

IN ARBITRATION BEFORE ARBITRATOR WILLIAM GREER

STATE OF ALASKA, )  
)  
vs. )  
)  
ALASKA CORRECTIONAL OFFICERS ASSOC )  
)  
\_\_\_\_\_ )

Re: Interest Dispute; ACOA

POST HEARING BRIEF

on behalf of

THE STATE OF ALASKA

Submitted this 27th day of February 2009

By: \_\_\_\_\_  
Nancy Sutch  
Labor Relations Analyst

By: \_\_\_\_\_  
Michael Barber  
Labor Relations Analyst

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## FACTUAL BACKGROUND

The State of Alaska (“the State”) is a public employer within the meaning of AS 23.40.250(7). Alaska Correctional Officers Association (“ACOA” or “the Association”) is an employee organization within the meaning of AS 23.40.250(5). The Association represents the Correctional Officers Bargaining Unit, which is composed of classified, non-supervisory employees of the Department of Corrections. These employees have primary responsibility for the custody and care of offenders committed to the custody of the Commissioner of the Department of Corrections and require certification by the Alaska Police Standards Council. All members of the bargaining unit are authorized to use deadly force under limited circumstances, all must be firearms qualified, and some members of the bargaining unit carry a weapon while on duty. All employees in the bargaining unit are subject to AS 23.40.200(b).

The Correctional Officers Unit became certified as a separate bargaining unit in 1997, being first represented by the Public Safety Employees Association (“PSEA”) and later forming the current Association. Prior to 1997, the Correctional Officers were represented by Alaska State Employees Association (“ASEA”) and Alaska Public Employees Association (“APEA”) as a part of the general government bargaining unit. The parties have maintained a continuous bargaining relationship. Approximately 774 employees will be affected by the Arbitrator’s decision.

## AUTHORITY OF THE ARBITRATOR AND CRITERIA FOR DECISION

The Arbitrator has the authority to decide this dispute pursuant to the Public Employment Relations Act (PERA)<sup>1</sup> inasmuch as it involves the wages, hours, and terms and conditions of employment of employees whose services may not be given up for even the shortest period of time.<sup>2</sup> The parties have not incorporated AS 09.43 et seq. into either the expired agreement or the submission stipulation and, consequently, the provisions of the Uniform Arbitration Act do not apply to this proceeding.

With respect to the parties' monetary proposals, which are contained in Articles 13, 18, 19, 20, 21, 22, 23, 24, and 25, the Arbitrator has the authority "to select either the State's proposal or the Association's proposal or to develop an alternative."<sup>3</sup> For the non-monetary proposals, the Arbitrator has the authority "to select either the State's proposal or the Association's proposal, without alteration."<sup>4</sup> If neither party presents compelling evidence of change, the Arbitrator may revert to the status quo.<sup>5</sup>

The parties' Interest Arbitration Submission Agreement sets out the criteria the Arbitrator is to use in deciding this dispute:

The criteria for decision are contained in the Alaska Statutes 23.40.070-.260, the Alaska Public Employment Relations Act, and the stipulations of the parties. The arbitrator may rely upon the reasoning in prior interest arbitration decisions involving the State. A major consideration in interest arbitration is the terms of employment that apply to employees who perform similar work and are employed by similar employers in the area.

The arbitrator may consider the comparison data submitted on the wages and working conditions of other employees, interest and welfare of the public, consumer price index, and overall compensation presently received by the employees.

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<sup>1</sup> AS 23.40.070-.260 at AS 23.40.200(b)

<sup>2</sup> AS 23.40.200(a)(1).

<sup>3</sup> State – ACOA 2009 Submission Agreement 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

The arbitrator may also use comparability both within the jurisdiction of the employer and with respect to similar employees in other jurisdictions, ability of the employer to pay, the welfare of the public, cost of living, and bargaining history.

The parties agree that the arbitrator may take notice of, and consider accurate, the factual findings and orders contained in interest arbitration opinions that apply to State of Alaska bargaining units that were rendered from January 1, 2000 to date, including page 25 of Arbitrator Greer's State-APEA (February 2008) opinion (as updated by the parties).

The purpose of the PERA can be found at AS 23.40.070, in which the legislature declared "that it is the public policy of the state to promote harmonious and cooperative relations between government and its employees and protect the public by assuring effective and orderly operations of government." While it is clear that the legislature intended that the PERA would promote harmonious relations with government employees, that goal must be balanced with an equally strongly-stated intention to protect the public by assuring effective and orderly operations of government.

The arbitrator may note that this particular language in Alaska's PERA is identical to that in Hawaii's bargaining law.<sup>6</sup> However, bargaining in Alaska may be distinguished from Hawaii by the fact that the right to bargain collectively inheres from Hawaii's constitution whereas it is merely a creature of statute in Alaska.<sup>7</sup> Consequently, there is no inherent right to bargain in Alaska and Alaska statutes and decisional and case law under those statutes strictly circumscribes all bargaining actions.

While the Legislature has delegated the right to bargain, including interest arbitration, to the Executive Branch, it has reserved to itself significant authority over the

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<sup>6</sup> HRS 89-1.

<sup>7</sup> *See*, 62 P.3d 189 (Hawaii, 2002).

product of that bargaining.<sup>8</sup> The Legislature has required that all monetary terms of a collective bargaining agreement be subject to funding through legislative appropriation<sup>9</sup> and that all monetary terms be reported to the Legislature for consideration.<sup>10</sup> Monetary terms are the changes in terms and conditions of employment that (A) will require an appropriation for their implementation; (B) will result in a change in state revenues or productive work hours for state employees; or (C) address employee compensation, leave benefits, or health insurance benefits, whether or not an appropriation is required for implementation.<sup>11</sup>

Pursuant to AS 23.40.250(9), the Arbitrator has no authority to decide the general policies describing the function and purposes of the employer except by the specific submission of such a dispute regarding a permissive subject of bargaining to the Arbitrator.<sup>12</sup> In the instant matter, the parties are compelled to arbitration after having reached impasse during negotiations. The parties agreed to pursue PERA's impasse-resolution process, interest arbitration, because each formed a good-faith belief that further bargaining was futile and would not produce an agreement on major, clearly mandatory subjects within the agreement such as wages, certain forms of premium pay, and uniform allowance. There has been no article-by-article determination by either the parties or the Alaska Labor Relations Agency (ALRA) that the parties are at impasse on specific articles before the arbitrator. The parties accepted this situation because the time

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<sup>1</sup> See, *Public Employees' Local 71 v. State of Alaska*, 775 P2d 1062, (1989)

<sup>9</sup> AS 23.40.215(a).

<sup>10</sup> AS 23.40.215(b).

<sup>11</sup> AS 23.40.250(4).

<sup>12</sup> Like the NLRA, PERA does not explicitly define permissive subjects of bargaining. The first clause of the definition of "collective bargaining" at Section 250(1) includes the well-known phrase "wages, hours, and terms and conditions of employment," as in the NLRA. However, "terms and conditions of employment" as defined at Section 250 (9) has no analog in the NLRA, and NLRB precedent cannot be relied upon. Both the Alaska courts and the Alaska Labor Relations Agency have held that federal precedent will be given "great weight." See, 8 AAC 97.450(b) and *Public Employees Local 71, supra*.

necessary to adjudicate such questions would have made it impossible to submit the arbitrator's award to the Legislature in time to assure consideration in this session.

The necessary factual predicate of interest arbitration is a state of impasse.<sup>13</sup> It is a *per se* unfair labor practice to persist to impasse on a permissive subject of bargaining.<sup>14</sup> The State is confident that the proposals it has formally submitted to the Arbitrator fall within his jurisdiction. However, in the process of fashioning an award, it is possible that the Arbitrator may depart from those proposals and in so doing move into areas outside his authority. The State is on record that it objects to any finding by the Arbitrator which impinges upon its general duties as a public employer as provided at AS 23.40.250(8).

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<sup>13</sup> AS 23.40.200(b)

<sup>14</sup> See, *NLRB v. Borg-Warner, Wooster Div*, 356 U.S. 342 (1958) and its progeny.

## ECONOMIC ENVIRONMENT

### The Bargaining Environment

Collective Bargaining for the majority of Alaskan public employees began in 1972, with the first agreements consummated in 1974.<sup>15</sup> With the PERA's enactment, all employees were brought under a common bargaining law administered by the Alaska Labor Relations Agency (ALRA). The early ALRA's presumption was that all employees of the Executive Branch shared a community of interest as such, and the PERA's prohibition against "unnecessary fragmentation" militated against formation of separate units.<sup>16</sup>

Soon after passage of PERA, Supervisors; Labor, Trades, and Crafts employees, and confidential employees formed separate bargaining units. Correctional Officers remained in the large general government unit ("GGU") until 1997, when the Correctional Officers unit was certified by the ALRA. The GGU in 1997 was, and largely remains, an amorphous mass of employees who are not readily identifiable as some other kind of employee and the contract terms attempt to cover employees from the lowest level clerks and couriers to very high level professionals lacking supervisory authority.

Almost from the beginning of bargaining, the unique conditions in correctional institutions were addressed by a series of contract amendments and addenda specific to Correctional Officers. By the 1990s the wages, hours, and terms and conditions of

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<sup>15</sup> Alaska Marine Highway Employees have had collective bargaining since the inception of the system in 1962 (AS 23.40.040).

<sup>16</sup> See, AS 23.40.090 and ALRA Decision and Order (D&O) 1.

employment of Correctional Officers were so distinct from the remainder of the GGU that the need for a separate bargaining unit was recognized by the ALRA.

The COs have been in a separate unit since 1997 and have been under voluntary agreements until proceeding to interest arbitration in 2006. It must be remembered that they at all times had access to interest arbitration, which is the mandatory means by which an impasse in bargaining is resolved for employees subject to AS 23.40.200(b). The Association now argues that it has lost purchasing power and asks this Arbitrator to undo the agreements into which it freely entered.<sup>17</sup> The agreement now in place was not imposed by a hostile employer taking advantage of a weak union, nor is it the product of a politically well-connected union's ability to secure a sweetheart deal. It is the product of the give and take of collective bargaining over 30 years between the State and four different representatives, all of which found common ground to reach a voluntary settlement up until recently. This Arbitrator must be loathe to disturb a relationship years in the making and must do so only on the most compelling, objective demonstration of a need to do so.

### The Role of State Government

Alaska is a natural resource State and, as such, the government's revenue stream is extremely dependent upon the revenue generated from oil, gas, and minerals. Most of Alaska's revenues are generated through a complex array of oil and gas property taxes, severance taxes, corporate income taxes, and from royalties. On average, 86 cents out of every dollar that the State of Alaska receives in revenue on an annual basis comes from oil and gas revenue. It must be emphasized that the revenue generated from oil and gas is finite. It is one-time compensation for the value of a product and there is less of the

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<sup>17</sup> See generally, Testimony of Reaume.

product remaining in the ground after each dollar of revenue is realized. Alaska has no income tax and no general sales tax, only the most urban areas have property taxes and the two largest urban areas have no sales tax.

It is critical to realize that even if Alaska had these alternate revenue streams in place, they could not even come close to sustaining the state's current level of expenditures. Given the State's dependence upon a single source of revenue and the State's constitutional responsibility to provide essential services such as K-12 education, public safety, and transportation infrastructure, it is incumbent upon the State to be conservative given the current economic climate.

The State must ensure that sustained and major downward changes in oil prices or oil production do not jeopardize the provision of these essential services. This foundational policy is expressed by the fact that a portion of the revenue that is extracted from a barrel of oil is placed into the Alaska Permanent Fund. The Alaska Permanent Fund was set up to ensure that the state's oil wealth would benefit future generation of Alaskans after the oil wealth of the State had been exhausted. It is irrelevant to this discussion that there is nearly \$27 billion in the Permanent Fund. That money belongs to the people of Alaska, and it is they, not the ACOA or this arbitrator, who can induce the Legislature to spend those savings. It is interesting to note that just about one year ago the balance in the Permanent Fund was \$40 billion. The Fund lost \$1 billion since February 10, 2009.<sup>18</sup>

The State does not argue inability to pay; rather, the relevant question is, on what will the money be spent? ACOA's demands and the arbitrator's award are but a suggestion to the Legislature. The arbitrator heard testimony from both sides regarding

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<sup>18</sup> Association Exhibit 51.

oil price and revenue projections. Essentially, the economic lifeblood of the State of Alaska is driven by a simple formula: Revenue = Price x Production. Alaska controls neither the price nor the production, and in fact the State has seen a steady decline in the rate of oil production for nearly 20 years due to the gradual depletion of the super-giant Prudhoe Bay oil field. The Prudhoe Bay field has been in production far longer than anticipated and its production is steadily declining. As John Boucher, the Senior Economist with the Office of Management and Budget testified, there is a 6-10% decrease in production every year. While satellite fields have been developed and technology has improved, production has dropped from over 2 MM barrels per day in the early 1980s to approximately 689,000 barrels per day today. If development began today on other prospects on the Arctic Coast, production and revenue are close to a decade, perhaps more, away.

Testimony at the hearing established that oil prices historically have been volatile and difficult to accurately predict. As stated in the Fall 2008 Revenue Sources Book;

Fiscal Year 2009 may be one for the record books when it comes to oil price volatility. Alaska North Slope (ANS) crude oil prices started out the year at close to \$133 per barrel, but dropped precipitously down to less than \$50 per barrel in November, a 63% decrease in only four months. We forecast ANS prices to level off for the remainder of the fiscal year in the \$62 per barrel range, closing out the fiscal year at \$77.66 per barrel when all twelve months are averaged. For FY 2010, we project an average price over the entire year of \$74.41.<sup>19</sup>

That was the projection as of December 9, 2008. The financial picture has changed since then.

The union attempts to convince the arbitrator those revenue predictions are meaningless. This position is at best naïve.

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<sup>19</sup> Association Exhibit 43.

High prices and production in the early 1980s produced huge State budgets and grandiose schemes. It all came unhinged in 1986 with the collapse of oil prices from the mid-\$30s/bbl. to \$10/bbl. or less. There ensued a decade of labor contract disapprovals, concessionary bargaining and labor strife. The State does not want a repeat of this.

Since the mid-eighties crash, the State has engaged in very conservative pattern bargaining with all its represented employees. After the strife of the late-eighties, the overarching bargaining policy was to secure agreements upon which the State could assure performance for a full three-year term and which the Legislature would approve.

The ACOA now comes with truly astounding wage and benefit demands claiming the need to make up for past “losses.” They have been offered the same wage package as most other units in this round of bargaining. In addition, the State offered the ACOA generous enhancements to pay increments, education incentive premium pay, and recruitment incentive leave provisions.

The ACOA has brought no detailed wage or benefit surveys. While it complains of cost-of-living differentials it likewise provides no objective data. What the ACOA has brought the arbitrator is personal discontents, opinions and anecdotes from a small minority of the Class One membership.

The State, on the other hand, brought detailed economic evidence and testimony from John Boucher, Senior Economist with the Office of Management and Budget for the Governor’s Office. He shared with this arbitrator Alaska’s fiscal outlook, not just for the immediate future, but looking prospectively as well. Without reciting his presentation, it is important to touch on some of the main arguments he presented. Unrestricted General

Fund revenue is anticipated to be \$5.5 billion for FY09 which is \$1.2 billion less than anticipated in the Fall Revenue Forecast.

This administration believes the best thing that can be done for the State and its future is to be financially responsible while looking at a surplus initially and now looking at a structural deficit. It is also important to note that federal funding allocated to the State is declining and we will have to heavily rely upon our own revenue and resources in the future. With the decline in federal funding, comes an increased cost to the State. The State is also looking at a massive PERS/TRS unfunded liability. The State has accepted responsibility not only on its behalf, but also on behalf of the school districts and political subdivisions of the state to absorb some of these costs. In addition, the elder segment of the state's population is growing, requiring increased Medicaid funding in the future.

