IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs.

ALASKA CORRECTIONAL OFFICERS' ASSOCIATION,

Defendant.

Case No. 3AN-13-8761 CI

ORDER REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT

This case arises out of binding arbitration between the State of Alaska and the Alaska Correctional Officers' Association. In that arbitration, the State and the ACOA contested whether a new staffing plan the Department of Corrections implemented violated the State and the ACOA's collective bargaining agreement ("CBA"). The arbitrator found that the new staffing plan, and the DOC's failure to inform the ACOA of the new plan and failure to discuss the new plan with the ACOA, violated the CBA and ordered the State to make the affected correctional officers whole, including a return to the prior staffing model. The State and the ACOA have filed competing motions for summary judgment. The Court DENIES the State's motion and GRANTS the ACOA's motion for the reasons stated below.

Statement of Facts[1]

I. History of the Underlying Dispute

The ACOA is the exclusive bargaining representative for a bargaining unit of correctional officers ("COs") employed by the DOC at various correctional facilities throughout the State. State's Mem. in Support of State of Alaska's Mot. for Summ. J.,[2] Ex. 1 at 3 [hereinafter "Arb. Op."]. Each correctional facility generally has two types of positions: security posts and administrative support positions. *Id.* The "vast majority" of COs work security posts. "These officers perform tasks directly related to the security and control of inmates, and count towards shift minimums so they have to be relieved before they can leave their posts." *Id.* By contrast, COs working administrative support positions "are not directly responsible for inmate supervision and usually do not even work on the secured side of an institution." *Id.*[3] COs in administrative support positions "do not count towards shift minimums and do not require relief before they take breaks or lunch." *Id.* at 4.

"Until 1981, all [COs] worked a forty (40) hour schedule, consisting of five days a week, eight hours a day with two consecutive days off each week." *Id.* In 1981, the State and the ACOA created the eighty-four hour schedule, which was "specifically tailored for [COs] assigned to security posts in the DOC institutions."

[1] An abbreviated version of the arbitrator's findings is presented here along with a discussion of her opinion and subsequent events. Alaska courts "give great deference to an arbitrator's decision, including findings of . . . fact." *State v. Public Safety Employees Ass'n*, 323 P.3d 670, 675-76 (Alaska 2014) (quoting *State v. Public Safety Employees Ass'n*, 235 P.3d 197, 201 (Alaska 2010)) [hereinafter "*PSEA 2014*"].

[2] Hereinafter "State's Mem."

[3] The arbitrator notes that these positions include "Housing Unit Supervisors, Institutional Training Officers, Institutional Compliance Officers, Disciplinary Sergeants, Records Sergeants, Special Projects Officers, Commissary Officers, etc." Arb. Op. at 3-4.

Id. The eighty-four hour schedule is a week-on/week-off schedule where a CO works twelve-hours each day during his "on" week. *Id.* The eighty-four hour schedule was originally implemented through letters of understanding, but became part of the 1990-1993 collective bargaining agreement and has been part of every subsequent collective bargaining agreement. *Id.* This includes the CBA at issue here, which covered the period from July 1, 2009 through June 30, 2012. *Id.* at 3. "Since adoption of the eighty-four (84) hour schedule, all [COs] assigned to security posts have worked that schedule on either a twelve (12) hour day shift, or twelve (12) night [sic] shift." *Id.* at 5.

The ACOA began hearing rumors in November 2011 that the DOC was considering a significant change to CO shift schedules. *Id.* The ACOA inquired with the State regarding those rumors in December 2011. Despite the request, the ACOA did not receive any confirmation that a new plan was being contemplated until DOC Commissioner Joe Schmidt sent a general distribution e-mail to the COs on January 4, 2012. *Id.* at 6. The ACOA learned of the Commissioner's email from COs who forwarded the email to the ACOA. *Id.*[4] On January 5, 2012, the ACOA sent a demand to the Department of Administration[5] to negotiate this staffing change, taking the position that "any modification of shifts would violate provisions of the CBA . . ." *Id.* The Department of Administration refused to bargain over the change, arguing that the CBA permitted the change. *Id.* at 8.

[4] The DOC also sent out later emails regarding the blended staffing plan without including the ACOA. Arb. Op. at 7.
[5] The Department of Administration is responsible for negotiating with the ACOA. Arb. Op. at 6.

While these changes were being discussed, the ACOA and the Department of Administration were also negotiating the terms of the next collective bargaining agreement. The ACOA raised the blended staffing model during those negotiations, but "State representatives refused to bargain over or discuss the Blended Staffing Plan implementation." *Id.* The DOC "only agreed to listen to concerns about implementation of the Blended Staffing Plan." *Id.*

The ACOA challenged the blended staffing plan by filing a suit for injunctive relief and filing a class action grievance under the CBA. *Id.* at 9. The superior court dismissed the suit for injunctive relief in favor of the arbitration discussed in the CBA. *Id.* at 9, n.5.[6] The DOC moved forward with the change and began implementing the blended staffing plan in May 2012 at seven facilities. *Id.*

> 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.

Id. at 9-10. The resulting estimated savings in manpower was equal to forty-three full-time employees. *Id.* at 10.

The ACOA's class action grievance challenging the blended staffing plan was repeatedly denied. *Id.* at 9. The ACOA and the State then proceeded to

[6] Case No. 3AN-12-6968CI. The ACOA's briefing conveys a sense of frustration that the State, after having forced the ACOA into arbitration, now seeks to overturn the result of the arbitration. *See, e.g.*, ACOA's Opp'n and Cross-Mot. at 18. While this frustration is perhaps understandable, it is irrelevant in the Court's analysis. The State does not waive its right to an award that is free from gross error and does not violate public policy because it earlier asked a court to enforce the terms of the parties' bargain.

arbitration and selected Janet L. Gaunt as arbitrator. *Id.* at 1. Arbitrator Gaunt held three days of hearings in 2013.[7] *Id.*

The parties could not agree on a statement of issues "and left that to the Arbitrator to resolve." *Id.* at 2. The arbitrator framed the issues as follows:

> 1. Did the State violate provisions of the Collective Bargaining Agreement cited in the ACOA Demand for Arbitration[8] when it unilaterally changed the work schedule of Correctional Officers assigned to security posts from an eighty-four (84) hour, 7 days on/7 days off work schedule to a forty-two (42) hour, 5 days a week work schedule?
>
> 2. If so, what is an appropriate remedy?

