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

Case No. 10-1581-CBA

DECISION AND ORDER NO. 293

This dispute over the arbitrability of a grievance was heard on January 27, 2011. Hearing Examiner Mark Torgerson presided. The record for this case closed on April 19, 2011, after the parties submitted post-hearing closing briefs and after the board completed its deliberations.

Digest: The petition by the Alaska State Employees Association is granted. The issue of age discrimination, pursuant to the nondiscrimination subsection of Article 6 of the parties' collective bargaining agreement, is arbitrable.

Appearances: Douglas A. Carson, Business Agent for the Alaska State Employees Association; Michael Barber, Labor Relations Analyst for the State of Alaska.

Board Panel: Aaron T. Isaacs, Jr., Vice-Chair; and Members Matthew R. McSorley and Will Askren.

DECISION

Statement of the Case

The Alaska State Employees Association (ASEA) filed this petition to compel the parties to arbitration, alleging a violation of Article 6 of the parties' collective bargaining agreement. ASEA contends that the State of Alaska (State) violated the collective bargaining agreement by discriminating against investigators John Bilyeu and Richard Finney, employees of the Alcohol Beverage Control Board, because of their age. The State denies the claim and argues that the grievance is not arbitrable.

Issues

1. Does the grievance filed by ASEA raise a question over application or interpretation of the discrimination terms in Article 6 of the collective bargaining agreement between ASEA and the State?
2. Is the grievance filed by ASEA arbitrable under Article 16 of the parties' collective bargaining agreement?

FINDINGS OF FACT

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

1. ASEA is the exclusive representative of employees of the State's general government unit. ASEA is an organization under AS 23.40.250(5).
2. The State of Alaska is a public employer under AS 23.40.250(7).
3. ASEA and the State have a collective bargaining agreement for the period July 1, 2007, through June 30, 2010. (Exhibit 1).
4. John Bilyeu and Richard Finney are members of ASEA.
5. Bilyeu and Finney work for the State as Investigator III's at the Alcohol Beverage Control Board (ABC Board), a division of the Department of Public Safety. Bilyeu has worked for the ABC Board for approximately 17 years, and Finney has been employed by the ABC Board approximately 16 years. Both of them have considerable previous law enforcement experience that required them to become proficient in the use of firearms.

6. As part of their job duties for the ABC Board, Bilyeu and Finney conduct investigations regarding illegal sales of alcohol. (Exhibit 2). These duties include the conducting of "shoulder taps" and "compliance checks." Both types of investigations are undercover and include the use of a minor under the legal drinking age of 21 years old.

7. During a shoulder tap, a minor will ask a person entering a licensed package store to buy them alcoholic beverages. During a compliance check, a minor will enter a bar or other establishment that sells alcohol and ask to be served alcohol.

8. In 2009, the ABC Board adopted a policy that permitted investigators to carry firearms, if the investigators met specific requirements. (Exhibit H).

9. Shirley Gifford is Director of the Department of the Alcohol Beverage Control Board. She was appointed Director in January 2009.

10. On September 15, 2009, Gifford sent a memorandum to ABC Board Chair Robert Klein, requesting among other things that two investigators, Joe Hamilton and Jeff Brink, be authorized to carry firearms under the ABC Board's new firearms policies and procedures.

11. On September 16, 2009, Gifford sent Bilyeu and Finney each an identical memorandum notifying them that the ABC Board of Directors would be voting on approval of new Enforcement Unit policies and procedures. Under these procedures, Bilyeu and Finney would be allowed to carry a firearm, if they wished, but only if they met qualifications contained in the new procedures. According to Gifford, both Bilyeu and Finney would be required, under the policies and procedures that pertain to them, to attend the Alaska Police Academy's 15-week training program before they could get authorization to carry firearms. (Exhibits 3 and 4).

12. On October 17, 2009, Finney sent Gifford a memorandum requesting that he be allowed to comply with the new policies and procedures under subsection C(3)(c) of the enforcement section. This subsection provides that an investigator may be considered for carrying a firearm if he "has not been employed as a police officer between three . . . and ten . . . years prior to employment" (Exhibit 3, numbered page 16). Finney noted in his memorandum that he was a police officer in the State of Alaska within 10 years of beginning employment as an ABC investigator. (Exhibit 5).