What may be most concerning of all from Mr. Boucher's testimony is that even with the new projected revenue, assuming a relatively modest 3% spending growth, the State could be soon spending its reserves. So, while the Union essentially argues that nothing about their bargaining unit costs a billion dollars and if the price goes in the toilet, we've gotten through it before, that should not be reason to give unprecedented cost of living increases. It fails to consider the State has a fiduciary responsibility to all of the citizens of this State. Its arguments obviously have no regard for the future.

The burden here is squarely on the Union's shoulders. It asks this arbitrator to undo an established, mature bargaining relationship. The State has recognized the areas where change is necessary and has made generous offers. The Union has not met its burden of demonstrating the need for the dramatic changes it seeks. The State is confident that the arbitrator will agree.

## ARTICLE 2 – Association Representatives and Activities

### Article 2.2.C

The State strongly objects to ACOA's proposed Article 2.1.C. ACOA seeks to establish a privilege for Officer Representative-member discussions "regarding contractual or disciplinary issues" where no such privilege has previously existed. The privilege would prohibit the Employer from even asking an Officer Representative, who might be a shift-supervisor, "to disclose information gained while acting in their capacity as an Officer Representative unless it involves knowledge of criminal misconduct."

- 1. ACOA has not demonstrated a compelling or substantial need for the proposed language.*

ACOA is the moving party with respect to this new language. The State respectfully submits that ACOA has not, and cannot, demonstrate a compelling or substantial need for an Officer Representative-member privilege. While it may argue in the brief that such a privilege is necessary if members are to seek and obtain union representation, the evidence does not support such an argument. The evidence presented at the hearing does not show a need for the broad privilege ACOA is seeking to establish.

- 2. In the 2005 interest arbitration between the State and PSEA, this Arbitrator declined to adopt a similar proposal.*

In 2005, PSEA made the following proposal: "No member shall be required to disclose any information during his/her interview that is recognized as confidential or privileged communications." PSEA argued that, in conducting an investigative interview, the employer might make requests of an employee that would "infringe upon disclosures that are made to persons who have recognized entitlements to confidential discussions (union representatives) or are entitled to invoke a privilege."

The State argued that a workplace investigation is not same as a criminal investigation or a court trial and the employee is not entitled to the same privileges as he or she would have in those contexts. The Arbitrator awarded the State's proposal, noting that "[s]ignificantly different considerations apply to the questioning of an employee in an [administrative investigation] and the examination of an individual in court." The same reasoning should be applied in this instance to deny ACOA's proposal.

*3. ACOA's proposal is unclear and would encourage officers not to report potentially serious misconduct.*

The ambiguity and subjectivity of ACOA's proposal would, the State believes, encourage officers not to report potentially serious misconduct. Take, as an example, the situation presented by ACOA witness Gary Damron. Mr. Damron, an Officer Representative, testified that, prior to his retirement, he was contacted as a representative regarding potential misconduct by an officer. The female officer who came to Mr. Damron asked that the information be kept confidential because she feared retaliation.

First, it is not at all clear that the incident described by Mr. Damron would be covered under ACOA's proposal. It appears that the information provided to Mr. Damron was "of a criminal nature". Second, it is not evident that Mr. Damron was acting in his capacity as an Officer Representative at the time he learned the information. The female officer apparently came to Mr. Damron to convey her frustration that management was not taking her allegations against another officer seriously enough.

Mr. Damron's testimony demonstrates some of the problems associated with ACOA's proposal. Who decides whether information is "of a criminal nature"? Is the issue subject to the grievance-arbitration process? When is an officer acting "in their capacity as an Officer Representative"? Does the privilege cover situations such as this,

where the member is not seeking representation? May the Department discipline the Officer Representative if he or she believed in good faith that the privilege applied?

*4. ACOA's proposal does not recognize the compelling interest that the Department has in addressing certain types of non-criminal conduct.*

As Dianne Kiesel testified, the Department has an obligation to address many types of non-criminal conduct. For example, the Department has a duty to prevent workplace harassment and discrimination. It also has a responsibility to ensure the health and safety of its employees. The proposal put forward by ACOA does not recognize the Department's compelling interest in addressing such matters. While they may not implicate criminal misconduct, these matters are vital to the Department's mission.

*5. All employees, even employees under investigation, have a duty to cooperate in a workplace investigation.*

An employee may not, except in instances where he or she faces potential criminal charges, refuse to cooperate with the employer's investigation into matters within its legitimate concern. This duty to cooperate applies where the employee's own conduct is being investigated and also to situations where another employee is under suspicion.<sup>20</sup> While expressing sympathy for the employee, Arbitrators "have held that reluctance to act as an 'informer' does not excuse him from the duty to cooperate."<sup>21</sup>

The duty of Departmental employees to cooperate in an investigation is already well-established and well-communicated. DOC policy currently provides,

During the course of an official investigation, employees shall cooperate fully by providing all information they may have concerning the matter under investigation, unless the employee invokes their Fifth Amendment right in a criminal investigation. Full cooperation involves responding to all questions

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<sup>20</sup> Adolph M. Koven and Susan L. Smith, *Just Cause: The Seven Tests*, BNA 2d ed., rev. by Donald F. Farwell, 188.

<sup>21</sup> *Id.*

truthfully and completely, and providing a signed statement or affidavit if requested.<sup>22</sup>

The duty of Departmental employees to report misconduct is similarly well-established. DOC policy currently provides that “[e]mployees shall accept no position, paid or unpaid, that conflicts with their duty to report wrongdoing by prisoners, volunteers, staff or members of the public.”<sup>23</sup> It also states that “Departmental employees have an affirmative obligation to report...any knowledge of criminal activity or unethical action on the part of other employees while on duty or on Department premises.”<sup>24</sup>

Most, if not all, Officer Representatives are Correctional Officers III. The Class Specification for the position of Correctional Officer III expressly states that officers are expected to “[r]eport infractions of rules or regulations and irregular or suspicious occurrences”.<sup>25</sup> They are also expected to “[c]onvey to superiors complaints made by Correctional Officers and prisoners” and “see that rules and regulations are being served, and that institutional programs are being carried out in a satisfactory manner.”<sup>26</sup>

ACOA argued at hearing that ACOA board members must agree to “treat all ACOA-related information obtained from staff, members, other officers, or third-party service providers as confidential”.<sup>27</sup> The State would note that Correctional Officers agree to abide by a “Code of Ethical Professional Conduct” and to “report any corrupt or

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<sup>22</sup> State’s Exhibit 25, Section VII.F.3.

<sup>23</sup> *Id.* at Section VII.B.5.

<sup>24</sup> *Id.* at Section VII.E.2.

<sup>25</sup> State Exhibit 6.

<sup>26</sup> *Id.*

<sup>27</sup> Association Exhibit 5.

unethical behavior of a fellow correctional, probation, or parole officer that could affect either an inmate, probationer, or parolee, or the integrity of the agency”.<sup>28</sup>

6. *No other collective bargaining agreement to which the State is a party contains the language ACOA is proposing in Article 2.2.C.*

As noted above, the collective bargaining agreement between PSEA and the State does not contain a privilege like the one ACOA is now proposing. Nor do the other agreements to which the State is a party. This seriously undermines any argument that ACOA may make that the privilege is necessary to ensure that employees seek and receive adequate representation. There is no compelling reason to label Officer Representative-member discussions “confidential”.

The only agreement in the record that contains such a privilege is the agreement between the State of California and the CPOA.<sup>29</sup> However, it should be noted that, in California, the privilege enjoyed by CPOA stewards is mandated by “Government Code 3303(h)”. There is no analogous statute or regulation in Alaska. Second, it appears that stewards play a much more significant role in the CPOA than Officer Representatives do in ACOA and are more akin to ACOA’s Professional Representatives.<sup>30</sup>

7. *The interests of the public would not be served by the creation of ACOA’s proposed privilege.*

“While dispute resolution in the private sector is bilateral—between employee and employer—in the public sector, it is trilateral, with three distinctly different interests to be accommodated—the employee, the particular governmental unit or agency as

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<sup>28</sup> State Exhibit 19, ¶ 9.

<sup>29</sup> See, Joint Exhibit 11, Article 2.07.E.

<sup>30</sup> *Id.* at Article 2.07.B. (stating that CCPOA stewards may 1) investigate employee grievances and assist in their presentation; 2) provide representation of an employee at an interrogation, fact-finding, or investigatory interview; 3) provide representation on E.E.O. complaints, disputes over modified duties/reasonable accommodation, and “return-to-work” hearings; 4) provide representation at shooting review boards; and 5) participate in meetings with local management including local Meet and Confer sessions).

employer, and the public as voter, taxpayer, and consumer of services.”<sup>31</sup> The interest of the public will not be served by creating a privilege which prevents the State from asking about or compelling the disclosure of potentially serious employee misconduct.

8. *The subject is a not a mandatory subject of bargaining.*

The phrase “terms and conditions of employment” is defined by statute 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 purpose of a public employer.”<sup>32</sup> The subject raised by ACOA, in particular, the duty to report employee misconduct, is not a term or condition of employment and is not mandatory subject of bargaining.

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<sup>31</sup> Elkouri and Elkouri, *How Arbitration Works*, BNA, 6<sup>th</sup> Ed., Ruben, Ed., 1361.

<sup>32</sup> AS 23.40.250(9).

## ARTICLE 9 – Employment Status

### Article 9.2.A (Association Proposal) – Probationary Period

Correctional officers achieve permanent status in their jobs upon receipt of APSC certification. ACOA proposes language making any pay increase resulting from this certification retroactive to the date the officer submitted the requested certification paperwork. ACOA argues that employees are being monetarily harmed by the normal administrative processing time involved in issuing a certificate.

The State objects to this proposal. Normal administrative processing times do delay certificates. However, APSC is prohibited by regulation from back-dating certificates. APSC recently began providing information to the State’s payroll section of the date an employee would have been eligible for certification. Payroll is issuing the retroactive pay due in these instances. There is no ongoing monetary harm to officers. ACOA’s proposal is unnecessary.

### Article 9.7 Bargaining Unit Seniority (Association and State Proposals)

In subarticle A.3, the Association seeks to have CO III service be the sole determinant for decisions affecting only CO IIIs. The State is adamantly opposed to this proposal for its detrimental effects on management’s rights and promotions.

Various posts require various skills and assignments of CO IIIs to various posts—which can occur on specific shifts—turns on a number of considerations including whether one possesses the needed skills for the post. For instance, a Records CO III needs to have received training in inmate time accounting. If this proposal is adopted, under the shift assignment language in Article 22, if no other CO III is interested in a vacant Records CO III post, which is always a day shift position, then management

would have to assign the newest CO III, whether they had the required training or not. Management will lose right to assign the most qualified CO III to the post.

With regard to leave scheduling under Article 20.1.E and transfer under Article 9.8, this proposal would also provide a disincentive for promotion to CO III. Management can foresee instances in which long-employed CO IIs who are now first in line every year for the most coveted leave times (ie, moose and deer hunting season) or who are first in line for the next vacancy for transfer contemplate having to drop back to the bottom again upon promotion to CO III and work their way back up over many years despite that they have more combined CO II/III tenure than their peers.

As for layoff under Article 10, this proposal, for example, could require the department to retain as CO III someone with 5 years combined service in favor of laying off a CO III with 15 years combined service. No other collective bargaining agreement to which the State is a party requires such action. This not only flies in the face of good personnel practice in that an employer should retain its longest tenured—and thus most experienced—employees in a downsized work environment but again, provides a disincentive to promotion as with leave and transfer above.

As for the Association's remaining proposal in this subarticle to provide seniority lists sorted in various ways, the State is amenable to providing a list in an Excel spreadsheet that the Association could sort according to its needs.

As for subarticle D.1, the State requests the arbitrator to award its proposal. It goes without saying that if seniority terminates for a permanent employee when they are discharged for misconduct or poor performance, it should similarly terminate for probationary employees when their employment ends (“non-retention”).

#### Article 9.8.A (Association and State Proposals) - Application for Transfer List

In subarticle A.1, the State proposes language to not have to use the CO II transfer list if not feasible. When the Department begins staffing its new institution in the Matanuska Valley, it anticipates many current officers residing in the Valley but working in Eagle River, Anchorage, Seward and Kenai institutions will want to transfer to the new institution. This will leave institutions with many vacancies that will need to be filled with new hires. Rather than fill these vacancies at the CO I level, the department desires the flexibility to fill at the CO II level via rehire or even a competitive list when there are potential applicants who could meet APSC's certification standards.

The Association's proposal in subarticle 4 to provide the name of each successful transfer employee is an unnecessary administrative burden to the State. The Association is already notified of transfer vacancies pursuant to subarticle 1 and needs only to consult the list of members and position control numbers (PCN) which the State provides 26 times yearly in accordance with Article 3.4.A to determine who was the successful transfer employee.

The arbitrator should award the State's proposal in subarticle 5 as it is also contained in the Association's proposal.

#### Article 9.8.B (Association and State Proposals) - Working Transfer Lists

The Association's proposal in subarticle 2 to permit CO IIIs to circumvent the State's online hiring system for the competitive list creates additional administrative burden and delay. Applications are used to screen candidates so management would have an additional step of asking CO IIIs who have 'cited their intent' to provide an application and then wait for its submission before proceeding with the selection process.

This additional burden and delay is nonsensical when CO IIIs can simply ‘cite their intent to compete’ by submitting an application online by the posted deadline like any other interested officer.

The arbitrator should award the State’s proposal in subarticle 3 as it is also contained in the Association’s proposal.

Article 9.8.C Special Circumstances (State Proposal)

The State requests the arbitrator awards its proposals. Again, when the Department begins staffing its new institution in the Valley, the Department will need the flexibility to also consider the experience levels in the affected institutions and even suspend or waive transfers to ensure institutions’ operations are not compromised by an excessive number of inexperienced new officers. There must be a balance maintained in the existing facilities as well as the new facility.

Article 9.8.D (Association and State Proposals)

The State objects to the Association’s proposal in this article as the Association provided no compelling or substantial need for it. Also, this proposal infringes on management’s Article 4 rights to operate and manage its affairs.

The State’s proposal to not permit CO I’s to transfer between institutions is needed as transfers make it very difficult for the Department to ensure an officer has received consistent and complete field training during the most crucial period of their career which is their probationary period.

## ARTICLE 12 – Notice of Discipline and Discharge

### Article 12.1.A

As they did three years ago,<sup>33</sup> ACOA has attempted to add language that would require the State to provide evidence supporting each disciplinary action at the time the action is taken. Almost identical language was proposed by PSEA in 2005. Based largely on the nature of work troopers perform, this Arbitrator awarded PSEA’s proposal in interest arbitration.<sup>34</sup> The Arbitrator also noted that “[t]he relevant state trooper collective bargaining agreements contain language similar to that proposed by PSEA”.

The two factors the Arbitrator relied upon in the State-PSEA interest arbitration—the rights-oriented nature of troopers’ work and comparability—are absent here. The Arbitrator was correct when he wrote that “troopers are responsible for providing due process to suspects”. Law enforcement officers today must keep pace with a large and increasingly complex body of criminal law. However, while Correctional Officers perform a vital criminal justice function, they do not provide inmates with due process.

As for comparability, with the exception of troopers, Correctional Officers have the same rights as other employees within the state.<sup>35</sup> Before discipline is imposed, the officer will have had at least one meeting with management. At this meeting, they will have had an opportunity to review any investigative materials gathered by the employer.

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<sup>33</sup> ACOA proposed very similar language in the negotiations over the previous contract.

<sup>34</sup> “In part because troopers are responsible for providing due process to suspects, it is reasonable to assume that troopers expect the State, when taking action that may affect the trooper’s employment, to provide due process to them. Given the due process focus of troopers’ jobs, it follows that the collective bargaining agreement applicable to troopers might address due process in employment.”

