

[Labor Relations Agency Stationery]

BEFORE THE ALASKA LABOR RELATIONS AGENCY

KENNETH MITCHELL and THE)
PUBLIC EMPLOYEES ASSOCIATION,)
)
Petitioners,)
)
vs.)
)
STATE OF ALASKA, DEPARTMENT)
OF TRANSPORTATION and PUBLIC)
FACILITIES,)
)
Respondent.)
_____))

Petition No. 84-7

ORDER AND DECISION NO. 92

BACKGROUND FACTS

Kenneth Mitchell is an Airport Safety Officer II employed by the State of Alaska. The Alaska Public Employees Association (APEA) is his bargaining representative. In 1983 Mr. Mitchell was shot in his right lower chest in his home. The shooting was either a suicide attempt or a result of a struggle with his wife. Mr. Mitchell carries a handgun on his job. The concern of the State concerning the shooting incident is obvious. The State took disciplinary action against Mr. Mitchell. Such action was grieved under the Collective Bargaining Contract by APEA. On December 19, 1983, 21 days

after the filing of the grievance, a full and final resolution was signed by the State of Alaska by the Commissioner of Administration's Office and Holli Ploog, APEA's Anchorage attorney. The letter of grievance resolution stated:

"That the following constitutes a full final resolution of the grievance filed on behalf of Kenneth Mitchell at Step 1 on November 29, 1983.

Mr. Mitchell shall be returned from leave effective October 13, 1983 and shall receive all pay and benefits of an Airport Safety Officer II through December 22, 1983.

Effective December 23, 1983 Mr. Mitchell shall be appointed to PCN 25-2610 as a Clerk III, Range 8, Step F.

Any psychotherapy received by Mr. Mitchell shall be at his expense. The Department of Transportation & Public Facilities shall provide an evaluation program to determine his suitability to return to Airport Safety Officer II duties. This evaluation program shall be conducted on a quarterly basis and will be paid for by the Department. The duration of this evaluation program shall not exceed eighteen (18) months unless mutually agreed upon by the parties.

This settlement is entered into for the sole purpose of resolving this specific dispute and does not establish any practice or precedent between the parties. The parties agree they will not refer to this settlement in any further complaint, grievance, arbitration, hearing, negotiation or any other matter."

Mr. Mitchell began the evaluation program by visiting the Langdon Psychiatric Clinic. Harriett McGinnis, Department of Transportation, referred him there. An October 12, 1983 report showed, in part, that he had an indifference to social responsibility and the welfare of others; he was skilled in

deceiving others; his feelings, when expressed, were likely to be very explosive and alienating to others; care should be taken in his treatment so that he not deceive others by superficial compliance with true efforts to make him more sensitive to the needs of others and accept the constraints and responsibilities through shared and social living. This report is different from Mr. Mitchell's own report when he saw Dr. Aaron Wolf of the Langdon Clinic on September 15, 1983.

Dr. Wolf concluded:

"I do not feel at this point that there is any problem with his return to work and functioning responsibly in all the aspects of his job as a Police Officer at the Anchorage Airport. I do intend to follow him in a supportive psychotherapy in relation to his marital difficulties."

Mr. Mitchell was instructed to see Dr. Rothrock of Fairbanks, Alaska. His appointments were made both before and after the Settlement on September 19, 1983, September 26, 1983, February 6, 1984 and May 7, 1984.

During June and July, 1984, Nancy Carlson of APEA, contacted Dr. Rothrock and attempted to elicit a definite yes or no to the question of whether Mr. Mitchell was suitable to return to work as a Safety Officer.

On July 24, 1984, a letter from Dr. Rothrock explaining his position of being unable to give a definite answer was typed but never received by Carlson. The substance of the letter was telephonically discussed by Carlson and Rothrock in July 1984. Shortly thereafter, APEA was "miffed" at the State's failure

to assist Mitchell by giving a definite yes or no answer. On August 16, APEA cited the State's affirmative duty to provide the evaluation program for Mitchell's suitability to return to Airport Safety Officer duties.

