IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
ALASKA CORRECTIONAL OFFICERS' ASSOCIATION,	)	
	)	
Defendant.	)	
	)	CASE NO. 3AN-13-8761 CI

MEMORANDUM IN SUPPORT OF STATE OF ALASKA'S MOTION FOR SUMMARY JUDGMENT

This arbitration decision must be vacated because it violates public policy by interfering with the State of Alaska's constitutional and statutory authority to allocate resources necessary to operate and manage its correctional facilities.[1] The award also violates public policy, and constitutes gross error, because it requires immediate implementation of the award in violation of PERA's requirement that monetary terms be subject to legislative appropriation. Moreover, the decision constitutes gross error because it is based upon unwritten terms added during the arbitration in violation of PERA and contract, the arbitrator improperly considered past practice, and because she exceeded her contractual authority by disregarding unambiguous terms reserving to

[1] This arbitration decision arises from a grievance filed against the State by the union representing correctional officers; Arbitrator Janet L. Gaunt issued a decision and awards dated April 20, May 16 and August 5, 2013. Ex. 1.

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management authority to assign shifts and duties. There are no material facts in dispute and the State should be granted summary judgment vacating the arbitration award.

STATEMENT OF THE CASE

I. Introduction

To protect the public, Alaska's Constitution and statutes give the State broad authority to direct and manage its correctional system. Crucial to the operation of the correctional system is management's ability to set hours of operation and assign duties and shifts to its work force, correctional officers. In this case, an arbitrator's decision violates public policy and constitutes gross error because it impermissibly intrudes on these powers in violation of the constitution, statute and the collective bargaining agreement.

The State's Department of Corrections ("DOC") reduced the number of staffed posts at seven out of thirteen of its facilities to meet shift relief recommendations of a legislative audit. The reduction in posts required changing shift assignments for a small percentage of correctional officers. The correctional officers' union grieved the implementation of the shift assignment change. The arbitration decision reversed the shift assignment change, in violation of the constitutional and statutory authority of the State to operate and manage its correctional facilities. Disregarding the express language of the contract, the arbitrator found the management rights and shift assignment clauses were ambiguous, considering instead evidence of alleged past practice. The arbitrator thereby substituted new, unwritten terms for unambiguous,

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written contract language that gave management the right to assign shifts. The decision requires all correctional officers assigned to "security posts" be placed on 12-hour shifts. This award will cost millions of dollars to implement and constitutes a monetary term which can only be funded by legislative appropriation, but the arbitration award again violates public policy where it requires the State it before seeking appropriation. The arbitration decision must not be enforced.

II. Facts, Law and Contract Provisions: How and Why DOC Implemented the Blended Staffing Model

The State of Alaska operates thirteen correctional facilities for the care and custody of convicted offenders in accordance with the Alaska constitution, which provides in relevant part:

> Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation.

Alaska Const. Art. I §12. This constitutional mandate is enforced through a statute that assigns to the commissioner of the Department of Corrections the power to allocate resources, control and operate the state's correctional facilities:

> The commissioner shall establish, maintain, operate and control correctional facilities suitable for the custody, care, and discipline of persons . . . convicted of offenses against the state; . . . each correctional facility operated by the state shall be established, maintained, operated, and controlled in a manner that is consistent with AS 33.30.015.[2]

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[2] AS 33.30.015 governs the living conditions for prisoners, including capping

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AS 33.30.011(1). Pursuant to this authority, the commissioner staffs the correctional facilities with correctional officers. The Public Employment Relations Act (PERA) enables correctional officers to be represented by a union for the purpose of collective bargaining. AS 23.40.070-.250. The correctional officers are represented by the Alaska Correctional Officers' Association ("ACOA") in grievance and arbitration proceedings. Ex. 1 p.3; Ex. A-1a. The State and ACOA are parties to a collective bargaining agreement (Agreement) by virtue of PERA. Ex. 1 p.3; Ex. A-1a. The collective bargaining agreement relevant to this dispute was in effect from July 1, 2009 through June 30, 2012. Ex. 1 p.3; Ex. A-1a. The Agreement's management rights clause, like AS 33.30.011(1), specifically reserves to the State the broad authority to operate and manage the affairs of the department:

> 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.

Ex. A-1.a. Art. 4. Pursuant to this reservation of authority, the employer assigns duties and shifts to employees. Correctional officers have only one class specification and perform different duties based upon the post to which they are assigned. Ex. 1 at 3; Ex. S-1, S-2, S-3; Ex. 3-B at 7. Most posts are assigned to oversee the daily activities of

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DOC expenditures for prisoners' food. It also prohibits prisoner possession of certain items and proscribes activities that could "facilitate violent behavior." AS 33.30.015(a)(3)(D).

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the incarcerated inmates. Ex. 1 at 3. Correctional officers assigned to these posts "have to be relieved before they can leave their posts." Ex. 1 at 3. A smaller number of posts provide administrative support services such as employee training, commissary staffing and recordkeeping. Ex. 1 at 3-4.

On January 4, 2012, DOC Commissioner Joe Schmidt notified all correctional officers to expect changes to staff schedules owing to "current leave usage, subsequent supplemental budget requests and the legislature's intent language." Ex. 1 at 6; Ex. A-19. The need to change shifts arose from a 2010 report from the Division of Legislative Audit recommending changes, as described in an affidavit submitted at the arbitration hearing:

> The principle recommendation was to increase the Shift Relief Factor. The Shift Relief Factor represents the number of correctional officers that must be available to cover a shift in addition to the regularly scheduled positions. The existing Shift Relief Factor was 4.8; Legislative Audit recommended an SRF of 5.0. To meet this requirement, the DOC would need more than 60 additional positions. The only alternative was to find significant cost avoidance within the existing staffing pattern. DOC chose to change the present staffing pattern to accommodate the new requirement.
>
> The current staffing is predominately two twelve-hour shifts, day and night. At night, during lockdown, inmates are sleeping. . . . Due to this reduced activity, there is a reduced need for correctional officers. By changing from two 12-hour shifts to three 8-hour shifts, the staffing during the graveyard shift can be reduced at the institutions where nightly prisoner lockdown is available. The employees who would normally work during part of that shift can be reassigned and thus not suffer a loss in wages, but the DOC would realize a cost avoidance necessary to meet the increased SRF.