13. Gifford denied Finney's request in an October 28, 2009, memorandum. She reasoned: "I understand that the time between your employment as a police officer and your employment with the ABC Board is under 10 years; however, it has been well over 10 years since you were a police officer. Therefore, you do not qualify for the two-week

academy" (Exhibit 6). Gifford indicated that Finney would be required to take the full 15-week academy course.

14. Both Bilyeu and Finney expressed concern about their ability to successfully complete the physical requirements at the police academy.

15. On November 2, 2009, ASEA Business Manager Jim Duncan sent Department of Public Safety Commissioner Joseph Masters a letter expressing concern over the effect of the new policy on Bilyeu and Finney. (Exhibit 7). Among concerns expressed, Duncan stated that "[t]he problem ASEA sees is that the policy could be interpreted to discriminate against these employees on the basis of their age." Duncan requested that Finney and Bilyeu be grandfathered into the new policies and procedures. (Exhibit 7). Gifford denied the request. (Exhibit 11).

16. Bilyeu and Finney sent Gifford memorandums stating their willingness to attend the 15-week academy. (Exhibits 8 and 9). Bilyeu noted that he had been a police officer in two other states besides Alaska, and as a member of the Alaska State Defense Force, he instructed others in firearms, handcuffing, baton, use of force, and other law enforcement subjects.¹

17. On November 9, 2009, Bilyeu sent a memorandum to Bob Beasley, Enforcement Supervisor. (Exhibit 10). Bilyeu's memorandum was a response to a memorandum Beasley had sent Bilyeu regarding Bilyeu's use of a handicapped parking space. Bilyeu expressed concern to Beasley about Beasley's memorandum. Among other concerns, Bilyeu noted that he has experienced "duty related injuries which were debilitating." Bilyeu also noted that he had never failed a "PT" test but that another investigator, "Hamilton," had failed a physical test since coming to the ABC Board. Bilyeu added: "I have never thought Investigator Hamilton could not perform his job because of his physical condition. But there seems to be a question about my ability to perform. This does not seem equitable or fair."

18. Bilyeu believes the new policy appears to be a motivation for him and Finney to retire. They contend that Investigator Hamilton failed a physical test but was nevertheless authorized to carry a firearm. They believe they are being discriminated against on the basis of age.

19. On December 22, 2009, ASEA filed a step one grievance with the State, alleging among other things that the new firearms policy discriminated against Bilyeu and Finney on the basis of age, in violation of Article 6 of the parties' collective bargaining

¹ Vice Chair Isaacs disclosed during the hearing that he too is a member of the Alaska State Defense Force. Neither party expressed concern as a result of this disclosure.

agreement. The State, in a January 6, 2010, letter from Director Gifford to ASEA business agent Doug Carson, denied the grievance. Gifford acknowledged that both Bilyeu and Finney were "avid shooters," but she asserted that many factors "contribute to qualifications - current law, defensive tactics, good physical condition, good restraint in stressful situations, good decision-making, understanding the application of the use of force continuum and ability to employ the continuum within the constraints of the law, and so forth." (Exhibit B).

20. ASEA moved the grievance through steps two, three and finally step four, and requested arbitration. The State refused to arbitrate, contending that the grievance was not arbitrable. ASEA then filed a petition to enforce the parties' collective bargaining agreement on August 27, 2010, requesting that we order the parties to attend arbitration.

21. The discrimination provision in Article 6 is a term of the parties' collective bargaining agreement.

ANALYSIS

1. Does the grievance filed by ASEA raise a question over application or interpretation of the discrimination terms in Article 6 of the collective bargaining agreement between ASEA and the State?

ASEA contends that the State's refusal to authorize investigators Bilyeu and Finney to carry firearms in the course of their duties raises a question of discrimination under Article 6 of the parties' agreement. ASEA argues that an arbitrator must decide the merits of its discrimination claim. The State disputes the arbitrability of the grievance filed on behalf of Bilyeu and Finney. The State maintains that the ABC Board's policy on carrying firearms is a "general policy describing the function and purposes of a public employer. It is not a term or condition of employment. Nor is it a subject over which the parties have negotiated." (State's Closing Brief at 5). The State concludes that it is not required to submit such a fundamental policy to arbitration.

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 the resolution of disputes through the grievance/arbitration procedure. When that process fails, either party may petition this agency to enforce the agreement.