<sup>35</sup> See, Joint Exhibit 4, Article 30.1 (giving supervisory employees the right to written notification of the reasons for a suspension or discharge); Joint Exhibit 5, Article 17.A (giving confidential employees the right to written notification of a discharge, suspension, or demotion for cause); Joint Exhibit 6, Article 14.B (giving general government employees the right to notification of the reasons for discipline or discharge concurrent with commencement of the action).

They will have also received a letter setting forth the reasons discipline is being imposed. Finally, ACOA will be able to conduct its own investigation.<sup>36</sup>

A factor that must also be considered is the Department's legitimate concern about retaliation. Evidence is often provided by coworkers fearful of retaliation.<sup>37</sup> Inmates may also provide information during the course of an investigation. It is easy to see why the Department would not want to give an employee the name of the inmate that provided evidence supporting the employee's discipline. While it may be possible to redact names, it is not always possible conceal an inmate's or coworker's identity.<sup>38</sup>

#### Article 12.2.A

ACOA has proposed two additions to Article 12.2.A. First, it has proposed adding language that would entitle an employee to, not only a fair investigation, but an "impartial" one. ACOA presented no rationale for this proposed addition. Management always seeks to conduct an impartial investigation. If ACOA believes that management was biased in the way it went about conducting an investigation, it may grieve management's action. There is no compelling reason to add this term to Article 12.2.A.

ACOA has also proposed language stating that "all investigative interviews and questioning will be conducted by members of the supervisory unit."<sup>39</sup> ACOA did not indicate why they need this language. It would result in a significant change in the way investigations are conducted. As Darice Walter testified, investigations are currently

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<sup>36</sup> See, Testimony of Darice Walter.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> ACOA proposed the same language in the negotiations over the current contract.

handled by her staff, members of the confidential bargaining unit. Also, in a twenty-four hour institution, there is no guarantee a supervisory employee will always be on shift.<sup>40</sup>

#### Article 12.2.B

Currently, Article 12.2.B provides that, “[w]hen the State determines sufficient information exists to warrant a formal investigation, which could result in disciplinary action,” the State must provide both ACOA and the member under investigation with “a written notice of the allegation(s) of misconduct, including the date, time and location, if known.” ACOA has proposed adding language requiring that the State’s notice be “detailed” about the “specific” allegations of misconduct.<sup>41</sup>

ACOA’s proposal adds little substance to the contract. ACOA is already entitled to the date, time, and location of the alleged acts of misconduct if those facts are known by the employer. If ACOA believes that the information provided is insufficient and violates the employee’s right to due process,<sup>42</sup> it can grieve the matter. The State respectfully submits that ACOA did not present a compelling or substantial reason supporting the adoption of these terms.

ACOA has also proposed that “where practical” an employee be given “a minimum of two of the employee’s duty days” to prepare for an investigative interview. Given officers’ week-on, week-off schedule, this obviously poses a problem. If potential misconduct were discovered just prior to the end of an employee’s week-on, management would not be able to interview the employee for nine days. This is unacceptable. There

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<sup>40</sup> *Id.*

<sup>41</sup> Again, ACOA proposed these same additions in negotiations over the current contract.

<sup>42</sup> *See, Head v. Chicago Sch. Reform Bd. Of Trustees*, 225 F.3d 794, 804 16 IER Cases 1519 (7th Cir. 2000) (“[N]otice is constitutionally adequate if it is reasonably calculated to apprise interested parties of the proceeding and afford them an opportunity to present their objections.”) (cited in *How Arbitration Works*, 1256 n.34).

are many situations that require prompt or immediate follow-up on the part of management.

Article 12.2.C.

ACOA has changed the language in Article 12.2.C to provide that, when a complaint (written or oral) “that may result in discipline” is filed against an employee, “the information contained in that complaint” will be made available to the employee and to ACOA “when a Notice of Investigative Interview is served.” Currently, the employee is entitled to view a copy of a written complaint of egregious misconduct that is filed by an inmate or citizen. Clearly, ACOA is proposing a significant change.

First, the State is concerned with the way in which ACOA’s proposal expands the scope of Article 12.2.C. Currently, the clause applies only to *written complaints filed by an inmate or citizen* which alleged *egregious misconduct*. If ACOA’s proposal is granted, the clause would apply to *any complaint*, written or oral, that may result in discipline, without regard to who filed it. Thus, the clause would apply to oral complaints lodged against one officer by another officer.

The State is also concerned that the proposed changes to Article 12.2.C. essentially circumvent Article 12.2.B. Article 12.2.B. specifies what notice must be provided when a formal investigation is warranted. It states that the member shall be provided written notice of the allegations of misconduct, including the date, time, and location, if known. ACOA’s proposal would give the officer the right to significantly more information in those instances in which a complaint, oral or written, was made.

As explained above, the State has serious and legitimate concerns with respect to retaliation, both against coworker-complainants and inmate-complainants. The State is

also concerned with the potential chilling effect that ACOA's proposal may have on the reporting of officer misconduct. If all complaints are later shared with the subject of the complaint, the State believes that people would be discouraged from reporting incidents of misconduct. This is clearly not something the Department wishes to discourage.

Finally, the changes that ACOA seeks to make in Article 12.2.C. are unnecessary. Due process requires only that an employee be informed of the allegations against him and given an opportunity to respond to those allegations. An investigatory interview is not a trial. Its purpose is to gather facts so that management can make an informed decision with respect to discipline. As mentioned above, the officer is given the opportunity to review investigative materials at the interview.

#### Article 12.2.D.

ACOA proposes two changes to Article 12.2.D. The first provides that an employee under investigation is entitled to "representation", as opposed to "a representative". ACOA did not explain the significance of this change. ACOA has the responsibility to ensure its representatives provide representation. ACOA's second change has to do with when an employee is entitled to a representative. ACOA seeks to secure the employee a right to a representative "prior to writing any required reports".

The U.S. Supreme Court held in *NLRB v. J. Weingarten, Inc.* that a union employee may insist on union representation during an investigatory interview that the employee reasonably believes may result in discipline.<sup>43</sup> The Court based the right on sections 7 and 8(a)(1) of the National Labor Relations Act, which are analogous to AS 23.40.080 and AS 23.40.110(a)(1) respectively. However, the scope of this right does not extend to the many routine reports officers are frequently called upon to write.

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<sup>43</sup> 420 U.S. 251, 257 (1975).

The Department has a very strong interest in receiving timely, accurate, and complete reports from its employees on all sorts of matters, both routine and exceptional (*e.g.* a report on an erroneous release of a prisoner). ACOA's proposal would delay its receipt of these reports. The Department also reasonably believes that ACOA's proposal would result in an edited version of events. The Department does not want, and cannot afford this. Again, it needs timely reports that are complete and factually accurate.

ACOA also seeks in Article 12.2.D. to limit the number of people that each party may have at an investigatory interview to two, unless a larger number is mutually agreed on. The only agreement to which the State is currently a party that limits the number of people who may be present at an investigatory meeting is the PSEA agreement. However, the State-PSEA agreement limits the number of *union representatives* that may be present.<sup>44</sup> It does not limit the number of management personnel that may be present.

ACOA did not prove that there have been issues with the number of management representatives who attend meetings. Darice Walter testified that HR usually seeks to limit the number of people at these meetings. She testified this had not been a problem in the past. On cross-examination, she was asked if she was aware that ACOA had complained about the number of people present at these meetings. She responded that she was not aware. This was the extent of the testimony on this issue.

Finally, ACOA proposes deleting the current language of Article 12.2.D which provides that neither a member nor ACOA may unreasonably delay an investigatory interview in order to obtain the services of a particular ACOA representative. ACOA has proposed replacing this language with the following: "The Employer will not

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<sup>44</sup> See, Joint Exhibit 3, Article 7, Section 4.4 ("The member may be accompanied by no more than (2) representatives at the employee interview...").

unreasonably deny a request for reasonable delay in order to allow a Professional Association Representative to be present.”

Both the current language and ACOA’s proposed language speak in terms of reasonableness. Both parties have an obligation to be reasonable. In regard to this issue, the State has an obligation to be reasonable in responding to requests to postpone an investigatory meeting. It will continue to respond reasonably to such requests on a case-by-case basis. ACOA has a corresponding duty to not attempt to unreasonably delay an investigatory interview and to recognize the Employer’s interest in expediency. Neither parties duties is advanced or supported by ACOA’s proposal.

The State believes that the problems which sometimes arise in this area stem from the fact that ACOA stewards generally do not represent members during investigatory interviews<sup>45</sup> and ACOA has only two “professional representatives”. The Employer should have the ability to speak to and question its employees regarding work-related matters without having to wait an unreasonable amount of time for Mr. Lecrone or Mr. Wilson to be present. For this reason the State opposes ACOA’s proposed language.

Article 12.2.E.

The State has proposed deleting Article 12.2.E., which currently gives an employee the right to a “pre-imposition meeting” if, based on the Employer’s investigation, it has made an initial determination that “a disciplinary suspension of 160 (one-hundred sixty) hours or more, demotion for cause, or dismissal is warranted.” The pre-imposition meeting appears to be a unique feature of the Correctional Officers’ contract. No such meeting is provided for in either the PSEA, SU, or GGU agreements.

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<sup>45</sup> Jim Lecrone testified that ACOA does not want its stewards to represent members in meetings that may result in dismissal and that ACOA does not know which investigations might result in dismissal.

It is the State's position that the pre-imposition meeting of Article 12.2.E is superfluous. As Ms. Walter testified, the time to provide extenuating or mitigating information is at the initial investigatory meeting, before a decision is made. Each notice of investigatory interview informs the recipient that they will have an opportunity to provide mitigating or extenuating circumstances. Experience with pre-imposition meetings has shown that they generally do not result in new information.

The employer has a duty to consider factors such as an employee's length of service and previous disciplinary record *before* deciding that significant discipline is warranted. It makes sense that the time to present information of this nature is in the initial interview, not in a post-decision meeting. If new information comes to light after discipline is imposed, it can be handled through the grievance process, which, in this contract, includes three steps prior to binding arbitration.

Article 12.3.A.

Article 12.3.A. currently requires the State to promptly notify both the member under investigation and ACOA when a formal investigation is concluded and a course of action determined. ACOA's proposal would require "written notification" and extend the duty to notify to all investigations, not just "formal investigations." ACOA presented no evidence of problems with the current language nor any basis to impose more formality on the current process. The State respectfully submits that ACOA has not met its burden with respect to this proposal.

The State also proposed changes to Article 12.3.A. The State proposed striking the section that provides that the Employer will endeavor to provide notice of the conclusion of a formal investigation no later than thirty days after the final pre-imposition

meeting. As explained above, the State seeks to eliminate the pre-imposition meeting altogether. It has stricken this portion of Article 12.3.A. to reflect that change. If Article 12.2.E. is retained, this language should be retained as well.

## ARTICLE 13 – Overtime and Premium Pay

### Section 13.1.First Paragraph

It is the State’s understanding that the Association withdrew their changes to this Section on February 16, 2009.

### Section 13.1. Second Paragraph

With the exception of the Labor, Trades and Craft Unit and the Public Safety Officers Unit, none of the other contracts in the state provide for daily overtime.<sup>46</sup> In the Labor, Trades and Craft Unit, the payment of daily overtime is for hours worked, not in pay status.<sup>47</sup> In the 2004-2006 agreement ACOA successfully negotiated a premium pay provision to pay time and one half, regardless of hours worked during the work week if called to work on a regular scheduled day off.<sup>48</sup> (The State wishes to eliminate the language in 13.11 but will address the issue in subsequent paragraphs).

Furthermore, the Correctional Officers also have the benefit of other premium pays if they are recalled or are called in early.<sup>49</sup> Currently the only instance that the Employer would not be penalized with a premium is if the Officer is on leave from his regular assignment and works unscheduled hours during the assigned work week. The Employer must not be penalized further by the addition of daily overtime.

### Section 13.2.F (Holiday Pay)

The Association has proposed language that if a holiday falls on the employee’s regularly scheduled day off, the employee shall receive payment for the number of hours they are scheduled to work on their regularly scheduled work days (new language

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<sup>46</sup> See, Joint Exhibits 4-6.

<sup>47</sup> See, Testimony of Teri Hill.

<sup>48</sup> See, Joint Exhibit 2, Section 13.11.

<sup>49</sup> See, Joint Exhibit 2, Article 13, sections 5 & 6.

underlined). Whether an officer works a forty-two hour workweek or an eighty-four hour workweek the total hours worked during the year equals two thousand one hundred and eighty-four ( $42 \times 52 = 2184$ ,  $84 \times 26 = 2184$ ). To adopt the Association's proposal would result in an unfair benefit to the officers working an eighty-four hour schedule. They would receive an additional forty-eight hours in holiday pay than the officers working a forty-two hour workweek. This serves as both an inequity among the employees and more importantly a cost item to the State.

#### Section 13.2.G (Adjustments for Holiday Pay)

The Association proposes deleting the entire section. The impact of this change would be that if adjustments for holiday pay did not occur in the appropriate pay period then penalty pay would be applicable under the provisions of Article 21.7 (F). While the testimony of Teri Hill was that normally the adjustments are made in the same pay period, there are manual adjustments that need to be made and sometimes the officers themselves miss adding holidays to timesheets appropriately. The Association did not articulate that there are significant problems associated with this Article and therefore there is no compelling reason for the change.

#### Section 13.3.A.4 (Assignment of Additional Hours)

The Association has proposed language that would make management responsible for the correct application of the procedures of calling in off-duty personnel to work. The testimony of Jim Lecrone was that the language change did not mean that Lieutenants will make all the calls. Rather, it meant that they need to monitor the process closely enough to ensure that procedures are followed correctly. The State believes proposed language implies something else. Specifically, the language, "on occasion, Management

may choose to delegate the tasks enumerated herein to certain bargaining unit members, however the responsibility for completing such task correctly remains Management's and can not (sic) be passed on to non-supervisory personnel" clearly puts the burden on management.

Standard and long-term practice is that shift sergeants call employees when needed for work assignments. This is not a new duty. It is listed in the State of Alaska classification specifications for the Correctional Officer III position under Examples of Duties ("schedule employee shifts").<sup>50</sup> Furthermore, the officers of the ACOA are at the institution during the evenings, weekends and holidays when management staff is not readily available. Assignment of duties and responsibilities are classification matters. Classification matter are not subject to the negotiation process.<sup>51</sup>

#### Section 13.3.B.4

The testimony of Jim Lecrone was that the current language was probably protective enough and this was not a crucial issue to the Association. The ACOA did not offer a compelling or substantial reason for the change and the arbitrator should reject the proposal.

#### Section 13.3.B.5

The testimony of Jim Lecrone was that the State had the right to discipline officers for failure to complete the Work Assignment Contact lists properly. The State agrees but believes it is worthy of notifying officers that discipline could result from such a failure. Additionally, advising officers of potential consequences supports that nay

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<sup>50</sup> State Exhibit 6, p.10.

<sup>51</sup> *Alaska Public Employees Association v. State of Alaska*, 831 P.2d 1243 (Alaska 1992).

abuse of the process will not be tolerated and serves to enhance attention to detail when making the calls.

Section 13.3.B (State's Proposal)

The State seeks to make changes to the remedy given to an officer who has not been called appropriately for a work assignment. Currently, the officer receives the pay they would have been entitled to if the call had been made correctly and they had worked the assignment. The State's proposal is to add that officer to the top of the work assignment list, essentially providing the officer the same opportunity they would have had if a mistake had not occurred.

As stated above, the shift sergeant is currently responsible for making the calls for unscheduled work assignments. If the sergeant fails to work the list in proper order, the only result has been that one officer will be paid for overtime hours worked and another will be paid for overtime hours not worked. By adopting this language the State will only pay one officer for overtime, the financially responsible and practical approach. In addition, the testimony of Craig Turnbull, Superintendent of the Spring Creek Correctional Center was that this process has already been used both formally and informally to resolve such disputes.

