IN ARBITRATION
BEFORE ARBITRATOR JANET L. GAUNT

ALASKA CORRECTIONAL OFFICERS ASSOCIATION,	)	
Grievant,	)	
v.	)	
STATE OF ALASKA,	)	
Respondent.	)	Grievance 12-002
	)	State Case 12-C-305

CLOSING ARGUMENT BRIEF OF ASSOCIATION
FROM ARBITRATION HELD JANUARY 29 AND 30 AND FEBRUARY 22, 2013

I. INTRODUCTION

In April of 2012, the Department of Corrections (DOC) violated the provisions of the Alaska Correctional Officers Association (Association) Bargaining Agreement, amplified by 30 years of past practice, when it moved Correctional Officers from their traditional twelve (12) hour security shifts and placed them on new eight (8) hour security shifts without first bargaining. In doing so the DOC ignored a long history of negotiations on twelve (12) hour security shifts, which began with a Letter of Understanding entered into in 1981, subsequently modified by renegotiated Letters of Understanding in 1985 and in 1986[1] and then formally recognized and incorporated into Appendix B of the 1990-1993 Collective Bargaining Agreement.[2]

The State of Alaska (State) attempted to justify the DOC's actions by asserting two things, its Article 4 Management Rights, and its rights under Article 22 (Shift Assignments). By its arguments based upon Articles 4 and 22, the State is implying that the Association waived its right to bargain. With these arguments, the State then bears the heavy burden of proof and persuasion that the Association waived its right to bargain

[1] Association 6b, 1993 Legislative Audit, page 6
[2] Association Exhibit 1j, 1990-1993 ASEA CBA

about changes in the work shift in one of two ways: 1) expressly, by clear and unmistakable waiver language, or 2) implicitly, through bargaining history or past practice. The State failed to bring forth any evidence to support either claim. In fact, the evidence presented by the Association attests to the Association's timely and vigorous attempts to enforce its right to bargain and its unrelenting desire to maintain the past practice of twelve (12) hour a day week-on/week-off, eighty-four (84) hour security shift schedules for Correctional Officers.

In April to May of 2012, the DOC implemented its "Blended Staffing Plan", [3] which consists of two parts. One part was the elimination of posts at night and the dropping of staffing at night by approximately 30 percent. The second part consisted of creating new eight (8) hour security shifts. The issue before this Arbitrator is not the Blended Staffing Plan as a whole, but one aspect of that plan; the DOC's actions in eliminating security shifts, which were previously all twelve (12) hour week-on/week-off shifts, and creating new eight (8) hour security shifts.

The reduction of staff at night by thirty percent is not desirable, and Correctional Officers believe it puts them at risk, but that change is within the DOC's rights under the Bargaining Agreement. However, the DOC does not have the right to change a part of the Collective Bargaining Agreement and an established past practice where the change harms Correctional Officers and renders other Articles in the Bargaining Agreement moot without first negotiating the change with the Association. The Association believes that the DOC did not have to create new eight (8) hour security shifts to institute its new Blended Staffing Plan. The DOC could have easily adjusted its existing twelve (12) hour security shifts to institute its Blended Staffing Plan and it would have been efficient and less disruptive, whereas the eight (8) hour security shifts have failed completely.

II. ISSUE STATEMENT

At the arbitration the Association submitted the following issue statement:

1. Did the State of Alaska violate the Collective Bargaining Agreement by unilaterally changing the work schedule of security Correctional Officers from

[3] Association Exhibit 24, Deputy Commissioner Edwards email to Superintendents and key Management personnel

week on/week off to five days on/two days off without first bargaining with the Alaska Correctional Officers Association (ACOA)?
2. Assuming a violation of the Collective Bargaining Agreement, what is the appropriate remedy?

Some of the Articles affected by the DOC's new eight (8) hour security shifts include Articles 13, 18, 19, 22, 30, 32 and 36. The Association requests the Arbitrator to retain jurisdiction for a period of 90 days following the issuance of a decision to resolve remedial disputes.

III. RELEVANT CONTRACT LANGUAGE

ARTICLE 4 - MANAGEMENT RIGHTS

Except – and only to the extent – that specific provisions of this Agreement expressly provide otherwise, it is hereby mutually agreed that the Employer has, and will continue to retain, regardless of the frequency of exercise, rights to operate and manage its affairs in each and every respect. Nothing in this Article shall be considered as superseding those rights granted to the Association in the Articles and/or Amendments of this Agreement.

ARTICLE 13 - OVERTIME

13.1 Forty-two (42) Hour Schedule

A. The workweek for employees assigned to a forty-two (42) hour schedule shall consist of forty-two (42) hours in pay status within a maximum of seven (7) days allowing for two (2) consecutive days off and all such employees shall be guaranteed a full workweek. The furlough provisions of 2 AAC 07.407 do not apply.

B. Members shall receive overtime pay at the rate of one and one-half (1 ½) times their regular rate of pay for all hours in pay status over the member's normal scheduled workday. Overtime pay or other premium pay shall not be pyramided or duplicated. Hours paid at the rate of one and one-half (1 ½) the appropriate rate of pay for any reason shall be credited only once in the calculation of hours in the workweek.

13.2 Eighty-four (84) Hour Schedule

A. The workweek for employees on the twelve (12) hour schedule shall be a fourteen (14) day work period consisting of eighty-four (84) hours in pay status with a maximum of seven (7) working days and seven (7) consecutive days off, and all employees shall be guaranteed a full workweek. The furlough provision of 2 AAC 07.407 shall not apply.

B. Employees working a twelve (12) hour shift shall receive a one-half hour (thirty minutes) duty-free paid meal period as well as two (2) fifteen (15) minute paid relief breaks. Every effort shall be made to provide a meal break midway through the shift not earlier than the three (3) hours after the start of the shift and not later than three (3) hours prior to the end

of the shift. Meal breaks that are not given shall be reported before the end of each shift. If the employee does not report the missed meal break, it will be assumed the break was taken. Missed meal breaks will be treated as time worked and will be paid at the applicable rate.

C. There shall be two (2) shifts, day and night. Night shift shall receive the swing shift differential set out in Section 21.

D. Work performed by overtime eligible employees in excess of eighty-four (84) hours of work in the work period is overtime and shall be paid at one and one-half (1 ½) times the appropriate regular or shift rate of pay. Overtime pay or other premium pay shall not be pyramided or duplicated. Hours paid at the rate of one and one-half (1 ½) the appropriate rate of pay for any reason shall be credited only once in the calculation of hours in the workweek.

E. Overtime pay for hours worked on a holiday shall be computed only on the hours worked between 12:01 a.m. and the following 11:59 p.m. on the holiday. This overtime compensation will be paid in addition to the eight (8) hours at the straight-time rate for holiday pay and is subject to paragraph D above.

F. If a holiday falls on the employee's regularly scheduled day off, the employee shall receive payment for the holiday for eight (8) hours at the straight-time rate provided the employee was in pay status for a portion of the last regularly scheduled workday prior to the holiday and in pay status for a portion of the next regularly scheduled workday after the holiday. Such holiday pay does not count for the purpose of computing overtime, nor the purpose of fulfilling the work period unless worked as provided in paragraph E above.

G. Every effort will be made to include adjustment(s) for holiday pay in the pay warrant issued for the appropriate pay period. If not possible, the adjustment(s) for holiday pay may appear on the next regularly issued pay warrant for the pay period following the pay period in which the holiday(s) occurred. Penalty pay shall not apply for pay shortages, which result from holiday pay adjustments.

ARTICLE 18 - MEAL AND RELIEF PERIODS

18.1 Meal Break

A. Forty-two (42) Hour Schedule:

1. A duty free meal break of not less than thirty (30) minutes nor more than one (1) hour shall be allowed approximately midway of each shift.

2. An additional meal break of thirty (30) minutes shall be allowed when a member works continuously for two (2) hours or more before or after the normal work day, and such additional meal break shall be considered as time worked.

3. In the event the member is recalled within two (2) hours of the termination of their normal work day, the Bargaining Unit member shall be granted a meal break in accordance with other provisions of this Article.

B. Eighty-four (84) Hour Schedule:

1. Members working a twelve (12) hour shift shall receive a one-half (1/2) hour duty-free paid meal period. Every effort shall be made to provide the meal break midway through the shift not earlier than three (3) hours after the start of the shift and not later than three (3) hours prior to the end of the shift.

2. Meal breaks, which are not given, shall be reported before the end of the shift. If a member does not report the missed meal break, it will be assumed the break was taken. Missed meal breaks will be treated as time worked and will be paid at the applicable rate.
3. In the event the member is recalled within two (2) hours of the termination of their normal shift, the Bargaining Unit member shall be granted a meal break in accordance with other provisions of this Article.

4. An additional meal break of thirty (30) minutes shall be allowed when a member works continuously for two (2) hours or more before or after the normal shift, and such additional meal break shall be considered as time worked and will be paid at the applicable rate.

18.2 Relief Period

A. All members shall be allowed two (2) paid fifteen (15) minute relief periods in each normal workday. The Employer shall establish reasonable rules governing the taking of such relief periods.

B. Relief periods will be taken away from the immediate workstation when the member works in a public area and where the Employer can reasonably provide such separate area.

C. When working other than the normal shift, a fifteen (15) minute paid relief period shall be allowed a member during any work period of at least four (4) hours duration, or as otherwise agreed.

D. If an employee is not allowed to take a relief break, he or she shall be compensated at the appropriate rate for the missed break if it is reported before the end of the shift. If an employee does not report the missed break, it will be assumed the break was taken. In the absence of a shift supervisor, an additional (15) minutes will be paid at the appropriate rate if the missed break is reported in accordance with Department/Institutional procedures.

ARTICLE 19 - HOLIDAYS

19.1 List
All employees shall be entitled to, and compensated for, eight (8) hours at their regular hourly rate of pay for all holidays listed below:

"Holiday" in this Agreement means:

1. The first of January, known as New Year's Day.
2. The third (3rd) Monday in January, known as Martin Luther King Jr. Day.
3. The third (3rd) Monday in February, known as President's Day.
4. The last Monday in March, known as Seward's Day.
5. The last Monday in May, known as Memorial Day.
6. The fourth (4th) of July, known as Independence Day.
7. The first (1st) Monday in September, known as Labor Day.
8. The 18th of October, known as Alaska Day.
9. The 11th of November, known as Veteran's Day.
10. The fourth (4th) Thursday in November, known as Thanksgiving Day.
11. The twenty-fifth (25th) day of December, known as Christmas Day.
12. Effective July 1, 2007, the holiday formerly known as Lincoln's Holiday shall be treated as a floating holiday. On February 12th of each year, the members' personal leave account shall be credited with eight (8) hours of personal leave.
13. Every day designated by public proclamation by the Governor of Alaska as a legal holiday.

19.2 Observance of Holidays

A. Forty-Two (42) Hour Schedule:
A designated holiday will normally be observed on the calendar day on which it falls, except employees who are regularly scheduled to work Monday through Friday will observe the preceding Friday when the holiday falls on Saturday, and will observe the following Monday when the holiday falls on Sunday. Normally, only those employees designated in advance by appropriate supervision will be required to work on a designated holiday. When a designated holiday falls on an employee's scheduled day off, other than Saturday or Sunday, the day of observance will be rescheduled to another day within the pay period.

B. Eighty-Four (84) Hour Schedule:
1. Overtime pay for hours worked on a holiday shall be computed only on the hours worked between 12:01 a.m. and the following 11:59 p.m. on the holiday. This overtime compensation will be paid in addition to the eight (8) hours at the straight-time rate for holiday pay and is subject to Article 13.9.