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Ex.A12e p.2 May 4, 2012 Affidavit of Deputy Commissioner Sam Edwards

On January 9, 2012, Deputy Commissioner Edwards sent a memo to all DOC superintendents that described the planned staffing change as follows:

> This memorandum is to serve as notification of the changes to the staffing methodology for our correctional officers in our in-state facilities and units. Basically we will be moving from a predominantly 12 hour model to a more blended model utilizing both 12 hour and 8 hour for maximum efficiency and utilization of staff resources. The shift offering the highest efficiency in the most fiscally responsible manner will be utilized.
>
> Director Brandenburg and I will visit each facility/unit impacted by the blended staffing model beginning the week of January 16th. We will explain the process in greater depth at that time and assist with questions related to implementation. Target date for implementation will be April 1. Specific dates will be provided to each Superintendent from Director Brandenburg.
>
> . . . As a rough gauge of what this will look like initially, our current staffing plan has roughly 90 percent of our correctional officers working 12 hour shifts and 10 percent working eight hour shifts. The blended staffing plan, as initially implemented, will look more like 75 percent working 12 hours shifts and 25 percent working eight hour shifts. Some facilities will have higher percentages of officers working eight hour shifts and some will have lower percentages of officers working eight hour shifts.

Ex. 1 at 7; Ex. A-21. In January, 2012, ACOA filed a Demand to Negotiate over the shift change, to which the State responded by declining to negotiate because the current Agreement permitted management to re-assign correctional officers' from a 12-hour shift (eighty-four (84) hour schedule) to an 8.5 hour shift (forty-two (42) hour schedule) as long as notice requirements were satisfied. Ex. 1 at 8. Ex. A-23. When the parties met to bargain the successor collective bargaining

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agreement, the parties did not bargain over implementation of the Blended Staffing Model. Ex. 1 at 8. However, the parties twice met to discuss employee concerns over implementation of the Blended Staffing Model. Ex. 1 at 8-9.

On March 6, 2012, ACOA filed a class action grievance claiming the State's implementation of "the shift change" violated provisions of the Agreement.[3] Ex. 1 at 9. The State denied the grievance, explaining that the Agreement's unambiguous terms gave management express authority to change the shifts, specifically referencing Article 4 Management Rights and Article 22 Shift Assignment. Ex. 1 at 9. Ex. A-3 c and A-3 f.

In May, 2012, the Department of Corrections (DOC) implemented the Blended Staffing Plan, which changed shifts for some correctional officers.

> The plan created new shift hours for the security officers placed on the forty-two (42) hour schedule. They worked from either 6:00 a.m. to 2:00 p.m. or 2:00 p.m. to 10:00 p.m. Security officer staffing during the hours from 10:00 p.m. to 6:00 a.m. when inmates are locked down in their cells was thereby reduced. The DOC first sought volunteers to change to a forty-two (42) hour schedule, and then filled the remaining slots with the least senior Correctional Officers.
>
> Prior to the change, approximately 72 officers (around 15% of the work force) had been working a forty-two (42) hour schedule. Ultimately, 119 Correctional Officers moved from an eighty-four (84) hour schedule to the forty-two (42) hour schedule. The total

[3] The grievance alleged that the State's actions violated the following provisions of the Agreement: Article 4 (Management Rights), Article 13.1 (Forty-two (42) hour Schedule), Article 13.2 (Eighty-four Hour Schedule), Article 22.1B (Hours of Operation), Article 30 (Conclusion of Collective Bargaining), and Article 36 (Availability of the Parties to Each Other).[3] Ex. 1 at 9; Ex. A-3 a- g.

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> number of officers working a forty-two (42) hour schedule after the change remained less than 25% of the total number of officers. The change resulted in an estimated savings of 80,640 hours per year, which is equivalent to forty-three (43) full-time positions.

Ex. 1 at 10. Ex. S-4.

In November 2012, the parties resolved the 2012-2015 Agreement through an interest arbitration award; the grievance regarding implementation of the Blended Staffing Model remained unresolved. Ex. 1 at 10. The grievance went to arbitration in January, 2013.[4]

III. Agreement Provisions at Issue

The Agreement provisions reviewed by the arbitrator include the following:

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 1\2) times

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[4] ACOA also filed an unfair labor practice complaint with the Alaska Labor Relations Agency, and a complaint for injunctive relief in superior court, which was dismissed. Ex. A-8 a-f; A-12 d-f.

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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 1\2) 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 1\2) 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 1\2) 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

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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 16 – GRIEVANCE ARBITRATION

16.6 Authority of the Arbitrator

B. The parties agree that the decision or award of the arbitrator shall be final and binding. The arbitrator shall have no authority to rule contrary to, amend, add to, subtract from, or eliminate any terms of this Agreement.

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 not qualified volunteers, the Employer shall select the least senior qualified employee. For purposes of this section, seniority is construed as Bargaining Unit seniority.

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

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.

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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. The Arbitrator's Decision to Reverse the Blended Staffing Model

On April 20, 2013, the arbitrator issued her opinion. The arbitrator acknowledged that the parties placed contractual limitations on the authority of arbitrators to determine grievances, to wit: "The arbitrator shall have no authority to rule contrary to, amend, add to, subtract from, or eliminate any terms of this Agreement." Ex. 1 at 18; Ex. A-1.a Art. 16.6. The arbitrator also acknowledged the Agreement addressed the employer's authority to assign shifts:

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

Ex. 1 at 18; Ex. A-1.a at Art. 22.2A. Despite the unambiguous language giving management the right to assign shifts in accordance with its needs, the arbitrator nonetheless found the collective bargaining agreement at Article 22.2.A Shift Assignment ambiguous by considering it "in context" with Article 13 Overtime, which references work schedules. Ex. 1 at 23-24. By finding the 12-hour shift "part of a schedule," that had been "established by Article 13.2. A," the arbitrator changed the issue presented for arbitration.

The union grieved the imposition of "8-hour shift schedules." Ex. A-3.a p. 2.