Brad Wilson mentioned that there is an arbitration decision on this subject from Arbitrator Robert Castrey.<sup>52</sup> Arbitrator Castrey ruled that to place a missed name at the top of the Work Assignment Contact List would violate the portion of Article 13.3.B.2 that states, "[n]o names shall be added to the Work Assignment Contact List after the end of the last shift in that rotation." Given that there was no dispute that the grievant had been passed over for an overtime opportunity and, in the absence of a contractually-

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<sup>52</sup> Association Exhibit 28.

mandated remedy for such violation, Arbitrator Castrey ordered that the grievant “be paid for the number of hours worked by his replacement at the grievant’s appropriate rate of pay.”<sup>53</sup>

The existence of this arbitration decision does not preclude the parties from specifying what the remedy for violations of the overtime call-in procedure will be. It does not mean that the parties cannot agree to the remedy set out in the State’s proposal. While arbitrators will often give a monetary award to an employee who was denied an overtime opportunity, some arbitrators have considered “make-up overtime” to be the more appropriate remedy.<sup>54</sup> A “make-up” remedy, the State believes, is the more equitable remedy because, without penalizing the employer, the employee is made whole.

#### Section 13.5 (Recall)

The Association has proposed radical changes to the recall provisions of the contract. They have essentially changed the very meaning of recall. Recall in most bargaining agreements means that the employee has left the premises and is recalled back to work. The State Trooper’s agreement (PSEA) specifically includes in the definition of recall as having left the premises of the Employer.<sup>55</sup> The agreements with the Supervisory Unit (APEA) and the General Government Unit (ASEA) both contain language addressing recall of employees and neither awards a minimum recall payment when the employee is still at work and merely held over at the workplace.

Recall or call-back clauses are intended to apply only to an employee called in after they have left the premises after completing their last regularly scheduled shift and are not otherwise “pre-“ scheduled to return to work at a later time. The costs to the State

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<sup>53</sup> *Id.* at 8.

<sup>54</sup> *See*, How Arbitration Works, 5th ed. at 745.

<sup>55</sup> Joint Exhibit 3, p. 62.

for implementing the Association's proposal would be astronomical. The total overtime for the bargaining unit as of June 30, 2008 was nearly ten percent of the total gross pay. The Employer has little choice but to hold over employees when officers call in sick or fail to report to work as scheduled. The minimum staffing requirements must be met. To add a minimum of four hours of pay when employees are heldover is unreasonable and the Association's proposal should be denied.

#### Section 13.7 (Standby)

The Association's proposal for standby pay encompasses two changes from the status quo. First, the method of calculation is different, but the outcome is the same. For example, under the current language the employee on standby would receive an amount equal to ten percent (10%) of seven and one half ( $7 \frac{1}{2}$ ) times the employee's hourly base salary. If the employee earns \$20/hour then the formula would be  $\$20 \times 7.5 \div .10 = \$15.00$ . Under the new language (an amount equal to  $\frac{3}{4}$  of an hour's pay) the outcome is the same.  $\$20 \times .75 = \$15.00$ . The State sees no reason for the change in calculation and no reason was given at the hearing.

The second change is more problematic. The standard standby language in all State contracts is compensation for each calendar day or portion of a calendar day that the employee is placed on standby. The Association has proposed that the officers be compensated for each eight hour period, or portion thereof that the member is so assigned. The Association offered no evidence to support why this change would be necessary.

#### Section 13.8 (Overtime)

The Association's proposal is:

When an overtime eligible Bargaining Unit member is required to perform work by telephone after the completion of the member's scheduled work hour or while in standby status, the time worked shall be recorded on the time sheet in fifteen (15) minute increments.

Teri Hill testified that when an employee is on standby and is required to perform work by telephone after the member's scheduled work hours it is paid as time worked and counts toward the overtime threshold. There was no evidence provided at hearing to support the change in language and it appears not to be necessary.

#### Section 13.10 (Overtime Pay Calculations)

Once again, the Association is proposing to make changes to the language but has offered no evidence of ongoing problems or non-compliance with the FLSA.

## ARTICLE 18 – Meal and Relief Periods

### Article 18.2.B.

ACOA has proposed a new Article 18.2.B., which would give officers the right to “combine their meal breaks and fifteen (15) minute relief periods, as they wish in concurrence with institutional needs.” As Larry DeBoard testified, officers at the Spring Creek Correctional Center (SCCC) may currently combine their 30-minute meal break with their two 15-minute relief periods. Larry (Charles) Ross testified that officers at the Anchorage Correctional Complex (ACC) are allowed to do the same.

Jim Lecrone testified that ACOA proposed this language because it was concerned that management may believe it has the right to combine officers’ meal break and relief periods. Garland Armstrong explained that management’s opposition to the proposal stems from similar concerns regarding expectations. He testified that management is concerned that, if the contract is amended to say that officers “may” combine their meal break and relief periods, they will view it as their right to do so.

As Mr. Armstrong testified, combining the meal break and relief periods will work at some institutions, but not all. The SCCC and ACC have significantly more staffing flexibility than the Department’s smaller institutions, such as the Mat-Su Pretrial facility. And, if the arrangement currently works at one institution, there is no guarantee that it will always work there in the future. Institutional needs vary from institution to institution and from one time period to another.

The State respectfully submits that there is no compelling or substantial reason for this language. The State has demonstrated a willingness to allow officers to combine their meal break and relief periods where they desire to do so and where it is feasible.

This demonstration of managerial latitude is not a basis to contractually shift such a prerogative to an exclusive right of the employee. The Employer must have discretion to assign the time and place of employees' work.

Article 18.2.C. & Article 18.3

ACOA has proposed deleting part of Article 18.2 and adding another clause titled "Meal and Relief Break Facilities." The proposals are related and, taken together, would require the Department to provide "an adequate area away from inmates where Officers may store and eat their meals." The "adequate area" would "include running water [and] adequate dry storage and cold storage to accommodate assigned staff." Facilities not currently possessing an "adequate" break area would have 18 months to provide one.

The State respectfully submits that ACOA has not met its burden with respect to this new language. The only testimony on this issue involved the Mat-Su Pretrial facility in Palmer. Randy McClellan testified that officers at that facility currently do not have a break room where they can eat their lunch or wash their hands. He testified that there used to be a break room at the facility, but that female prisoners were put in there because of overcrowding and the area is currently occupied by minimum security inmates.

The area that Mr. McClellan spoke of has not been used as a break room for many years now. It was, perhaps ten years ago, converted to a female dorm. Two years ago, the Department began to use the area to house minimum-security inmates. However, there is a designated break room at the Mat-Su Pretrial facility. It is located outside the control room. While the room is also used for other purposes, it provides officers a place where they may take their meal breaks and relief periods away from inmates.

Other than Mr. McClellan, there were no other witnesses on this issue. There was no testimony regarding deficiencies at any of the Department's other twelve facilities. To the contrary, Garland Armstrong testified that, while not all facilities may have designated "break rooms", they do have areas where officers may take their break away from inmates. Given the breadth of the proposal<sup>56</sup> and its likely cost,<sup>57</sup> the State believes ACOA has not met its burden of showing a substantial or compelling need.

The cost element of ACOA's proposal is something that should not be underestimated. Were ACOA's proposal to require the construction of additional rooms or the retrofitting or modification of existing rooms, it would likely result in a very significant cost to the Department. Building costs in the more remote areas of the State, such as Nome, are astronomical. The State would ask the Arbitrator to take these cost considerations into account when formulating deciding this issue.

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<sup>56</sup> The proposal would apply to all thirteen of the Department's institutions.

<sup>57</sup> *See*, Testimony of Garland Armstrong.

## ARTICLE 19 - Holidays

### Article 19.2.B.2 (Observance of Holidays, Eighty-Four Hour Schedule)

Please refer to the arguments made in Article 13.2.F and G. The language proposed by the Association and the arguments made by the State are the same.

## ARTICLE 20 – Leave

### Article 20.1.A

ACOA has proposed major changes to Article 20.1.A.1, which governs the accrual of personal leave. Under ACOA's proposal, new officers with 0-2 years of experience will accrue the same amount of leave that officers with ten or more years experience currently accrue (*i.e.* 11.08 hours per pay period). Not only has ACOA drastically increased the accrual rate across the board, it has also broken down the “years of service” table into six categories, as opposed to the current four.

*1. Correctional Officers do not need drastic changes to their accrual rate.*

The current accrual rates appear to have been carried over from the previous contract, when officers worked a 40-hour workweek. The current rate was calculated by dividing the number of hours worked per week (40) by the number of days worked in that week (5) and then multiplying the result (8 hrs./day) by the rates set out in AS 39.20.200.<sup>58</sup> The result was then multiplied by the number of months in a year (12). Finally, that number was divided by the number of pay periods in a year (26).

Thus, for officers with 0-2 years of experience, the rate of 7.38 hours per pay period was calculated as follows: 40 (hours/week) divided by 5 (days/week) = 8 hours/day. Eight hours/day multiplied by 2 days leave accrual under AS 39.20.200(a)(1) = 16 hours of leave accrual/month. Sixteen hours of leave accrual/month multiplied by 12 months = 192 hours leave accrual/year and 192 hours of leave accrual/year divided by 26 bi-weekly pay periods/year = 7.38 hours of leave accrual/pay period.

Officers now work 42-hours per week, not 40-hours per week. As set out in Article 13.1.A, officers on a 42-hour schedule work 42 hours in a seven day period with

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<sup>58</sup> See also, AAM 280.020.

two consecutive days off. As set out in Article 13.2.A, officers on an 84-hour schedule work 84 hours in a fourteen day period with seven consecutive days off. Thus, officers on the 84-hour schedule work the same number of hours in a pay period as officers on the 42-hour schedule (84) and average 42 hours per week.

Plugging 42 hours/week into the formula set out above, the leave accrual rates would be increased slightly. The rate for individuals with 0-2 years of service would be 7.75 hours per pay period. The rate for individuals with 2-5 years of service would be 8.72 hours per pay period. The rate for individuals with 5-10 years of service would be 9.69 hours per pay period. The rate for individuals with over 10 years of experience would be 11.63 hours per pay period. The State would agree to this accrual schedule.

The State, however, objects to ACOA's proposal. ACOA essentially proposes treating the "days" referred to in AS 39.20.200 as 12-hour days. Thus, an officer with 0-2 years of experience would get 288.08 hours of personal leave per year under ACOA's proposal (11.08 hours per pay period x 26 pay periods per year). If the officer received two 12-hour days of leave per month under AS 39.20.200, they would be receiving 288 hours of personal leave per year (24 hours per pay period x 12 months per year).

Granting ACOA's proposal would mean that officers on a 42-hour schedule would, at 0-2 years of service, accrue 36 (8-hour) days of leave/year. This is significantly more than other state employees receive who work a comparable number of hours. It is also significantly more than officers on the 84-hour schedule would receive. While all officers work the same number of hours per pay period and per year, officers on the 42-hour schedule with 0-2 years of service would accrue 12 more "days" of leave per year.

In support of its proposed leave accrual schedule, ACOA will argue that, when an officer on the 84-hour schedule gets sick, he or she must take 12 hours of leave, not 8. All employees, of course, have to take leave equivalent to the number of hours that they were absent from work. The State would simply note that an officer on the 84-hour schedule also gets 7 days off per pay period, instead of the 4 days off that someone on the 42-hour schedule would get. They also get these 7 days off in a row.

As former Commissioner Mark Antrim testified, the 84-hour schedule is something that attracts people. It is a benefit. There is no justification for giving officers on this schedule an additional benefit of increased leave accrual. These officers work the same number of hours as officers on the 42-hour schedule and do not work significantly more hours than other state employees. It is true that they work more hours during their days on. However, this is compensated by the 7 days off they receive every other week.

*2. ACOA presented no rationale for further breaking down the “years of service” category.*

The statute that governs leave accrual rates, AS 39.20.200, sets forth four categories of years of service: 1) less than 2; 2) at least two but less than 5; 3) at least 5 but less than 10; and 4) 10 or more. These four categories are currently reflected in the accrual table of Article 20.1.A.1. They are also found in the accrual tables of many of the State’s other collective bargaining agreements.<sup>59</sup> ACOA did not present a compelling rationale for adding additional “years of service” categories.

Article 20.1.C

ACOA proposes two changes to Article 20.1.C. First, it seeks to delete the language which provides that employees on the 84-hour schedule will not normally be

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<sup>59</sup> See, Joint Exhibit 3, Article 14, Section 1.a.; Joint Exhibit 4, Article 29.1.A.; Joint Exhibit 5, Article 8.01; Joint Exhibit 6, Article 26.01.

granted personal leave for non-emergency personal business or medical appointments.

Second, it seeks to add language stating that, at a minimum, pre-scheduled leave will be approved for at least one officer on each twelve-hour security shift and that overtime considerations will not be a reason to deny leave to this minimum number of officers.

*1. Deletion.*

No rationale was given for the deletion ACOA has made and thus ACOA failed to carry its burden with respect to the change. Employees on the 84-hour schedule have seven days off in a row every pay period. It is not difficult to schedule “non-emergency personal business” and “medical appointments” for one’s week off. In instances where this is possible, the current language allows the supervisor to grant the leave. It simply says that, in most situations, it will not be granted.

*2. Addition*

ACOA’s proposed addition is a significant intrusion into management’s right to direct its workforce. The clause ACOA seeks to modify sets out the conditions under which personal leave may be taken: “Personal leave may be taken by an employee at any time business permits, upon prior permission by the facility supervisor or designee. An employee’s request for personal leave will not be unreasonably denied.” ACOA would add to this reasonableness standard a set formula for granting leave.

As Garland Armstrong testified, ACOA’s proposal will work at some institutions (and is currently being used at some of the larger institutions). However, it is not practicable at all institutions. Each institution is different with respect to staffing, the minimums it must meet, etc. Thus, as Mr. McClellan testified, at Mat-Su Pretrial, a very small facility, only one person can be on leave per 24-hour rotation (encompassing two

shifts). ACOA's proposal does not account for this. It says that the employer *must*, at all its institutions, approve pre-scheduled leave for at least one officer from each shift.

#### Article 20.1.E

The parties have reached agreement with respect to ACOA's proposal on Article 20.1.E. The language will now read,

Each facility will develop procedures for scheduling leave on an annual basis ensuring that leave selection is based on seniority. **An Officer not wishing to take pre-scheduled leave that they were selected for will advise Management and the portion relinquished shall be made available to the senior officer who was denied that time during the previous open window period. If declined, the offer will be made to the next senior who was denied during the previous open window period. If no officer requested the effected time period during the open window period, the time can be made available to others on the basis of seniority.**

#### Article 20.2

##### *1. Suspicion of Leave Abuse.*

ACOA seeks to add language to Article 20.2.A.1 prohibiting management from asking an employee "to provide a physician's certificate for illnesses of less than three (3) days unless they have been previously notified in writing that they are suspected of abusing leave." ACOA presented no compelling or substantial reason for its proposal. Jim Lecrone mentioned a 2008 interest arbitration between Multnomah County, Oregon and the Multnomah County Corrections Deputies Association.

Multnomah County had sought to add "sick leave verification language" to its contract. The county's proposal allowed it to require a physician's certificate where an employee had previously been notified that, due to an articulated reasonable cause, future verification would be required. The proposal also stated that the verification period could

not exceed six months beyond the date the notice was given to the employee. The union sought status quo language. Arbitrator Boedecker awarded the county's proposal.

The situation before this Arbitrator is significantly different than that presented in the Multnomah County interest arbitration. Prior to Arbitrator Boedecker's decision, the county's contract had only allowed it to require a physician's certificate if the employee was absent for 3 consecutive days or more. Here, the parties' contract allows the State to require a physician's certificate whenever leave abuse is suspected. Since ACOA seeks to curtail this right, it must present a *compelling* or *substantial* need for the change.