Id.

II. The Arbitrator's Opinion and Award

The Arbitrator issued her initial opinion and award on April 20, 2013. After discussing what issues she needed to resolve and the facts preceding the arbitration, she listed a section of "Relevant Contract Language." Arb. Op. at 11 (emphasis omitted). Of particular note are the arbitrator's citations to Articles 4 and 16.6.B. Article 4 is titled "Management Rights" and states

> 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

[7] Those hearings were "tape recorded with the understanding that the tape was solely for the Arbitrator's use and would not be retained." Arb. Op. at 1. Neither party has produced a transcript of the proceedings. Not having a proceeding transcribed produces an inferior record for the reviewing court when the award is later challenged or needs to be confirmed and enforced. The Court suggests the parties reconsider this practice in the future.

[8] The ACOA cited "Articles 4 (Management Rights), 13.1 (Forty-two Hour Schedule[)], Article 13.2 (Eighty-Four Hour Schedule), Article 22.1.B (Hours of Operation), Article 30 (Conclusion of Collective Bargaining), and Article 36 (Availability of Parties to Each Other)." Arb. Op. at 2 (citing Arb. Ex. A-3g).

> in this Article shall be considered as superseding those rights granted to the Association in the Articles and/or Amendments of this Agreement.

Id. (citing Arb. Ex. A-1a at 10-11 [hereinafter "CBA"]). Article 16.6.B states: "[t]he 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." *Id.* at 14 (citing CBA at 39).

The arbitrator then turned to the parties' dispute. First, she analyzed whether the blended staffing plan violated the CBA. Second, she analyzed whether the DOC violated the CBA in not directly notifying the ACOA of the decision to implement the blended staffing plan and in refusing to discuss the new plan with the ACOA.

A. Arbitrator Gaunt rules the blended staffing plan violates the CBA

The arbitrator began her discussion of the blended staffing plan noting that

> it is not this Arbitrator's role to decide whether the DOC's Blended Staffing Plan is a good idea or not. What I must decide is whether the DOC was entitled to do what it did. In the course of that endeavor, I am mindful of the following contractual limitation that the parties have placed on the authority of their arbitrators: 'The arbitrator shall have no authority to rule contrary to, amend, add to, subtract from, or eliminate any terms of this Agreement.'

Arb. Op. at 18 (citing CBA at 39 (Article 16.6.B)). She also held that she must follow contractual language that is clear and unambiguous. *Id.* at 18-19. She applied the "context rule" to determine if there was an ambiguity in the CBA. *Id.*

at 19-20.[9] She 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." *Id.* at 20.

The arbitrator found that there was an ambiguity in the CBA regarding the State's authority to assign security posts to the forty-two hour schedule. *Id.* at 21-24. The ACOA argued that the CBA required that all COs staffing security posts work an eighty-four hour schedule. The State took the position that it had broad discretion to determine the hours each CO worked no matter their position. The State cited Article 22.2.A, which states "[s]hift assignments shall be made in accordance with the needs of the Employer," as the source of its unfettered authority. *Id.* at 21. However, Arbitrator Gaunt found that the parties and the CBA "have referred to shifts in different ways for different purposes." *Id.* at 21. She noted that "shift" has been used to describe the time of day someone on the eighty-four hour schedule works (day shift or night shift) as well as the job duties for a CO on the forty-two hour schedule (such as "Disciplinary Sergeant shift"). *Id.* at 22.

The arbitrator also noted that, while Article 22.2.A refers to *shifts*, Article 13.1 and 13.2 refer to the forty-two hour *schedule* and the eighty-four hour *schedule*, respectively. *Id.* at 22-24. She also found that the eighty-four hour schedule was incorporated into the CBA "specifically for [COs] to work *when assigned to security posts*." *Id.* (emphasis original).

[9] Arbitrator Gaunt gave this description of the context rule: "any 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 dealings between the parties." Arb. Op. at 20.

The arbitrator recognized the State's position that the descriptions of the forty-two and eighty-four hour schedules were "only described in Article 13 to define when an employee assigned to either schedule receives overtime." *Id.* at 24. However, she found that the ACOA's interpretation of the CBA, limiting security posts to the eighty-four hour schedule, was equally plausible and concluded that there was an ambiguity regarding whether DOC had a right "to assign [COs] to either of the schedules established by Article 13, regardless of the duties they perform." *Id.*

The arbitrator then analyzed "the parties' most evident intent when negotiating" the language at issue to determine if the State had violated the CBA in implementing the blended staffing plan. *See id.* at 24-34. She did so through the lens of three principles: "(1) standards of contract interpretation, (2) the concept of past practice, and (3) the principle of reasonableness." *Id.* at 25 (citing The Common Law of the Workplace 65 (BNA 1998)).

The arbitrator first looked at the parties' past practice. *Id.* at 25-27. She found that "the ACOA convincingly established that after the 1990 CBA was adopted, and probably for many years before, security officers have always worked the eighty-four (84) hour schedule." *Id.* at 26. The arbitrator agreed with the State's position that "some practices develop from choices made by an employer in the exercise of retained managerial discretion without any intention of a future commitment." *Id.* The arbitrator noted that "[a] historical practice is not necessarily a binding one . . . Mutual acceptability is a crucial element." *Id.* at 27. Here, however, the arbitrator found "the record persuasive that the parties' long-

standing practice *did reflect a mutual understanding* that the eighty-four (84) hour schedule described in Article 13.2 was the applicable schedule for security officers." *Id.* (emphasis added).