2. If a holiday falls on the employee's regularly scheduled day off, the employee shall receive payment for the holiday for eight (8) hours at the straight-time rate provided the employee was in pay status for a portion of the last regularly scheduled workday prior to the holiday and in pay status for a portion of the next regularly scheduled workday after the holiday. Such holiday pay does not count for the purpose of computing overtime, nor the purpose of fulfilling the work period unless worked as provided in Paragraph 1 above.

ARTICLE 22 - SHIFT ASSIGNMENT

22.1 Hours of Operation

A. Hours of operation shall be established by the Employer.

B. The Employer will notify the Association prior to implementing any large scale change in the hours of operation.

22.2 Shift Assignments

A. Shift assignments shall be made in accordance with the needs of the Employer.

B. Neither permanent assignments nor temporary assignments shall be used as a means of disciplining employees. The parties acknowledge that the changes in assignment may be appropriate as part of a corrective or investigatory action.

C. Except in emergencies or situations in which the employee agrees, shift assignment will not be changed without at least five (5) days' notice; except that nothing in this Article precludes temporary reassignment of an employee because of illness, vacation, emergency, training, orientation, or similar causes.

D. When the Employer changes the shift assignment of an employee, the Employer, whenever feasible, will solicit volunteers from among the group of potentially affected employees and select the senior employee from among the qualified volunteers in the job class. If there are no qualified volunteers, the Employer shall select the least senior qualified employee. For purposes of this section, seniority is construed as Bargaining Unit seniority.

22.3 Alternative Workweeks

A. A four (4) day workweek or other form of alternative workweek schedule may be established by written mutual agreement of the Employer and the Association, the terms of which schedules shall be set forth in Letters of Agreement.

B.

B. The Commissioner of Corrections or designee may approve flexible work hours.

22.4 Shift Exchanging

A. An employee may be permitted to exchange shifts with other employees in the same classification or level provided:

1. The employee makes a written request to his/her shift supervisor(s) at least twenty-four (24) hours prior to the exchange;

2. The shift supervisor(s) approves the exchange; and

3. The employees exchanging shifts shall not be entitled to any additional compensation (e.g., overtime, holiday pay, shift differential) that they would not have otherwise received.

B. Once approved, the shift exchange becomes a regular work assignment for the period of the exchange.

C. Once approved, shift exchanges shall not be subject to further review, except to cover operational needs. If a shift exchange is denied, the shift supervisor denying the exchange shall state the reason for the denial on the written request.

22.5 Split Shifts

The Employer agrees that employees will not be scheduled to work split shifts except in those instances where there is no reasonable alternative.

22.6 Temporary Duty Assignments

A. When the Employer changes the duty assignment of an employee from an 84-hour assignment to a 42-hour assignment, or vice versa, the Employer, whenever feasible, will solicit volunteers from among the group of potentially affected employees and select the senior employee from among the qualified volunteers in the job class. If there are no qualified volunteers, the Employer shall select the least senior qualified employee. For purposes of this section, seniority is construed as Bargaining Unit seniority.

B. The Employer shall notify the Association when temporary duty assignments exceed sixty (60) days.

ARTICLE 30 - CONCLUSION OF COLLECTIVE BARGAINING

The Agreement expressed herein in writing constitutes the entire agreement between the parties and no oral statement shall add to or supersede any of its provisions.

The parties acknowledge that during the negotiations which preceded this Agreement, each had the unlimited right and opportunity to make proposals with respect to any subject or matter not removed by law from the area of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been with the knowledge or contemplation of either or both the parties at the time they negotiated and signed this Agreement.

The parties further agree that, notwithstanding the above Section, maintenance of contract matters, should they develop, may be negotiated under the supplemental agreement provision.

ARTICLE 32 - SUPERSEDING EFFECT OF THIS AGREEMENT

32.1 Superseding Effect of this Agreement
If there is conflict between the terms of this Agreement and any Personnel Memoranda or rules of the merit system, the terms of this Agreement shall supersede those memoranda or rules in their application to the Bargaining Unit.

32.2 Supplemental Agreement
This Agreement may be amended by supplemental agreements at any time during the life of this Agreement. Should either party desire to negotiate a matter of this kind, it shall notify the other party in writing of its desire to and of the specific subjects it wishes to negotiate. Authorized State and Association representatives will sign supplemental agreements thus completed. Unless otherwise agreed to in writing by both parties, supplemental agreements shall remain in effect for the duration of the Agreement.

32.3 Conditions Not Specifically Covered
In the event of any enactment by the Legislature, which creates conditions not specifically covered by this Agreement, the parties agree to confer immediately for the purpose of arriving at a mutually satisfactory supplement covering such action. Such supplement shall become part of this Agreement.

ARTICLE 36 - AVAILABILITY OF PARTIES TO EACH OTHER
The parties agree that representatives of the Association and the State shall meet at reasonable times for discussions of this Agreement, its interpretations, continuation, or modification. Both parties agree that an obligation to meet expeditiously and in good faith exists.

This provision is established for the purpose of facilitating two-way communications.

IV. HISTORICAL BACKGROUND

For over thirty years Alaska's correctional institutions have operated under the same staffing plan. The overwhelming majority of Alaska's Correctional Officers are assigned to security shifts. The primary responsibility of every Officer on a security shift is the direct and indirect supervision of inmates and to ensure orderly security and control of the institution. As a result of Letters of Understanding in 1981, 1985 and 1986, the 1990-1993 ASEA Bargaining Agreement, and all subsequent Bargaining Agreements, Correctional Officers on security shifts have worked an eighty-four (84) hour week-on/week-off schedule consisting of seven (7) consecutive twelve (12) hour days on, followed by seven (7) consecutive days off.[4] Unrefuted testimony by multiple Correctional Officers and one retired Director demonstrated that no Correctional Officers

[4] Association Exhibit 1a – Article 13.2 and Exhibit 1b. c, d, e, g, h, and j in various locations

assigned to security shifts worked forty (40) hour, five (5) day a week schedules. The forty (40) hour schedule was only worked by a small number of Correctional Officers assigned to perform supporting functions of an administrative nature. As further articulated in the 1993 Legislative Audit, its mandated purpose was to "*review and report on the history of the week-on, week-off 12-hour work shift*" that was in place for "*most line Correctional Officers.*"[5] The 1993 Legislative Audit's review of the history of how twelve (12) hour shifts were adopted reflects the parties' intent that all Correctional Officers assigned to security posts would work the seven (7) day-on, seven (7) day-off twelve (12) hour shift schedule.

As reflected in then Commissioner Frank Prewitt's response to the 1993 Audit, issues relating to twelve (12) and eight (8) hour work schedules were subject to the collective bargaining process.[6] Until now, no one has questioned the requirement to bargain over the Correctional Officer work schedules. Sergeant Colang, retired Sergeant Rendon, and Business Agent Lecrone testified that they had been on every Association bargaining team since 2003. Mr. Lecrone also testified that he was employed as a Correctional Officer from 1987 to 2001. Sergeants McLellan and Crowley also testified to having been on one or more of the Association's bargaining teams. In unrefuted testimony, during each of these witnesses' time as Correctional Officers, the past practice had always been that security shifts were twelve (12) hour shifts. Additionally, each witness gave unrefuted testimony that during their time as members of the Association's bargaining teams there had never been any discussion about placing Officers on eight (8) hour security shifts and that eight (8) hour work schedules had only been for Officers performing supporting functions. Mr. Mike Addington, who had been Director of Institutions from 2002 to the end of 2006, also provided unrefuted testimony that, throughout his time as a Correctional Officer and tenure as the Director of Institutions, the schedule for Officers working on security shifts was always twelve (12) hour shifts and that the forty (40) hour schedule was only for those with non-security supporting and administrative duties.

[5] Association Exhibit 6b, Page 1, under "Objectives"
[6] Association Exhibit 6b, page 15, Commissioner Prewitt's response to the Legislative Audit

In 2012, the DOC decided to ignore more than thirty years of past practice and placed Correctional Officers, previously assigned to twelve (12) hour week on week off security shifts, on forty-two (42) hour five day a week security schedules in what was referred to as Phase I[7] of the Blended Staffing Plan.

Prior to the implementation of the Blended Staffing Plan, all Alaska Correctional Officers assigned to security posts[8] had been assigned to the eighty-four (84) hour week-on/week-off schedule consisting of seven (7) consecutive twelve (12) hour days followed by seven (7) consecutive days off.[9] Simultaneously, about five (5) percent of Alaska Correctional Officers have historically worked non-security or administrative positions within the facilities.[10] These administrative Officers work a forty (40) hour work schedule consisting of five (5) eight (8) hour workdays in a seven (7) day period, allowing for two (2) consecutive days off.[11] In 2006, the parties negotiated to change the forty (40) hour workweek to a forty-two (42) hour workweek consisting of four (4) eight and a half (8.5) hour work days followed by one eight (8) hour work day, followed by two consecutive days off for the small group preforming non-security or administrative jobs.[12]

Administrative support positions work a standard eight (8) hour a day, forty-two (42) hour workweek schedule. Some of these include property, time accounting, institutional and academy trainers, records, security sergeants, compliance, and other non-security supporting type positions not directly responsible for inmate supervision. In unrefuted testimony Sergeant Scott and others stated that those in administrative support positions would not respond to a fight. They did say that they would respond to a facility-wide issue, such as a fire or riot, but then it would be every hand on deck for a facility-wide emergency.

[7] Association Exhibit 21, Deputy Commissioner Edwards Memorandum to all Superintendents
[8] Association Exhibit 7a- 2005 Kay Walter Study Report, page 3, definition of "post" and throughout her study where she reports on each institution's "Officer Posts" and computes relief factors based on 12 hour posts
[9] Association Exhibit 1a – Article 13.2 and Exhibit 1b, c, d, e, g, h, and j in various locations
[10] Association Exhibit 7a - 2005 Kay Walter Study Report, page 3, definition of "position" and throughout study where she reports on each institution's non-shift Sergeants and non-shift Officers
[11] Association Exhibit 1a – Article 13.1 and Exhibit 1c, d, e, g, h, and j in various locations
[12] Association Exhibit 1b - Article 13.1

This is in contrast to the security shift Correctional Officers, whose sole purpose is to maintain security within the institutions. There has always been a clear distinction between these two groups of Officers. One of the many differences explained in testimony is that administrative support staff members -- forty-two (42) hour positions -- are not tied to a post. Furthermore, it is not required that these Officers be relieved for breaks or lunches. Conversely, twelve (12) hour security shift Officers are required to notify their supervisor and make arrangements to cover their posts while absent. In addition, security shift Officers count toward shift minimums and, by contrast, administrative Officers do not.

It has been more than three decades, dating back before the parties agreed in 1981 to eighty-one (81) hour shifts and, later, to eighty-four (84) hour shifts, since eight (8) hour security shifts were the practice for Officers who perform duties directly and primarily related to the security and control of inmates. The State did not offer any contradictory evidence and did not refute the Association's testimony on this issue.

Beginning in April and May of 2012, the DOC started to move a significant number of security shift Correctional Officers from the week-on/week-off twelve (12) hour schedule to the forty-two (42) hour security schedule. The stated intent was that, by the completion of Phase I of the Blended Staffing Plan, 25-30% of the Correctional Officers at seven of fourteen institutions would be working eight (8) hour shifts.[13] This was a significant change to Correctional Officer conditions of employment and violated the 2009-2012 Collective Bargaining Agreement (CBA), as established by past practice and language in previous Bargaining Agreements.