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The grievance references the word "shift" ten times: the union was grieving the *shift* change. Ex. A-3.a. The arbitrator disregarded the subject of the entire grievance history – whether changing the *shift* violated the Agreement - reframing the issue to whether changing the *work schedules* violated the Agreement. Ex. 1 at 23-24.

The State explained that the only reference to work schedules in the Agreement outlines the parties' agreement on the maximum number of work hours and work days before overtime is incurred:

> **Article 13 Overtime**
> **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.

The arbitrator accepted the union's assertion that the "84-hour schedule" was in the contract "specifically to describe the type of schedule Correctional Officers would work when assigned to security duties." Ex. 1 at 24. The arbitrator thus found Article 22 ambiguous as to whether it "gives DOC the right to assign Correctional Officers to either of the schedules established by Article 13, regardless of the duties they perform." Ex. 1 at 24.

Because the arbitrator found the shift assignment provision ambiguous, she determined that she was able to consider the past practice of the parties in order to determine the intention behind the contract terms at issue. Ex. 1 at 25. The arbitrator

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considered past practice evidence even though the Agreement's management rights clause reserved to the employer all rights not specifically addressed in the Agreement, effectively prohibiting consideration of past practices. Ex. A-1.a at Art. 4. The arbitrator found there was a "mutual understanding" between the parties that the eighty-four (84) hour work schedule was the applicable schedule for "security officers." Ex. 1 at 24; 27. The arbitrator added the term "security officers" to the Agreement, creating a job classification by assigning this title to correctional officers who oversee inmates.[5] Ex. 1 at 3.

The arbitrator awarded ACOA a remedy requiring the State to "make affected Correctional Officers whole for those wages and benefits they lost by virtue of having their work schedules improperly changed and directed the State to send to ACOA direct notice of significant staffing plan changes at the same time that notice was sent to correctional officers. Ex. 1 at 38. The arbitrator retained jurisdiction to resolve remaining disputes and directed the parties to reach agreement on the remedy, or at least narrow the issues. Ex. 1 at 38.

V. The Arbitrator's Subsequent Rulings on Remedy

On May 14, 2013, ACOA contacted the arbitrator to report the parties were not in agreement on her intended meaning regarding the remedy. Ex. 2-A. ACOA enclosed a copy of a May 10, 2013 letter from the State in which it acknowledged the obligation

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[5] There is only one class specification for Alaska's correctional officers. Ex. S-1, S-2, S-3.

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to "make affected Correctional Officers whole" but noted the arbitrator's remedy did not require the State to move Correctional Officers to an 84-hour schedule. Ex. 2-A. On May 16, 2013, the arbitrator issued an addendum to the April 20, 2013 award, in which she further ordered that all "security Correctional Officers" be restored to "the 84-hour schedule from which they were moved." "Until that occurs, the state's liability for any associated lost pay and other fringe benefits will continue to accrue." Ex. 1 at 39. The arbitrator offered to assist in resolving disputes over the remedy by considering written argument or providing a remedial hearing. Ex. 1 at 40.

On July 26, 2013, ACOA sent an email message to the arbitrator containing a 12-page letter complaining that the State had not moved officers off the 8 hour shifts, and asking her to require the State to comply with her award. Ex. 2-C. On July 29, the arbitrator notified the State it had until August 2 (four days) to respond to the allegations in ACOA's 12-page letter by explaining why it had not "restored correctional officer to the 12 hour shifts." Ex. 2-D.

On August 2, 2013, the State responded, explaining that it could not reassign employees to 12-hour shifts without hiring 62 additional positions because it would put the safety of prisoners and employees at risk and thereby violate public policy. Ex. 2-E. In addition, the State explained that DOC did not have budgetary authority to hire the new positions, which would require a legislative appropriation pursuant to AS 23.40.215. Ex. 2-E. The State explained that it had provided to ACOA the list of employees affected by shift change, and that it had been in discussion with ACOA

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about ways to calculate backpay. Ex. 2-E. The State requested a hearing to address the legal and practical issues related to the enforcement and implementation of the arbitration award. Ex. 2-E.

In an August 5, 2013 addendum to her April 20, 2013 award, the arbitrator ruled that the affected correctional officers must be restored "to the 84-hour work schedule and the 12 hour shifts encompassed therein"; she found that "the assertion that the DOC might need to hire additional officers does not excuse compliance with the specified remedy" and declared it not "necessary" to hold a hearing or take any additional evidence on the subject of the cost of the 12-hours shifts, further finding the State had had a "reasonable period of time" in which to "restore security officers to the 84 hours schedule." Ex. 1 at 41-42. The arbitrator directed the State to implement her award or "exercise whatever rights remain to challenge the ruling." Ex. 1 at 41-42.

STANDARD OF REVIEW

An arbitration award will be vacated if it is contrary to public policy or the result of gross error. *State v. Public Safety Employees Ass'n.*, 257 P.3d 151, 158 (Alaska 2011). The public policy exception to the enforcement of arbitration awards is based on the premise that a court cannot enforce a contract or arbitration award that is contrary to public policy. *Id.* at 158-59; *W.R. Grace & Co.* 461 U.S. 757, 766 (1983). The Court will vacate an arbitration award as gross error "if [its] independent review of the decision indicates that the arbitrator had made an 'obvious and significant' mistake." *Alaska State Employees Ass'n./AFSME Local 52 v. State,* 74 P.3d 881, 883 (Alaska

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2003), quoting *State v. Public Safety Employees Ass'n, Local 92*, 798 P.2d 1281, 1285 (Alaska 1990).

This arbitration arises out of a labor management contract required by the Public Employment Relations Act (PERA). AS 23.40.070-.260. Arbitration is thus compulsory[6], not voluntary, and the arbitration is not subject to the Revised Uniform Arbitration Act. AS 09.43.300–595.

ARGUMENT

Alaska's jurisprudence has developed a high level of deference in reviewing arbitration awards. But there are exceptions to this level of deference – particularly in compulsory arbitration cases – all of which apply here. Common law left open two windows through which to prevent enforcement of an arbitration decision: when enforcement of the decision would violate public policy, and when it constitutes gross error. An arbitration decision must not be enforced when it intrudes upon the statutory authority of the executive branch to control its correctional facilities and manage its resources, and where it requires implementation requiring the expenditure of millions of dollars without regard for the legislature's authority to appropriate funds. The resulting violation of public interest must outweigh the deference in reviewing arbitration awards.