On or about August 16, the Department of Administration conducted an in-house investigation of Mr. Mitchell. On August 31, 1984 APEA filed this Petition for Enforcement. On November 13, 1984 an Addendum was filed. The State of Alaska took immediate, almost simultaneous action in late August by retaining an expert, the Law Enforcement Psychological Services Corporation of San Jose, California, to evaluate Mr. Mitchell. The State expedited the evaluation with the cooperation of Mr. Mitchell. The evaluation was conducted on September 27 and 28. The report was received by the Department on October 15, 1984. Mr. Mitchell was reinstated as an Airport Safety Officer the same day as a new hire.

LEGAL ISSUES

APEA contends the State breached their duty by:

(a) Not providing the evaluation program to determine Mr. Mitchell's suitability. Dr. Rothrock was never instructed by the State that he had to give the yes or no reply; and

(b) Not returning Mr. Mitchell to work pursuant to the intent of the contract of December 19, 1983.

Hence, APEA argues that:

(a) Mr. Mitchell is entitled to return to his former

status of Airport Safety Officer and not be considered a rehire;

(b) Not be required to serve a new probationary period;

(c) Have his merit anniversary date as an Airport Safety Officer remain unchanged;

(d) Receive full credit towards his police and fireman retirement for the period he was absent from his duties;

(e) Receive any and all expenses incurred for the physical examination he was required to take prior to his being reimbursed by the State;

(f) A Cease and Desist Order;

(g) Receive the difference in wages he would have earned had he worked as an Airport Safety Officer, including overtime, holidays, performance, incentive, etc.;

(h) Receive all other rights, benefits or privileges foregone by virtue of his compliance with the agreement.

The State replied:

(a) That this Agency was without jurisdiction or, if not without jurisdiction, should defer the matter to arbitration;

(b) The conditions of reinstatement were mandated by the Collective Bargaining Contract;

(c) The State acted reasonably and in good faith throughout all the time periods, both before and after it was determined that Dr. Rothrock was not going to give the definite yes or no;

(d) Mr. Mitchell was exhibiting some strange and

frightening characteristics as late as August 1984 which would have been the subject for further investigation regardless of Dr. Rothrock's evaluation program. (See confidential memo dated August 21, 1984.)

A hearing was held in Anchorage November 26, 1984. Oral evidence was received from Dr. Rothrock, Nancy Carlson of APEA, Darrel Keith of the Department of Transportation and Marvin Hennen for the State of Alaska. A deposition of Holli Ploog was received and entered. Neither Harriett McGinnis, the State officer who retained Dr. Rothrock and who has since retired, nor Eleanor Andrews, who signed the Letter Grievance Resolution for the Commissioner of Administration, nor Mr. Mitchell, testified. The lack of testimony concerning the reasonable expectations of the parties who negotiated the contract is clear from the record.

JURISDICTION

The Agency must first rule on the jurisdictional issues.

A.S. 23140.210 states, in part:

"Agreement. Upon completion of negotiations between an organization and a public employer, if a settlement is reached, an employer shall reduce it to writing in a form of an agreement 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."

The Collective Bargaining Agreement of the parties states, in part:

"in the event the matter is settled by written agreement between the APEA business representative and the Commissioner of Administration, such written agreement shall have the same force and effect as a decision or award of the Arbitrator and be final and binding on each of the parties in that they will abide thereby. Should either party fail or refuse to abide by the written agreement, the prevailing party shall be free to take whatever action it deems necessary, and such action will not be considered in violation of this agreement."

It appears to the Agency that Holli Ploog was acting as the APEA Business Representative and that an agent for the Commissioner of Administration signed the Agreement.

Hence, we conclude that the written agreement should have the same force and effect as a decision or an award by an Arbitrator and be final and binding on each of the parties. The fact that the grievance resolution was approved by the Commissioner of Administration is important because grievances at Step One are settled by the first level of supervision outside the bargaining unit. Grievances at Step Two are settled by the director or their designated representative. Step Three grievances are settled by an APEA Business Representative and the Commissioner or such other administrative head as may be the highest supervisor of the department. Step Four is settled by appeal to the Commissioner of Administration.