The Association's first indication that the DOC was considering making fundamental changes to security shift schedules came from Correctional Officers who started hearing rumors of the DOC's intentions in November of 2011. Because the Association was unable to confirm or discount these reports, it asked the State about DOC's rumored intentions when it met at the first bargaining session for a successor Agreement to the parties' 2009-2012 Agreement. In unrefuted testimony by Sergeant Crowley, Sergeant McLellan, and Business Agent Lecrone, during the first bargaining

[13] Association Exhibit 11h - e-mail conveying DOC response to Legislator on constituent question, page 2. Immediately above list of seven facilities

session on December 5 and 6, 2011, the Association's lead negotiator, Business Manager Brad Wilson, asked the State's lead Negotiator, Labor Relations Deputy Director Kate Sheehan, if the DOC intended to change security shifts from twelve (12) hour shifts to eight and one-half (8.5) hour work schedules. Her response was that she had heard nothing about this and promised to ask the DOC and to let the Association know at or before the next bargaining session. Also, Sergeant Crowley, Sergeant McLellan, and Mr. Lecrone testified that at the January 30, 2012 negotiating session, the Association asked to negotiate the shift schedule change and was told the State did not believe it had to negotiate the change to security shifts and had no intention of doing so. The State again offered no evidence to refute the Association's testimony by Sergeant Crowley and others.

On January 4, 2012, midway between the parties' first and second negotiating sessions mentioned above, Commissioner Joe Schmidt of the Alaska Department of Corrections sent an e-mail to all Correctional Officers that advised them that changes were going to be made to shift schedules and that Deputy Commissioner Sam Edwards would be providing the details within two weeks.[14] Correctional Officers forwarded a copy of this e-mail to the Association, as it was not included as an addressee by the DOC. In fact the Association was never officially notified that the State intended to change its past practice. In reaction to Commissioner Schmidt's e-mail on January 5, 2012, the Association sent a Demand to Negotiate[15] to the State, reminding it of the obligation to bargain in good faith before making unilateral changes to terms and conditions of employment[16] and reminding the State of the long-standing past practice that existed. The Association received the State's response on January 30, 2012.[17] In that response, the State claimed that, based on current contract language, it was not obligated to negotiate and had no intention of negotiating before implementing the change from twelve (12) hour security shifts to the new eight (8) hour security shifts. The State's response went on to say, "*while you acknowledge in your letter that you were not aware of all the details at the time you wrote to me, you have since been brought up to date of*

[14] Association Exhibit 19
[15] Association Exhibit 20
[16] Association Exhibit 16, State Website, Alaska Statute 23.40.250 (1) at: http://www.legis.state.ak.us/basis/folio.asp
[17] Association Exhibit 23 - the Commissioner of Administration's response to ACOA's bargaining demand

the proposed changes." (Id.) This statement was not accurate. The only information the Association received was the January 4th e-mail forwarded from Correctional Officers. There were no details in the January 4th e-mail and it only referred to future communications to Correctional Officers, not the Association.

Coincidentally, the parties' second two day negotiation session started on January 30, 2012, the same day that the Association received the State's response and rejection of its Demand to Bargain. In unrefuted testimony, throughout the January 30-31 bargaining session, the State's representatives steadfastly refused to bargain or even discuss the issue. They consistently held to this position throughout the bargaining process and continue to do so today.

In addition to the contract negotiations, Mr. Jim Lecrone and others testified to two other meetings where the state refused to bargain. One instance occurred on February 13, 2012, when Mr. Lecrone and five Correctional Officers met with Deputy Commissioner Sam Edwards, Director of Institutions Bryan Brandenburg, and Human Resources Manager Dana Phillips. Another occurred when Mr. Wilson and Mr. Lecrone met with Deputy Director Lee Sherman. The State officials at those two meetings not only refused to negotiate, but refused to even hold discussions on possible alternatives to the new eight (8) hour security shifts, stating they were only there to listen.

The Association took all possible actions against the State's refusal to bargain prior to the imposition of the new eight (8) hour security shifts on Correctional Officers. On January 11, 2012, the Association filed an Unfair Labor Practice (ULP) with the Alaska Labor Relations Agency (ALRA).[18] On January 18, 2012, ALRA acknowledged receipt of the Association's ULP and determined that the charge was sufficient for filing and it was accepted.[19] On February 9, 2012, concerned that the DOC would impose its shift changes prior to ALRA ruling on the Association's ULP, the Association requested that the ALRA seek injunctive relief[20] under the authority granted to them in Alaska Statute 23.40.150.[21] ALRA denied that request not because they found against the

[18] Association Exhibit 8a, ACOA's ULP filing
[19] Association Exhibit 8b, ALRA response to ACOA's ULP
[20] Association Exhibit 8c, ACOA Communication to ALRA
[21] Association Exhibit 17, Link to Legislative web page

Association's case, but because an "*order or decision*" had not been issued and because "*the Agency lacks resources to participate in that process.*"[22]

On March 6, 2012, prior to the DOC's implementation of the Blended Staffing Plan, the Association filed grievance 12-002[23] (State Case 12-C-305), which ultimately led to this arbitration.

On April 19, 2012, the Association sought assistance from the Governor's Office.[24] A response was not received until June 20, 2012.[25] The Governor's office suggested that the Association meet with DOC Commissioner Joe Schmidt. Unfortunately, Commissioner Schmidt has been unwilling to meet with the Association for several years.

On May 4, 2012, the Association filed a Complaint for Injunctive Relief in Superior Court (3AN-12-6968CI).[26] On January 8, 2013, the Court dismissed the Association's request for injunctive relief stating that "*[i]t is appropriate for this court to require ACOA to exhaust its remedies. Interpretation of the contract belongs in the arbitration scheduled for the end of this month. Parties bargained for the arbitration and there is no evidence of either party entering the arbitration in bad faith. Therefore, the parties must first arbitrate…Otherwise the Court would be inserting itself where it doesn't belong, destroying the parties' contract.*"[27]

Because of widespread concerns that the new eight (8) hour security shifts put Officers at risk, separates them from their families, and are a serious DOC Bargaining Agreement violation, the Association attempted to pursue every possible remedy to stop implementation. In response, the State stubbornly rejected the Association's offer to negotiate, even while in the midst of negotiations for the 2012-2015 Collective Bargaining Agreement. Adding injury to insult, the State did not hesitate to use the unilateral imposition of eight (8) hour security shifts as grounds to reduce Correctional Officers' annual leave. The State's refusal to negotiate this unilateral change to the terms

[22] Association Exhibit 8 d, February 22, 2012 ALRA response
[23] Association Exhibit 3 a-g, Association Grievance 12-002 – State Case 12-C-305
[24] Association Exhibit 13a, - ACOA's correspondence to Governor's office
[25] Association Exhibit 13b - Response letter from Governor's Office
[26] Association Exhibit 12a -Complaint for Injunctive Relief
[27] Alaska Superior Court Case 3AN-12-6968CI, bottom of page 7 and top of page 8 (Submitted with this brief)

and conditions of employment violates the contract and endangers Officers and the public.

V. ARGUMENTS

A. Violation of the Collective Bargaining Agreement

The DOC violated Articles 13, 18, 22, 30, 32 and 36 of the Agreement when it unilaterally changed Correction Officers' work schedules. A previous Alaska Arbitration ruling set out the applicable standard for contract interpretation:

> When a dispute arises over the meaning of a collective Bargaining Agreement, an arbitrator's first consideration must be whether an ambiguity exists. Collective Bargaining Agreements are a unique type of contract, but their interpretation is governed primarily by established principals of contract law adapted to the collective bargaining context. According to one of those principles, where contract language is clear and unambiguous, the evidence meaning must be given effect. *See, e.g.* Elkouri and Elkouri, How Arbitration Works, 358-360 (4th ed. 1985)(citing cases); 17 Am. Jur. 2d, Contracts §241.

Anchorage Police Department Employees Association v. Municipality of Anchorage, Grievance No. 94-4 (Gaunt, 1998).

B. Past Practice

The United States Supreme Court has recognized that not all contractual obligations are expressly set forth in a collective Bargaining Agreement. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 63 U.S. 574, 581-82 (1960). The court in *United Steelworkers* noted:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law -- the practices of the industry and the shop -- is equally a part of the collective Bargaining Agreement although not expressed in it.

Id. "It is thus now well-established that a clearly established 'past practice' can also become a binding part of the labor contract if certain criteria are satisfied. The practice must be consistent, longstanding, and mutually accepted by employer and union."

Anchorage Police Department Employees Association v. Municipality of Anchorage-EAP Visit Arbitration, (Gaunt, 2011), *citing Celanese Corp. of America,* 24 LA 168, 172 (Justin 1954); Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," 59 Mich. L. Rev. 1017, 1025 (1961).

Evidence that a past practice of a twelve (12) hour security shift for Corrections Officers has existed for over 30 years is well documented in the Legislative Staffing Audits and staffing studies conducted by Kay Walter for the Department of Corrections. It is a practice that both parties have been aware of and neither, until now, have contested. Although the State never challenged the Association's past practice claim during arbitration, the Association believes it is relevant to the analysis in this case.

As noted earlier, the twelve (12) hour, week-on/week-off security shift schedule came into existence in 1981 in a Letter of Understanding that was subsequently modified by renegotiated Letters of Understanding in 1985 and 1986[28] and was then formally recognized in Appendix B of the 1990-1993 ASEA Bargaining Agreement.[29] The twelve (12) hour security shift was specifically tailored for Officers assigned to security positions. The only reason eight (8) hour shifts remained in the 1990-1993 Agreement, and subsequent agreements, was for Officers performing support duties. What existed in Appendix B and elsewhere in the 1990-1993 ASEA agreement has, over the years, been moved to other parts of subsequent Agreements, such as Article 13, Article 18, Article 22, and elsewhere; however, the language supporting the Association's past practice claim still exists. This unbroken past practice related to these two types of shifts is well documented in the 1990-1993 ASEA Bargaining Agreement, 2005 Kay Walter Staffing Study[30], and in the 1993[31] and 2010[32] Legislative Audits.

1. **<u>1990-1993 ASEA Bargaining Agreement - Appendix B</u>**

Appendix B of the 1990-1993 ASEA Bargaining Agreement contained subparagraphs for both the forty (40) hour schedule and the eighty-four (84) hour schedule. The eighty-four (84) hour schedule is addressed in Appendix B, Section C of

[28] Association 6b -1993 Legislative Audit, page 6
[29] Association Exhibit 1j - 1990-1993 ASEA CBA
[30] Association Exhibit 7a, 2005 Kay Walter Staffing Report
[31] Association Exhibit 6b, 1993 Legislative Audit
[32] Association Exhibit 6d, 2010 Legislative Audit

the 1990-1993 ASEA Bargaining Agreement. Appendix B, Section C is almost exactly like Article 13.2 A in the parties' 2009-2012 agreement. Appendix B Section C states that:

> *"C. Eighty-four (84) Twelve [12] Hour Schedule.*
>
> *1. The workweek for employees on the twelve (12) hour schedule shall be a fourteen (14) day work period consisting of eighty-four (84) hours in pay status within a maximum of seven (7) working days and seven consecutive days off, and all employees shall be guaranteed a full workweek..."*[33]

Likewise, the forty (40) hour schedule is addressed in Appendix B, Section B.1 of the 1990-1993 ASEA Bargaining Agreement and, except for the parties having agreed to change the forty (40) hour workweek to a forty-two (42) hour workweek, is almost exactly the same as Article 13.1 A in the parties' 2009-2012 Agreement. Appendix B section B.1 states that:

> *"The workweek for employees assigned to a forty (40) hour schedule shall consist of forty (40) hours in pay status within a maximum of seven (7) days allowing for two (2) consecutive days off, and all such employees shall be guaranteed a full workweek."* [34]