Moreover, the arbitrator's decision should be vacated as a gross error because it was based on several obvious and significant mistakes, including disregarding statutory and contractual constraints on her authority, by disregarding material terms of the labor

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[6] AS 23.40.210.

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agreement in reaching her decision and improper reliance on purported past practice.

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Alaska R. Civ. P. 56(c); *Sonneman v. State*, 969 P.2d 632, 635 (Alaska 1998). The existence of a factual question will not prevent entry of summary judgment unless the fact at issue is material. A fact is not material if, as a matter of law, the fact would make no difference in the outcome of the case. *Whaley v. State*, 438 P.2d 718, 720 (Alaska 1968). There are no genuine issues of material fact in this case and the State is entitled to judgment as a matter of law.

I. THE ARBITRATION DECISION IS CONTRARY TO PUBLIC POLICY

A. Violation of Public Policy Is An Exception to the Enforcement of Arbitration Awards

An arbitration award cannot be enforced if it violates an explicit or dominant public policy. *State v. Public Safety Employees Association*, 257 P.3d 151, 158 (Alaska 2011); *See Eastern Associated Coal Corp. v. United Mine Workers of America*, 531 U.S. 57 (2000). Under the "public policy" exception to the enforcement of an arbitration award, the court will not enforce an arbitrator's decision "where doing so would violate an explicit, well-defined, and dominant public policy." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983).

The basis for the "public policy" exception to the general deference to arbitration awards is that arbitration decisions essentially establish terms of a contract, and a court

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cannot enforce a contract that is contrary to public policy:

> A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy.

State v. Public Safety Employees Ass'n, 257 P.3d 151, 160 (Alaska 2011)(quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987). This public policy doctrine:

> derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests confining the scope of private agreements to which it is not a party *will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.*

United Paper Workers Int'l Union v. Misco, Inc., 484 U.S. at 42. (emphasis added). The public policy at issue must be ascertainable by "reference to law and legal precedents" rather than "general considerations of supposed public interest." *W.R. Grace*, 461 U.S. at 766. To determine whether an arbitration violates public policy, the Supreme Court has looked "to the entire body of law" in Alaska, including the "common law, statutes and constitution of this state." *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1132 (Alaska 1989).

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B. The Arbitration Award Should Be Vacated Because It Violates the Statutory Authority of the DOC Commissioner to Control and Operate the State's Correctional System

The State has a constitutional duty to maintain a penal system that protects the public. Alaska Constitution Art. I §12.[7] This duty is delegated to the DOC commissioner to whom statute provides broad authority to allocate resources in order to operate and manage the State's correctional facilities in a safe, efficient, and fiscally responsible manner. AS 33.30.011(1). In addition, Alaska's common law recognizes the broad authority of the DOC commissioner to operate the state's correctional facilities:

> Operation of the system of penal administration in Alaska is dependent upon a properly staffed and functioning division of corrections which has . . . the responsibility for treatment, rehabilitation and custody of incarcerated offenders.

State v. Chaney, 477 P.2d 441, 446 n. 26 (Alaska 1970). The courts have declined to intervene in matters related to the operation and management of the corrections system:

> There are strong indications of a legislative intent to leave the establishment, control and management of the prison system in the hands of the Commissioner of (the [Department] of Corrections) whenever practical under the state constitution.

Rust v. State, 582 P.2d 134,137 (Alaska 1978)(citing *McGinnis v. Stevens*, 543 P.2d 1221, 1237 n. 48 (Alaska 1975)). The *Rust* court also noted that "resource allocation is an executive concern involving many day to day decisions" which are within the

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[7] The State's constitutional and statutory duties are described in detail *supra* in Statement of the Case at II. Facts, Law and Contract Terms.

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authority of the Department of Corrections. *Id.* While the *Rust* line of cases were decided on the basis of separation of powers, they nonetheless recognize the broad authority of the DOC commissioner to manage the operations and resources of the correctional system.

The state constitution and statute, along with case law cited supra, demonstrate a well-defined and dominant public interest in conferring in the DOC commissioner the power to control and operate the State's correctional system. Central to that authority is the power to determine the hours of operation, assign duties and assign staff to perform the duties. These are executive concerns for which only the commissioner can make the policy decisions required to allocate resources. This authority is acknowledged in the negotiated Agreement.

The employer has the authority to set the hours of operation (Article 22.1) and assign shifts (Article 22.2). Ex. A-1.a. at Art. 22. The employer retains "rights to operate and manage its affairs in each and every respect" *regardless of the frequency of exercise* regarding any subject not specifically written in the Agreement. Ex. A-1.a. at Art. 4. The employer thus has the broad authority to manage staff in a manner consistent with law and the terms of the Agreement, and specific authority to assign staff to posts and shifts.

Pursuant to that authority, the DOC Commissioner determined the staffing levels and needs at certain institutions warranted the reduction of hours at certain posts from 24 hours to 16 hours per day. *See* Ex. 1 at 7. This decision enabled the department to

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meet Legislative Audit's recommended relief factor staffing levels for correctional officers while conserving department resources.[8] Allocation of resources is an inherently management decision. The arbitrator's decision removed the authority of the commissioner to assign duties to staff where she added terms that do not exist in the agreement: duty assignments she refers to as "security" and "administrative" officers. Ex. 1 at 3. In addition, her decision removes the commissioner's authority to assign the hours of work to correctional officers occupying these duty assignments in that it requires that "security officers" work *only* 12 hour shifts.[9] Ex. at 22; 27. But the most profound invasion into the commissioner's authority is the resulting impact on the hours of operation. Due to the decision, posts which are presently staffed for 16 hours must now be changed to 24 hour staffing in order to accommodate the 12-hour shifts ordered by the arbitrator.[10] Ex. 1 at 22; 27. The arbitration decision thus infringes upon the commissioner's authority to set the hours of operation in violation of statute and the Agreement. AS 33.30.011; Ex. A-1.a. at Art. 22.1.