In prior decision and orders, we have cited several cases in which the United States Supreme Court addressed arbitrability. (See, e.g., *Alaska State Employees Association, AFSCME Local 52, AFL-CIO, v. State of Alaska*, Decision and Order No. 261 (December 31, 2002); and *Alaska Public Employees Association/AFT, AFL-CIO, v. State of Alaska*, Decision and Order No. 264 (April 21, 2003)). These include the *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 another case, *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 121 L.R.R.M. (BNA) 3329 (1984), the Supreme Court shed further light on arbitrability and the principles announced in the *Steelworkers* cases. The issue in *AT&T Technologies* was whether the parties intended to arbitrate layoffs predicated on a "lack of work" determination by AT&T. The Court held that under the first trilogy principle, "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 held 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).

Article 6.01, titled "Nondiscrimination," provides:

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 or mental disability, marital status, change in marital status, pregnancy, parenthood, political affiliation or belief, or Union affiliation, or otherwise as specified in law.

(*Id.* at 5).

Article 16 describes the grievance/arbitration process that applies to ASEA and the State for the relevant contract period. It provides in pertinent part:

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 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.

(Exhibit 1 at 24).

ASEA contends that in its application of the firearms policy to ABC Board Investigators Finney and Bilyeu, the State discriminated against them on the basis of age. ASEA further contends that by including a discrimination provision in the parties' agreement, "the State clearly contemplated and agreed to claims of discrimination being

subject to the grievance procedure contained in Article 16 of the agreement." (ASEA Closing Brief at 10). ASEA stressed that it is not challenging the validity of the State's firearms policy, only the State's application of that policy. ASEA contends that the policy has been applied "differently to different employees," and this raises a question about discrimination under Article 6. (*Id.* at 11).

In deciding arbitrability, we must not decide the merits of a case. We must only decide whether this particular type of dispute is subject to arbitration pursuant to the grievance/arbitration provision in the parties' collective bargaining agreement. In making this decision, we must not base the decision on whether or not the issue is frivolous. We must not decide the merits of the dispute, only the arbitrability of the dispute.

We find the collective bargaining agreement clearly and unmistakably contains a nondiscrimination provision. We further find that the parties disagree whether the State's application of its firearms policy to Finney and Bilyeu was discriminatory. Under Article 16 of the collective bargaining agreement, this raises a dispute subject to the grievance/arbitration process.

2. Is the grievance filed by ASEA arbitrable under Article 16 of the parties' collective bargaining agreement?

We have found that the parties' disagreement over application of the Article 6 nondiscrimination terms of the collective bargaining agreement is subject to the grievance/arbitration process in Article 16. We have reviewed the remaining articles of the collective bargaining agreement and we have not found any applicable alternative dispute resolution and appeal procedures in those articles. We therefore conclude that this grievance is arbitrable.

The State contends that it is not required to negotiate over its firearms policy because the policy is not a term or condition of employment, and that under the Alaska Supreme Court's decision in the so-called *Kenai II* opinion, "what is arbitrable is bounded by the limits of what is negotiable." This argument misses the point of ASEA's petition. As noted, ASEA is not disputing the State's firearms policy. In fact, there is no reference to that policy in the parties' collective bargaining agreement. ASEA is disputing the application of that policy to Investigators Finney and Bilyeu, and whether that application violates the nondiscrimination provision of the agreement. The application of the policy to Finney and Bilyeu, on the grounds that the State violated the nondiscrimination provision, is arbitrable.

The State also argues that the parties' dispute is not arbitrable because the ABC Board's firearms policy is not a mandatory subject of bargaining. Again, this dispute

raises an arbitrable question over the application of that firearms policy to Finney and Bilyeu, not a question over the validity of the policy.

The State asserts that our decision and order in *Alaska State Employees Association v. State of Alaska*, Decision and Order No. 254 (April 25, 2001) (D&O 254), is "directly on point." (State's Closing Brief at 8). In D&O 254, the State amended its firearms policy for probation officers. The probation officers could still carry firearms, but the officers first had to pass a psychological test. Two probation officers, who had carried firearms previously, failed the psychological examination and were denied authorization to carry firearms.

ASEA filed a grievance on behalf of these two and all other probation officers, arguing that the changes to the firearms policy jeopardized the safety of the probation officers. In essence, ASEA was questioning the validity of the new policy. The State denied the grievance at all levels and ASEA filed a petition to compel the parties to arbitration.

