

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

STATE OF ALASKA,)
)
Plaintiff,)
)
v.)
)
ALASKA CORRECTIONAL)
OFFICERS' ASSOCIATION,)
)
Defendant.)

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JAN 21 2014

TINDALL
BENNETT & SHOUP

CASE NO. 3AN-13-8761 CI

STATE OF ALASKA'S REPLY TO ACOA'S OPPOSITION TO STATE'S
MOTION FOR SUMMARY JUDGMENT/STATE'S OPPOSITION TO
ACOA'S MOTION FOR SUMMARY JUDGMENT

The State requests relief from a grievance arbitrator's ruling that removes the power of the Commissioner of the Department of Corrections to determine how to staff correctional facilities, including the authority to determine the appropriate staffing of particular posts, the hours of work, the assignment of duties and the ability to change work schedules for correctional officers. The arbitrator's decision violates public policy in its disregard of the commissioner's constitutional, statutory and contractual authority to operate and staff the State's correctional facilities. The award violates PERA by requiring immediate implementation of a work schedule – at a cost of millions of dollars - without regard to the legislature's right to decide whether to fund it. ¹AS 23.40.215.

¹ The court should disregard ACOA's arguments that implementation of the award won't require hiring 62 new positions and a legislative appropriation. Opp. Br. pp. 11-13. ACOA cites no evidence to support this argument. The State has explained there is

The arbitrator committed gross error and exceeded her contractual authority when she ignored the management rights clause and added and removed contract terms vesting shift assignment in the State in order to reach her decision. The court should apply an 'arbitrary and capricious' standard of review after balancing the public policy of judicial non-interference with arbitrations against the State's constitutional and statutory duty to operate its correctional facilities to protect the public, and the legislature's authority to appropriate the monetary funds of a labor agreement. This arbitration decision must be vacated.

THE ARBITRATOR COMMITTED GROSS ERROR AND HER DECISION VIOLATES PUBLIC POLICY BY USURPING THE COMMISSIONER'S AUTHORITY TO OPERATE AND STAFF CORRECTIONAL FACILITIES

The State holds the power to operate and manage the correctional facilities to effectively protect the public. By law, the DOC Commissioner has the sole authority to operate the state's correctional facilities. AS 33.30.011(1). The collective bargaining agreement reflects this larger public policy, that it is the responsibility of the State, through DOC, to operate correctional facilities to as to effectively protect the public, by reserving to the commissioner the right to assign shifts, duties and all other management rights not expressly written in the labor agreement.² The contract also restricts the

a safety risk if the shifts are changed without additional staffing, the approximate cost to implement the award, and PERA's requirement of legislative appropriation to fund monetary costs particularly here where the award would change state employee work hours. Memorandum Supporting State's Motion for Summary Judgment pp. 23-31.

² See Memorandum Supporting Motion for Summary Judgment p. 34-38.

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2 authority of an arbitrator to change its terms:

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4 The arbitrator shall have no authority to rule contrary to, amend,
5 add to, subtract from, or eliminate any terms of this Agreement.

6 Ex. A 1 a Art. 16.6B. Arbitrator Gaunt's decision removed the commissioner's power
7 to set the hours of operation, determine staffing requirements and assign shifts and
8 duties by awarding the union authority to negotiate over those terms. The parties did
9 not negotiate those terms – but the arbitrator's decision now makes them part of the
10 contract.³ The union's argument reinforces this position where it references the creation
11 of the terms "security" and "administrative" to define correctional officer positions.
12 ACOA claims the arbitrator "recognized" and "acknowledged" the "two types of
13 positions" but "did not rewrite the contract." Opp. Br. p. 17. The decision changed the
14 terms of the contract by creating an entitlement to particular duty positions with specific
15 hours that did not exist before. The arbitrator created "security" and "administrative"
16 posts and made those terms the key and critical component of her decision. The
17 arbitrator not only exceeded her contractual authority – she violated public policy when
18 she interfered with the DOC commissioner's power to operate the State's correctional
19 facilities by requiring that the commissioner assign personnel to certain positions
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22 ³ ACOA mistakenly argues that "the State necessarily agreed to a limitation on the
23 commissioner's management authority and control" when it agreed to a description of
24 work schedules for purposes of calculating overtime pay. Opp. Br. p. 9 referencing
25 Ex. A-1 a Art. 13.2. The State did not agree to surrender the commissioner's power to
26 assign shifts and duties when it negotiated a provision describing when overtime pay
would be applied. Even if it had, such a provision would be null and void because it
would violate AS 33.30.011(1) which does not enable the DOC commissioner to co-
manage the correctional facilities with the correctional officers' union.

twenty-four hours a day regardless of DOC's authority to manage correctional facilities including determining how officers should be assigned and what hours particular posts should be staffed.