A past practice exists as it pertains to the eighty-four (84) hour week-on/week-off schedule consisting of twelve (12) hour days followed by seven (7) consecutive days off and the forty-two (42) hour schedule consisting of four eight and one half (8.5) hour work days followed by one eight (8) hour work day. As evidenced above, the parties' have a long and well-documented past practice of having two twelve (12) hour security shifts which include a day shift and a night shift (Article 13.2), supplemented with a small number of Officers on forty (40) hour (recently changed to forty-two (42) hour) schedules, performing administrative functions (Article 13.1). Furthermore, at the

[33] Association Exhibit 1 j, 1990-1993 ASEA CBA, Appendix B, page 121
[34] Association Exhibit 1 j, 1990-1993 ASEA CBA, Appendix B, also on page 121

bargaining table Correctional Officers have been willing to negotiate away built in overtime in order to ensure that the twelve (12) hour security shift is retained.[35]

2. The 2005 Kay Walter Staffing Study

Kay Walter is an "expert" consultant hired by DOC in 2005 and 2008 to review staffing practices. Throughout Ms. Walter's 2005 report, she provides information to confirm the past practice as it relates to assigning Correctional Officers to eighty-four (84) hour shifts and forty (40) hour shifts. Her report confirms the Association's claim that all security posts were to be week-on/week-off twelve (12) hour positions and that only non-security positions were filled with Officers working forty (40) hour schedules. In Section One of her 2005 staffing study, Kay Walter defined "position" as *"a job that is intended to be a 37.5 or 40 hour a week job completed by a person with specific abilities for the position (e.g. a training sergeant is a position). When the staff member holding the position goes on vacation, the responsibilities of the job are deferred and/or delegated to another person,"*[36] confirming that as recently as 2005, the parties understood that forty (40) hour shifts for Officers on security posts were never negotiated nor intended for Correctional Officers assigned to security shifts.

It is noteworthy that, in the above quote, Kay Walter mentions thirty-seven and one-half (37.5) hour employees and forty (40) hour Correctional Officers; the 37.5 hour workweek was the workweek Correctional Officers worked prior to the 1981 Letter of Understanding and, even today, is the workweek for most administrative and clerical employees[37]. The only change relevant to the Association's past practice claim since ASEA's 1990–1993 Agreement was to change the forty (40) hour week to a forty-two (42) hour week. This was decided at the negotiating table between the two parties. This change was one of several made in ACOA's 2006-2009 Agreement to make the forty (40) hour schedule somewhat more acceptable to Correctional Officers forced to move from twelve (12) hour security shift positions to supporting duties of administrative nature, that Correctional Officers often consider to be desk jobs.

---

[35] Association Exhibit 6a, 1993 Legislative Audit, pages 5-8
[36] Association Exhibit 7a, page 3
[37] Association exhibit 16, State Website, for ASEA CBA, page 58 Article 22.01 (Workweek) at http://doa.alaska.gov/dop/fileadmin/LaborRelations/pdf/contracts/ASEA2010-2013Contract.pdf and ASEA Bargaining unit Profile at http://doa.alaska.gov/dop/fileadmin/LaborRelations/pdf/buprofiles/ASEA.pdf

In the section of Kay Walter's report called "Shift Patterns", she supports the language in the parties' contract as amplified by the past practice, for example the concept of eight (8) hour shifts being for Officers performing administrative-like duties:

> *"Each institution has some correctional staff that do not work 12 hour shifts. They are doing administrative functions to support the institution. Examples of these would be Training Sergeants, Property Officers, and Special Projects Officers. Some of these staff work 8 hour shifts and are not replaced when they are absent. Correctional staff have traditionally been used for these as the functions may require prisoner contact and/or using correctional staff provides flexibility so these staff can assist the shift. This appears to be a sound practice."*[38]

Here and elsewhere, the DOC's own consultant confirms that Correctional Officers assigned to security shifts were assigned to twelve (12) hour shifts and that most Officers assigned to perform administrative and support functions were assigned to the eight (8) hour work schedule. The Association says "most" only because, on some occasions, DOC has assigned some Officers who perform administrative supporting duties to twelve (12) hour schedules. It did so when it met their own needs and the Association never objected because most Officers simply do not like the administrative eight (8) hour shifts. However, the reverse was never true. Until now all security shift Correctional Officers have been assigned to twelve (12) hour, week-on/week-off schedules prior to the current Arbitration. As testified to during the Arbitration, the Association attempted to bargain for all Correctional Officers, including forty-two (42) hour administrative staff, to work twelve (12) hour shifts. All attempts to negotiate, to come to an agreement, for these forty-two (42) hour administrative Officers were rejected by the State because institutional Managers wanted those Officers who are responsible for administrative duties working at the same time as they did.

Still another quote from Kay Walter's report on the nature of the duties of "non-shift sergeants assigned to forty (40) hour shifts at the time she did her study is found under the heading of "Non Shift Sergeants", in which she states that:

[38] Association Exhibit 7a, page 5

> "*Historically in DOC there are five major functions sergeants have performed: Discipline hearings, Standards-grievance and old Cleary compliance issues, Security-telephone monitoring, key control, UA program, etc., Training, Records."* [39]

Kay Walter's study also contains detailed breakdowns of each Alaska Correctional Institution's "Posts", and shows them as security posts entirely filled by Correctional Officers assigned to eighty-four (84) hour schedules. Additionally, it shows non-shift Officers and Sergeants assigned to forty (40) hour schedules. For example, when looking at the Anchorage Correctional Complex, the report gives a detailed list identifying each specific post, identifying specific non-shift Officers, and identifying specific shift and non-shift Sergeants. [40] Wherever the report lists non-shift Officer or non-shift Sergeant positions, it also shows the hours they work. Since this study was done prior to the parties' Agreement to change the forty (40) hour work schedule to forty-two (42) hours, almost all non-shift positions reflect forty (40) hour work schedules. It should be noted that in the listing of the Anchorage Complex's Posts, every Officer and sergeant post except for two that have the notation "*not currently staffed*" has an asterisk denoting that it is a minimum staffing position whereas none of the non-shift Officer and non-shift Sergeant positions are asterisked to identify them as minimum staffing positions. Also, all of the non-shift posts except the one twelve (12) hour Prisoner Transport Officer (PTO) are followed by the comment "*no relief required.*" That all Post Officers were assigned to twelve (12) hour schedules can also be seen in Kay Walter's Report by looking at her calculation of relief factors[41] used to determine her recommendation for the number of Officer Position Control Numbers (PCN)s (each PCN represents a funded position) that she felt were needed to staff each post. This can be found in the report's "Staffing Recommendations"[42] section.

In calculating the relief factor, Kay Walter used the twelve (12) hour shift model and noted that, "*using the 12 hour shift model, each employee works 7 days a week, every other week for a total of 182.5 days per year.*" The bottom line of her calculations was that the number of Officers needed to fill one seven (7) day a week twelve (12) hour post

[39] Association Exhibit 7a, page 12
[40] Association Exhibit 7a, pages 22 and 23
[41] Association Exhibit 7a, pages 5 - 10
[42] Association Exhibit 7a, page 24

was 2.4 and that the number of Officers needed to fill one seven (7) day a week twenty-four (24) hour post was 4.8.[43] Kay Walter's "Staffing Recommendations" shows twelve (12) hour Officers being assigned to every post that is asterisked, indicating that it is a minimum staffing requirement, but shows all but one of the eight non-shift positions as eight (8) hour positions. That one is the one twelve (12) hour PTO, a security position with duties inside and outside of the institution. Although the above focuses on the Anchorage Complex, it is worth noting that Kay Walter's Report gives a similar breakdown for all Alaska institutions and what is discussed about the Anchorage Complex is consistent with all other institutions.

3. The 1993 & 2010 Legislative Audits

The 1993 Legislative Audit[44] and the 2010 Legislative Audit[45] of the Department of Corrections highlight the past practice as it existed prior to and after Kay Walter's 2005 staffing study. The 1993 Audit recounts how twelve (12) hour shifts came into existence and the beginning of the past practice relating to the twelve (12) hour and forty (40) hour work schedules that were ultimately recognized in the 1990-1993 ASEA Agreement. The 2010 Legislative Audit documents the continuation of the past practice that was documented in the 1993 Audit and the 2005 Walter staffing study. For example, the 2010 Legislative Audit recognized that the nature of the eighty-four (84) hour, twelve (12) hour per day, week-on/week-off shift schedule in the 2009-2012 CBA was considerably different from that of the forty-two (42) hour, five (5) day a week, eight and a half (8.5) hour schedule, wherein it noted that, "*Generally, COs work 12-hour shifts every day of the week with one week on and one week off. COs assigned to duties that are administrative in nature (such as records, compliance, training, security oversight, and inmate discipline) typically work an 8-hour/5 day shift."* [46] This statement is footnoted as follows in recognition of the change from the forty (40) hour shift to the forty-two (42) hour shift: *"Officers work 8.5 hours for four days and 8 hours on the fifth*

[43] Association Exhibit 7a, page 7
[44] Association Exhibit 6b - 1993 Legislative Audit
[45] Association Exhibit 6d - 2010 Legislative Audit
[46] Association Exhibit 6d, page 14, next to last paragraph

day for a total of 42 hours for the week."[47] This documents that the past practice that began in 1981 was still the practice when the 2010 Audit of Alaska's correctional facilities was completed.

The 1993 Legislative Audit recognized that Alaska's Correctional Facilities "*...typically have what are designated as 'posts.' Each security post is a station which requires a correctional Officer's presence to effectively oversee the daily activities of the facility's inmates. Typically these security stations are designated as either 24-hour or 12-hour posts.*"[48] Prior to 1981, all Alaska Correctional Officers were assigned to eight (8) hour shifts. The culmination of the negotiations that began with 1981 Letter of Understanding and resulted in Appendix B of the 1990-1993 Bargaining Agreement was that the 3 eight (8) hour security shifts that had previously existed were replaced with 4 twelve (12) hour security shifts, and that only those positions with duties that were supportive and administrative remained on the eight (8) hour schedule. It is in this context that the opening paragraph of the 1993 Audit states, "*Currently, most DOC line correctional Officers work 12-hour shifts for seven consecutive days and then are off duty for seven days*."[49] Mr. Lecrone's testimony provided a firsthand report of what the staffing was at the Sixth Avenue Correctional Center (SACC) in 1987 and further substantiates the Association's past practice assertion. During his employment as a Correctional Officer during the transition period between the 1986 Letter of Understanding and the 1990-1993 ASEA Bargaining Agreement, when he was hired as a Correctional Officer in 1987, he said that there were 4 security shifts and all assigned to them worked the twelve (12) hour, week-on/week-off schedule. The only Officers working eight (8) hour schedules had duties that were not directly related to providing hands-on security and control.

The 1993 Audit documents that from 1981 to 1990, when twelve (12) hour shifts were first incorporated into the Correctional Officers' Bargaining Agreement, *"The week-on, week-off, 12 hour work shift (designated as 7/12 in the rest of this report) for correctional Officers (COs) has been gradually put in place within the Department of Corrections (DOC). The impetus for adopting the 7/12 work shift schedule came from*

[47] Association Exhibit 6d, 2010 Legislative Audit, page 14, footnote # 30
[48] Association Exhibit 6b, 1993 Legislative Audit, page 10, second paragraph
[49] Association Exhibit 6 b, 1993 Legislative Audit, un-numbered cover letter, first paragraph

line correctional Officers and was put in place at the request of facility superintendents on a facility-by-facility basis."[50] The history described by the 1993 Audit is one of Correctional Officers bargaining in regard to the twelve (12) hour security shifts.