In sum, Alaska's constitution, statutes, and judicial decisions all demonstrate that

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[8] "The change resulted in an estimated savings of 80,640 hours per year, which is equivalent to forty-three (43) full-time employees." Ex. 1 at 10.

[9] "[T]he DOC was not contractually free to move those Correctional Officers assigned to security posts from an eighty-four (84) hour work schedule to a forty-two (42) hour work schedule." Ex. 1 at 34. "The twelve (12) hour shift worked by security officers is part of a "schedule" that has been established by Article 13.2A." Ex. 1 at 23.

[10] The alternative, to staff a 16-hour post with 12-hour employees, would arguably result in large increases in overtime costs at each post every day.

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Alaska has an explicit, well-defined and dominant public policy requiring the State to control and operate its correctional facilities for the purpose of protecting the public, as well as rehabilitating the offenders. The State's power to operate the correctional system requires that it retain the managerial prerogative to allocate resources by setting the hours of operation and assigning duties and shifts. The arbitrator's decision in this case violates public policy because it rescinds the DOC commissioner's implementation of the Blended Staffing Model, and thus interferes with his statutory authority and duty to manage and operate the state's correctional facilities. Vital to that duty is the ability to assign duties and hours of work. Enforcement of the arbitrator's decision would reverse the lawful assignment of correctional officers from 12 to 8 hour shifts; force the employer to assign shifts based upon the duties performed by the employee; and require the DOC to either change its hours of operation to remove 16-hour posts or spend substantial amounts in overtime pay to staff 16-hour posts with employees who can only work 12-hour shifts. Enforcement of this arbitration decision would violate the public policy of the State of Alaska.

C. Enforcement of the Award Would Violate Public Policy Where It Directs The State To Implement It Prior To Seeking Legislative Appropriation in Violation of PERA

In addition to the violation of public policy caused by the arbitrator's decision, her *award* independently violated public policy by directing that the State challenge her decision or implement the award regardless of inherent safety risks and in violation of PERA's legislative appropriation provision. (This part of the award also constitutes

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gross error, as addressed more thoroughly in this brief at II. A.)

Alaska Statute 23.40.215(a) specifically provides that "[t]he monetary terms of any agreement entered into under [PERA] are subject to funding through legislative appropriation." Monetary terms are defined as:

> "changes in the terms and conditions of employment resulting from an agreement that (a) will require an appropriation for their implementation; (b) will result in a change in state revenues or productive work hours for state employees or (c) address employee compensation, leave benefits or health insurance benefits, whether or not an appropriation is required for implementation."

AS 23.40.250(4). The award in this arbitration is a monetary term because it will costs several million dollars and will result in a change in productive work hours for state employees. Ex. 2-E.

In her August 2, 2013 letter to the arbitrator, the State's representative explained that restoring the former 12-hour shifts would require hiring new staff thus immediate implementation of the award would create put prisoners and staff at risk:

> [T]he State of Alaska has not yet reassigned bargaining unit employees to 12 hour shifts. The State cannot do so without hiring an estimated 62 additional corrections officers. These 62 additional corrections officers are absolutely necessary in order to provide sufficient staffing and protection level for the prisoners, employees and other individuals who reside and work inside the State's correctional institutions. If the State were to immediately restore the 12-hour shift schedule without hiring 62 additional corrections officers, the safety of prisoners, employees and other individuals would be placed at unconscionable risk. State public policy would therefore be violated if the Arbitrator's remedy compelled the Department of Corrections to immediately restore the 12-hour work schedules at current staffing levels.

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Ex. 2-E. The arbitrator responded that the State's need to hire additional officers did not excuse its failure to return all correctional officers to the 84-hour work schedule, and she refused the State's request for a hearing regarding her award:

> What kind of staffing would best effect the specified remedy is up to the DOC to determine. However an assertion that the DOC might need to hire additional officers does not excuse compliance with the specified remedy or establish an impossibility defense. The State has an obligation to fund its contractual commitments, one of which was utilization of the work schedule described in Article 13.2.A of the CBA. It is clearly not impossible to staff the DOC in a way that assigns security officers to an 84 hour schedule, because that is what the DOC did for decades. I do not find a hearing or any additional evidence necessary to reach that conclusion.

Ex. 1 at 40. In addition, the State explained it could not implement the award based on current staffing and it did not have the budgetary reserves to hire the number of staff to effect the award, therefore statute required the State to first obtain a legislative appropriation:

> [T]he Department of Corrections unfortunately does not have the current budgetary authority to hire 62 additional corrections officers. That authority can come only from the Alaska legislature. *See* AS 23.40.215.

Ex. 2-E. The arbitrator did not comment on the statutory requirement for legislative appropriation in her response:

> The State has received a reasonable period of time to begin restoring security officers to the 84 hour schedule. . . . If the State takes issue with the merits of my decision or its specified remedy, it should exercise whatever rights remain to challenge the ruling. If the State fails to do so or to effectuate the specified remedy, then the ACOA will have (sic) file suit to enforce the Award.

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Ex. 1 at 40. The arbitrator thus ignored public policy concerns – both safety and statutory – by requiring an immediate implementation of her award.

Public safety is the paramount concern in maintaining the state's correctional system. Alaska Const. I §12. The State's representative explained to the arbitrator that the State could not immediately implement her award because, at present staffing levels, if the State immediately restored the 12-hour shift "the safety of prisoners, employees and other individuals would be placed at unconscionable risk." Ex. 2-E. The arbitrator did not respond to this safety concern, but directed the State to implement the award. Ex. 1 at 41-43. This flagrant disregard for the safety of the people in the facilities violates the public policy articulated in Alaska's constitution.

The other public policy violated by this arbitration award is PERA itself.[11] The Supreme Court has consistently enforced AS 23.40.215(a), overturning arbitration awards violative of its terms, by applying the gross error exception. "Alaska law is well settled that arbitration awards are subject to legislative appropriation under PERA." *University of Alaska Classified Employees' Association v. University of Alaska,* 988 P.2d 105, 109 n.15 (Alaska 1999).[12] The legislature's power to appropriate, as it

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[11] The Supreme Court adopted the public policy exception to the deference towards PERA arbitration decisions in *State v. PSEA,* in 2011. Understandably, there is no case law on whether an arbitrator's disregard of PERA's legislative appropriation provision violates public policy.