Moving to the bargaining history between the ACOA and the State, the arbitrator found further support for the ACOA's argument. *Id.* at 27-32. Before conducting her review of the facts she noted that "[a]rbitrators look for both evidence of the respective parties' intent and also for evidence regarding whether intent was manifested in some way to the other side." *Id.* The arbitrator found that "all of the offered testimony supports a conclusion that the State never evidenced [an intent to be able to move security officers to the forty-two hour schedule whenever it chose to do so] during bargaining table discussions between the parties." *Id.* at 28-29. She cited both senior ACOA personnel and a former DOC Director of Institutions to support her conclusion. *See id.* at 29-31. She found that the intent of giving the DOC discretion to move COs among shifts, as stated in Article 22.2.A, was "that security officers would be on the eighty-four (84) hour schedule and the shift assignments made by the DOC pursuant to Article 22.2.A would be among the four established shifts for that work schedule." *Id.* at 31-32.[10]

The arbitrator finally examined the reasonableness of the parties' positions and found the State's interpretation of the CBA less reasonable than the ACOA's interpretation. *Id.* at 32-33. She found that the State's position that it could move

[10] The four established shifts are Week 1 (Day), Week 1 (Night), Week 2 (Day), Week 2 (Night). Arb. Op. at 22.

every CO to a forty-two hour schedule whenever it chose to do so would render the eighty-four hour schedule "a nullity." *Id.* at 32. She noted that "[c]ontracting parties are presumed not to have intended a nullity." *Id.* In contrast, she found that the ACOA's interpretation would give effect to both Article 13 and Article 22.2.A. *Id.* at 32-33.

In her conclusion, the Arbitrator noted that "[t]he rights retained by the DOC management pursuant to Article 4 of the Agreement are subject to limitations applicable through express provisions of the CBA. Article 13 is one such provision." *Id.* at 33. She finally found that

> [u]nless an officer was assigned an administrative position, the DOC was not contractually free to unilaterally move those [COs] assigned to security posts from an eighty-four (84) hour work schedule to a forty-two (42) hour work schedule during the term of labor contract [sic]. By doing so, the DOC violated Article 13.1 and 13.2 of the 2009-2012 Agreement when it implemented the Blended Staffing Plan.

Id. at 34.

B. Arbitrator Gaunt finds that failure to notify the ACOA of and discuss the blended staffing plan violated the CBA

The arbitrator also determined that the State violated Article 36 of the CBA. *Id.* at 35. That provision states that the parties will meet to discuss the CBA and its provisions and that they will do so "expeditiously and in good faith." *Id.* (citing CBA at 69). The provision's purpose is to "facilitat[e] two-way communications." CBA at 69.

The issue here was whether the State's failure to notify the ACOA of the blended staffing plan directly, failure to discuss the plan with the ACOA, and

failure to negotiate the plan violated these provisions. The arbitrator found Article 36 created "an obligation to meet for 'discussion' of the [CBA] and its interpretation." Arb. Op. at 35. The arbitrator further found that the State absolutely refused to engage in "discussion," but would "only listen to ACOA concerns." *Id.*

The arbitrator also held that the State's failure to inform the ACOA of the blended staffing plan while "making pronouncements to its [COs] about the planned change" violated Article 36's obligation regarding good faith communication. *Id.* at 36. The arbitrator found that the ACOA was "entitled to direct notice of changes to the working conditions of the officers it represents." *Id.* The arbitrator noted that this was particularly important considering that the ACOA had inquired into rumors that changes were coming and the State still did not include the ACOA on several key emails. *Id.*

C. The Arbitrator's Remedy

The arbitrator's April 20, 2013 opinion concluded with the issue of an appropriate remedy. The arbitrator noted that "what is appropriate may vary for each security officer affected by the work schedule change." *Id.* at 37. She ruled that "the traditional remedy is to restore to any injured party the wages and/or benefits they would have received if the violation had not occurred." *Id.* She then directed the parties "to see if they can reach agreement regarding each circumstance or at least narrow the issues that remain unresolved." *Id.* She retained jurisdiction to resolve any remaining issues and gave the following direction regarding the award:

> As an appropriate remedy, the State is directed to:
>
> (a) make affected [COs] whole for those wages and benefits they lost by virtue of having their work schedules improperly changed; and
>
> (b) send the ACOA direct notice of significant staffing plan changes at the same time that the DOC announces those changed to [COs] the ACOA represents.

Id. at 38.

The parties worked to resolve the issue of the award, but eventually reached an impasse and the arbitrator intervened by email dated May 16, 2013. *Id.* at 39. The arbitrator clarified that her award required the State to "restor[e] security [COs] to the 84-hour schedule from which they were moved." *Id.* She stated that she "did not set a specific date for changing the work schedules" to give the parties time to determine the best transition, but that until the security COs were put back on the eighty-four hour schedule, "the State's liability for any associated lost pay and other fringe benefits" would continue to accrue. *Id.*

The parties continued to have difficulty implementing the award and the arbitrator was asked to intervene again. *Id.* at 41. The most relevant issue here was that the State took the position that it could not restore all of the affected COs to the eighty-four hour schedule yet because the State would need to hire 62 new COs before implementing the award in order to maintain prisoner and CO safety in the State's facilities.[11] The State asserted it did not have the legislative

[11] The need to hire 62 additional employees appears to come from recommendations made in a 2010 Legislative Audit report regarding the appropriate "shift relief factor" for the State's facilities. The relief factor is "the number of full-time equivalent positions (FTE) needed to fill a post on a continuous basis during a single shift." Arb. Ex. A-6d at 3. "A post is a [CO] position that is

authority to hire these additional personnel and that if the legislature refused to approve the additional personnel, the award would be void for impossibility of performance. State's Mem., Ex. 2-E at 1-2.

The arbitrator addressed this issue in an August 5, 2013 email. She noted, that "an assertion that the DOC might need to hire additional officers does not excuse compliance with the specified remedy or establish an impossibility defense." Arb. Op. at 42. She continued,

> [t]he 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.

Id. The arbitrator noted that the parties may need to proceed to litigation regarding her award, but also proposed ways to move forward. *Id.* The State filed this lawsuit less than a week later and the record does not indicate that any additional activity has occurred in the arbitration.

Procedural History

The State filed this suit on August 9, 2013 asking the Court to vacate the arbitrator's award. The ACOA filed its answer and counterclaim on August 23,

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defined by the location, time and duties, but may be staffed interchangeably by a number of COs." *Id.* (emphasis omitted). "The SRF is multiplied by the number of positions assigned to a specific post to determine the number of staff necessary to provide relief for the post." *Id.* A 2005 study found that the appropriate SRF for one twenty-four hour, week on/week off post was 4.8. The 2010 study found that this SRF had been inaccurately calculated and that the four facilities studied in the 2010 audit were actually understaffed. The 2010 report noted that DOC would need to hire 47 FTEs to bring the SRF up to appropriate ranges at those four facilities. *Id.* at 17. The Legislative Audit division does not have the power to give their recommendations the force of law. *See* AS 24.20.271.