It is generally recognized that management has a legitimate concern in preventing sick leave abuse and, in doing so, "may formulate reasonable rules for the documentation of illness" "or develop a system for the policing of sick benefits plans, so long as it is not arbitrary, discriminatory, or unreasonable."<sup>60</sup> The current language is not arbitrary, discriminatory, or unreasonable. It is the same language as that found in the collective bargaining agreements which govern the Confidential and General Government Units.<sup>61</sup>

Nor has the current the State applied the language in an arbitrary, discriminatory, or unreasonable manner. Obviously, management must have a reasonable basis for suspecting leave abuse before it requires an employee to support his or her absence with a physician's certificate. There was no testimony at all that management has abused this provision and required an employee to provide a physician's certificate where there was no factual basis to suspect leave abuse.

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<sup>60</sup> See, *How Arbitration Works* at 1086.

<sup>61</sup> See, Joint Exhibit 5, Article 8.04 ("Employees shall not be required to provide a physician's certificate for illness of less than three (3) days unless improper use is suspected."); Joint Exhibit 6, Article 26.04 ("Members will not be required to provide a physician's certificate for illnesses of less than three (3) days unless improper use is suspected.").

The current language is reasonable. It recognizes the interest management has in preventing *all* instances of leave abuse, not just chronic leave abuse. As Ms. Sutch noted, ACOA's proposal would leave the employer impotent in the face of blatant, but not repeated, leave abuse. There is no evidence that the employer has abused the rights that this clause gives it. If, in the future, ACOA believes that management did not have grounds to suspect leave abuse in a particular instance, it may grieve the action.

2. *Compliance with HIPAA, ADA, and "confidentiality requirements"*.

ACOA proposes the following language, "All requests for physician's certificates for everyday illnesses shall comply with Health Insurance Portability and Accountability Act (HIPAA) confidentiality requirements and with the Americans with Disabilities Act." Of course, the State must comply with all applicable federal statutes.<sup>62</sup> However, that does not mean that the State's compliance with these statutes should be subjected to binding arbitration under Article 16 of the parties' agreement.

The State believes that ACOA failed to meet its burden on this issue. There was no evidence that the State has been requesting physician's certificates in a manner that violates either HIPAA or the ADA. Nor was there testimony that the current avenues of redress for HIPAA and/or ADA violations are inadequate.<sup>63</sup> ACOA failed to demonstrate a compelling or substantial for this language and the State respectfully asks the Arbitrator deny ACOA's proposed addition.

Articles 20.3.A & 20.3.B

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<sup>62</sup> The State does not see how the HIPAA is applicable to requests for physician's certificates. The HIPAA Privacy Rule, which governs the *disclosure* of "protected health information", applies to "covered entities", which include health plans, health care providers, and health care clearinghouses. The ADA, of course, applies to state and local governments.

<sup>63</sup> For example, currently, the Department of Health and Human Services, Office of Civil Rights, is responsible for enforcing the HIPAA Privacy Rule.

ACOA's proposals for Articles 20.3.A and 20.3.B reflect current practice. The State currently pays employees for time in court and time spent traveling to and from the institution to court, whether the time is spent on behalf of the employer or not. However, as Ms. Hill testified, with respect to time the employee spends in court that is not on the employer's behalf, it is not counted as time worked for purposes of the overtime threshold. This is because if the employee is not working on behalf of the employer.

#### Article 20.6.A

ACOA deleted the portion of Article 20.6.A that allows for bi-annual audits of the Business Leave Bank and added language requiring the State to provide ACOA "with a monthly statement reflecting additions and withdrawals and the current Business Leave account balance." The State does not object to the second change. However, it would like to retain the ability to audit the account. As Mark Minthorn testified, audits are a good business practice. No reason was put forward for removing this provision.

#### Article 20.6.B

ACOA seeks the ability to purchase business leave "on a dollar for dollar basis by submitting a check to the Employer." As Mr. Minthorn testified, no other union is allowed to purchase business leave in this manner. Also, leave cannot be purchased on a "dollar for dollar basis", as ACOA proposes. Employees on business leave still receive all the benefits of being a state employee (*e.g.* PERS and SBS). To cover these costs, the State would have to take thirty-eight cents out of every dollar paid by ACOA.

Most importantly, however, ACOA did not demonstrate why it needs to be able to purchase business leave from the State. Article 20.6.B already provides a means by which ACOA can increase its Business Leave balance: "Upon request from the President

of the Association, when authorized by the membership, the Employer shall transfer from one (1) to eight (8) hours from each Bargaining Unit member’s personal leave account to the Association Leave Bank...”

ACOA did not demonstrate a compelling or substantial need for the ability purchase business leave from the State. If it needs to increase its business leave account balance, ACOA may appeal to its membership. The agreement for the General Government Unit contains a similar provision,<sup>64</sup> as does the agreement for the Confidential Unit,<sup>65</sup> the agreement for the Public Safety Officers Unit,<sup>66</sup> and the agreement for the Supervisory Unit (which makes the deduction automatic).<sup>67</sup>

#### Article 20.6.C

ACOA also wants its members to have the ability to transfer annual leave to the Business Leave Bank in increments of one hour, thereby avoiding the need for an assessment of the membership. Again, ACOA has the means to increase its business leave account balance—it may assess its members. There is no need for this proposal.

#### Article 20.7.A

The State will address ACOA’s proposal to create a Legal Trust Fund in the section on Article 21.

#### Article 20.7.B.1

ACOA’s addition of the term “injury” to Article 20.7.B.1 is a small but hugely significant change. It would give an employee who qualifies for workers’ compensation

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<sup>64</sup> See, Joint Exhibit 6, Article 26.08.A (“[A]ny bargaining unit member at his/her option may transfer personal leave in one (1) hour increments to the [Union Business Leave] Bank.”).

<sup>65</sup> See, Joint Exhibit 5, Article 8.08 (“[V]oluntary contributions in increments of seven and one-half (7.5) hours may be made by any employee.”).

<sup>66</sup> See, Joint Exhibit 3, Article 14, Section 5 (“Upon request from the President of the Public Safety Employees Association, the Employer shall transfer from one (1) hour to one (1) day from each bargaining unit member’s personal leave account to the Association Leave Bank.”).

<sup>67</sup> See, Joint Exhibit 3, Article 29.9.A – B.

a maximum of 1,000 of *injury* leave. As Dianne Kiesel testified, injury leave is now used to cover the portion of an employee's earnings that is not covered by Workers' Compensation (usually around 20%). The combined payments from Workers' Compensation and injury leave are counted against the employee's 1,000 hour maximum.

As Ms. Kiesel noted at the hearing, if only the injury leave portion of the payments were counted against the 1,000 hour maximum, an employee would be able to be out of work on injury leave for an extremely long time. Suppose, for example, that Workers' Compensation covered 87.88% of an employee's absence from work (representing 73.82 hours). The other 12.12% of the employee's absence (10.18 hours per pay period) would be covered by the injury leave account.

Under ACOA's proposal, this employee would be entitled to 1,000 of "injury leave". So, each week, he would only be charged with having used 10.18 hours of injury leave—the hour-equivalent of the injury leave payments that he receives. The employee would be able to stay out on injury leave for just over 98 weeks (1,000 / 10.18). This is unacceptable for the Department. ACOA presented no compelling evidence in support of its proposed change to the injury leave provisions.

#### Article 20.7.B.2

Section 280.210 of the Alaska Administrative Manual provides that "[a]n employee's leave, merit, and longevity anniversary dates are advanced one month for every 23 days of accumulated leave-without-pay in a leave year unless provided otherwise in statutes, regulations, or labor contracts." ACOA seeks to add language providing that time spent on injury leave "shall not be counted as leave-without-pay for the purpose of advancing the member's merit or longevity anniversary dates."

The State treats Workers' Compensation as a form of leave without pay because the employee is not being compensated via the State payroll and is not considered to be in working status for the hours covered by Workers' Compensation. This is a statewide practice that has been in place for many years. Personnel Memorandum 94-1, section 5, states that "Leave without pay is recorded for the portion of time covered by the Workers' Compensation payment."

#### Article 20.7.B.3

ACOA has simply moved the second half of what is currently Article 20.7.B.1 into a new section. The State sees no reason for the change as it does not add clarity to the contract.

#### Article 20.7.B.5

ACOA seeks to delete the language requiring an employee, in order to qualify for injury leave, to make a written request to the Superintendent or designee within 21 calendar days from the date of injury. The language AOCA has proposed adding to this section would tie injury leave to qualification for Workers' Compensation: "[A] finding that the injury or illness qualifies for compensation under the Worker's Compensation Act shall be sufficient for this Agreements [sic] Injury Leave provisions to be invoked."

As Garland Armstrong testified, the Department would like to see this language remain in the contract. Practically speaking, injuries covered by Workers' Compensation are almost always approved as qualifying injuries for the purpose of injury leave. However, the Employer has an interest in knowing who is out on injury leave. The Employer also has an interest in knowing what the cause of the injury was so that it can ensure that, if the injury resulted from a workplace hazard, that hazard is dealt with.

## Article 20.8 - Recruitment Incentive Leave

The parties have agreed to the following language,

Any member that recruits a candidate that successfully completes the Academy shall have twenty (20) hours of personnel leave credited to their leave account. If this same candidate successfully completes their probationary period, the member shall have an additional twenty (20) hours of personal leave credited to their account. The process for the candidate to identify the member responsible for their recruitment will be Workplace Alaska.

## ARTICLE 21 – Wages

### Article 21.1 - Wage Adjustments

As with any interest arbitration, the economic package is always the source of much debate. Usually, both parties use expert witnesses to support their position and convince the arbitrator that their proposal is appropriate and within reason. In this case, the Union chose to offer the opinions of Mr. Chance to support its case. While some of what he said could be based on fact, much of his testimony was his opinion on what the State does with its revenues and operating budget.

It is the State's position that the Correctional Officers' wages should be compared to those of other State of Alaska employees (when considering percentage increases as well as general wages) and also account for the current economic climate. As required by AS 39.25.150(2), the pay plan must reflect the principle of "like pay for like work". Adjusting the salary of Correctional Officers based on the salaries paid to those employed by other states and/or the federal government would skew the State of Alaska's statutorily-mandated "like pay for like work."

Mr. Chance gave testimony on the sources of State revenue and its expenditures. He made claims that the State has money "stashed" in various funds and accounts. However, he could not identify where these unnamed funds were located, nor could he provide any evidence or proof in regard to his claim. It is in the Association's best interest to provide the arbitrator with the impression that the State is flush with funds and simply unwilling to compensate its employees fairly. To imply that the State of Alaska would intentionally "stash" funds simply to not have to provide cost of living increases for the members of this bargaining unit is an absolutely absurd argument. Any

comparison with other states, the comparison should also account for how many of those states are closing facilities, laying off employees, and releasing prisoners due to insufficient funding.

The Governor and the Legislature must make sound financial decisions on behalf of all Alaskans. They also have a fiduciary responsibility for justifiable spending and to “balance the budget”. It would be unfortunate to get ourselves back in the position that we were in back in 1986, when the State had to lay off employees due to the lack of funds. Governor Palin’s goal is to save for the future, live within the State’s means and focus investments on core services. Due to the decline in oil production and prices, the State is taking a fiscally conservative and responsible approach to spending the funds it has available.

In past interest arbitrations, this arbitrator has looked at the pattern of wage changes that may or may not have resulted from negotiation of contracts with other unions in the State of Alaska. Mr. Chance asserted that the pattern was set when the State and the Inlandboatmen’s Union (IBU) recently reached agreement. In past interest arbitrations the maritime unions were not used as a comparator, and they should not be used as a comparator now. The State does not deny that the IBU received what appears to be an attractive package agreement when looking at the wage increases alone. The State did agree to a lump sum payment of \$2,137 per employee in pay status effective July 1, 2008. This was done to avoid retroactive pay calculations and serves to keep the base pay at a lower rate. The State also agreed to a 5% wage increase effective July 1, 2009 and a 4% wage increase effective July 1, 2010. This was done in consideration of the following; the IBU does not receive any merit increases or longevity pay as do the

majority of the shore-side unions. The only increase in wages that this bargaining unit realizes is through a negotiated wage increase. The IBU has been without a contract for nearly two years and has had not had a wage increase since July 1, 2006. In addition, the IBU had made significant concessions in the most recent agreement.<sup>68</sup> Under the new terms, the State has gained the following concessions; the ability to contract out for service to two additional ports (pending a feasibility study), the IBU will no longer be entitled to a provision known as split wages, will receive a reduced benefit under the unearned wages provision, and employees hired on or after July 1, 2008 will receive one week less of leave per year. When looking at the overall increase to the base wage rate, the offer is comparable to a 3%, 3%, 3% offer with the State gaining significant concessions.

More valid comparators exist with the shore side unions. A review of the Historical Negotiated Wage Increase Summary<sup>69</sup> reveals that the pattern for 2009 is just under 3% when averaging the increases listed and 2.75% for increases in 2010. Given the current economic climate, it is fairly certain that any voluntary agreements reached over the next year will not result in anything more than those percent increases.

#### Article 21.2 - Geographic Differential Pay

The Association has agreed to keep the geographic differential pay rates that exist in the current agreement and is no longer seeking the changes it presented at the interest arbitration. The remaining dispute concerns retroactivity. For simple reasons, the State objects to any retroactive application of this pay differential. Deputy Commissioner Kevin Brooks testified that, starting with Administrative Order 237, Governor Palin

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<sup>68</sup> See, Association Exhibit 46, p.2.

<sup>69</sup> State Exhibit 21.

appointed a recruitment and retention work group. Six Commissioners were tasked with looking at the issue for the state. Outcomes included the commissioning of a geographic differential and salary study. Last year \$400,000 was requested and was approved by the Legislature for this study. As soon as the process could begin in the fiscal year, the Department of Administration procured services to have the study completed.

Understanding that the study would affect all state employees in all departments, participation and buy-in was sought from many areas, included bargaining unit members from most unions and legislative representatives. One of the problems is that the statutory table for geographic pay<sup>70</sup> is based on election districts and that differs with many labor contracts. The result is that in different locations, depending on whether an employee is under statute or contract, employees working side by side might be getting different differentials. In addition, arbitration decisions have awarded differentials to at least one bargaining unit that then had to be extended to another.

The State wanted to look at a systematic approach. The study is expected to be finalized on or before May 1, 2009. The State fiscal year runs from July 1 through June 30. Planning for the next fiscal year starts on July 1, with budget instructions to departments in August. Preliminary decisions are made in November, and final decisions are made in December. Proposed budgets are released to the public on or about December 15. This allows sufficient time for legislative review and final action prior to the next fiscal year.

To implement the results of the study for ACOA effective July 1 of this year when there are ten other bargaining units as well as non-covered employees who will be impacted would create an inequity. That is precisely what the study is intended to cure.

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<sup>70</sup> Joint Exhibit 8, p. 4.

Deputy Commissioner Brooks testified that the State has come far in recognizing the different costs of living in different parts of Alaska and is working to create an equitable situation. It seems unfortunate that the work could be undone by this Arbitrator.

Mr. Brooks also testified that retroactive implementation creates a severe hardship for the State to administer. Payroll staff would be required to recreate every action that has happened for every employee affected and adjust their payroll months after the fact. This could include leave cash-ins, promotions, merit increases, leave without pay, acting status, to name a few. The task is enormous. And why should one group of employees be affected before the rest? If the Arbitrator is to award a retroactive increase, the question is “Is any potential decrease in a geographic differential retroactive as well?”

The State respectfully requests that this Arbitrator allow the State to finish its process and do the right thing for all State employees, not just a select group.

#### Article 21.2/21.3 - SCCC Incentive Pay

The State created a separate section in Article 21 for SCCC incentive pay for two reasons. First, this will make it easier to locate. Second, it recognizes that the SCCC incentive is not a geographic differential in that it does not compensate an employee for the increased costs of living in a particular location. The State has also added language providing that the incentive will only be paid for work performed at SCCC. The State believes that this language clarifies the original intent behind SCCC incentive pay.