Twelve (12) hour security shifts have always been such a priority for Correctional Officers that they have repeatedly shown a willingness to make concessions in order to make the shift structure more fiscally attractive.[51] The 1981 Letter of Understanding, which was the first to formally recognize the seven (7) day, twelve (12) hour security shift schedule for Correctional Officers, had four and one-half (4.5) hours of built in overtime that the parties had not anticipated. The DOC thought this too expensive and, following discussions in 1985, a new Letter of Understanding was signed wherein Correctional Officers agreed to give up all but two (2) hours of the built in overtime to keep the seven (7) day, twelve (12) hour shifts. The 1985 Letter of Understanding was replaced by a re-negotiated 1986 Letter of Understanding in which the State agreed to keep the twelve (12) hour shifts in return for Correctional Officers agreeing that no overtime would be paid until more than eighty-four (84) hours were worked in a two week period. This Agreement was carried forward into the 1990-1993 Alaska State Employees Association (ASEA) CBA[52], the first Bargaining Agreement to formally recognize the seven (7) day twelve (12) hour shift schedule.

The Letters of Understanding that preceded the 1990-1993 ASEA Agreement, and all Correctional Officer Agreements since then, contain language describing both the eighty-four (84) hour, seven (7) days-on/seven (7) days-off, twelve (12) hour shift schedule and the forty (40) hour (Now 42 hour), five (5) days on, two (2) days off, eight (8) hour (now 8.5-hour) work schedule. None of the Agreements since 1981 specifically stated which Officer positions fell under which schedule; the evidence of the past practice supports and strengthens contract language that is clear and unambiguous; that is that twelve (12) hour shifts are for Officers on security shifts and that the five (5) days on,

[50] Association Exhibit 6b - 1993 Legislative Audit, page 5, first paragraph
[51] Association Exhibit 6b - 1993 Legislative Audit, page 6, first paragraph
[52] Association Exhibit 1j

two (2) days off, eight (8) or eight and one-half (8.5) hour schedule is for Officers performing administrative support duties.[53]

Even if this was not the intent of the State, the past practice has created a new binding agreement that dictates that any change must be negotiated. Legal precedent exists that past practice can create binding contract language, even if it is not written down in the contract itself. [54]The existence of this past practice is closely related to the subject of mandatory subjects of bargaining in the discussion that follows. The National Labor Relations Board decision in A.T. Klemens & Sons and Local 122...(1992 WL 1465793.) stated that:

> "*...when it was found that an employer has created a term and condition of employment for its employees, by virtue of a past practice, established by a showing of a consistent or long-standing pattern relating to a particular situation affecting wages, hours or working conditions of its employees, the practice becomes a mandatory subject of bargaining, and the employer must notify the union of its intent to change the past practice and bargain in good faith to the point of impasse before changing it. A unilateral change violates Section 8(a)(5)(1) of the Act. Robbins Door & Sash CO., 260 NLRB 659 (1982).*"
>
> *"Respondent's claim that the collective Bargaining Agreement's provision for management rights privileged its actions is rejected by me, as simply not consistent with the law. Such a claim depends, at bottom, upon a claim that the union waived its rights on this subject, an argument that requires clear and unmistakable evidence in support.* Robbins Door & Sash Co., *ibid.;* Rose Arbor Manor, *242 NLRB 795 (1979)*"

C. Mandatory Subject of Bargaining

Director Brandenburg testified that he believes that the DOC has the authority to unilaterally make any changes it wishes to Correctional Officers' work schedules. The DOC fails to recognize its duty to bargain with the Association in this matter. "The duty to bargain over what are often called 'mandatory' subjects of bargaining arises from the requirement that the State and the Association negotiate collectively over 'wages, hours, and other terms and conditions of employment'". *State v. Public Safety Employees Association*, 93 P.3d 409, 411-12 (Alaska 2004). Unilateral changes made by an

[53] Elkouri & Elkouri, "How Arbitration Works", Sixth Addition, page 630, "Past-Practice as a "Gap-Filling" Remedy"
[54] Elkouri & Elkouri, "How Arbitration Works", Sixth Addition, page 630, "Past-Practice as a "Gap-Filling" Remedy"

employer are considered violations of its duty to bargain, just like a refusal to bargain. See, e.g., *NLRB v. Katz,* 369 U.S. 736, 742-743 (1962); *McClatchy Newspapers, Inc*., 339 NLRB 1214 (2003)(finding employer's unilateral change in shift schedules violated its duty to bargain).

ALRA is the agency that administers the Public Employment Relations Act as it pertains to collective bargaining for the State's public employees. It is also the agency that hears and issues decisions on unfair labor practices brought by employers, unions, or individuals. Since ALRA's inception, it has issued hundreds of "Decisions and Orders,"[55] several of which deal with the duty to bargain in good faith and discuss mandatory subjects of bargaining, permissive subjects of bargaining, and prohibited subjects of bargaining. Herein the Association will discuss two such decisions. Copies of these decisions are submitted with this brief.

In the "Analysis" section of Decision and Order 271,[56] the ALRA states that:

> *"Wages, hours, and terms and conditions of employment are a mandatory subject of bargaining. Alaska State Employees Ass'n/AFSCME Local 52, AFL/CIO v. State of Alaska, Decision and Order No. 158 at 15 (May 14, 1993), aff'd. Alaska State Employees Ass'n v. State of Alaska,* 3 AN-93-05800 CI. AS 23.40.070(2) and AS 23.40.110(a)(5) *obligate the State to bargain collectively in good faith with MM&P over these mandatory subjects of bargaining."*
>
> *"We found that the parties' collective Bargaining Agreement had expired. However, the employer is prohibited from making unilateral changes to mandatory subjects of bargaining until the parties either reach a new agreement or reach impasse. The parties must continue to bargain in good faith if they have not reached agreement on a new contract. The duty to bargain in good faith requires the parties to maintain the status quo until they negotiate to impasse. Intermountain Rural Electric v. NLRB, 984 F.2d 1562, 1566, 142L.R.R.M. (BNA) 2448, 2452 (10th Cir. 1993)."*
>
> *"A unilateral change to a mandatory subject of bargaining alters the status quo. Unilateral changes by an employer during the course of a collective bargaining relationship concerning matters that are mandatory subjects of bargaining are normally regarded as per se refusals to*

[55] ACOA Exhibit 16 - State of Alaska Website - All ALRA Decisions and Orders are available on the State's web page at http://labor.state.ak.us/laborr/dosearch.htm
[56] ACOA Exhibit 16, State Webpage under 2004 decisions at http://www.labor.state.ak.us/laborr/dosearch.htm

bargain." 1 Patrick Hardin and John Higgins, Jr., The Developing Labor Law, at 773, (4th ed. 2001).

Decision and Order 208[57] is even more similar to the issue brought before you by the Association's and the Department of Corrections' current issue than Decision and Order 271. The Association emphasizes this decision because one of the issues in Decision and Order 208 was whether or not the Alaskan city of Seldovia should have bargained before changing the work schedule for Police Officers on the Seldovia Police force. Another issue was whether changing the Police Officers' schedules was a mandatory subject of bargaining. Decision and Order 208, at item number 5 of the "Discussion" section, states:

> *An employer's unilateral changes to terms of employment that are mandatory subjects of bargaining during the course of negotiations is a per se violation of the duty to bargain in good faith. University of Alaska Classified Employees Ass'n, APEA/AFT, AFT-CIO v. University of Alaska, Decision & Order No. 185, at 8 (April 13, 1995), reversed on other grounds, no. 3AN-95-3909CI (super. ct., July 19, 1996); see generally 1 Patrick Hardin, The Developing Labor Law 596 (3d ed. 1992).*
>
> *Work schedules and eligibility for overtime are mandatory subjects of bargaining. AS 23.40.070(2) requires negotiations "on matters of wages, hours, and other terms and conditions of employment." The phrase "terms and conditions of employment" is defined to mean "the hours of employment, the compensation and fringe benefits" among other things. AS 23.40.250(a). Thus, the City's unilateral change of the police department work schedule was a unilateral change of a mandatory subject of bargaining and a violation of the duty to bargain in good faith under AS 23.40.110(a)(5).*

1. **The State has Recognized the Need to Negotiate Shift Changes and Hours in the Past**

There is a well-documented past practice of the State negotiating changes in working conditions with the Association, as well as previous acknowledgements by the State that it knew the issue before you to be a mandatory subject of bargaining. In his response to the 1993 Legislative Audit 20-4441-93, Commissioner of the Department of

[57] Association Exhibit 16, State Webpage, under 1996 at http://www.labor.state.ak.us/laborr/dosearch.htm

Corrections, Frank Pruitt, stated that he was unable to comment on the Audit's findings because: *"Correctional Officer work schedules are subject to the collective bargaining process which is underway at this time."* [58] Mr. Mike Addington, who was Director of Institutions during Governor Murkowski's administration, testified that, during his tenure, there were lengthy Article 22 discussions on issues such as seniority and qualifications[59] and that there was never any discussion on placing eight hour Officers on security posts. Additionally, he testified that the Department, during his tenure would not have made such a change, but had they considered it they would have considered it a mandatory subject of bargaining and would not have imposed changes without bargaining. Mr. Addington's testimony about the contract negotiations that he was involved in corroborates similar testimony by Sergeant Colang and Mr. Lecrone, that considerable discussion took place on Article 22, but that none dealt with changing the past practice of security shifts. In this case, even changes in rules for assigning of Officers to already existing shifts were considered something that had to be bargained.

The 1993 Legislative Audit clearly shows that changes to the twelve (12) hour and forty (40) hour schedules were issues that the parties at the time felt needed to be bargained, as seen in several places in the Audit Report, and reflected in the following quotes:

> *"As in 1985, the threat of suspending the LOU generated an outpouring of protest on the part of CO`s. In response to the many protesting COs it appeared that the Legislature inserted intent in the FY 87 budget act (passed in the spring of 1986) stating that before the department makes any changes in the shift hours of its correctional Officers, it shall meet with representatives of the correctional Officers to discuss and analyze the impact of any shift changes."* [60] *(Underline added for emphasis)*

Despite the history of bargaining that preceded the adoption of Correctional Officer twelve (12) hour shifts, the DOC refused to negotiate with the Association before unilaterally placing Officers on the new eight (8) hour security shift schedules.

[58] Association Exhibit 6b, page 15
[59] Mr. Addington was referring to discussions on Article 22.2 D and 22.6, which deals with assignment changes from one duty shift to another or between the 84 hour and 42 hour schedules
[60] Association Exhibit 6b - 1993 Legislative Audit, pages 7 and 8.

D. The Association Never Waived the Right to Bargain over Changes in the Work Schedule of Correctional Officers

It cannot be said that the Association either deliberately or inadvertently waived its right to bargain on the State's changes in Correctional Officer shift schedules. The Association sent a timely demand to bargain to the Commissioner of Administration, filed an Unfair Labor Practice, filed a grievance, communicated with the Governor's office, and filed a Complaint for Injunctive Relief. The Association did all it could do to maintain the twelve (12) hour schedule for all Correctional Officers assigned to security shift positions. It did everything possible to preserve its right to bargain over any of the changes the Department intended to unilaterally impose. Still the State has refused to accept the Association's good faith offer to negotiate Correctional Officers' working conditions.