2013 seeking the Court's confirmation and enforcement of the award. The State filed its answer to the ACOA's counterclaims on October 4, 2013.

The State filed a motion for summary judgment on November 27, 2013 and included all of the exhibits from the arbitration with its initial filing.[12] The ACOA filed its combined opposition and cross-motion for summary judgment on January 3, 2014. The State filed its combined opposition and reply on January 21, 2014. The ACOA filed its reply on January 27, 2014.

The Supreme Court of Alaska decided *State v. Public Safety Employees Ass'n*, 323 P.3d 670 (Alaska 2014), after briefing was completed in this matter. This Court issued an order informing the parties that they should be prepared to discuss the recent opinion at oral argument. The Court also gave the parties the option of submitting supplemental briefing, which they both did.

The Court held oral argument on May 13, 2014. On May 16, 2014, and with the Court's permission, the ACOA filed a supplemental document regarding evidence presented at the arbitration regarding safety concerns.

Standard of Review

I. The Summary Judgment Standard

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Alaska R. Civ. P. 56. In a motion for summary judgment, the moving party has the initial burden of offering admissible evidence showing both the absence of

[12] The ACOA agrees that these are all of the exhibits used during the arbitration. ACOA's Consolidated Opp'n to State of Alaska's Mot. for Summ. J., and Mem. in Support of Cross-Mot. for Summ. J. at 4, n.1 [hereinafter "ACOA's Opp'n and Mem."].

any genuine dispute of fact and the legal right to a judgment. *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005). Once the moving party has made this showing, the burden shifts to the non-moving party to produce admissible evidence reasonably tending to dispute or contradict the moving party's evidence. *Id.*

To defeat a motion for summary judgment, the non-moving party may not rest on its allegations, but must put forth specific facts showing that there is a genuine, material factual dispute. *Id.* A genuine, material factual dispute requires more than a scintilla of contrary evidence. *Id.* In meeting their respective burdens, the parties may use pleadings, affidavits, and any other material that is admissible in evidence. *Miller v. Fairbanks,* 509 P.2d 826, 829 (Alaska 1973). In evaluating a motion for summary judgment, the Court must draw all reasonable inferences in favor of the non-moving party. *Cikan*, 125 P.3d at 339. Reasonable inferences are those inferences that a reasonable factfinder could draw from the evidence. *Alakayak v. British Columbia Packers, Ltd.*, 48 P.3d 432, 449 (Alaska 2002).

II. Standards applicable to the Court's review of arbitration awards

Alaska has a strong policy in favor of enforcing arbitration awards and the Court cannot vacate an arbitrator's award solely because it would not have ruled in the same manner as the arbitrator. *State v. Public Safety Employees Ass'n*, 257 P.3d 151, 155, 165-66 (Alaska 2011) (citing *Baseden v. State*, 174 P.3d 233, 237 (Alaska 2008) and *Dep't of Public Safety v. Public Safety Employees Ass'n*,

732 P.2d 1090, 1093 (Alaska 1987)) [hereinafter "*PSEA 2011*"]. The policy in favor or arbitration is so strong that the Supreme Court of Alaska has held that it is "*loathe* to vacate an award made by an arbitrator." *Dep't of Public Safety*, 732 P.2d at 1093 (emphasis added). Moreover, arbitrators have broad discretion in creating appropriate remedies where the underlying contract is silent. *Alaska Public Employees Ass'n v. State, Dep't of Environmental Conservation*, 929 P.2d 662, 663 (Alaska 1996).

Despite these high standards, arbitration awards are not unassailable. Two potential justifications for vacating an arbitration award are at issue in this case. The first is the public policy exception, which applies where the arbitration award itself violates an "explicit, well-defined, and dominant public policy." *PSEA 2014*, 323 P.3d at 676 (quoting *PSEA 2011*, 257 P.3d at 161).[13] The public policy exception "'establish[es] a high hurdle for the vacatur of arbitration awards.'" *Id.* (quoting *PSEA 2011*, 257 P.3d at 153).

The second justification for vacatur at issue here is where the arbitrator makes an error that goes beyond the deference a court typically extends to an arbitration award. The level of deference the Court should apply is at issue in this matter. The ACOA argues that the Court should apply the gross error standard. ACOA's Reply Mem. in Support of Def.'s Cross-Mot. for Summ. J. at 1-3 [hereinafter "ACOA's Reply"]. This is because, the ACOA claims, this was

[13] *PSEA 2011* discusses three "common principles . . . that should be used in the public policy exception analysis." *PSEA 2014*, 323 P.3d at 676, n. 14. These factors, however, are most relevant in arbitrations where a public employee discharged for misconduct seeks reinstatement. *See id.* The Court does not find them helpful here.

grievance arbitration and the gross error standard applies to grievance arbitrations. *Id.* at 2 (citing *PSEA 2011*, 257 P.3d at 158).

The State argues that the Court should apply the less deferential arbitrary and capricious standard.[14] State's Reply to ACOA's Opp'n to State's Mot. for Summ. J./State's Opp'n to ACOA's Mot. for Summ. J. at 8-11 [hereinafter "State's Reply and Opp'n"]. The State claims that important public policy considerations, the award's allegedly significant monetary value, and the State's characterization of this arbitration dispute as being of a "contractually formative" nature warrant the use of the arbitrary and capricious standard. *Id.* at 9-10 (citing *Alaska State Employees' Ass'n v. State of Alaska*, 74 P.3d 881, 882-83 (Alaska 2003)). The State notes that the Supreme Court of Alaska has used the arbitrary and capricious standard to review interest arbitration awards. *Id.* The State claims that "[t]his case is solely about interpreting contract provisions, and thus does not require the trier of fact to rely on testimony and witness credibility that would warrant a more deferential standard of review." *Id.* at 11.

There are, generally, two types of employment arbitration:

> 'Interest arbitration is a process in which the terms and conditions of the employment contract are established by a final and binding decision of the arbitration panel. It differs from grievance arbitration, which involves the interpretation of the employment contract to determine whether the conditions of employment have been breached.'

[14] The State's original memorandum uses the "gross error" standard with no mention of the arbitrary and capricious standard. *See* State's Mem. at 27. The State first raised the use of the "gross error" standard in its combined opposition and reply. This opinion gives no weight to that inconsistency.