A review of the agreement language compared to the arbitrator's decision makes clear that the decision was a gross error in addition to a violation of public policy. For example, the agreement's management rights clause, like the statute granting the DOC commissioner sole authority to operate the state correctional facilities, specifically reserves to DOC 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 establishes the hours of operation and assigns duties and shifts to employees: "Hours of operation shall be established by the Employer," and "Shift assignments shall be made in accordance with the needs of the Employer". Ex. A-1 a. Art. 22.1. A; Ex. A-1 a. Art. 22.2 B. For further clarification, the contract specifically references management's right to make temporary duty assignments between the 42-hour and 84-hour assignments:

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

1
2 vice versa, the Employer, whenever feasible, will solicit volunteers
3 from among the group of potentially affected employees and select
4 the senior employee from among the qualified volunteers in the job
5 class. If there are no qualified volunteers, the Employer shall select
6 the least senior qualified employee.

7 Ex. A-1 a Art. 22.6. The arbitrator committed an obvious mistake when she concluded
8 that the Employer did not have the authority to change "work schedules," referred to as
9 "shifts" and *duty assignments*. Ex. 1 pp. 23-24. Additionally, the parties' contract does
10 not contain any provision barring the employer from changing duty assignments, shifts,
11 or work schedules. There is no provision creating job descriptions known as "security"
12 and "administrative" posts. Because such provisions are not expressly provided for in
13 the contract, the management rights clause controls: the employer retains the "right to
14 operate and manage its affairs in each and every respect . . . *regardless of the frequency*
15 *of exercise*". Ex. A-1 a Art. 4. Under the parties' contract, the employer has the right
16 to change work schedules and job duties. Thus the arbitrator's decision not only
17 violated public policy, it was also a gross error.

18
19 Viewing the arbitration decision as part of the contract, the arbitrator changed the
20 contract as follows:

- 21 1. Regarding shift changes, the management rights clause is eliminated. Ex. A-1 a Art.
22 4. The employer no longer has, "regardless of the frequency of exercise, the rights
23 to operate and manage its affairs in each and every respect . . . absent express
24 provisions in this Agreement." The arbitrator ruled contrary to the employer's right
25 to assign duties and shifts, then added *unwritten* terms to the Agreement. The
26

1
2 arbitrator based her decision on evidence of past practice directly controverting the
3 requirement of "*express provisions* in this Agreement". The arbitrator added the
4 terms "security officer" and "administrative support officer" to the Agreement even
5 though reference to assignment of posts, duties and job classification do not exist
6 within the agreement and are within the exclusive rights of the employer to
7 determine. See Memo Supporting Motion for Summary Judgment p. 34.
8

- 9
10 2. The management right to assign shifts in accordance with need is deleted. Ex. A-1 a
11 Art. 22.2 B. Temporary Shift Assignment is deleted. Art. 22.2D.
12
13 3. The word "overtime" is eliminated from Article 13 so it no longer defines when
14 overtime is paid for a shift and corresponding work schedule. The following words
15 are added: "security shifts work only 12-hour shifts" and "administrative support
16 shifts work only 8-hour shifts." Ex. A-1 a Art. 13
17
18 4. The arbitrator's authority clause is eliminated. Ex. A-1 a Art. 16.6. In this
19 decision, the arbitrator "ruled contrary to, amended, added to, subtracted
20 from, and eliminated" the above-cited terms of the agreement.

21 The provisions resulting from this arbitration decision are not reconcilable with
22 the management rights, shift assignment and arbitrator authority provisions and violate
23 public policy regarding the commissioner's right to operate the correctional system.

24 Although the State agreed to arbitrate the issue of whether the Department of
25 Corrections violated the contract when it implemented the Blended Staffing Schedule,
26 the arbitration decision changed the agreement in such fundamental ways that it went

beyond the arbitrator's authority and must be vacated.

**THE ARBITRATOR'S DECISION VIOLATES PUBLIC POLICY AND
CONSTITUTES GROSS ERROR BY REQUIRING IMMEDIATE
IMPLEMENTATION IN VIOLATION OF PERA.**

The arbitrator's award also constitutes gross error – and a violation of public policy - because it requires the State to violate PERA by immediately implementing its terms without first seeking legislative appropriation. The Supreme Court has consistently interpreted the plain language of AS 23.40.215 to require that the monetary terms of a collective bargaining agreement “do not become effective unless and until the legislature specifically funds them.”⁴ The union's opposition does not contain facts or arguments responding to the State's assertions on this point (see Memorandum Supporting Motion for Summary Judgment pp. 23-32). Accordingly, the State's motion for summary judgment should be granted for this reason.