- 1. The State’s proposed language reflects the way that the SCCC incentive is currently being paid and clarifies the intent behind the incentive.*

The SCCC incentive was created to help deal with recruitment and retention problems at the State’s only maximum security facility. The intent was to encourage officers to stay *and work* at SCCC. This intent is evident in the last paragraph, which

states, “Employees who choose to work at an institution other than SCCC on regular time off will be paid at their earned step rather than the increased step”. Also, as Teri Hill testified, the State’s language reflects the way that the incentive is being paid.

There was not a great deal of testimony on this issue at hearing. ACOA witness Larry DeBoard testified to the effect that there were inconsistencies in the way that the State was paying the incentive. He provided an example involving two Prisoner Transportation Officers or PTOs. Superintendent Craig Turnbull later clarified that these two PTOs had been transporting prisoners for the Central Transportation Unit on their RDO. Thus, under the current contract, they were not entitled to the SCCC incentive.

*2. The State does not object to ACOA’s proposal regarding SCCC incentive pay.*

ACOA has also added new language to the section on SCCC incentive pay. ACOA’s proposal would require the State to pay the SCCC incentive “begin[ing] on the first day worked following the employee’s attainment of the SCCC consecutive years worked prerequisite.” The State does not object to this language. Arbitrator Downing’s April 29, 2008 Opinion on this subject makes it clear that the incentive pay is due after an officer has met the requirement regarding consecutive years worked at SCCC.

Section 21.6 (Association Proposal) and Section 21.4 (State Proposal) - Education Incentive Premium Pay

The parties both agree to this premium pay. The difference is that the State language provides for the pay with proof of the degree. The Association’s language provides for the pay *upon presenting* proof of that degree. There was no testimony regarding this at hearing. The State’s concern is that the Association’s language seems to infer that the pay is expected at the moment the proof of degree is presented. Clearly the

State has no intention of delaying the payment, but needs to work within the confines of normal payroll processing.

Section 21.9 (Association Proposal) and Section 21.4 (State Proposal) - FTO Instructor Pay

The Association seeks to expand what it gained in the previous interest arbitration. During that arbitration this arbitrator determined that the role and duties performed by Department of Public Safety and Department of Corrections FTOs were significantly different. However the award did include a premium pay for time in conducting scheduled training classes. The Union's proposal would require the Employer to apply the premium for all hours worked regardless of whether the Officer was conducting training. The Union has offered no evidence that there has been a significant change for FTO qualified Officers and therefore the Association's proposal should be rejected.

Article 21.5 (State Proposal) and Article 21.3 (Association Proposal) - Pay Increments

This Article was formerly titled Longevity Increments. Both parties agreed to implement pay increments computed at the rate of 3.75% of the employee's base salary every two years. Currently, an officer would be appointed at "A" step of the appropriate pay range. For example a Correctional Officer II hired at a Range 13 step A, would move to B step in one year and would serve one year C, D, E and F. In accordance with AS 39.27.022 the employee would then be required to serve two years at F prior to moving to J (there is no G, H or I step in the CO salary schedule), two years at J prior to moving to K, five years at K prior to moving to L and four years at L prior to moving to M. M is the final step in the range.

Under the proposed language once the employee reaches F step they will receive a pay increment every two years and there *is no cap or final step*. As long as they keep working every two years, and have exhibited “acceptable or better” service, they will receive a pay increment. The only difference between the State’s proposal and the Union’s proposal is the requirement for a performance evaluation. The same proposal has been accepted by and applied to the PSEA<sup>71</sup> the APEA,<sup>72</sup> CEA,<sup>73</sup> ASEA,<sup>74</sup> as well as those employees that are excluded or not covered by a collective bargaining agreement.<sup>75</sup> The Association offered no compelling or substantial reason why they should be treated any differently.

Finally, the language that the Association is seeking regarding the denial of a performance incentive is already addressed in Article 14.1. D. and has already been agreed to by the parties.

#### Section 21.10 - Prisoner Transportation Officer (PTO) Pay

Once again, the Association is proposing that all Prisoner Transportation Officers (PTOs) receive a premium on top of base wage. This time, the requested premium is 5%. Once again, the State strenuously objects to this proposal. While PTOs do take on additional duties, these are duties for which they have volunteered. When they are first admitted to a PTO Academy, they are required to pass a physical fitness test; however, there is no requirement to keep up these skills. The only requirement that must be maintained is handgun and shotgun qualification. Regular COs are not required to maintain both of these qualifications (although they must if they are to staff a post which

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<sup>71</sup> Joint Exhibit 3, p. 57.

<sup>72</sup> Joint Exhibit 4, LOA at end of contract.

<sup>73</sup> Joint Exhibit 5, LOA at end of contract.

<sup>74</sup> Joint Exhibit 6, LOA at end of contract.

<sup>75</sup> Joint Exhibit 14.

requires an armed officer). This firearms qualification is important in two aspects. First, the regular COs must qualify only once per year and the PTOs are only required to qualify twice per year. This is not a monthly or weekly event. Second, the way the proposal is worded, every CO who is firearms-qualified would receive the premium pay, whether they were a PTO or not. This would defeat the purpose of a PTO premium.

The State also objects to the proposal because it would pay the premium for all hours worked. The Association's main argument focused on the danger of being a PTO and being out of the institution with inmates. If that is the case, why pay a premium when they are not actually doing a transport? The additional danger is not present so they would not need to be paid an additional premium. Therefore, they would be receiving a 5% premium without actually transporting any inmates. This seems quite unfair to the regular COs.

The Association's argument also ignores the fact that transports involving prisoners of higher custody levels require two or more officers, one of whom must be an armed PTO. It is common practice at most facilities for the second officer to be an unarmed regular CO, rather than a PTO. This second unarmed regular CO does all the contact work with the prisoner during the transport (e.g. adjusts restraints during a medical appointment), leaving the PTO to provide cover and armed assistance if necessary. It is arguable that the regular CO on these transports is exposed to the same level of danger as the PTO or more so because they are unable to defend themselves with a weapon. Likewise, this 5% premium seems quite unfair to the regular COs performing these duties.

It is also important to point out that the Department of Public Safety (DPS) has the statutory responsibility for transportation of prisoners prior to arraignment. DPS is not only responsible for the transport; they are well equipped and trained to deal with transporting inmates. They can be called at any time to assist DOC, and, in fact, are called many times. PTOs are not necessarily sitting at home with bated breath waiting for the phone to ring. The troopers are available 24-hours a day and can handle emergency situations. Additionally, Troopers are fully commissioned peace officers and have full arrest authority anywhere in Alaska. PTO's on the other hand, have limited authority to act only in reference to prisoners in the custody of the Department of Corrections, hence the PTO's special commission.

Another note of interest is that only one of the comparators, Multnomah County pays anything like a PTO premium. The officers in that jurisdiction that obtain the Uncontrolled Environment training (UNET) receive a 1.5% premium. It is important to note that this premium pay was the result of an interest arbitrator's award and not requested by the Association. Transporting prisoners is a duty of the job or a duty of a different law enforcement agency and there is no additional pay.

The Association has failed to provide a compelling argument why PTO's should receive a premium pay for all hours worked. It is patently unfair to the other COs who would be doing the same job for less pay. Should the Arbitrator award a PTO premium pay, the State requests that it be paid only for time actually spent transporting prisoners. This is apparently when the additional danger occurs and the only time that it should be paid. The State believes that the Association has not met their burden and this proposal should not be awarded.

#### Article 21.6 (State Proposal) and Article 21.4 (Association Proposal) - Shift Differentials

Both parties sought to clean up some of the language that no longer reflected current practice in A. and B. of this section. However the Association is seeking to make significant changes to the time periods in which shift differential is paid. For example, 21.4.B.3. of the Association's proposal would require the Employer to pay a 3.75% premium to any officer working on a day shift. There was no evidence put on as to why that language change is necessary, and there does not appear to be any other external employer that pays such a premium. The APEA (J-4, p.58), the CEA (J-5, p.33) the ASEA (J-6, p.41) and the exempt employees (J-8, p. 4) all have a swing shift that starts at 12:00 and ends at 7:59 p.m. and a grave shift that starts at 8:00 p.m. In March of 2006, the State and the ACOA entered into a resolution regarding shift differentials (S-8). Teri Hill testified that this resolution has resolved most problems with shift differential administration for payroll purposes. There was no compelling or substantial reason supplied by the Association for a change in this section and the arbitrator should not disturb the status quo.

#### Section 21.5 (Association Proposal) and Section 21.7 (State Proposal) - Hazard Pay

The Association has proposed two changes in this section. First, it seeks to add new language that would provide a hazard pay premium whenever an institution exceeds its published maximum cap. Deborah Miller, Superintendent of the Anchorage Correctional Complex (ACC) testified that the maximum cap is the maximum number of prisoners an institution is intended to house. Superintendent Miller said that at ACC the maximum cap is 852 prisoners. However, as a remand facility that number fluctuates constantly throughout the day. At four p.m. the count may be 852 and a minute later it

might be 850 or 860, depending on how many prisoners roll out the door. There is constant movement with prisoners going to hospitals, halfway houses and a whole gambit of other reasons that will make the number change throughout the day. She further testified that the State does not control how many people come in to the facility and they cannot say that they are not accepting any additional prisoners. The Association did not provide evidence that there are currently any specific safety concerns, merely the generalization that if the institution is over the maximum cap then it could be less safe than if it were below the cap.

The State is committed to providing a safe environment in the institutions. Deputy Commissioner Sam Edwards testified that the current administration has taken steps to increase staffing and reduce overcrowding. When he came into his current position in 2006 there were 697 officers hired, and as of the week of the hearing there were 774 with almost ten more coming in the next month. Hiring more officers is something that the department can control; the number of prisoners it can receive is not.

Establishing a hazard premium pay based on the maximum cap will not make the institutions safer, and would be problematic to administer. Furthermore, a review of the other bargaining agreements before this arbitrator reveals that no other state or county provides a premium pay when facilities are above the maximum cap. The State respectfully submits that this proposal should not be accepted.

Article 21.6.D (State Proposal) and Article 21.13.D (Association Proposal) – Acting in a Higher Range

Both parties have added language addressing the issue of when an employee becomes entitled to “acting status” pay. The State proposes including a twelve-hour duration-of-service requirement. ACOA proposes eliminating any duration-of-service

requirement, meaning that an officer would be entitled to pay at a higher range as soon as he or she assumes the duties of a position in that higher range. As explained below, this issue was addressed by the Arbitrator in the parties' 2006 interest arbitration.

1. *In the 2006 interest arbitration, the Arbitrator retained the written-delegation requirement, but struck the duration-of-service requirement.*

Prior to this most recent contract, Article 21.6.D imposed two conditions precedent on the State's duty to pay an employee acting status pay.<sup>76</sup> First, the employee had to have received a prior written delegation to perform essentially all of the functions of a specific position in a higher range than the employee's own. Second, the employee had to have worked in the higher-range-position for either seven or fifteen consecutive calendar days, depending on the employee's schedule.

During negotiations over the current contract, ACOA proposed that Article 21.6.D be changed to read,

An employee directed to perform essentially all of the duties of a specific position in a higher range than the employee's own shall be paid at the step of the higher range that would be appropriate in case of promotion. Upon commencement of duties in the bargaining unit member's regular position, the bargaining unit member will return to the normal rate of pay.

ACOA's proposal would have eliminated both the written-delegation and the fifteen-days-of-service requirements of Article 21.6.D. Regarding the written-delegation requirement, this Arbitrator awarded the State's proposal of no change. Regarding the fifteen-days-of-service requirement, the Arbitrator awarded ACOA's proposal, citing his

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<sup>76</sup> "An employee who has received prior written delegation from his/her division director or designee to perform essentially all of the duties of a specific position in a higher pay range than the employee's own for more than fifteen (15) consecutive calendar days for employees on a forty (40) hours schedule or seven (7) consecutive regularly scheduled working days for employees on an eighty-four (84) hour schedule shall, retroactive to the first (1st) day, be paid at the step of the higher range that would be appropriate in case of promotion. Upon commencement of duties in the bargaining unit member's regular position, the bargaining unit member will return to the normal rate of pay."

decision in the 2005 interest arbitration between PSEA and the State in which he had stricken a similar fifteen-day duration-of-service requirement.

2. *The State's proposal is consistent with the language of Article 21.6.D providing that a member will be paid "retroactive to the first (1<sup>st</sup>) day" and that a member must assume "essentially all of the duties" of a position in a higher range.*

It is significant that the section on acting status in the PSEA agreement starts with the operative word "when". It specifies that a bargaining unit member becomes eligible for pay at a higher range as soon as he or she receives a written assignment to perform "many of the duties" of a position in a higher range. The word "when" is absent from Article 21.6.D of ACOA's contract. However, Article 21.6.D. does contain temporal language—the phrase "retroactive to the first day".

The phrase "retroactive to the first day" has been in this article since before the 2006 interest arbitration. ACOA proposed striking the phrase along with the duration-of-service requirement. However, the language was retained. The phrase clearly envisions a waiting period before acting status pay becomes due. Otherwise, the phrase is essentially meaningless. It is a fundamental rule of contract interpretation that, to the extent possible, all words and phrases in a clause should be given meaning.

If there is indeed some sort of durational requirement, the issue becomes what that requirement is. The State has interpreted the requirement to be twelve consecutive hours in the higher position. The State's interpretation is supported by the phrase "essentially all of the duties of a specific position". Some bright-line rule is needed here. It is reasonable to say that twelve hours, or one shift, is the minimum amount of time needed for an officer "to perform essentially all of the duties of a specific position".

3. *It is evident from an examination of other contracts, that some sort of duration-of-service requirement is reasonable.*<sup>77</sup>

Oregon's corrections contract imposes a five-day/forty-hour requirement.<sup>78</sup> California's corrections contract imposes a fifteen-day requirement.<sup>79</sup> Washington's corrections contract imposes a three-day requirement.<sup>80</sup> Multnomah County's corrections contract imposes a four-hour requirement.<sup>81</sup> Members of the Confidential Unit<sup>82</sup> and the General Government Unit<sup>83</sup> are subject to a fifteen-day requirement and members of the Supervisory Unit are subject to a ten-day requirement.<sup>84</sup>

The comparators demonstrate that some sort of duration-of-service requirement is the norm, not the exception. The State's proposal—that an officer be required work a minimum of twelve consecutive hours in a position in order to become eligible for pay in the higher range—is justified. The twelve-hour requirement is supported by the current language of Article 21.6.D. Twelve hours (or one shift) is the minimum amount of time in which one can perform essentially all the duties of a position.

#### Section 21.11 (Association Proposal) - Commercial Driver's License (CDL) Pay

The Association has proposed the following new language;

Any Bargaining Unit member who possesses a CDL that is used to benefit the Employer shall receive a premium of 5% of their regular rate of pay so long as they maintain their CDL qualifications. All costs of obtaining and maintaining CDL qualification (sic) shall be at the expense of the employer.

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<sup>77</sup> It appears that the only agreements that do not contain some sort of duration-of-service requirement are the PSEA agreement and the King County, Washington agreement.

<sup>78</sup> See, Joint Exhibit 10, Article 20, Section 1.

<sup>79</sup> See, Joint Exhibit 11 Article 9.07.B (If the employee works in a higher classification for more than 15 but less than 30 days, he or she will receive a differential only "for that period in excess of fifteen (15) calendar days." If the employee works in a higher classification for more than 30 days, he or she will be paid "from the first day of the assignment.")

<sup>80</sup> See, Joint Exhibit 12, Article 32.5.

<sup>81</sup> See, Joint Exhibit 14, Article 16.C.

<sup>82</sup> See, Joint Exhibit 5, Article 13.09.

<sup>83</sup> See, Joint Exhibit 6, Article 21.06.C.4.

<sup>84</sup> See, Joint Exhibit 4, Article 24.8.C.6.