Public Safety Employees Ass'n, Local 92 v. State, 902 P.2d 1334, 1335 n.1 (Alaska 1995) [hereinafter "*PSEA, Local 92 II*"] (quoting *Municipality of Anchorage v. Anchorage Police Dep't Employees Ass'n*, 839 P.2d 1080, 1081 n.1 (Alaska 1992)). Our supreme court has specifically held that the gross error standard applies to grievance arbitration and that the arbitrary and capricious standard applies to compulsory interest arbitration. *Public Safety Employees Ass'n, Local 92 v. State*, 895 P.2d 980, 984 (Alaska 1995) [hereinafter "*PSEA, Local 92 I*"] (citing *Nizinski v. Golden Valley Electric Ass'n, Inc.*, 509 P.2d 280, 283 (Alaska 1973) and *State v. Public Safety Employees Ass'n*, 798 P.2d 1281, 1287 (Alaska 1990) [hereinafter "*PSEA 1990*"]).

A court using the gross error standard will vacate an award only where the arbitrator commits a mistake that is "both obvious and significant." *PSEA, Local 92 I*, 895 P.2d at 984 (quoting *City of Fairbanks v. Rice*, 628 P.2d 565, 567 (Alaska 1981)). A court using the arbitrary and capricious standard reviews the arbitrator's award for an abuse of discretion. *Id.* (citing *Municipality of Anchorage v. Anchorage Policy Dep't Ass'n*, 839 P.2d 1080 (Alaska 1992)).

The present case involves a class of COs grieving the DOC's decision to switch them from the eighty-four hour schedule to the forty-two hour schedule. The parties were not at an impasse regarding what language they should include in their collective bargaining agreement. They had a fundamental disagreement over what the terms of their existing agreement were and whether the DOC had violated the agreement. This was *grievance* arbitration and the gross error standard would normally apply.

The fact that the arbitrator interpreted the agreement does not transform the arbitration into an interest arbitration. The arbitrator's need to interpret the agreement is specifically contemplated in the definition of grievance arbitration. *See PSEA, Local 92 II*, 902 P.2d at 1335 n.1 (quoting *Municipality of Anchorage v. Anchorage Police Dep't Employees Ass'n*, 839 P.2d at 1081 n.1 (stating "grievance arbitration . . . involves *the interpretation of the employment contract* to determine whether the conditions of employment have been breached." (emphasis added)).

The public policy justifications the State raises to support using the arbitrary and capricious standard also do not affect the standard of review here. First, the case law does not indicate that the fact that the arbitrator has entered an award that could cost the State a substantial amount of money deserves a less deferential standard.[15] Moreover, such a policy begs the question of how substantial an award needs to be before less deference is appropriate. Answering that question would engender additional litigation, which would undermine the efficiency justification for arbitration. *See Dep't of Public Safety*, 732 P.2d at 1093 (stating "[a]rbitration allows parties to resolve their disputes through relatively expeditious and inexpensive processes. Parties to a dispute will have little incentive to enter into arbitration unless arbitration awards are allowed to lie in repose. 'As a result, we have followed a policy of minimal court

[15] However, one of the reasons for the arbitrary and capricious standard in interest arbitration is that public resources will be used to put the agreement into effect. That consideration does not rely on the amount of the award, but on the fact that public funds are at issue. Public funds are always at issue where the State is a defendant in arbitration.

interference with arbitration.' *City of Fairbanks Municipal Utilities Sys. v. Lees*, 705 P.2d 457, 460 (Alaska 1985).").

Second, this arbitration did involve testimony and witness credibility. *Cf.* State's Reply and Opp'n at 11 (arguing "[t]his case is solely about interpreting contract provisions, and thus does not require the trier of fact to rely on testimony and witness credibility that would warrant a more deferential standard of review."). The arbitrator took testimony regarding the parties' bargaining histories, the intent behind their respective positions, and their historical practices in trying to resolve the ambiguity she identified in the CBA. *See, e.g.*, Arb. Op. at 26. Her findings on these issues were integral to her rulings.

Third, the fact that the award implicates public policies regarding the safety and security of prisoners, COs, and the public does not justify less deference when examining the opinion for error. The public policy exception our supreme court has recognized adequately addresses this concern. Lowering the level of deference solely because of the public policies implicated would be unnecessarily duplicative.

The supreme court has held that the gross error standard applies to compulsory grievance arbitration. *PSEA, Local 92 I*, 895 P.2d at 984 ("In grievance disputes 'gross error' is the standard.") (citing *Nizinski*, 509 P.2d at 283). The State has provided no compelling reason why the Court should deviate from those plain statements. Thus, the Court will review the arbitrator's award here using the gross error standard and vacate the award only if the arbitrator committed an obvious and significant error or violated public policy.

Discussion

I. The arbitrator's award does not violate public policy.

The State argues that the arbitrator's award violates public policy because the award (1) burdens the DOC Commissioner's statutory authority to control and operate the State's correctional system; (2) requires the State to implement the award prior to seeking legislative approval; and (3) jeopardizes the safety of inmates and DOC staff. State's Mem. at 20-27. The ACOA disagrees as to each of these issues.

A. The arbitration award does not violate public policy regarding the DOC Commissioner's authority

The State notes that there are both constitutional and statutory provisions relevant to the State's authority to operate its prison system. *Id.* at 20 (citing Alaska Const., art. I § 12 and AS 33.30.011(1)). The State further points to provisions in the CBA allowing the DOC Commissioner to set hours of operation and assign shifts to demonstrate DOC's "broad authority" to run the State's prisons. The State argues that the DOC Commissioner's decision to move to a blended staffing model falls within this broad authority and that the arbitrator's award reversing that decision thus violated public policy. *Id.* at 20-22.

The ACOA claims that the award does not violate public policy by restricting the DOC Commissioner's authority. First, the ACOA notes that the CBA, to which the State agreed, is necessarily a restriction on unfettered management discretion. ACOA's Opp'n and Mem. at 9. Second, the ACOA argues that a "generic grant of constitutional authority" to operate prisons is not

the type of "explicit, well defined, and dominant" public policy contemplated by the public policy exception. *Id.* at 10. Third, the ACOA asserts that requiring the eighty-four hour week-on/week-off schedule does not in itself violate public policy. *Id.* Fourth, and finally, the ACOA notes that Alaska's public policy favors collective bargaining for public employees. *Id.* at 10-11.