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⁴ *University of Alaska Classified Employees Ass'n v. University of Alaska*, 988 P.2d 105, 108-109 (Alaska 1999)(AS 23.40.215(a) conditions effectiveness of monetary terms of public sector CBA on legislative appropriation, thus no interest due on late funded pay increases); *Public Safety Employees Ass'n v. State of Alaska*, 895 P.2d 983, 985-86, (Alaska 1995) (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.); *Fairbanks Police Dep't v. City of Fairbanks*, 920 P.2d 273, 274-75 (Alaska 1996); *State v. Public Safety Employees Ass'n*, 798 P.2d 1281, 1285 n. 7 (Alaska 1990); *Public Employees' Local 71 v. State of Alaska*, 775 P.2d 1062, 1064 (Alaska 1989).

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2 AN 'ARBITRARY AND CAPRICIOUS' STANDARD OF REVIEW IS
3 APPROPRIATE BECAUSE THIS ARBITRATION DECISION ARISES FROM
4 COMPULSORY PUBLIC SECTOR ARBITRATION AND IS ANALOGOUS TO
5 AN INTEREST ARBITRATION.

6 This arbitration decision merits a standard of review that takes into account the
7 conflicting public policies affecting the employer – as a governmental entity – and the
8 statutorily mandated duty to arbitrate grievances. In the private industry model,
9 Alaskan courts take a “hands off” approach to arbitration review. The Supreme Court
10 recently reiterated that “both the common law and Alaska statutes evince a strong public
11 policy in favor of arbitration.” *Johnson v. Aleut Corporation*.⁵ There are three reasons
12 for this high level of deference: 1) the Revised Uniform Arbitration Act governs the
13 rules of arbitration; 2) the parties have voluntarily agreed to arbitrate disputes, and 3)
14 private industry labor contracts are comparatively free from public policy
15 considerations. In contrast, public employment labor contracts are: 1) not subject to the
16 Revised Uniform Arbitration Act⁶; 2) required by statute to include a grievance
17 arbitration clause⁷ and, 3) subject to multiple and sometimes conflicting public policies.
18 Private industry employers operate for profit. The primary purpose of a public
19 employer like the State is to provide public service and thus it must operate within
20 overarching public policy concerns. These differences between public and private
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24 ⁵ 307 P.3d 942, 947-948 (Alaska 2013).

25 ⁶ AS 09.43.300-595.

26 ⁷ AS 23.40.210.

1
2 employers warrant a relaxed standard of review for arbitration decisions arising out of
3 the public sector. In this case, the State has a public policy interest in protecting the
4 public by maintaining control of the operation of its correctional facilities. The
5 legislature also has a constitutional public policy interest in exercising its power to
6 appropriate funds regarding monetary terms of proposed PERA contracts before they
7 are implemented. The court should balance these public policy interests against the
8 interests served by applying a deferential standard for review of arbitration decisions
9 which has its origins in voluntary private sector contracts.⁸
10

11
12 A traditional rationale for the high deference standard is that arbitrations offer a
13 comparatively faster, less expensive dispute resolution process than litigation and thus
14 judicial non-intervention encourages use of arbitrations. *Department of Public Safety v.*
15 *Public Safety Employees Ass'n*, 732 P.2d 1090, 1093 (Alaska 1987)(to encourage use of
16 arbitration, awards are allowed to "lie in repose.") In this case, the public policy of
17 judicial non-interference in arbitrations must be weighed against the public interest in
18 protecting public safety through the State's continued operation of its correctional
19

20 ⁸ In a recent Pennsylvania grievance arbitration, a public employee was terminated
21 for physically sexually harassing a co-worker but was returned to work by an arbitrator.
22 The court weighed the public policy favoring judicial non-intervention in arbitrations
23 against the public policy against sexual harassment:

24 A labor arbitration decision is entitled to deference by a reviewing
25 court, but it is not entitled to a level of devotion that makes a
26 mockery for the dominant public policy against sexual harassment.
*Philadelphia Housing Authority v. American Federation of State, County and Municipal
Employees*, 52 A. 3d 117, 1127-28 (Penn. 2012). The court vacated the arbitration in
part because it encouraged similar behavior in others "without fear of any meaningful
consequence." *Id.*

1
2 system and maintaining the separation of powers by ensuring the legislature has the
3 opportunity to appropriate arbitration awards.
4