[12] The arbitration award also constitutes gross error, thus a thorough analysis of relevant case law appears later in this brief at II. A. p. 28. *See also Fairbanks Police Dep't v. City of Fairbanks*, 920 P.2d 273, 274-75 (Alaska 1996)(legislative approval a

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applies to funding PERA labor agreements, is an "explicit, well-defined, and dominant public policy" that must be protected.

Here, the arbitration award requires immediate implementation requiring the State to either staff the prisons in a manner that could expose staff and inmates to safety risks or spend millions of dollars to hire more staff to cover 24-hour posts prior to seeking legislative appropriation. Ex. 2-E. This award should not be enforced because it violates PERA and the public policy of the State of Alaska.

II. THE ARBITRATOR'S DECISION SHOULD BE VACATED BECAUSE IT IS THE RESULT OF GROSS ERROR

In addition to the public policy exception to the enforcement of arbitration decisions, it is well established that a labor arbitration award may be vacated if it is the result of gross error, which has been defined as an "obvious and significant" mistake. *State v. Alaska Pub. Employees Ass'n,* 199 P.3d 1161, 1162-63 (Alaska 2008); *Baseden v. State,* 174 P.3d 233, 238 (Alaska 2008). The Alaska Supreme Court has vacated grievance arbitration decisions for gross error in situations where the arbitrator ignored a contract provision or a statute.[13]

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common requirement in public sector collective bargaining ensuring legislative control over fiscal appropriations).

[13] *See City of Fairbanks v. Rice*, 628 P.2d 565 (Alaska 1981) (gross error found where arbitration board refused to base decision on collective bargaining agreement reached after per diem costs incurred even though parties bargained in subsequent agreement that higher per diem rate would apply retroactively.); *University of Alaska v. Alaska Community Colleges' Federation of Teachers, Local 2404*, 64 P.3d 823 (Alaska 2003) (arbitrator grossly erred in finding employer violated nondiscrimination clause of

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A. The Arbitration Award Is Based Upon An Obvious And Significant Mistake In That It Disregards PERA's Requirement Of A Legislative Appropriation To Fund Monetary Terms of An Arbitration Award

The arbitration decision's disregard of PERA's mandate that arbitration awards are subject to legislative appropriation not only violates public policy, it constitutes gross error. The Supreme Court has consistently found gross error where arbitrators have insisted on immediate implementation of an award before a legislative appropriation can be sought. AS 23.40.215(a). In *UACEA v. University of Alaska,* the court refused to enforce an arbitration award of a pay raise because the legislature had not funded it. 988 P.2d at 105. "Our decisions interpreting PERA have consistently upheld the statute's plain meaning." *Id.* at 108. In *Public Safety Employees Association v. State*, the court overruled an arbitrator's decision requiring the State to fund an interest arbitration remedy by reallocating its resources because a state agency cannot "circumvent the requirement of legislative approval." 895 P. 2d 980, 985-86 (Alaska 1995). In *Public Employees Local 71 v. State of Alaska*[14], the court again upheld AS 23.40.215(a)'s "plain meaning" where it ruled that a legislative appropriation funding monetary terms in one year of a multi-year collective bargaining agreement

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collective bargaining agreement by granting pay increases to non-represented employees but not to union members to remedy salary inequities.); *Public Safety Employees Ass'n. v. State*, 902 P.2d 1334, 1335 (Alaska 1995) (grievance arbitrator committed gross error in holding state could have implemented geographical differential increases to certain employees without legislative approval; arbitrator ignored statutory language requiring legislative approval before state could act.)

[14] 775 P.2d 1062 (Alaska 1989).

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does not oblige a public employer to pay according to those terms in subsequent years. "Only a specific vote of approval will satisfy AS 23.40.215(a)'s requirement of "funding through legislative appropriation." *UACEA*, 988 P.2d at 109 (quoting *Local 71*, 775 P.2d 1064).

While this PERA provision is generally applied to new collective bargaining agreements and interest arbitration decisions, it has also been applied to grievance arbitrations. The Supreme Court applied AS 23.40.215(a) in vacating a grievance arbitration in which it found an arbitrator had committed gross error by applying a penalty against the state for its failure to immediately implement the monetary terms of his award; the arbitrator ignored the statute which required the state to first seek legislative approval. *Public Safety Employees Association v. State*, 902 P. 2d 1334, 1335 (Alaska 1995). Regardless of the type of arbitration at issue, AS 23.40.215(a) is invoked if a monetary term requires funding through legislative appropriation, so it applies in this case.

Here, the arbitration award requires legislative appropriation because it will require an appropriation and will result in a change in state employee work hours.[15] Exc. 2-E. Despite the State's explanation that implementation of the award would

[15] The records does not reflect an exact cost to fund the arbitration award, but there is adequate evidence that funding would require a legislative appropriation. For example, the record indicates DOC would have incurred additional costs in the amount of $4.9 million to hire 60 additional positions to meet the SRF recommended by Legislative Audit. Ex. A-12.e p. 3. The cost to "make whole" affected correctional officers whose shifts were changed as a result of moving to the Blended Staffing Plan would be in addition to this amount.

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require a legislative appropriation pursuant to statute, the arbitrator responded that the State had already had "a reasonable amount of time" to implement her award, declined the State's request for a remedy hearing, and instructed the State to either implement the award or appeal her decision. Ex. 1 at 41-42. Apparently, ACOA similarly interpreted the arbitrator's August 12, 2013 award to require immediate implementation, as can be seen by ACOA's Answer and Counterclaims demanding an injunction that will "command" the State to "promptly implement the Arbitrator's awards." Answer and Counterclaims at 6. By requiring immediate implementation, the arbitrator grossly erred when she disregarded the statute requiring legislative appropriation of the monetary terms of a contract.

In addition to disregarding PERA, the arbitrator ignored the parties' specific contractual agreement acknowledging the statutory requirement that monetary terms be funded by legislative appropriation:

ARTICLE 33 - LEGISLATIVE ACTION

> A. The parties acknowledge that implementation of the monetary terms of this Agreement is subject to AS 23.40.215. . . .

