropriate services, but it may not control the details by which those services are accomplished by establishing general policies. We hold that the court may not under the guise of an exercise of its authority to direct probation officers propound a firearms policy.

Id. at 237-38. (emphasis added).

We find the court's reasoning applicable to this dispute. The Commissioner of Corrections [4] is charged by statute with establishing a firearms policy for probation and parole officers. We agree with the State that establishment and implementation of a firearms policy is the statutory responsibility of the Commissioner of Corrections. AS 33.05.010. AS 23.40.250(9) defines "terms and conditions of employment" as "the hours of employment, the compensation and fringe benefits, and the employer's personnel policies affecting the working conditions of the employees; but does not mean the general policies describing the function and purposes of a public employer." We find the policy regarding the carrying of firearms falls within the ambit of the employer's general policies. It is therefore not a term and condition of employment. Accordingly, ASEA's petition to compel the parties to arbitration on this issued is denied and dismissed.

B. Should we compel arbitration on whether the documents related to the psychological testing are subject to the requirements of Article 34 of the collective bargaining agreement?

Article 34.01 of the collective bargaining agreement provides that a bargaining unit member "shall have the right to examine his/her official personnel files. Reasonable requests for copies of material contained in personnel files will be honored." Article 34.03 states: "No secret files shall be kept on any bargaining unit member and the location of all files containing personnel records shall be made known to a bargaining unit member upon request." (Joint Exh. 1 at 54).

ASEA asserts that the State has refused to provide any documentary information or records regarding the psychological tests and results. ASEA argues that the psychological testing affects members and "would be part of the members' personnel files. Therefore, each affected member is entitled to see the entire file." (ASEA November 23, 2000, Brief at 8). ASEA contends that failure to disclose this information violates the Article 34 prohibition against keeping secret files on bargaining unit members.

The State, on the other hand, contends that "the psychological information is used for the sole purpose of screening probation officers that wish to carry a firearm. It is on this basis that the testing information is separate from the basic personnel file." (State's Reply Brief at 5).

We believe this issue raises the question whether the documents related to the psychological testing are secret files under Article 34 or are properly excluded from personnel files. We find this dispute raises a question about the interpretation or application of the parties' collective bargaining agreement. Therefore, the parties are ordered to arbitrate this issue.

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). This Agency has jurisdiction under AS 23.40.210 to consider this matter.

2. As petitioner, ASEA has the burden to prove each element of its case by a preponderance of the evidence.
3. The Agency will not adjudicate an alleged unfair labor practice charge that is raised as part of a collective bargaining agreement enforcement petition.
4. ASEA has failed to prove by a preponderance of the evidence that the dispute over the firearms policy is subject to the parties' collective bargaining agreement.
5. The Commissioner of Corrections is charged by AS 33.05.010 with the responsibility of establishing and implementing a firearms policy.
6. ASEA has proven by a preponderance of the evidence that documentary information and records related to the psychological testing of probation and parole officers raises a question regarding the interpretation or application of the terms of the parties' collective bargaining agreement. This matter is appropriate for arbitration under the grievance-arbitration provisions of the parties' collective bargaining agreement.

ORDER

1. The petition by the Alaska State Employees Association regarding its request to order the parties to arbitration over firearms policy for probation and parole officers is DENIED AND DISMISSED.
2. The petition by the Alaska State Employees Association to order the parties to arbitration under Article 34 of the collective bargaining agreement, to determine whether documentary information and records related to the psychological testing of probation and parole officers are secret files, is GRANTED. The parties are ordered to arbitrate this issue in accordance with this decision.
3. 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

Aaron Isaacs, Jr., Acting Chair

Raymond Smith, Board Member

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 *ALASKA STATE EMPLOYEES ASSOCIATION, AFSCME Local 52, AFL-CIO, vs. STATE OF ALASKA*, Case No. 00-1040-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

J. Michael Robbins, ASEA

Kent Durand, State of Alaska

Signature

[\[1\]](#)The parties do not dispute this Agency's authority to determine the arbitrability of this dispute. We believe we have jurisdiction to decide arbitrability issues under AS 23.40.210. This statute grants the Agency authority to enforce collective bargaining agreements. Since grievance-arbitration provisions are included in these agreements, the Agency's jurisdiction may be triggered when a party files a petition to enforce the agreement. Section 16.03A of the ASEA/State contract states in part that "[q]uestions of arbitrability shall be decided by the arbitrator. This contract language is the same as that contained in the PSEA/State contract addressed in Decision and Order No. 253. See *Public Safety Employees Association v. State of Alaska*, Decision and Order No. 253 (April 25, 2001).

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

[\[3\]](#)For a discussion of arbitrability and historical analysis of agency decisions, see *Public Safety Employees Association v. State of Alaska*, Decision and Order No. 253 at 6-11 (April 25, 2001).

[\[4\]](#)The Department of Corrections was created after the lawsuit was filed in *APEA-1982*.