The burden of proving waiver is on the State. In analyzing a waiver in a Collective Bargaining Agreement, Alaska follows NLRB precedent. *See University of Alaska v. University of Alaska Classified Employees' Ass'n,* 952 P.2d 1182, 1186 (Alaska 1998). The test for whether a party has contractually waived its right to bargain about a particular mandatory subject is whether the waiver is in "clear and unmistakable" language. *Id*. at 1185. The NLRB has held that "we will ordinarily not infer a waiver of the right to bargain over a particular mandatory subject of bargaining from a contract clause couched in general terms." *Guard Publishing Company*, 136 LRRM 1260, 1261 (NLRB 1991). The NLRB analyzes waivers by examining "all surrounding circumstances including but not limited to bargaining history, the actual contract language, and the completeness of the collective-Bargaining Agreement." (citations omitted) *University of Alaska*, 952 P.2d at 1185.

The State did not introduce any evidence to show that such a waiver existed and did not refute either Association Business Agent Jim Lecrone's testimony or the evidence that supported that testimony that the Association immediately and persistently demanded to bargain over the changes to work schedules. The intent of the parties in drafting the language and the extensive bargaining history regarding working conditions, including

work schedule and other language in the contract, makes it clear that the Association has never waived its right to bargain over this issue, nor did the State dispute this fact.

The parties' Management Rights Clause, Article 4 and Article 30 are broad and non-specific and do not provide support for a waiver argument. Moreover, the parties' bargaining history and contract language give no indication that the Association intended to relinquish its right to bargain over the subject of the shifts applicable to Correctional Officers but indeed, that history speaks loudly to the contrary. The parties' Management Rights and Article 30 are as follows:

> Article 4 (Management Rights): *"Except – and only to the extent – that specific provisions of this Agreement expressly provide otherwise, it is hereby mutually agreed that the Employer has, and will continue to retain, regardless of the frequency of exercise, rights to operate and manage its affairs in each and every respect. Nothing in this Article shall be considered as superseding those rights granted to the Association in the Articles and/or Amendments of this Agreement."*[61]
>
> Article 30 (Conclusion of Collective Bargaining): *The Agreement expressed herein in writing constitutes the entire agreement between the parties and no oral statement shall add to or supersede any of its provisions.*
>
> *The parties acknowledge that during the negotiations which preceded this Agreement, each had the unlimited right and opportunity to make proposals with respect to any subject or matter not removed by law from the area of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been with the knowledge or contemplation of either or both the parties at the time they negotiated and signed this Agreement.*
>
> *The parties further agree that, notwithstanding the above Section, maintenance of contract matters, should they develop, may be negotiated under the supplemental agreement provision.*

The language in the Agreement's Management Rights provision is broad and does not constitute a waiver. National Labor Relations Board (NLRB) precedent rejects such

[61] Association Exhibit 1a - Article 4

broad language as insufficient to constitute a waiver of the right to bargain over terms of employment:

> *"Normally, a mere catchall phrase in a management-rights clause to the effect that the "Company retains the responsibility and authority of managing the Company's business," or that "all management rights not given up in the contract are expressly reserved to it," or that "the exclusive functions and rights or management include, but are not restricted to the right… to establish or continue policies, practices or procedures," falls short of bring a "clear and unmistakable" relinquishment.*

Charles J. Morris, ed., The Developing Labor Law, 643-644 (2nd ed.) (citation omitted). Unless the management-rights clause is couched in specific terms or makes reference to other Article of this Agreement."); Kiro Inc. and Television and Radio Artists, Seattle Local, 151 LRRM 1268 (NLRB 1995) (affiliate of national television network found to have violated the Labor Management Relations Act by failing to bargain about effects on employees of decision to produce a new half-hour news program for broadcast on the channel of an independent television station; no waiver despite management-rights clause which reserved to the employer the right to "schedule," "assign work," and establish "production standards"); Johnson-Bateman Company, 295 NLRB 26 (1989) (employer's unilateral implementation of a drug/alcohol testing requirement found to be a violation where management rights clause permitted the employer to unilaterally "issue, enforce, and change Company rules" in general terms, without making reference to any particular subject areas); Indiana Borough, 28 PPER (LRP) P28, 187, 1997 PPER (LRP) LEXIS 126, *5-6 (1996) (Borough did not have the right to unilaterally change to a system of rotating police shifts from steady shifts where management rights and zipper clauses broadly worded and did not specifically address shift changes, and the agreement contained an additional clause entitled "Past Practices," which stated that "all existing benefits not modified by this Award shall remain as is."); White Rose Lodge #15 Fraternal Order of Police v. City of York, 26 PPER (LRP) P26,171, 1995 PPER (LRP) LEXIS 67 (1995) (Borough did not have right to unilaterally change to a system of rotating police shifts from steady shifts where boilerplate management rights clause not specific enough to constitute an unmistakable waiver by

the union of its right to change from the four shifts to three shifts schedule); Township of Upper Saucon, 2 PPER (LRP) P24,025; 1993 PPER (LRP) LEXIS 4 (1993) (township violated bargaining obligation by unilaterally changing police Officers' rotating shift schedule to a fixed shift schedule; broadly worded management rights clause, which reserved the township's right "to schedule hours," did not constitute a clear and unmistakable waiver of the union's right to bargain over the disputed change); California Department of Developmental Services, 15 PERC (LRP) P22,167; 1991 PERC (LRP) LEXIS 392 (1991) (state violated bargaining obligation by unilaterally changing employee's workweek from five eight-hour days to four ten-hour days; arbitrator found that the parties did not incorporate a provision which would have given management the specific right to unilaterally implement a 4-10s workweek, and that neither the management rights clause nor the zipper clause contained language specific enough to constitute a waiver); City of Lakewood, 1990 OPER (LRP) LEXIS 3949, *10 (Ohio App. 1990) (city violated its Bargaining Agreement by unilaterally changing firefighters' work schedule from a two-platoon system to a three-platoon system where the change altered the on-duty and off-duty hours of the firefighters; arbitrator rejected argument that management rights clause constituted a waiver because "[n]o language in the management rights clause clearly gives the city the unilateral right to change the scheduling system.").[62]

Because Alaska law follows NLRB precedent and the Association's Bargaining Agreement with the State does not contain a zipper clause, a specific management rights clause, or any other provision expressly relinquishing its right to bargain about the subject of the shifts of Correctional Officers, the Association has not "clearly and unmistakably" waived its right to bargain about the shifts of Correctional Officers by express agreement. The particular subject area for which the employer wishes to make a unilateral change, it will generally not be found to constitute a waiver of a mandatory subject of bargaining. Id.

[62] For an example of a management rights clause that was found to be sufficiently specific enough to constitute a waiver of the union's right to bargain over changes in the police workweek from 4-10s to 5-8s, see, e.q., City of Romulus, 1 MPER (LRP) P 19, 102, 1998 MPER (LRP) LEXIS 68.

E. Moving Correctional Officers from 12 Hour Security Shifts to the New 8 Hour Security Shifts Adversely Impacts Correctional Officers.

The new eight (8) hour security shifts that the DOC unilaterally imposed have had an adverse impact on Alaska Correctional Officers. As testimony from the arbitration revealed, this change opines to significantly affect the safety risks for Officers, inmates and the public. In addition, also shown, some Officers are suffering severe financial hardships and there has been a dramatic and negative affect on the hiring and retention of Officers. The DOC had other options open to them that would accomplish their goals without changing Correctional Officers' week-on/week-off schedule. Against the Legislatures explicit instructions, the DOC refused to explore any other options, to the detriment of Correctional Officers.

Prior to the change being made, Officers and the Association stated that if the new eight (8) hour shift schedule was adopted it would bring hardship on Correctional Officers and be problematic for the mission of the DOC. Based on the existing shifts and a 30 year past practice, Correctional Officers have made important decisions as to the location of their housing, child care, and transportation. The DOC has itself, recently, and in the past, used the week-on/week-off schedule as a hiring tool for recruitment. The DOC even created business cards that showed Correctional Officers fishing on their week off as a testament to the benefit of the week-on/week-off schedule and as an inducement to consider a career in Corrections.[63]

Based on these ads and commitments, many Correctional Officers selected a Corrections career just for the week-on/week-off schedule. Some chose this career because they love Alaska and wanted to spend time hunting and fishing but others made the choice because of family issues.[64] Many Correctional Officers have special needs children, including two Board members, and the week-on/week-off gave them the opportunity to keep their children at home with them.

Prior to the implementation of the new shift schedules, Management was aware of the disruption in the lives of Correctional Officers caused by the eight (8) hour shifts. On January 30, 2009, Director Sam Edwards spoke to the House Judiciary Standing

[63] Association Exhibit 27a – Seward Card
[64] Association Exhibit 11i – Legislative Letters from Officers Opposing the Blended Staffing Plan

Committee on the subject of the twelve (12) hour security shifts. Director Edwards made two very important points: (1) Correctional Officers plan their lives around the week-on/week-off shifts and (2) the week off is needed to recover. In response to a question by Representative Coghill Mr. Edwards stated:

> *"Through the chair, Representative Coghill, that's probably the very last thing that our Correctional staff would ever give up before they left the career is that 12 hour shift. Since it came on in the early 80s, I worked it very briefly, they have a week off, every other week; they have a week off. People really plan their lives around that. It allows them to do more things and, you know, you hear most people say when we were working 5 – 8 hour days, it was high paced or stressful or you know whatever the issue was or whatever the adjective it was two days were not enough to prepare yourself to come back to work and the week off is. Any informal, you know, pole or study that we have ever done with the staff, there is probably nothing worse that you could do to them then suggest that the 12 hour shift is going to go away."*[65]

Prior to the implementation of the new shifts, DOC Officials, including Deputy Director Edwards and Director Brandenburg, traveled to all the institutions involved in Phase 1 of the new eight (8) hour security schedule. Large crowds of Correctional Officers attended and were very forthcoming with the concerns they had about safety, the running of the institutions, along with how the change would disrupt their lives.

1. Safety & Officer Training

With the new plan, Officers will be placed at unacceptable levels of risk. One reason that is so, was explained by Sergeant John Scott, the top training Officer at the Anchorage Correctional Complex. In unrefuted testimony, Sergeant Scott testified that previously, training of new Officers was the responsibility of a single Field Training

[65] Association Exhibit 11g- Recording and transcript of Deputy Commissioner Edwards testimony before the House Judiciary Committee

Officer (FTO), over a three-week work period on a single shift. During that period, trainees followed and learned from that experienced FTO.

For thirty years there were four shifts and two rotations, for seven days the day shift started at 6 am and is relieved at 6 pm. At 6 pm the night shift came in and worked till 6 am when the day shift returned. Then after 7 days, the next rotation would start and repeat with a new set of Officers. Now, however, new Correctional Officers, working in eight (8) hour security shifts, move through all four shifts and cannot stay within a single shift. Because of that, and because many institutions and many shifts do not even have FTOs, a new recruit may be trained by any Officer who happens to be on the post to which the recruit is assigned that day for duty. However, the Officer on the post does not know what other Officers have already told the new recruit, eliminating consistency in the recruit's training.

Sergeant Scott, Sergeant Colang, and other witnesses, testified to the lack of consistency in the training of the new eight (8) hour shift security recruits. This lack of consistency undermines effective teamwork and coordination of work during emergencies. The reduced teamwork and coordination also can be exploited by inmates, or confuse them, since inmates no longer have consistently available personnel with whom they deal with during any given week. These issues affecting consistency and training put not only new recruits, but all Correctional Officers, potentially in harm's way.

Sergeant John Scott's testimony about Officer Sean Winslow is illustrative. According to Sergeant Scott, at a time when Officer Winslow had only worked approximately 90 days, he was filling out his log book at a desk in a Module one night when he was "sucker punched" by an inmate and fell to the floor unconscious with a broken jaw. Fortunately, the inmate halted his attack and in time Officer Winslow was able to regain consciousness and make a radio call for assistance. He did however spend the next several months off work with his jaw wired shut. Unlike those who had been on twelve (12) hour shifts before him, and who had consistency in their training and evaluations, Officer Winslow had nine different Officers training him and received no weekly FTO evaluations and only one daily evaluation concerning him had ever been completed. Officer Winslow was lucky to have survived this attack.