The Court agrees with the ACOA. The State's position would undermine the entire idea of collective bargaining for DOC employees, which is similarly enshrined in Alaska law. *See* AS 23.040.070. An arbitrator's award in grievance arbitration is an interpretation of the agreement between the parties: here the State and the ACOA. Where the arbitrator finds the State has violated the CBA, the arbitrator is essentially finding that there is a limit on the DOC Commissioner's authority in the CBA, to which the State agreed, and that he exceeded that limit.

The State's and the ACOA's arguments demonstrate the tension here between the DOC's authority and public policies favoring collective bargaining for public employees. If the imposition of any limit on the DOC Commissioner's operational authority violates public policy, as the State argues, then the CBA becomes worthless to the ACOA and its members. This outcome would specifically violate the public policies evidenced by Alaska's Public Employment Relations Act ("PERA"), AS 23.40.070-AS 23.40.260, which encourages the use of collective bargaining for public employees. *See* AS 23.40.070.

The best approach to resolving this tension is to harmonize the two policies at issue here. *See Borg-Warner Corp. v. Avco Corp.*, 850 P.2d 628, 633-

34 (Alaska 1993) (stating "[w]hen two statutes deal with the same or related subject matter, we strive to construe them as harmoniously as possible."). The best interpretation that harmonizes the two statutory regimes is that the DOC Commissioner operates the State's prisons, but the State has decided that one of the ways in which the DOC will operate prisons is through union labor. Where the CBA imposes restrictions on the commissioner's powers, those restrictions are a part of the way in which the State has decided it will operate and manage its prisons. Those contractual limitations do not violate public policy because they are an extension of the State's right to manage its correctional facilities. Therefore, the arbitrator's award interpreting the State's agreement with the ACOA does not violate an explicit, well-defined, and dominant public policy regarding restrictions on the DOC Commissioner's authority.

B. The arbitration award does not violate a public policy regarding prior legislative authorization of monetary terms in a collective bargaining agreement

The State argues that the arbitrator's award violates public policy because it contradicts PERA's requirement that "monetary terms" in a collective bargaining agreement are subject to approval by the legislature. State's Mem. at 23-24 (citing AS 23.40.215(a)). The State makes two arguments related to PERA. The State first argues that the award violates PERA because the arbitrator required the State to implement the award immediately or face continuing fines and sanctions even though "monetary terms" are subject to legislative appropriation prior to implementation. *Id.* The State then argues that the award violates PERA because the State's implementation of the award

requires the State to hire additional COs and it cannot do so without legislative appropriations. *Id.* at 25. The State claims that prisoners and staff will be at risk unless the State hires these additional COs. *Id.*

The ACOA argues that the award does not violate public policy regarding legislative appropriations. ACOA's Opp'n and Mem. at 11-13. The ACOA asserts that that the legislative appropriation requirement the State cites only applies to "changes in the terms and conditions of employment" and the arbitrator's award does not create such a change. *Id.* at 11-12 (emphasis omitted). The ACOA claims that the award restores the status quo. The ACOA also notes that the State's argument is based on the idea that the award requires the State to hire 62 additional COs, which is found nowhere in the award and appears to be based on a non-binding legislative audit finding that the ACOA claims the State has ignored for two years. *Id.* at 12. The ACOA finally claims that the legislative appropriation requirement is not an appropriate basis to invalidate the award, because PERA only requires that the State must request funds from the legislature; not that the funds must be provided. *Id.* at 13.

Monetary terms of an agreement entered into under PERA "are subject to funding through legislative appropriation." AS 23.40.215(a). PERA requires the Department of Administration to "submit the monetary terms of an agreement to the legislature within 10 legislative days after the agreement of the parties . . . The complete monetary and nonmonetary terms of a tentative agreement shall be submitted to the legislature no later than the 60th day of the legislative session . . ." AS 23.40.215(b). PERA defines "monetary terms of an agreement" 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 appropriation is required for implementation.

AS 23.40.250(4).

These facts and the definition of "monetary terms" demonstrate the problems with the State's argument. A monetary term is a *change* in the terms and conditions of employment. The arbitrator did not change the terms and conditions of employment, she determined what the existing terms in the CBA meant. In a grievance arbitration, that is exactly what the arbitrator is supposed to do. If anything, it is the State that attempted to change the terms and conditions of employment. The "change" the arbitrator required was a return to what she found the CBA required.

Cases the State cites do not compel the opposite conclusion. For example, in *Fairbanks Police Dep't Chapter, Alaska Public Employees Ass'n v. City of Fairbanks*, 920 P.2d 273 (Alaska 1996), the supreme court held that an arbitration award was subject to PERA's legislative appropriation mandate. *Fairbanks Police Dep't*, 920 P.2d at 274-75. In that case, the parties went to interest arbitration over several provisions including meal and clothing allowance increases. The arbitrator found for the union and ordered the inclusion of meal and clothing allowance increases in the new collective bargaining agreement. *Id.*

at 274. The Fairbanks City Council decided not to fund the meal and clothing increases and the union brought suit to enforce the award.

The superior court granted summary judgment to the city holding that the terms of the agreement were subject to legislative appropriation even though it was the result of an arbitration award. The Supreme Court of Alaska affirmed noting that the legislative appropriation requirement was explicitly applicable to "any agreement entered into under AS 23.40.070-23.40.260." *Id.* at 275 (citing AS 23.40.215(a)). The court also noted that its ruling maintained "legislative authority over governmental appropriations." *Id.* (citing *Public Employees' Local 71 v. State*, 775 P.2d 1062, 1064 (Alaska 1989)).

Although *Fairbanks Police Dep't* could be broadly interpreted to make all arbitration awards subject to legislative approval, that would overstate the holding. *Fairbanks Police Dep't* stands for the principal that the terms to be included in a collective bargaining agreement, whether reached through mutual assent or interest arbitration, are subject to legislative appropriation. The fact that an arbitrator ordered a particular term included in the collective bargaining agreement does not remove the legislative appropriation requirement. *Fairbanks Police Dep't* does not, however, hold that all grievance arbitration awards are subject to legislative appropriation.