We denied and dismissed ASEA's petition. For support, we applied analysis from *State v. Alaska Public Employees Association*, 644 P.2d 236 (Alaska 1982). We found the following language particularly persuasive: "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." (*Id.* at 237-238). We then said: "We agree with the State that establishment and implementation of a firearms policy is the statutory responsibility of the Commissioner of Corrections." (D&O 254 at 7).

Here, unlike the petition in D&O 254, ASEA is not questioning the validity of, or implementation of the ABC Board's amended firearms policy. ASEA does question the *application* of that amended policy to Finney and Bilyeu, and ASEA alleges discrimination under Article 6. If we assume theoretically, for example, that Finney and Bilyeu had failed to pass the amended policy's physical requirements needed to qualify to carry firearms, ASEA could not argue that the investigators' failure to pass this 'test' raises a question over the validity or legitimacy of the firearms policy. ASEA does not question the validity of the policy. ASEA alleges age discrimination, under Article 6, in the application of that valid policy.

Finally, the State argues:

The Association's argument seems to be that, so long as it alleges discrimination, it has the right to challenge any decision or action that the State makes without regard to whether the decision or action concerns wages, hours, or other terms and conditions of employment. Such a

holding, if adopted by ALRA, would have significant implications and would frustrate the intent behind PERA.

(State's Closing Brief at 12).

In determining arbitrability, we first review the record, including the grievance/arbitration clause of the collective bargaining agreement, to determine if there is a "controversy or dispute involving the application or interpretation of the terms of this Agreement" (Exhibit 1, Collective Bargaining Agreement, Article 16). If we find such a controversy or dispute exists, "or if it is reasonably arguable that such a dispute is involved," we then look to other areas of the agreement to determine if the parties agreed to an alternative dispute resolution as the exclusive remedy for the particular controversy or dispute. *Public Safety Employees Association v. State*, 658 P.2d 769, 773 (Alaska 1983). See *Alaska State Employees Ass'n, AFSCME Local 52, AFL-CIO v. State of Alaska*, Decision and Order No. 288, at 9 (June 3, 2009). If we find no alternative resolution, the dispute is deemed arbitrable, even if allegations appear frivolous.

First, the collective bargaining agreement's grievance arbitration clause does not limit arbitration disputes to "wages, hours, or other terms and conditions of employment." It provides that arbitration applies to disputes over interpretation or application of "terms of this Agreement." Clearly, the discrimination provision in Article 6 is a term of the agreement. It is a controversy or dispute involving the application or interpretation of Article 6, because ASEA believes the State discriminated based on age of the employees, and the State disputes the allegation.

Second, in our review of the articles in the collective bargaining agreement, we have found no articles that preclude the parties from pursuing arbitration of Article 6 discrimination claims. In other words, there is no article or procedure in the agreement that provides for an alternative process to resolve discrimination claims. This being so, the parties would have no avenue to resolve Article 6 discrimination claims without the arbitration process. With no process available, Article 6 would be pure fluff. The parties could not have intended such a result.

We conclude, under the facts of this case, that this matter is arbitrable. The parties shall proceed to arbitration in accordance with their collective bargaining agreement's grievance/arbitration provisions.

CONCLUSIONS OF LAW

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

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

3. As petitioner, Alaska State Employees Association must prove each element of its case by a preponderance of the evidence. 8 AAC 97.350(f).

4. The Alaska State Employees Association has proven by a preponderance of the evidence that the parties' dispute concerns the application or interpretation of a term of the parties' collective bargaining agreement, specifically Article 6 on nondiscrimination.

5. The issue for arbitration is whether the State of Alaska discriminated against John Bilyeu and Richard Finney under Article 6 of the collective bargaining agreement, when applying the Alcohol Beverage Control Board's policy on carrying firearms. The validity of the Board's policy itself is not a subject of arbitration.

ORDER

1. The petition by the Alaska State Employees Association to compel arbitration in this case is granted, as described in Conclusion of Law number 5, above.

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.

Dated: _____

ALASKA LABOR RELATIONS AGENCY

Aaron T. Isaacs, Jr., Vice-Chair

Matthew R. McSorley, Board Member

Will Askren, Board Member

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. 10-1581-CBA, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 21st day of June, 2011.

Cole Milstead
Law Office Assistant III

APPEAL PROCEDURES

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

This is to certify that on the ___ day of June, 2011, a true and correct copy of the foregoing was sent by mail, postage prepaid to:

Douglas A. Carson, ASEA
Becky Hultberg, State of Alaska