F. Placing Security Shift Correctional Officers on Anything Other than Week-on/Week-off Twelve (12) Hour Shifts Causes Contract Inconsistencies

Mr. Lecrone testified that the State's implementation of eight (8) hour security shifts required it to ignore and/or violate many parts of the 2009-2012 Bargaining Agreement that flow from the original 1990-1993 ASEA Bargaining Agreement which was never designed to function with the concept of eight and one-half (8.5) hour security shifts. None of the conflicts identified below existed prior to the State's imposition of eight (8) hour security shifts.

1. Meal Breaks (Article 18)

Article 18 (Meal breaks) is one example of this conflict.[66] The Bargaining Agreement dictates that Officers on twelve (12) hour security shifts get paid for duty free thirty-minute meal breaks, while Officers working the eight and one-half (8.5) hour schedule do not receive paid meal breaks. Officers on the twelve (12) hour security schedule are limited to thirty minute meal breaks. However, Officers assigned to the forty-two (42) hour administrative schedule are allowed duty free meal breaks of not less than thirty minutes nor more than one hour.[67] In practice, since the imposition of the Blended Staffing Plan, eight and one-half (8.5) hour Officers on security shifts are no longer allowed to take breaks of over thirty (30) minutes in duration.[68] Meshing the contractual requirements for meal breaks into the Department's action of placing security shift Officers on eight (8) hour shifts has caused confusion, and is a violation of the Bargaining Agreement.

For example, at the Palmer Correctional Center, the Superintendent initially published a memo stating that forty-two (42) hour Officers could "*... leave the prison grounds for their meal breaks...*"[69] and then, later, she amended that memo to state that "*Eighty-four and Forty-two (42) hour shift Officers are not allowed to leave the facility*

[66] 1990-1993 12-hour Officer Meal breaks are addressed in Appendix B, C 1 of Association Exhibit 1j and 2009-2012 12-hour Officer meal breaks are addressed in Article 18.1 B.1 of Association Exhibit 1a
[67] 1990-1993 8-hour Officer meal breaks are addressed in ASEA Article 23, Section 1 of Association Exhibit 1J AND 2009-2012 8.5 hour Officer meal breaks
[68] Association Exhibit 4 f - Grievance on Meal Breaks
[69] Association Exhibit 9i

grounds."[70] The reason for that confusion is the new eight (8) hour security shift does not conform to any of the agreements, from the 1990-1993 ASEA Agreement to the 2009-2012 ACOA Agreement. For thirty years eight and one half hour (8.5) Officers took meal breaks of up to one hour in duration because they were not required to be available for security issues. Due to the nature of their administrative duties and because they were not counted against minimum staffing requirements, they could leave the institution. Officers on eight (8) hour schedules were also not required to leave their radios on and were not expected to respond to emergencies while on break. Now, those assigned to the newly created eight (8) hour security shifts are counted towards minimums, are not allowed to take meal breaks of more than 30 minutes, are no longer allowed to leave the institution on their meal breaks, and there are varied opinions on whether or not they are required to leave their radios on and to respond to emergencies while on break.

2. <u>Holidays (Article 19)</u>

Article 19's provisions on holidays is another area that historically existed and continues to exist because both parties know and understand that the duties assigned to eight (8) hour Officers are "supporting" in nature as opposed to the duties and responsibilities of twelve (12) hour Officers assigned to security shifts. Article 19 has always reflected that Officers assigned to twelve (12) hour shifts had to work on holidays that fell within their scheduled workweek unless they were on leave.[71] Conversely, the Bargaining Agreement has "always" reflected that Officers assigned to eight and one-half (8.5) hour work schedules were expected not to work if the holiday fell on one of their duty days or, if the holiday was on one of their scheduled days off, they were to take off the regularly scheduled work day that proceeded or followed the holiday.[72] Initially, Palmer told their eight and one-half (8.5) Officers assigned to security shifts that they would be required to work the July 4th holiday. Then, on July 3rd, after the assigned Officers had arranged their plans to work that day, Palmer issued revised guidance telling

[70] Association Exhibit 9j
[71] Association Exhibit 1a, Article 19.2 B
[72] Association Exhibit 1a, Article 19.2 A

them that they would not be working.[73] Again, similar to the meal break confusion, this occurred because a succession of contracts was bargained without anyone contemplating eight and one-half (8.5) hour Officers being assigned to security shifts. Another related consideration is whether minimum staffing levels are maintained when eight (8) hour security shift Officers are on meal or holiday breaks.

3. Shift (Article 13.2)

Article 13.2 C explicitly states that there shall be two shifts, day and night. This language corresponded with the two security shifts of 6 a.m. to 6 p.m. and 6 p.m. to 6 a.m. that existed in Alaska institutions. The language specifying the two shifts does not correspond to the DOC's new shifts of 6:00 a.m. to 2:00 p.m. and 2:00 p.m. to 10:00 p.m. Neither past practice nor explicit contract language contemplates a forty-two (42) hour security shift and, thus, the DOC has exceeded the contractual authority granted to it in Article 4 and must therefore bargain before making this change.

G. The State's Arguments Lack Merit

The State gave a relatively short opening statement, presented few exhibits, and presented only one witness, Director of Institutions, Bryan Brandenburg. The focus of the State's case appeared to be what they believed to be their rights under Article 4 (Management Rights) and under Article 22 (Shift Assignments). The State ignored the Association's past practice argument on twelve (12) hour security shifts yet briefly suggested that Article 30 (Conclusion of Collective Bargaining), though not saying how it helped its case or calling it a "zipper" clause, allowed them to assign Officers to eight (8) hour security shifts.

First, regarding Article 30: By virtue of the fact that twelve (12) hour security shifts and eight (8) hour support schedules have been the past practice for thirty years, as established elsewhere in this briefing, specific meaning has been given to the otherwise general language in Articles 13.1 and 13.2 and the past practice has become a mandatory subject of bargaining, just as surely as if it had been typed into the parties' Bargaining Agreement (The National Labor Relations Board decision in A.T. Klemens & Sons and

[73] Association Exhibit 5k

Local 122...1992 WL 1465793.) The State was obligated to inform the Association of their intended change and was obligated to bargain before unilaterally imposing that change. Therefore, the State cannot correctly claim that Article 30 precluded the Association from having the right to compel them to bargain. Additionally, there was no clear and unmistakable waiver of the Association's right to bargain. To the contrary, the Association's demand to bargain was clear and unmistakable.

Second, regarding Article 30, Articles 13, 18, and 19 each address forty-two (42) and eight-four (84) hour shifts separately and clearly shows that the parties contemplated these as distinctively different shifts intended for different purposes. Article 18.1 A contains holiday provisions for Officers working the forty-two (42) hour schedule that are distinctly and functionally different than the holiday provisions for Officers on eighty-four (84) hour schedules found in Article 18.1 B. Likewise, Article 19.2 A contains holiday provisions for Officers working the forty-two (42) hour schedule that are distinctively and functionally different from those contained in Article 19.2 B for Officers on the eighty-four (84) hour schedule. The functional differences between the two schedules in these two articles is because one of the two schedules, the eighty-four (84) hour shift schedule, was intended for those on twelve (12) hour shifts directly providing institutional security and control 24 hours a day, and the other, the forty-two (42) hour schedule was intended for those whose duties were of a supporting administrative nature. Articles 18 and 19 help substantiate the argument that the forty-two (42) hour schedule addressed in Article 13.1 was intended for Officers performing support duties that did not require 24 hour coverage, and that the twelve (12) hour shifts addressed in Article 13.2 were intended for Officers providing security and control duties, as demonstrated by the past practice. In light of Articles 18 and 19 and past practice, Article 13 clearly expresses the parties' intent to have two specific schedules for two distinctively different types of duties. Article 30 only applies to those provisions not "*specifically referred to or covered in this agreement*." These two work schedules are specifically referred to in the Agreement and represent the parties' agreement to have eighty-four (84) and forty-two (42) hour work schedules, therefore the Association did not waive its right to bargain over these issues and the State may not make a unilateral change before bargaining. Even if the State should argue in its brief that Article 30 is a

zipper clause, this provision of the Bargaining Agreement is not a waiver of the right to bargain the change in work schedules.[74]

DOC also argued that Articles 22.1 (Hours of Operation) and 22.2 A (Shift Assignments) convey to them the authority to make such changes. Article 22.1 states that: *"Hours of operation shall be established by the Employer"* and Article 22.1 states that *"Shift assignments shall be made in accordance with the needs of the Employer."*[75] Similar language can be found in the 1993 Alaska State Employees Association (ASEA) Bargaining Agreement, the first Bargaining Agreement to place Correctional Officers on twelve (12) hour shifts. This Agreement stated "*Hours of Operation shall be established by the Employer. Scheduling of employees and assignment to shifts shall be determined by the Employer."*[76]

ASEA's language remained unchanged until Correctional Officers left ASEA and joined the Public Safety Employees Association (PSEA). The first Bargaining Agreement after joining PSEA moved the above quoted provisions to Article 22, where it was separated into Article 22.1 and 22.2 A, with the language in 22.2 A slightly, but not substantially, changed. The language in the Association's 2009-2012 CBA is the same as it first appeared in 2000.[77] Although the language in ASEA's Agreements had stated, "*Scheduling of employees and assignment to shifts shall be determined by the Employer,"* the PSEA CBA shortened that to "*Shift assignments shall be made in accordance with the needs of the Employer*." However, the intent was no different than that more clearly expressed in the ASEA CBAs. As evidenced by ex-Director of Institutions Mike Addington's unrefuted testimony, the DOC understood that language to mean that it could assign Officers to any one of the four twelve (12) hour security shifts that existed, or they could assign them to eight (8) hour administrative positions to meet its needs, so long as it complied with the seniority requirements stated in the Agreement. Mr. Addington testified he never interpreted Article 22.2 as giving DOC the right to create eight (8) hour security shifts and to place Officers on such shifts.

[74] City of Kentwood v. Police Officers Labor Council, 2008 WL 4724271 (Mich. AQpp.2008)
[75] Association Exhibit a -2009-2012 CBA
[76] Association Exhibit 1j, 1990-1993 ASEA CBA, Appendix B, Section A 2, page 120
[77] Association Exhibit 1e, 2000-2003 PSEA CBA, Article 22, pages 41 and 42

In attempting to reinforce their argument that Article 22 gives them the right to assign Officers to eight (8) hour security shifts, the State briefly attempted to counter the Association's past practice claim by suggesting that Article 13.2 was not relevant because it is about "overtime." The Association believes there is more than sufficient evidence to support its claim that, since the inception of twelve (12) hour shifts in 1981, the past practice has been that security shifts are twelve (12) hour shifts; in fact that is precisely what they were created for. Additionally, the reference to eighty-four (84) hour shifts is found not only in Article 13.2 but also in Articles 18 and 19 further supporting the Association's position that the parties have agreed to an eighty-four (84) hour work shift in the Agreement.

The State is also likely to argue that Article 4 gives DOC the right to unilaterally make changes to Officers' schedules. This argument also lacks merit. While the management rights clause allows the DOC to exercise its rights, the Agreement clarifies that it is limited by "specific provisions of this Agreement [that] expressly provide otherwise."[78] The Agreement goes on to state that "[n]othing in this Article shall be considered as superseding those rights granted to the Association in the Articles and/or Amendments of this Agreement."[79] In other words, the Agreement specifies that the DOC's actions are limited by the Agreement and therefore the DOC does not have the management right to violate Articles 13, 18, 19, 22 or to supersede the rights provided to Association members in those provisions.