It appears to this Agency that the subject matter of this dispute was important enough to be settled only by the Commissioner of Administration or her assistant. The Agency notes the State's arguments at the hearing and within the post

hearing memorandum. We agree with the general principles that arbitration is the preferred method of resolving disputes. This Agency often cites The Developing Labor Law. We agree that arbitration is the primary mechanism for the resolution of disputes arising under the Collective Bargaining Agreements.

By making this conclusion in this case, we in no way encourage the parties to bring their actions directly to the Agency. The intent of the law is clear that the arbitration is the preferred method. However, the parties did negotiate an agreement which was tantamount to arbitration. A.S. 23.40.210 allows either party the right of action to approach the Agency to enforce that "Arbitration" Agreement.

This Agency has noted the NLRB Collyer and Spielberg Doctrines in its prior Orders and Decisions (NLRB pre and post arbitration deferral cases). This decision is a judgment call. We believe the state labor policy is better served by having this Agency decide this case. In other instances, somewhat similar facts may come before us and this Board may decline to exercise our jurisdiction.

We do so when we believe that the State labor policy is better served by leaving the parties to other procedures, as the National Labor Relations Board decides these issues on a case by case basis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the entire record, we make the following Findings of Fact and Conclusions of Law and **ORDER:**

1. The parties' December 19, 1983 Agreement is a legally enforceable contract.

2. The State of Alaska provided an appropriate evaluation program by its contracts with Langdon Clinic, Dr. Rothrock, the Law Enforcement Psychological Services Corporation of San Jose, California and its in-house investigation.

3. The evaluation program was conducted on a quarterly basis.

4. The Petitioners did not meet their burden of proving by a preponderance of the evidence that the parties intended that Mr. Mitchell return to his Airport Safety Officer II duties without the probationary requirements of a new hire.

The Agency has looked to the contract, itself, and to the extrinsic evidence regarding the parties' intent. There is no direct evidence from the signatories, and little, if any extrinsic evidence on this issue. The Petitioners did not argue or waive one ambiguity at the hearing.

The Agency will not assume Petitioners' intent without relevant evidence. The State followed the parties' Collective Bargaining Agreement in reassigning Mr. Mitchell to his Airport Officer Safety II duties.

5. Mr. Mitchell returned to work as an Airport Safety Officer II on or about October 15, 1984.

6. The police retirement system is different from other state employees because of the inherent risks. Mr. Mitchell should not receive police retirement benefits for the period

of time he voluntarily took the position as Clerk III, pursuant to the December 19, 1983 settlement. The retirement monies for the period of time Mr. Mitchell was a Clerk should be calculated by the State following its retirement system policies.

7. The physical examination paid for by Mr. Mitchell should have been paid for by the State as they made the unilateral decision that Mr. Mitchell was once again qualified for Airport Safety Officer II duties.

The difference between the physical examination and the probationary requirements is gleaned from the evaluation program of the December 19, 1983 contract. The State had the obligation to provide the evaluation program. The medical expenses were a part of that evaluation program for an Airport Safety Officer II.

8. Mr. Mitchell is not entitled to any difference of wages from the duties of Clerk III and Airport Safety Officer II from December 23, 1983 through October 15, 1984.

9. The merit anniversary date of Mr. Mitchell should remain unchanged.

10. The issue of the Cease and Desist Order is moot.

O R D E R

1. The State of Alaska is **ORDERED** to reimburse Mr. Mitchell his actual costs for the physical examination (noted as approximately \$100 at the hearing).

2. Each party is to bear their own costs and attorney fees.

DATED AND SIGNED this 5th day of February, 1985.

SIGNED: _____
C. R. "Steve" Hafling, Chairman

SIGNED: _____
Ben Humphries

SIGNED: _____
Marlene Johnson

[Signatures on File]