Ex. A.1.a. at Art. 33. The parties bargained a specific acknowledgement of the statutory requirement that legislative appropriation as a prerequisite to the State's duty to implement monetary terms. The arbitrator thus disregarded both statute and the parties' agreement when she directed the State to implement the terms of the award. Ex. 1 at 40. The arbitrator's award should be vacated because she committed an obvious and

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significant mistake when she disregarded statute and contract provisions by directing the State to implement the award. *PSEA*, 902 P. 2d at 1335.

B. The Arbitrator's Decision Should Be Vacated As Gross Error Because the Arbitrator Made an Obvious and Significant Mistake in Ignoring PERA'S Requirement that Labor Agreements Be Written

The arbitrator's decision violates both PERA and the Agreement because it is based not upon the written words to which the parties agreed, but upon purported "past practice." Under Alaska law, the terms of a public employment collective bargaining agreement must be in writing. AS 23.40.210(a). Unwritten, oral provisions of an agreement are void. *Classified Employees' Ass'n. v. Matanuska-Susitna Borough Sch. Dist.*, 204 P. 3d 347 (Alaska 2009).[16] The Agreement unambiguously reflects the statutory requirement that all terms be in writing:

> 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.

Ex. A-1 a. Article 30. The arbitrator was made aware of both the statutory and contractual requirement that terms be in writing. Ex. 3-B at 2. Yet the arbitration decision disregards this requirement by considering a term that is not in the contract - "security"[17]- in finding the terms of the Shift Assignment provision had a "latent"

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[16] Also applied in *Hafling v. Inlandboatmens' Union*, 585 P.2d 879 (Alaska 1978); cited in *Barnica v. Kenai Peninsula Borough Sch. Dist.*, 46 P.3d 974 (Alaska 2002); *State v. Alaska State Employees' Ass'n.*, 190 P.3d 720 (Alaska 2008).

[17] The arbitrator used the work "security" as an adjective variously describing duties, officers and posts. See e.g., Ex. 1 at 22. This term is not in the Agreement. See

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ambiguity requiring that she apply the "context rule:"

> [A]ny determination of meaning or ambiguity should be made after considering relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade and the course of dealing between the parties.

Ex. 1 at 20. The arbitrator noted that "evidence of context is admitted for the purpose of aiding in the interpretation of what is in the instrument, and *not for the purpose of showing intention independent of the instrument.*" Ex. 1 at 20. (emphasis added). By applying the "context rule," the arbitrator found Article 22.2.A Shift Assignment ambiguous when read in conjunction with Article 13.2 Overtime:

> The CBA does not state which Correctional Officers will work which schedule, but the Association introduced evidence that the eighty-four (84) hour schedule was incorporated into the labor contract specifically for Correctional Officers to work *when assigned to security posts.*

Ex. 1 at 22. The arbitrator thus committed an obvious mistake by violating the context rule: she determined plain language ambiguous by considered testimony "showing intention independent of the instrument": the concept that only "security post assignments" were assigned to 12-hour shifts. By finding the written term ambiguous, the arbitrator was able to considered evidence of a purported past practice. Ex. 1 at 24. Under the labor law principle of past practice, an unequivocal, clearly enunciated, longstanding, mutual agreement to a certain practice can fill in gaps in a general

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contract term or, as the arbitrator applied it here, modify clear contract language.[18] However, arbitrators generally do not admit evidence of past practice to restrict the exercise of management functions:

> Arbitrators are often hesitant to permit unwritten past practice or methods of doing things to restrict the exercise of traditional and recognized functions of management.
>
> Management functions are specifically referred to as methods of operation or direction of the workforce, including assignment of duties and shifts.
>
> The mere failure of the Company, over a long period of time, to exercise a legitimate function of management, is not a surrender of the right to start exercising such right.

How Arbitration Works, Elkouri & Elkouri (6th ed. 2003), pp. 612; 615.

Disregarding this industry standard, the arbitrator accepted purported past practice evidence about assignment of duties and shifts when she determined that there was a long-standing practice of keeping "security officers" on the eight-four (84) hour schedule. Ex. 1 at 25. In response to the State's argument that the management rights clause retained the managerial discretion to exercise a right, the arbitrator concluded that the parties' practice indicated a "mutual understanding" that the eighty-four (84) hours schedule described in Article 13 was the applicable schedule for "security officers." Ex. 1 at 26-27. Despite the lack of evidence that a management representative has ever stated – either orally or in writing – that it was abandoning its right to assign employees on 12-hour shifts to 8-hour shifts, the arbitrator found there

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[18] *See* How Arbitration Works, Elkouri & Elkouri (6th ed. 2003), p. 608.

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was a "mutual understanding" because the employer had not exercised its right to do so. Ex. 1 at 30-32. Given her analysis of past practice, the arbitrator created the unwritten term that "security officers would be on the eighty-four (84)hour work schedule." Ex. 1 at 32.

The arbitrator ignored AS 23.40.210(a) when she created the terms "security" and "administrative" as correctional officer duty assignments and determined that the duty assignment dictates whether a correctional officer can be assigned to either a 12- or 8-hour shift. Ex. 1 at 25-27. The terms "security" and "administrative," delineating duties, posts or job classifications, do not exist within the collective bargaining agreement. The arbitration decision constitutes gross error because it was reached by applying terms and constructs that were not written in the contract, thereby violating both PERA and contract.

C. The Arbitrator Exceeded Her Authority By Disregarding Material Terms Of The Agreement, Thus Her Decision Constitutes Gross Error

The authority of an arbitrator is determined by relevant statute and the parties' agreement. In this case, the agreement specifically restricted the arbitrator's power:

Article 16.5 Authority of Arbitrator

> The parties agree that the decision or award of the arbitrator shall be final and binding. The arbitrator shall have no authority to rule contrary to, amend, add to, subtract from, or eliminate any terms of this Agreement.

The arbitrator cited to this provision in her decision, acknowledging that she had no authority to add to, amend or eliminate any provision in the Agreement. Ex. 1 at 14.