As stated in the section regarding PTO premium pay, Correctional Officers volunteer for the duty. This was also acknowledged by Jim LeCrone upon cross examination. The requirement for some positions to possess a CDL is addressed in the class specifications for the CO II and CO III.<sup>85</sup> When combined, the Association's proposal for 21.10 and 21.11 would provide a 10% wage increase to Correctional Officer's that possess a CDL and transport prisoners. A review of the other bargaining agreement entered into the record reflects that no other employer pays a premium for maintaining a CDL. In the State of Oregon<sup>86</sup> and State of California,<sup>87</sup> the employer reimburses basically for any out-of-pocket costs associated with obtaining and maintaining the CDL and nothing more.

#### Section 21.12 (Association Proposal) - Multiple FTO, PTO, and CDL Pay

The Association's proposal is that any bargaining unit member that maintains FTO, PTO and/or CDL qualification should be paid the total cumulative premium pay for each qualification. The proposed language does not require the member to actually be performing the duties associated with conducting a training class or transporting prisoners in a vehicle requiring a CDL, rather the mere possession of these credentials would entitle the officer to the cumulative total.

#### Section 21.14.I (Association Proposal) - Termination Pay

The Association seeks to change the existing language that provides all permanent employees with two weeks notice or two weeks pay prior to non-disciplinary termination. The existing language is working and everyone understands exactly what it means. The State is concerned that this new language would be inappropriately applied to cases in

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<sup>85</sup> See, State Exhibit 6, pp.8 and 11.

<sup>86</sup> See, Joint Exhibit 10, p.21.

<sup>87</sup> See, Joint Exhibit 11, p.54.

which the Employer seeks to dismiss an employee for a continued pattern of misconduct where the final act is not “egregious.” The Employer has a legitimate business interest in not keeping a potentially disgruntled employee on the premises for up to two weeks.

Section 21.16 (Association Proposal) - Legal Trust Fund

The Association has proposed taking \$250,000 from the injury leave account provided for in Article 20.7 and using it to establish a Legal Trust Fund. Future contributions would be made by reducing the amount provided for the injury leave account in half, so that \$4 per employee in pay status per month would be deposited to the injury leave account (vice \$8) and the remaining \$4 would now be deposited to the Legal Trust Fund.

The State does have some concerns with this proposal. There was absolutely no evidence supplied that such a Trust has even been established. Who are the Trustees? Where does the money go? Additionally, the State would now have to devote resources to set up, monitor and administer payments to the Fund. The Association has not met its burden to show that the State should be making payments to a fund that may not even yet exist.

## ARTICLE 22 – Shift Assignments

### Article 22.2.C

The State strongly objects to ACOA’s proposed language in Article 22.2.C. The proposed language would dramatically increase the payment of overtime and the payment of “minimum guarantee”. Based on the current structure of the week-on-week-off work assignments, the State would, in most every instance, have to compensate an employee with overtime and pay for time not worked (minimum guarantee) to affect a schedule change or to provide the employee with training opportunities. This is simply not practicable or feasible.

The current language provides guidelines and a notice period for when the State can change a shift assignment, except in emergencies or situations in which the employee agrees.<sup>88</sup> The State currently makes every effort to reduce any impact of extended work week requirements due to shift changes or training opportunities. In addition, under this pay structure the State meets the requirements of the Fair Labor Standards Act (FLSA) which requires payment of overtime to be considered on the fourteen (14) day “work period”. The State should not be further penalized with additional overtime and the minimum guarantee requirements provided for in Article 13.2.A and 13.2.D.<sup>89</sup> of the parties’ current agreement. The ACOA, failed to demonstrate any compelling reason why the change was needed. The arbitrator should award the States proposal maintaining current language.

### Article 22.6.A

The State adamantly objects to ACOA’s proposed Article 22.6.B. ACOA is seeking to change the language to incorporate a process that would limit the Employer’s

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<sup>88</sup> Joint Exhibit 2, Article 22.2.C.

<sup>89</sup> *Id.*

ability to assign the work and manage its operation. Essentially, this language would incorporate a prerequisite where the assignment of work or duties would be based on seniority, not the ability of an individual or the best interest of the institution. Craig Turnbull testified that this is a very serious issue and would be a devastating change for all institutions.

*1. ACOA has not demonstrated a compelling or substantial need for the proposed language.*

ACOA is the moving party with respect to the new language. The State respectfully submits that ACOA has not, and cannot, demonstrate a compelling or substantial need for incorporating that a seniority provision be considered when the Employer is assigning the work.

*2. This language is in direct conflict with Article 4, Management Rights.*

Article 4 of the Parties agreement specifically and clearly outlines that the Employer has the right to operate and manage its affairs in each and every respect. ACOA's proposed language essentially eliminates that right and dictates that work will be assigned based on seniority. It is well established that, "In general, management is permitted to exercise much more discretion in assigning individual duties and tasks to workers than it is permitted in assigning workers to regular jobs. While the assignment of the workers to regular jobs often requires the observance of contractual "seniority" and "fitness and ability" considerations, collective bargaining agreements much less frequently contain direct restrictions on the right of management to assign duties and tasks to workers."<sup>90</sup> It is crucial that Employer retain its right to manage its operation for the sake of safety, security and justice for its employees and the general public.

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<sup>90</sup> Elkouri and Elkouri, *How Arbitration Works*, BNA, 6<sup>th</sup> Ed., Ruben, Ed., Ch. 13.9.D.i., 697

3. *ACOA's proposal would clearly limit the ability to meet the needs of the institution and the Officers.*

As testified by Craig Turnbull, to limit the ability to assign duties or posts, based on seniority, would clearly not be in the best interest of the institution. Management would not be able to consider competency, performance or special skills when making an assignment. In addition, it would seriously limit Managements obligation to cross-train employees in order to enable them to work all posts or assignments, hence limiting an officer's ability to have the knowledge, skills and ability for promotional opportunities. Clearly to accept this language would not do the Employer or Employees justice.

Article 22.6.B

ACOA is the moving party with respect to the added language of Article 22.6.B; however it did not provide compelling reason, or testimony as to why the addition of this language was necessary.

As mentioned above, it is critical that the Superintendent's be afforded the opportunity to manage and assign the work based on the needs of the institution and the knowledge, skills and abilities of individual employees. This language would essentially open up for dispute each and every work assignment which is ludicrous and very time consuming, in circumstances where time is already a precious commodity.

Article 22.7.A

Again, as the moving party ACOA has not, and cannot, provide compelling or substantial need for this change of language. The current language provides for temporary duty assignment that would change the structure of an employees work period, (i.e. from an 84 hour week on/week off schedule to a 42 hour, five day work week). This

language again attempts to primarily restrict the assignment of any work, placing the totality of assignment on seniority and in conjunction with the language proposed in Article 22.6.B above open up every assignment of work to a grievance and arbitration process.

## ARTICLE 23 – Equipment and Clothing<sup>91</sup>

### Article 23.2

- 1. The problems of the past with respect to ill-fitting and poorly-made uniforms have been addressed and there is no need for ACOA's proposed language.*

ACOA's proposed language would require that employee uniforms be "properly fitting and sized". Jim Lecrone testified that there have been issues with ill-fitting and poorly-made uniforms in the past. The State did not deny these issues existed. As Craig Turnbull explained, for a time, the Department was utilizing the prisoner-employment program at the Highland Mountain Correctional Center to make uniforms. However, the program was discontinued due to the problems Mr. Lecrone identified.

As Bryan Brandenburg explained, several LMC meetings were held to address this issue, among others. It was agreed that the Department will use an outside vendor to provide uniforms. Both parties hope and expect that, with the move to this outside vendor, the problems of the past will be eliminated.<sup>92</sup> The State submits there is no need for ACOA's proposal. Management wishes to provide its officers with quality uniforms and is open to meeting with ACOA to resolve any problems that may arise on this issue.

- 2. Management does not have complete control over the uniform-procurement process.*

ACOA has also proposed language that would require the Department to provide uniforms to all employees within thirty days of their annual hire date. Without giving specifics, Jim Lecrone testified that it has sometimes taken up to a year for officers to receive their uniforms. The 30 day provision that is being proposed by ACOA, he stated, would help deal with this by giving management set date.

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<sup>91</sup> On February 14, 2009, the State objected to a new proposal submitted by ACOA the previous Tuesday. The Arbitrator sustained the objection. This section therefore does not address that proposal.

<sup>92</sup> Mr. Lecrone testified that both parties are enthusiastic about the switch.

As Craig Turnbull explained, uniforms are currently ordered by a procurement technician. The officer will put in a request for a new uniform. After checking to make sure that the officer is near his or her anniversary date, the procurement technician will then order the uniform. The order will now be filled by the vendor. Much of this process is outside of management's hands. ACOA's proposal does not recognize this. It assumes that management has complete control over the uniform-procurement process.

3. *ACOA has not demonstrated a compelling or substantial need for its language regarding the frequency with which the Department must provide officers their uniforms.*

ACOA has also added language requiring the Department to provide each officer with three sets of shirts and three sets of military-BDU-style trousers per year. Currently, the Department tries to do this. However, not every officer needs three sets of shirts and trousers each year. ACOA's proposal simply requires three sets per year, without regard to need. ACOA did not show that there is a compelling or substantial need for adding the language it has proposed.

4. *ACOA has not demonstrated a compelling or substantial need for the language it has added regarding soft-body armor vests.*

ACOA has proposed adding language to Article 23.2 requiring the Department to provide each Prisoner Transportation Officer (PTO) with a "soft-body armor vest" and to replace each such vest "in accordance with manufacturer's specifications and/or applicable safety standards." The PSEA agreement has similar language.<sup>93</sup> ACOA President Danny Colang testified that the language was added due to concerns with vests being used beyond the manufacturer's specifications period.

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<sup>93</sup> See, Joint Exhibit 3, Article 21.

ACOA has not demonstrated a compelling or substantial need for its proposed language. There was no testimony that the Department has refused either to provide a PTO with a vest or to replace a vest if it learns the vest has exceeded applicable safety standards.<sup>94</sup> The issue seems to be whether the burden of keeping track of the replacement date should fall on management or the employee. The State simply believes that the employee is in a better position to know the vest's replacement date.

5. *With the move to an outside vendor, the Department no longer has total control over the fabric blend of its uniforms.*

The State has proposed deleting the section of Article 23.3 that requires the Department to provide trousers and shirts with a fabric blend of no less than 35% cotton to synthetic. As Craig Turnbull explained, with the move to an outside vendor for uniforms, it may not be easy to find uniforms with the fabric blend currently called for in the contract. The Department will seek to provide comfortable uniforms that do not need to be dry cleaned. There is no need for the cotton-to-synthetic formula that now exists.

### Article 23.3

1. *ACOA's proposed "maintenance/dry cleaning allowance" is unnecessary.*

ACOA has again asked for a uniform cleaning allowance.<sup>95</sup> Correctional Officers receive at least three uniforms. These uniforms do not need to be dry cleaned—they are “wash and wear” uniforms. Correctional Officers' uniforms are distinct from those worn by troopers, which *do* need to be dry cleaned. ACOA noted that officers are held to

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<sup>94</sup> It is not clear what these safety standards are or where they are found. ACOA did not explain this.

<sup>95</sup> During the previous interest arbitration ACOA proposed “a \$48 per month clothing maintenance allowance with no requirement to submit receipts.”

appearance standards.<sup>96</sup> Many State employees are held to appearance standards. Very few, however, receive a cleaning allowance like the one ACOA is asking for.

2. *ACOA's proposal is costly.*

The cost of ACOA's proposal is significant. April Wilkerson calculated that it would cost some \$598,752 per year.<sup>97</sup> Not only would the Department have to provide each CO I – III with \$63 per month, it would have to provide each employee that supervises a CO I - III with the same amount. Article 16.4 of the SU agreement currently provides that supervisory employees “who are issued uniforms will receive a dry cleaning allowance equivalent to that provided for by their subordinate’s union”.<sup>98</sup>

3. *There is no prevailing practice regarding the Employer's payment of costs associated with cleaning/laundrying employee uniforms.*

Looking to other corrections contracts, there appears to be no pattern with regard to provision of a cleaning allowance. Multnomah County, Oregon does not pay for the cost of cleaning employee uniforms.<sup>99</sup> King County, Washington does not appear to pay for uniform maintenance either.<sup>100</sup> The State of Washington does pay for the laundering of uniforms, so long as it is done “at a location chosen by the Employer.”<sup>101</sup> The State of California pays its officers a yearly uniform allowance.<sup>102</sup>

There was no testimony regarding whether the uniforms worn by officers in these other jurisdictions are similar to the “wash and wear” uniforms worn by Correctional

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<sup>96</sup> See, Testimony of Jim Lecrone.

<sup>97</sup> State Exhibit 12.

<sup>98</sup> Joint Exhibit 4.

<sup>99</sup> See, Joint Exhibit 14, Article 21, Section 6.

<sup>100</sup> See, Joint Exhibit 13, Article 12, Section 2 (“On each April during the duration of this Agreement, employees shall be furnished with vouchers worth three hundred fifty dollars (\$350.00) *for the purpose of purchasing authorized uniforms and authorized related items.*”) (emphasis added).

<sup>101</sup> See, Joint Exhibit 12, Article 36.3. ACOA's proposal, on the other hand, would prohibit the Department from requiring officer to submit receipts to show that they did, in fact, use the money for cleaning costs.

<sup>102</sup> See, Joint Exhibit 11, Article 14.04 (presumably, this covers the cost of cleaning, but it is not clear).

Officers in Alaska. The State respectfully submits that there is no pattern on this issue, certainly not one which can be applied in this case. ACOA did not demonstrate a compelling or substantial need for its proposal. The State asks that the Arbitrator deny ACOA's request for the reasons stated in his previous opinion.

Article 23.4

*1. ACOA's proposal does not address the Department's legitimate concerns.*

ACOA has proposed language stating that "[a] dress uniform will be allowed." The Department recognizes that dress uniforms are a way for officers to show the pride that they take in their profession. The Department would like for its employees to be able to wear dress uniforms at certain events sanctioned by management. However, the Department has legitimate concerns that are not addressed by ACOA's proposal.<sup>103</sup>

The Department is concerned over who decides when the uniforms may be worn. Again, the Department would allow officers to wear dress uniforms *at events that are sanctioned by management*. Although the uniforms will be worn away from the institution, officers who wear them will still be representing both the Department and the State. Put another way, while ACOA will be paying for them, they are still Correctional Officer uniforms. Management must be able to control when and where they are worn.

The Department's second concern is also related to the fact that officers who wear a dress uniform will be representing the State and the Department. What rules apply to such an officer? Can the Department discipline an officer for misconduct (*e.g.* fighting) at an event? The State believes it can.<sup>104</sup> However, there is nothing in the proposal that

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<sup>103</sup> See generally, Testimony of Craig Turnbull.

<sup>104</sup> Generally, an employer may discipline an employee for off-duty misconduct if there is a sufficient nexus.

says this is the case. Does the Department's policy on appearance still apply? The Department believes that it would, but, again, the proposal does not say so.

## ARTICLE 24- Safety and Health

### Section 24.1 - Safety Equipment

The Association proposes to add a listing of safety equipment. The testimony of Danny Colang was that most of the times the items were being provided but consistency between the institutions was lacking. Larry DeBoard testified that at this institution he would like to have medical grade gloves be provided for protection from blood-borne pathogens. There was no testimony that indicated that the Department of Corrections was not supplying safety equipment required by the Division of Labor Standards and Safety regulations. This is a requirement listed in the existing language of 24.1.

### Section 24.2.B (Association Proposal) - Recording and Reporting

The Association has asked that the Employer provide a copy of all Special Incident Reports (SIRs) involving assaults on Association members as well as other issues involving the health and safety of Correctional Officers. Special Incident Reports are highly confidential and as such, the State objects to releasing these documents. At hearing the parties discussed providing statistical information to the Association that should satisfy their needs. There was discussion about categorizing assaults into levels of severity. For example, Craig Turnbull indicated that whenever an inmate even touches an Officer it could be considered an assault. The State has a valid interest in distinguishing between such low level occurrences to those that are more severe.