That is not to say that a grievance arbitration award cannot be invalidated because the legislature refused to fund a monetary term of a collective bargaining agreement. In *Univ. of Alaska Classified Employees Ass'n v. Univ. of Alaska*, 988 P.2d 105 (Alaska 1999), the Supreme Court of Alaska vacated a

grievance arbitration award because the legislature had not funded the provisions that the arbitrator found were breached, making them ineffective. *Univ. of Alaska Classified Employees Ass'n*, 988 P.2d at 109. *PSEA, Local 92 I* similarly held that legislative approval of monetary terms in an agreement "is required before the terms become effective" and that "penalties for nonpayment would not accrue until the date when legislative approval is obtained." *PSEA, Local 92 I*, 895 P.2d at 986.

Here, however, the arbitration award is not a monetary term of the agreement because it is not a change in the terms and conditions of employment resulting from an agreement. Moreover, the State has not demonstrated that the arbitration rests on a provision of the CBA that the legislature has chosen not to fund. There is no evidence, for example, that the legislature has refused to fund eighty-four hour schedule positions or passed a resolution specifically disapproving the use of the eighty-four hour schedule for all security posts. If anything, members of the legislature expressed concern regarding DOC's implementation of the blended staffing plan. *See* Arb. Ex. A-11b at 2, Arb. Ex. A-28e at 8.[16]

[16] In 2012, the Senate Finance Budget Subcommittee noted, "[t]he Subcommittee finds the Department has failed to adequately study the proposed "blended shift model" which would place a greater number of correctional officers on 8-hour shifts." Arb. Ex. A-11b at 3. The subcommittee adopted the following statement of intent: "it is therefore the intent of the legislature that the Department utilize the $1,700,000.00 appropriation to Population Management in FY13 to maintain the status-quo shift scheduling policy." *Id.* at 2. The final version of the bill removed that language, but stated "it is the intent of the legislature that the Department of Corrections should consider the potential costs, including costs of litigation or arbitration, officer and inmate safety, and employee recruitment and retention, when evaluating any changes to the historical policy of using shift staffing." Arb. Ex. A-28e at 8. Later budgets include no statement of intent regarding DOC staffing policy and neither party has cited to any legislative statements or appropriation

The budget documents in the record do not include specific line items for the number of eighty-four hour positions versus the number of forty-two hour positions the legislature intended to fund that would demonstrate that DOC does not have the funds to go back to the prior staffing schedule. *See* Arb. Ex. A-28e at 8-10; *see also* Arb. Ex. A-11b. The appropriation and budget documents do not present that level of detail. The text of the appropriations bill in the record, CCS HB 284, only shows the total amount allocated per institution and does not designate how each institution must use those funds. Arb. Ex. A-28e at 9. The State also has not provided any evidence demonstrating that the amount of money the legislature provided makes it impossible to return to the prior staffing plan such that the Court could infer that the Legislature intended to prevent the State from returning to the prior staffing plan.

The State has not demonstrated that the arbitrator's award is void because it would violate PERA. PERA does not create a requirement for the legislature to approve the funds necessary to implement a grievance award. To the extent that PERA might apply where the arbitrator orders the State to use a particular staffing plan, there is no violation when the arbitrator's award requires the State to return to the plan previously funded by the legislature without any evidence that the legislature did not intend to continue funding that plan through the general unallocated funds it has granted that particular State agency. The arbitrator's award does not violate PERA.

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restrictions that would make it impossible to implement the arbitrator's award. *See* 2014 SLA ch. 16; 2013 SLA ch. 14.

C. The arbitration award does not violate public policy by making the DOC's facilities unsafe

The State cites the Alaska Constitution to demonstrate that safety is a "paramount concern" in managing the State's correctional facilities. State's Mem. at 26 (citing Alaska Const. art. I, §12 (stating, in part, "[c]riminal 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.")). The State argues that without hiring additional staff, which it allegedly cannot do, inmates and staff will be at risk. The State claims that "[t]his flagrant disregard for the safety of the people in the facilities violates the public policy articulated in Alaska's constitution." *Id.*

The ACOA notes that the State's argument is premised on the idea that the State needs to hire additional guards before implementing the arbitrator's award. ACOA's Mem. and Opp'n at 13. The ACOA argues that hiring additional guards is simply a recommendation from the 2010 legislative audit and not binding. The ACOA also points out that the DOC "resisted the audit's recommendation for more than two years . . ." *Id.*

There likely is an explicit and dominant public policy in favor of keeping the State's prisons reasonably safe. It is unclear, however, that this policy is sufficiently well-defined. Exactly what does it mean for the prisons to be reasonably safe such that the Court could determine that an arbitrator's award violates the public policy in favor of prison safety?

The Court agrees that one component of maintaining a reasonably safe prison would presumably be appropriate staffing levels. However, the State does not cite, and the Court has not independently found, any constitutional provision, statute, or regulation that requires a particular level of staffing that the Court could point to as a basis for invalidating the award. The 2010 Legislative Audit, on which the State relies, is a recommendation and does not have the force of law. Without a constitutional, legislative, or regulatory pronouncement on which the Court can rely, the Court finds that the State has failed to demonstrate that the arbitration award will violate a *well-defined* public policy.

The argument the State advances here is similar to that advanced in *PSEA 2014*. There, the State pointed to "broad categories of undesirable behavior" to justify its request that the Supreme Court of Alaska overturn an arbitrator's award requiring the State to reinstate a trooper. *PSEA 2014*, 323 P.3d at 680. The court declined noting that broad constitutional provisions "do not evince the requisite explicit, well-defined, and dominant public policy" necessary to overturn the award. *Id.* at 679. Similarly broad statutory and regulatory statements were also insufficient to indicate that "reinstating a trooper who has engaged in sexual misconduct is against public policy." *Id.* at 680-81. The court noted that using broad categories "would make nonsense of our statement in *PSEA 2011* that the public policy exception does not permit a court to reject an arbitration decision merely because the court might have decided the case differently." *Id.* at 681.

Here too, the State points to broad statements regarding maintaining safe prisons that do not address the minimum levels of staffing necessary to accomplish that goal. There is no objective criterion against which the Court can measure the award to determine if it violates public policy, and these broad statements do not rise to the level of an explicit, well-defined, and dominant public policy on which the Court could justify vacating the arbitrator's award. All the Court would be doing is using the cover of these broad policy statements to justify its determination that the arbitrator was wrong. This is the exact danger our supreme court warned against.