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The arbitrator then exceeded this authority by: 1) disregarding Article 4, which gives authority to management to determine all matters not specifically bargained in the Agreement; 2) disregarding the employer's right to set hours of operation and assign shifts at Article 22.1 and 22.2; 3) disregarding the reference to "overtime" in a provision referencing work schedules at Article 13.2b; 3) adding the terms "security officer shall only be assigned to the 84-hour work schedule" to Article 13.2b; and, 4) adding the term "management shall notify the union of changes to shift assignments simultaneously with notifying employees" to Article 36.

a. The arbitrator's decision disregarded Article 4 Management Rights

In Article 4, the employer specifically retained broad authority to operate and manage the affairs of the department:

> 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.

Ex. A-1.a. at Art. 4. The employer clearly retained any right not specifically addressed in the agreement – no matter how frequently the right is exercised. As addressed above, the negotiated language clearly excludes past practice and reserves the right to management to make the type of changes at issue here. The employer retained the right to determine what duties must be performed, for how many hours a duty post will be filled, and by which employees. The arbitrator disregarded the clear and unambiguous

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language of Article 4 in adopting unwritten terms that resulted in removing the management "right to operate and manage its affairs in each and every respect." Ex. A-1.a. Art. 4.

b. The arbitration decision disregarded Article 22 allowing the employer to set hours of operation and assign shifts and work assignments; removed the word "overtime" from Article 13, and added the term "security officers only work the 84-hour work schedule."

The agreement specifically reserves to management the right to set the hours of operation and assign shifts "in accordance with the needs of the employer". Ex. A-1.a. at Art. 22.1A; 22.2A. The parties negotiated this written language. Further, the parties contemplated that there would be changes in shift assignments and addressed that issue by providing that in most circumstances employees would receive at least 5 days' notice of a change in their shift assignment. Ex. A-1.a. at Art. 22.2C. While the arbitrator reviewed these provisions, she decided that Article 22.2 was ambiguous when read in conjunction with provisions about overtime:

> An ambiguity arises when Article 22 is read in combination with Article 13. Article 13.1 and 13.2 describe two different "schedules:" a forty-two (42) hour schedule and an eighty-four (84) hour schedule. The CBA does not state which Correctional Officers will work which schedule but the Association introduced evidence that the eighty-for (84) hour schedule was incorporated into the labor contract specifically for Correctional Officers to work *when assigned to security posts*.

Ex. 1 at 22.

> For security officers, the ACOA contends the shifts that could be changed pursuant to Article 22 were the four recognized shifts worked under that eighty-four (84) hour schedule. That contention

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> is lent plausibility by a wording change between Article 13.1.A and 13.2.A. . . . The wording change does arguably indicate a work schedule the parties intended certain officers would be "on" not just assigned to at the State's discretion.

Ex. 1 at 23. The arbitrator thus found ambiguity in the employer's right to assign shifts by interpreting two provisions in Article 13Overtime:

> 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 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. . .

Ex. A-1 at Art. 13.1A; 13.2A. The arbitrator concluded that management can only change the shifts of employees on the 12-hour shift from day shift to night shift, and they can only be assigned to oversee inmates. This erroneous reasoning lead the arbitrator to the conclusion that management can change the shifts of employees "assigned to" the 8.5 hour shift, but cannot reassign employees "on" the 12-hour shift. This tortured interpretation negates the purpose of the provision, which is to provide the framework for overtime computation. Further, it required the arbitrator to ignore Article 22.6, which indicates the expectation of the parties that the employer has the authority to change duty assignments:

> **22.6 Temporary Duty Assignments**
> A. When the Employer changes the duty assignment of an

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> 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.

The arbitrator committed obvious and significant mistakes in concluding that the employer did not retain the right to assign duties.

The arbitration decision made obvious and significant errors in subtracting management's right to set the hours of operation, assign shifts, and change duty assignments. It amended Article 13, a standard FLSA-required provision about workweeks and overtime, by removing reference to "overtime." The arbitrator further exceeded her authority by adding job classifications ("security officer"; "administrative support officer"),[19] and by adding terms assigning the classifications to specific shifts. Ex. 1 at 23.

c. The arbitrator committed an obvious and significant mistake when she added the term "the State shall notify ACOA simultaneously with notifying employees of changes in shift schedules" to Article 22 and 36

The arbitrator ruled contrary to the plain language of Article 36 when she determined the State violated its terms - despite uncontroverted evidence that the parties

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[19] The assignment of duties to a position is specifically reserved to the employer. See reference to job classification in the Agreement at Article 1.2 A and B. In addition, the Supreme Court has recognized that job classification and salary range assignments are not mandatory subjects of collective bargaining. *Alaska Public Employees Ass'n., v. State*, 831 P.2d 1245 (Alaska, 1992).

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met and conferred about the shift change - because she added a requirement that the State should have provided notice of changing to the Blended Staffing Model to ACOA at the time it provided notice to the employees. Ex. 1 at 37. Article 36 contains no such requirement, and neither does the shift assignment provision at Article 22. Ex. 1 at Art. 22. The Agreement does not obligate the State to notify the union of the shift assignment change and the State has the right to assign shifts, thus Article 36 was not violated.

The arbitrator's decision and award disregarded statute and the contractual prohibition against changing the contract's terms. Ex. A-1.a at Art. 16.6B. The decision thus constitutes gross error.

CONCLUSION

The public interest in insuring that the Department of Corrections maintains its statutory authority to staff its facilities in an effective and economical manner is paramount in this case. An arbitration award that disregards the plain language of the contract in a way that violates the statutory duty of the DOC commissioner to assign posts and shifts at correctional facilities violates public policy. The arbitrator decision to require implementation of her award also violates public policy, and constitutes gross error, because she ignored PERA's requirement that the State first seek a legislative appropriation to fund the monetary terms of a labor agreement. The arbitrator committed gross error by applying unwritten terms to the Agreement in violation of statute and the Agreement. In addition, the arbitrator exceeded the authority afforded

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her through the labor agreement by disregarding material terms in the contract and adding terms to support her interpretation awarding rights to bargain over duty and shift assignments. Accordingly, the arbitration decision and award cannot be enforced due to its public policy violations, and should be vacated for gross error.

Dated this 21st day of November, 2013.

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