The Association emphasizes that this controversy is not about a Management decision to assign an individual Officer to one correctional facility or another, or about a decision to move any individual Officer from a day shift to a night shift or vice versa, or to reassign an individual Sergeant or Officer from the eighty-four (84) hour security shift rotation to the forty-two (42) hour administration schedule, or to place him or her into a position such as Training Sergeant, Records Sergeant, or any one of the recognized support assignments that have previously been associated with forty-two (42) hour schedules. All other arguments notwithstanding, this controversy is about Management's actions based on their assumption that they have the right to move a significant number

[78] Association Exhibit a -2009-2012 CBA.
[79] Id.

of Officers off of twelve (12) hour security shifts and move them into newly created eight (8) hour security shifts. At the time it was originally announced, DOC Management stated that such a change, when implemented, would reduce payroll costs – an opinion which the Association, Institutional Managers and Correctional Officers believe to be absolutely false. Study after study has shown twelve (12) hour shifts to actually reduce leave and overtime, and to enhance the smooth running of a correctional twenty-four hour operation, which is why Correctional Departments around the country have and continue to switch to these shifts.[80] There is no doubt that cutting staff 30 percent at night saved money but the eight (8) hour security shift part of the Blended Staffing Plan has turned out to be a financial disaster as everyone but DOC upper Management predicted. Neither the fact that it is costing money nor if it had actually saved money is relevant; the State should have notified the Association that it wished to change a significant number of twelve (12) hour security shifts into eight (8) hour security shifts and should have brought proposals to the bargaining table. Even Director Brandenburg testified that the new eight (8) hour security shifts were not working and not saving money, though he blamed it on the Superintendents.

Though not in testimony per se, there were comments by State/DOC officials that the new eight (8) hour security shifts were needed to enact the blended staffing schedule. And though not argued at the arbitration, the State may try to argue in its brief that the new eight (8) hour security shifts are a good thing. In fact, the new eight (8) hour shifts have been an unmitigated disaster for the DOC in many ways. Putting aside the damage to the lives of Correctional Officers, it has disrupted the running of the institutions, caused serious dissention between upper DOC Management and its own Superintendents, raised the hostility of the inmates incarcerated, and actually cost the DOC in unnecessary overtime. The Association brought forth testimony on all the above and it was uncontested by the State. Moreover, when Director Brandenburg testified he affirmed much of what was testified to by Association witnesses in regard to the damage the eight (8) hour security shifts were doing.

The testimony of Director Brandenburg was telling in many areas. When questioned on the additional cost associated with the creation of the new eight (8) hour

[80] Association Exhibit 10a,b,c,d,e,and f – Other state's experience with 12 hour shifts

security shifts, along with other problems, he blamed his Superintendents. All Superintendents have had careers in corrections and all have spent many years running one or more of Alaska's Correctional Institutions. The Director testified that the Superintendents had not implemented the new schedules properly and that he was still "training" them on the proper way to implement the new eight (8) hour security shifts at their institutions. The Association respectfully disagrees that the Superintendents are the problem and that the new eight (8) hour security shifts themselves are the reason for the serious problems that have arisen. Superintendents were given specific directives from the Director. Then, due to Legislative concerns about the new eight (8) hour security shifts, the DOC waited until Legislators recessed for the year before implementing the new eight (8) hour security shifts. This allowed four additional months for the Director to explain to the Superintendents how the shifts should be implemented.

Then the Superintendents sent out memos, approved by the Director, on how the new eight (8) hour security shifts were to be implemented.[81] Those memos were followed and, except for one change, authorized by the Director, there has been no deviation from what was first implemented. The one change that Director Brandenburg testified to on February 22nd involved taking new recruits off their new eight (8) hour security shifts and putting them on twelve (12) hour week-on/week-off security shifts for a period of time so they can be properly trained. The Association applauds this change, but believes it was not made until after the Director heard Training Sergeant John Scott's testimony at arbitration on January 29th. This one exception was again directed by the Director due to serious problems with training. If the memos the Director approved were not what he wanted, he could have made changes. If the Superintendents were not doing their jobs and needed training to properly implement the new eight (8) hour security shifts, the Director has had almost a year to "train" them and fix the problems.

If you accept the Director's testimony, that there were implementation problems because he was still "*training*" the Superintendents, does that not substantiate the Association's claim that the new eight (8) hour security shifts were a major deviation from past practice?

[81] Association Exhibit 9, a through o, Implementation memos from Superintendents to staff

In addition, when the Director was questioned about why the DOC could not have implemented their Blended Staffing Plan by simply adjusting the starting times of the already existing twelve (12) hour security shifts he had no response. Though repeatedly questioned on the subject, he did not give one reason why the DOC could not have used the twelve (12) hour security shifts, while still cutting the night shift staffing by a third. This alternative option was suggested and discussed with DOC Management by Correctional Officers and Legislators. In addition, it was in the Association's opening statement and testified to during the first days of this arbitration, so it is unlikely the Director was unprepared for the question. If there were cost-related or other concerns with adjusting the twelve (12) hour security shifts instead of going to eight (8) hour security shifts, why did the Director not mention it when questioned?

The Director testified that Article 4 of the Bargaining Agreement gave him the authority to change Correctional Officers' work schedules as he saw fit. He went on to testify that Article 4 gave him the right to move 100 percent of the security positions to eight (8) hour security positions without negotiations. Should new phases of the blended staffing plan lead to 100 percent of Officers on eight (8) hour security shifts, it would render the language in many of the Bargaining Agreement's articles moot.

The Director also testified that the Blended Staffing Plan was necessary to obtain a certain relief factor as mandated by a Legislative Audit. The Legislative Audit found that the DOC should add more posts and hire 47 more Officers. The DOC's actions are a complete distortion of the Legislative Audit findings as was evidenced by the Legislature's negative response to the DOC's actions of cutting posts, cutting staffing at night, and instituting the new eight (8) hour security shifts. Though the Director avoided answering the question, the DOC could have increased its relief factor just as easily by adjusting the start times of twelve (12) hour security shifts and with this step could have avoided the additional overtime costs, the disruption of the institution and Officers' lives, and harming the training programs that came with going to the new eight (8) hour security shifts. Simply placing 10% of the security Officers on a 10 a.m. to 10 p.m. shift, instead of moving Officers to the eight (8) hour security shifts, would have been much more effective. That change would not have caused the DOC to incur additional overtime costs. That change would not have disrupted the FTO training program. That

change would not have torn families apart. That change would not have hurt recruitment severely, or led many good Officers to quit at the very time when the DOC was in need for Officers to staff the newly opened Goose Creek mega-prison.

In addition to his testimony on the Legislative Audit, Director Brandenburg testified that the Department was responding to Legislative intent language in the funding bill for the 2009-2012 Bargaining Agreement. Commissioner Schmidt made a very similar comment in his message to Correctional Officers on January 4, 2012, when he wrote:

> *"The Legislature included clear intent language directing the Department of Corrections to take "all responsible actions necessary, including shift modification, to mitigate financial and other exposure" resulting from the arbitrator's 2009 decision."*[82]

Please note that nothing in the Legislature's intent language countermanded the Department of Corrections' obligation to bargain before imposing changes to a mandatory subject of bargaining. However, if the Department of Corrections sincerely believed that the Legislature's intent language was binding upon them, then at the very least, under Article 32.3 (Superseding Effect of This Agreement), they should have been willing to immediately meet and confer for the purpose of arriving at a mutually satisfactory supplement for the Bargaining Agreement.[83] In spite of numerous requests to bargain and to discuss this with them, they vehemently refused.

IV. CONCLUSION

The contract language in the Bargaining Agreement, in place at the time the DOC moved to eight (8) hour security shifts and which still exists in the current Bargaining Agreement, clearly speaks to two shifts. Articles 18 and 19, which speak to lunches and holidays, also reflect these same two shifts as well as the past practice of twelve (12) hour week-on/week-off security shifts. Association witnesses and documentation clearly outline a long standing past practice of all security Officers working week-on/week-off security shifts. None of these facts were challenged or refuted by the State.

[82] Association Exhibit 19
[83] Association Exhibit 1a, Article 32

Association testimony regarding discussions about what was said during contract negotiations, what was discussed regarding shifts, and what the Bargaining Agreement language actually means was also unrefuted. Testimony that going to eight (8) hour security shifts did not save money and disrupted the running of the institutions where it was instituted was not only not refuted, but Director of Institution's testimony supported Association witnesses' testimony.

In addition, the Association took every step possible to stop the implementation of the eight (8) hour security shifts from bringing the issue to the negotiating table prior to going to court.

If the DOC wanted to change any or all of the twelve (12) hour week-on/week-off security shifts to eight (8) hour security shifts, the State should have notified the Association and the Association should have had the opportunity to negotiate the change in bargaining. The DOC never notified the Association. Instead the DOC, angry over a leave award by Arbitrator Greer that no longer exists, forced a change on Correctional Officers that turned out to be as damaging to the Department as it was to the Correctional Officers.

The Association attempted to offer a solution to the DOC but was rebuffed. If there had been negotiations, the Association could have brought in witnesses, such as Corrections experts, along with past and present Correctional Officer Management personnel to talk about alternative options. The Association could have brought forward evidence that by retaining the twelve (12) hour shifts, by supplementing and utilizing different start times, as an alternative to imposing forty-two (42) hour shifts, the Blended Staffing Plan would have been workable (although the deep cuts to the night shift would have still rendered institutions unsafe at night). Had there been negotiations, much of the damage that was done, both to Correctional Officers and the Department, would have been avoided.

The recitation of facts and arguments show that the State violated past practice and Articles of the Collective Bargaining Agreement by unilaterally changing the workweek of Correctional Officers from twelve (12) hour security shifts to eight (8) hour security shifts without first bargaining with the Alaska Correctional Officers Association.

The Association respectfully requests that the Arbitrator sustain this grievance on behalf of the Association and its members.

VI. REMEDY SOUGHT

Should the Association prevail, the Association seeks retroactive enforcement of Articles 13.1 (Forty-two (42) Hour Schedule) and 13.2 (Eighty-four (84) Hour Schedule); specifically that all security shift positions be filled in accordance with the provisions of the eighty-four (84) hour schedule contained in Article 13.2, and that only positions with duties that are supporting and administrative nature be assigned to the forty-two (42) hour schedule.

In light of the State's implied suggestion that the arbitration decision should not apply to Correctional Officers hired after Workplace Alaska postings started to advertise positions as forty-two (42) hour positions, the Association believes that the award should reflect that the Bargaining Agreement applies to all members regardless of when they were hired, and it prevails whenever information that conflicts with it is posted elsewhere.

Lastly, the Association requests that the award recognize that, were it not for the State's violation of the Bargaining Agreement, all Officers that worked eight (8) hour security shifts would otherwise have been working seven (7) twelve (12) hour shifts followed by seven (7) consecutive days off. As a result, their availability for overtime opportunities was reduced from seven days out of fourteen to two days out of ten and, therefore, every day they worked that otherwise would have been one of their seven consecutive days off was worked for regular pay rather than for the "RDO Premium Pay." [84] The Association requests that all members harmed are made whole in all respects and most importantly the harmful eight (8) hour security shifts come to an end.

DATED: March 22, 2013.

[84] Association Exhibit 1a, 2009-2012 Collective Bargaining Agreement, Article 21.9 (RDO Premium Pay)

Brad Wilson
Business Manager
Alaska Correctional Officers Association
203 E. 5th Avenue
Anchorage, AK 99501-2519
Brad@acoa.us
(907) 646-2262