5 The standard of review applied in actions to vacate arbitrations has varied
6 depending on the issue and type of dispute. Aside from compulsory public employment
7 arbitration versus voluntary private industry arbitration, the courts have assigned
8 different review standards based on whether the decision is from an interest⁹ or a
9 grievance arbitration. The gross error standard has been applied to grievance
10 arbitrations involving employment termination. *State of Alaska v. Alaska Public*
11 *Employees' Ass'n*, 199 P.3d 1161, 1162-63 (Alaska 2008). The court has used the less
12 deferential "arbitrary and capricious" standard in interest arbitration cases, because the
13 issues presented are contractual and therefore more easily reviewed:
14

15 [D]eference need not be as wide-ranging when a dispute is of a
16 "contractually formative nature," because we can more easily
17 review the legal relationship between the parties in the dispute.
18 Grievance arbitration lacks this transparency; greater deference is
19 therefore appropriate.

20 *Alaska State Employees' Ass'n/AFSCME Local 52 v. State of Alaska*, 74 P.3d 881, 882-
21 83 (Alaska 2003)(citing *PSEA*, 902 P.2d at 1336 (standard of review is 'arbitrary and
22 capricious' when dispute is of "contractually formative nature.") This arbitration
23 decision warrants closer judicial review than do the disciplinary grievances over

24 ⁹ Interest arbitration is a process in which the terms and condition of the
25 employment contract are established by a final and binding decision of an arbitrator
26 when the parties are unable to reach agreement through collective bargaining. See
Public Safety Employees' Ass'n, 902 P.2d 1334, 1335 n. 1 (Alaska 1995)

1
2 reinstatement of an employee that make up most of the arbitration review case law.
3
4 This case is solely about interpreting contract provisions, and thus does not require the
5
6 trier of fact to rely on testimony and witness credibility that would warrant a more
7
8 deferential standard of review. In addition, the value of the claim is estimated to cost
9
10 millions of dollars and thus has a comparatively greater impact on the public's resources
11
12 than the costs at issue in an employment reinstatement grievance arbitration.
13

14
15 The facts of this case establish the arbitrator's decision was a result of gross
16
17 error. But the facts also warrant a different standard of review. The court should apply
18
19 the standard of review used in "contractually formative" arbitrations: whether the
20
21 arbitrator was arbitrary and capricious in reaching her decision.¹⁰ Under either standard
22
23 of review, the decision should be vacated.

24 CONCLUSION

25 For the reasons set forth above and in the State's memorandum in support of the
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27 motion for summary judgment, the arbitrator's decision violated public policy and was
28
29 gross error. Accordingly, the State respectfully requests that this court vacate the
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31 arbitration decision and dismiss ACOA's counterclaims.


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¹⁰ The Supreme Court has vacated contractually formative grievance arbitration decisions by finding they met both arbitrary and capricious and gross error standards of review. *University of Alaska v. Alaska Community Colleges' Federation of Teachers*, 64 P.3d 823, 826 (Alaska 2003); *PSEA*, 902 P.2d at 1135.

1
2 DATED this 17th day of January, 2014.

3
4 MICHAEL C. GERAGHTY
ATTORNEY GENERAL

5 
6 By: Joan M. Wilkerson
7 Assistant Attorney General
Alaska Bar No. 9006040

8
9 **CERTIFICATE OF SERVICE**

10 This is to certify that on this date, January 17, 2014, a
11 true and correct copy of the foregoing document,
12 **STATE OF ALASKA'S REPLY TO ACOA'S
OPPOSITION TO MOTION FOR SUMMARY
JUDGMENT/OPPOSITION TO CROSS MOTION
and ORDER DENYING DEFENDANT'S CROSS-
MOTION FOR SUMMARY JUDGMENT** was
13 served by first class U.S. Mail on the following:

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

4 STATE OF ALASKA,)
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10 ALASKA CORRECTIONAL)
OFFICERS' ASSOCIATION,)
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12 Defendant.)
13)

CASE NO. 3AN-13-8761 CI

14
15 ORDER DENYING DEFENDANT'S CROSS-MOTION
16 FOR SUMMARY JUDGMENT

17 Defendant Alaska Correctional Officers' Association, having filed a Motion for
18 Summary Judgment and the matter having been fully considered,

19 IT IS ORDERED that the motion is DENIED. Defendant Alaska Correctional
20 Officers' Association is denied summary judgment on its counterclaims.

21 DATED at Anchorage, Alaska, this _____ day of _____, 2014.

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Honorable Mark Rindner
Superior Court Judge