### Section 24.2.B (State's Proposal) - Monitored Health Program

The language in this section provides for an annual physical for officers that come in contact with pathogenic, carcinogenic and toxic substances or with infectious blood, airborne or body fluid borne diseases. The Employer will reimburse Officers for actual,

receipted out of pocket expenditures up to two hundred dollars (\$200). The State also provides for a health insurance plan (See Article 17). On obvious concern for the State is that an employee that has a physical can submit the bill to the insurance plan and also collect the \$200.00. If the claim has been paid through the insurance plan then the employee should not be reimbursed.

## ARTICLE 25 - Travel, Per Diem and Moving

### Section 25.2 - Travel Status

The Association has made two changes in this Article. The first change is the deletion of the sentence, “An employee is not in travel status for local travel and or “day trips.” It is unclear why this language was deleted and there was little testimony regarding the entire Article during the hearing. This sentence is almost exactly the same as that provided for in the Alaska Administrative Manual (AAM) which states, “A traveler is not in travel status for local travel and day trips.”<sup>105</sup> If the Association’s position is that the language in the contract is superfluous, then the State does not disagree with the deletion.

The second change to Article 25.2 regards reimbursement for mileage. The State believes that this new language is both unnecessary and unclear. Currently the mileage reimbursement is \$0.550. Typically, the State of Alaska uses the rates for automobiles established by the IRS and the established rates from the U.S. General Services Administration for all other types of vehicles; however, the state implementation dates may lag slightly. The AAM clearly addresses how and when the reimbursement for mileage should occur and there was no evidence presented that would indicate that the State is not in compliance with the AAM.

### Section 25.6 - Privately-Owned Conveyances

This proposal adds a new section to this Article. Once again, the State finds that the language is both unnecessary and unclear. The AAM addresses the issue of privately-owned conveyances with greater clarity. The Association’s proposal indicates that the member could determine when they will use their own vehicle for State business; in

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<sup>105</sup> State Exhibit 9, p. 5 (emphasis added).

contrast the AAM requires that an approving official substantiates that privately owned vehicles are used only when it is in the best interest of the State. As stated above, reimbursement is based upon the IRS, but implementation dates may lag slightly. There was no compelling or substantial reason for the new language in this Article and consequently the Association's proposal should be rejected.

## ARTICLE 26 – Protection of Rights

### Article 26.1 - Illegal Work

The State is the moving party with respect to Article 26. The State has proposed adding language clarifying that one bargaining unit member should not knowingly require another member to perform work in violation of a federal, state, or local law. The State’s language simply recognizes the fact that Correctional Officers II and III are at times responsible for directing the work of their fellow members and that, like the Employer, they should not knowingly require someone to violate the law.

The Class Specification for the Correctional Officer III position provides that it is “the lead level class with responsibility for the work of Correctional Officers I and II”.<sup>106</sup> Correctional Officers III may serve as a “shift supervisor”. In this position, the Correctional Officers III will direct the work of the officers assigned to his or shift.<sup>107</sup> For example, a Correctional Officer III may “[d]irect the inspection of prisoner’s quarters for contraband” or “supervise the departmental prisoner transport unit/staff”.<sup>108</sup>

The expectation embodied in the State’s proposal can already be found in Policy and Procedure #202.15, Standards of Conduct. Section VII.E.1. provides that “[e]mployees are expected to obey all federal, state, and local laws.” Section VII.A.1. provides that “[e]mployees shall not aid, abet, or incite another employee to violate these guidelines.” The State’s proposal does not create a new expectation for Correctional Officers. The expectation should, however, be made explicit in the contract.

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<sup>106</sup> State Exhibit 6, Class Specification for Correctional Officer III, 9.

<sup>107</sup> *State of Alaska, Department of Corrections v. Alaska State Employees Association, AFSCME Local 52, AFL-CIO*, Case No. 95-379-RD, Alaska Labor Relations Agency Decision and Order No. 233, located at <<http://labor.state.ak.us/laborr/dosearch.htm>>.

<sup>108</sup> State Exhibit 6, Class Specification for Correctional Officer III, 9.

## ARTICLE 29 – Legal Indemnification

### Section 1

The parties' proposals are identical regarding Article 29, Section 1.

### Section 2

In Section 2, ACOA seeks to keep what is currently the third paragraph of Article 29, which provides as follows:

The member shall have the right to counsel; however, the Employer shall have the right to determine which attorney will represent the member. If the member objects to the attorney provided by the Employer, the following process for selection of a defense attorney shall prevail: The Commissioner of the Department of Corrections and the Attorney General shall meet with the member and/or a representative of the Association in an effort to select an attorney who shall represent the member. The Attorney General shall make the final decisions; except, if in consultation with the member or his/her representative, the Attorney General determines that, due to an actual or potential conflict of interest, he/she or his/her representative cannot adequately defend both the State and the member, he/she shall select an attorney from outside the Attorney General's office to represent the member; such selection shall be subject to the appeal of the member or his/her representative.

The State has proposed deleting this language.

The first sentence is redundant. Section 2 states that the Employer will provide a "legal defense" to a member who is named as a defendant in a legal action if the member was acting within the scope of his or her employment at the time of the incident out of which the action arose. Section 1.a. clarifies that "[p]roviding a legal defense means that Employer appoints at its expense counsel to represent the member in a legal action."

There is no need to again state that the member shall have the right to counsel.

The second sentence is unnecessary. The current language allows the member to object to the attorney provided by the Employer. In reality, this almost never happens. However, if it does, the Attorney General makes the final decision. The employee

currently has no right to choose his or her attorney—the employee merely has the right to object to the attorney selected by the Employer and to have input regarding who the attorney will be. This right will not disappear with the deletion of this language.

Under current language, where an attorney from the AG’s Office cannot adequately defend both the State and the member, the Attorney General may select an attorney from outside the AG’s office to represent the member. This decision is “subject to the appeal of the member or his/her representative.” Again, no rights will disappear with the deletion of this language. The “appeal”, it seems, would go to the Attorney General. It would be the Attorney General who again makes the final decision.

### Section 3

Section 3 of ACOA’s proposal retains what is currently the second paragraph of Article 29, which provides as follows:

A member charged in any civil action in the performance of his/her duties as required by the Employer shall not lose his/her position, pay or benefits; costs stemming from a civil suit against any member in the performance of his/her duties as provided in this Article shall be borne by the Employer, including any judgment rendered against the member. If it is determined by a court of competent jurisdiction that the member was not acting in the course or scope of his/her employment, the Employer is not liable for any judgment and may recover any costs incurred from the member.

The State has proposed deleting this language.

The first sentence of the above-quoted language is misleading. It could be interpreted to imply that a member charged in a civil action for an act or omission done within the scope of the member’s duties cannot be disciplined for that act. The fact that an employee was acting within the scope of his or her duties does not shield the employee from discipline. As Ms. Voigtlander testified, discipline does not preclude the provision of a legal defense. Likewise, the provision of a defense should not preclude discipline.

The remainder of the paragraph is simply redundant. Section 2 of the State's proposal provides that the Employer will provide the member with a legal defense if the member was acting within the scope of employment at the time of the incident out of which the legal action arose. Section 3 provides that, except for punitive damages, the employer will indemnify a member for a judgment or legal obligation if the obligation arose from an act committed by the member within the scope of his or her employment.

#### Section 4

In Section 4 the State has incorporated the definition of "scope of employment" found in AS 09.50.253(h)(1).<sup>109</sup> ACOA proposes the same definition (*i.e.*, the statutory definition).<sup>110</sup> However, it adds two subsections, both of which deal with the passing of medication. From the testimony presented at the hearing on Friday, February 13, 2009, it is clear that Sections 4.e. and 4.f. of ACOA's proposal were added in an attempt to shield members from liability and/or discipline in connection with the passing of medication.

Sections 4.e. and 4.f. of ACOA's proposal have no place in Article 29. Article 29 deals generally with the subjects of indemnity and the provision of a legal defense. Section 4 should set out in equally general terms those situations in which the State will be contractually required to provide these benefits. It should provide a general framework against which a variety of actions may be measured. It is inappropriate to graft onto such a general framework the very specific act of passing medication.

ACOA's concerns over a member's potential liability for passing medication can and should be addressed under the general framework of Sections 4.a. through 4.d. If the employee's act of passing medication was authorized and occurred within authorized

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<sup>109</sup> *See*, Testimony of Gail Voigtlander.

<sup>110</sup> It should be noted that the statutory definition closely matches the common law definition.

time and space limits (*e.g.* at the institution and during the employee's shift), and if the act was done to serve the state and the employee did not perform the act with gross negligence, malice, etc., he or she will be covered under the State's proposed language

In Sections 4.e. and 4.f. ACOA is attempting to shield its members, not only from liability, but also from discipline in connection with the passing of medication. This is not the proper place to address discipline. All discipline is subject the just cause standard. If an employee is disciplined for improperly passing medication and the employee feels they were not properly trained in how to perform this task, they may raise that concern within the grievance-arbitration process of Article 16.

ACOA is also attempting in Section 4.f. to restrict the passing of medication to those institutions in which it is currently practiced, "unless the Employer can demonstrate that there is no other practicable means to distribute medication within those institutions." Again, such a restriction has no place in Article 29, which deals generally with indemnification and the provision of a legal defense. Furthermore, it is a significant and unjustified intrusion into management's rights.

Finally, ACOA's proposed Sections 4.e. and 4.f. are not consistent with its proposal in Sections 4.a. through 4.d. ACOA is saying in Sections 4.e. and 4.f. that duties assigned to an officer that are outside the scope of the officer's profession should be considered within the scope of the officer's office or employment. This simply does not make sense. The addition of 4.e. and 4.f. confuse the clear definition of "scope of employment" set out in the State's proposal and in AS 09.50.253(h)(1).

## Section 6

### *1. Punitive Damages*

Section 6 of the State’s proposal provides that a member will not be indemnified for punitive damages. This is consistent with Section 4.d. In order to be held liable for punitive damages, one’s conduct must have been “outrageous” or evidencing a “reckless indifference to the interests of another person”<sup>111</sup>. If an employee acted in such a manner, they would probably not be acting within the scope of their employment, meaning that indemnification would be inappropriate. Section 6 simply makes this clear.

Furthermore, as Ms. Gail Voigtlander testified, the State cannot be held liable for punitive damages.<sup>112</sup> The State’s proposed Section 6 is consistent with this immunity. The Public Safety Employees Association has similar language in their collective bargaining agreement with the State. The State believes that the contract should make it clear to the employee that the State will not indemnify them for outrageous conduct or conduct that evidences a reckless indifference to the interests of another person.

### *2. Criminal Charges*

ACOA proposes a new section 6 titled “Criminal Charges” which would retain much of the language of what is now the fourth paragraph of Article 29. That language now states that if a member is charged criminally for acts committed in the discharge of their duties and in the scope of their employment, the member will be reimbursed for reasonable costs and attorney’s fees if the member is acquitted or the charges dropped, providing such charges do not result from the willful misconduct or gross negligence.

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<sup>111</sup> AS 09.17.020(b).

<sup>112</sup> AS 09.50.280 (“If judgment is rendered for the plaintiff, it shall be for the legal amount found due from the state with interest as provided under AS 09.30.070 and without punitive damages”).

This cost—the reimbursement for costs incurred by a member in connection with a criminal case—is one that is born by the Department of Corrections. It is not funded through the State’s risk management program. Also, all felonies in the Alaska (and many misdemeanors) are prosecuted by the Criminal Division of the AG’s Office. The State would simply like to note that it is an odd situation when one State agency is dismissing charges against a state employee and another State agency is footing the bill.

## ARTICLE 37 – Duration of the Agreement

The State proposes deleting the final paragraph of Article 37. This paragraph is what is known as a “wage reopener”, or, as ACOA witness Art Chance referred to it, a “me too” clause. As Mr. Chance noted, from the employer’s point of view, it is undesirable to have such a clause in a collective bargaining agreement. The State acknowledges that it is seeking to take away a right currently enjoyed by ACOA. However, as the Arbitrator has previously noted, while interest arbitration awards may favor the status quo, they can also result in innovations.<sup>113</sup>

1. *The current clause is based on the false premise that simply because other state employees have received a greater wage increase, those employees are doing better economically than ACOA members.*

The Arbitrator is familiar with the dynamics of collective bargaining. It is not a process subject to easy calculation. For example, while members of the Inland Boatmen’s Union (IBU) recently received a lump-sum-5-4 package, as Ms. Sutch testified, IBU members 1) had not received a wage increase since 2006; 2) do not receive merit increases; 3) gave up “split wages”; and 4) reduced leave accruals. To look only at wages ignores the actual deal that was struck. It is too narrow of a view. It does not account for the uniqueness of each particular agreement.

2. *Comparability supports the deletion of the wage reopener clause.*

A review of the State’s other collective bargaining agreements demonstrates that these types of clauses are the exception, not the norm. Currently, the Public Safety Officers Unit has a wage reopener in their agreement.<sup>114</sup> However, there is no wage reopener in the Supervisory Unit’s agreement, the General Government Unit’s

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<sup>113</sup> See, State of Alaska and Alaska Correctional Officers Association, Interest Arbitration Opinion for Collective Bargaining Agreement Effective July 1, 2006, 3.

<sup>114</sup> See, Joint Exhibit 3, Article 37.

agreement, or the Confidential Unit’s agreement. The Anchorage Police Department’s agreement, to which the State is not a party, has a wage reopener, but it is tied to the Anchorage CPI, not another contract.<sup>115</sup>

Multnomah County’s corrections contract has a wage reopener, but it is for the benefit of the employer. It provides that if the county’s good-faith estimate of general fund operating resources falls more than 15% below the actual general fund operating resources of the preceding fiscal year, “any general wage increase provided by th[e] agreement for the fiscal year for which such reduced revenue is projected shall not be implemented and negotiations over the terms of a substitute general wage provision for the affected fiscal year will commence immediately”.

The State of Oregon’s corrections contract does not include a wage reopener. Neither King County’s corrections contract nor the State of California’s corrections contract contain a wage reopener either. Article 45.3 of the State of Washington’s corrections contract allows the entire agreement to be reopened by the mutual consent of both parties. This is not a “wage reopener” or “me too clause” like the one in ACOA’s contract. Internal and external comparability weigh in favor of the State’s proposal to delete this clause.

*3. Considerations of equity also support the deletion of the wage reopener clause.*

Considerations of equity also support the deletion of the wage reopener clause. As noted above, the majority of state employees do not have the benefit of a wage reopener in their contract. Thus, if the Labor, Trades, and Crafts Unit (LTC) employees receive a 2-1-1 wage increase and the General Government Unit (GGU) later receives to

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<sup>115</sup> Joint Exhibit 9, Article XV, Section 5.E.1.

a 2-2-2 wage increase, Local 71 would have no ability to reopen the contract. However, if it were ACOA that received the 2-1-1 increase, they would be able to reopen the agreement as to economic issues.

## CONCLUSION

The State appreciates the attention of the Arbitrator at the hearing and in this brief to the entire process of Alaska's collective bargaining law. The State has attempted to show its reasonableness and its willingness to work on problems identified by the Association. The State believes it has been reasonable and thorough on each and every issue presented. Individual articles and articles in combination as proposed by the Association represent significant costs to the State. The State urges the Arbitrator to very carefully weigh the positions of the parties and attempt to fashion a decision based on what the parties would have mutually agreed to without the use of interest arbitration.

The State believes that the Arbitrator must first be guided by his professional commitment to impartiality. He must fairly and impartially decide the issues on the facts and arguments presented to him. Second, the Arbitrator must always be guided by his statutorily-imposed obligation to fairly and reasonably decide the matters before him in a manner that discharges his dual obligation to promote harmonious and cooperative relations while protecting the public and assuring the orderly and effective operations of government.

The State has sought to structure this writing to provide guidance to the arbitrator as to his statutory charge. The State is confident that the arbitrator will render his decision in a manner which comports with that charge and, hereby, places these matters before him for decision.