There is no basis for applying the public policy exception to this case. The arbitration award does not violate the DOC's broad managerial discretion. The award does not violate PERA. The award does not violate a *well-defined* public policy regarding safety. The Court, therefore, declines to invalidate the award on public policy grounds.

II. The arbitrator did not commit gross error

The State argues that the arbitrator committed gross error where she ordered implementation of her award without legislative approval in violation of the CBA and PERA. State's Mem. at 28-31. The State further asserts that the award was the product of gross error because the arbitrator added unwritten terms to the CBA in violation of PERA. *Id.* at 28-34. The State also claims that the arbitrator committed gross error because she exceeded her authority when she disregarded particular portions of the CBA. *Id.* at 34-38. The State finally claims that the arbitrator committed gross error in finding that the CBA required

the State to notify the ACOA and the COs simultaneously regarding changes in the shift schedule. *Id.* at 38-39.

The ACOA claims there was no gross error related to the legislative appropriation process for the same reasons as those discussed above. ACOA's Mem. and Opp'n at 14. The ACOA further claims that the arbitrator did not commit gross error where she found that the contract language was ambiguous and used extrinsic evidence of the parties' past practices to interpret the contract. *Id.* at 14-15. The ACOA rejects the idea that the arbitrator was bringing new terms into the agreement. *Id.* at 17. The ACOA notes that simple disagreement with the arbitrator's decision is insufficient justification for the Court to void it. *Id.* at 16, 18.

As discussed earlier, a gross error is one that is obvious and significant. The Court cannot vacate an arbitrator's award in favor of its own interpretation of a collective bargaining agreement "merely because it finds its own to be better reasoned." *Dep't of Public Safety*, 732 P.2d at 1093. The Court should uphold the arbitrator's award if the arbitrator's interpretation of the agreement "is reasonable in light of the contract language and the context in which the contract was made." *Id.* "'[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.'" *PSEA 2014*, 323 P.3d at 684 (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

A. The arbitrator did not commit gross error by requiring immediate implementation of her award

The parties' arguments on this point are similar to those discussed above in the public policy exception discussion related to PERA. State's Mem. at 28-31; ACOA's Mem. and Opp'n at 14. The conclusions above regarding PERA's inapplicability to this particular grievance award similarly apply here. The arbitrator did not violate PERA, and thereby commit gross error, where she ordered the State to implement the award immediately.

B. The arbitrator did not commit gross error in determining that only the eighty-four hour schedule applied to security posts

The State argues that the arbitrator violated PERA's requirement that all the terms of an agreement be in writing where she found that security posts could only be filled by employees on the eighty-four hour schedule. State's Mem. at 31. The State asserts that the arbitrator's interpretation similarly violated the CBA's restrictions on the arbitrator's ability to add or subtract terms from the CBA. The State also claims that the arbitrator improperly relied on past practice to find that the CBA was ambiguous regarding the meaning of the State's authority to move employees among shifts as it needed. *Id.* at 32-34.

The ACOA argues that it is entirely appropriate for an arbitrator to review extrinsic evidence and surrounding contract provisions to determine if an ambiguity exists. ACOA's Mem. and Opp'n at 15. The ACOA further argues that past practice is a well-established tool for resolving ambiguities in an agreement. *Id.* at 15-16. The ACOA asserts that the State is merely claiming that the

arbitrator "got it wrong" which is an insufficient basis to vacate the award. *Id.* at 18.

The arbitrator did not commit gross error here. The arbitrator reviewed the parties' agreement and found that there was a question regarding the meaning of Section 22.2.A, which gives the State authority to move COs among shift assignments. The word "shift" is not defined anywhere in the agreement and it is unclear to what it refers. It could be a simple reference to specific weeks or days worked. It could refer to the time of day when someone works. It could also refer to the specific job responsibilities assigned to an employee. The arbitrator examined extrinsic evidence to determine the parties' intent when they used the word "shift." Doing so was not an obvious and significant error; particularly as Alaska courts themselves will look to extrinsic evidence to determine contract meaning. *See Weiner v. Burr, Pease & Kurtz, P.C.*, 221 P.3d 1, 9 (Alaska 2009). Moreover, the award does not run afoul of PERA's written terms requirement because the arbitrator was determining the meaning of an existing term, as opposed to adding new terms to the CBA.

The arbitrator's decision to use past practice to help understand the meaning of the term also was not gross error. The State admits that past practice may be used to "fill in gaps in a general contract term or, as the arbitrator applied it here, modify clear contractual language." State's Mem. at 33 (citing Elkouri & Elkouri, How Arbitration Works 608 (6th ed. 2003)). The State challenges, however, the arbitrator's finding that the parties had a "mutual understanding" that the eighty-four hour schedule was specifically for security

posts, claiming that there was "a lack of evidence that a management representative has ever stated . . . that it was abandoning its right to assign employees on 12-hour shifts to 8-hour shifts . . ." *Id.* This is an invitation to examine the arbitrator's factual findings, which is not something that the trial courts do when determining whether to confirm an arbitration award. Moreover, the arbitrator cited to both ACOA and DOC witnesses in finding that there was a mutual understanding on this issue. Arb. Op. at 29-32. The State's challenge on this point is not persuasive.

The State also cites a variety of contract provisions it claims the arbitrator's award violates. The majority of these are disposed of easily. The State cites to provisions of Article 22 giving DOC the right to "set the hours of operation, assign shifts, and change duty assignments." State's Mem. at 38. The State also cites the general reservation of management rights in Article 4. *Id.* at 35-36. The State finally claims that the arbitrator removed the reference to "overtime" in Section 13 of the CBA and added a job classification, which she assigned to specific shifts. *Id.*

The ACOA argues the arbitrator did not remove or add any terms to the agreement, but was interpreting the written terms of the contract. ACOA's Opp'n and Mem. at 16. The ACOA points out that the Arbitrator specifically recognized the limits on her authority and argues that she succeeded in respecting those boundaries. *Id.* The ACOA reiterates the rule that the mere fact that an arbitrator "got it wrong" is not enough to justify vacatur: the errors must be obvious and significant. *Id.* at 18

1. *The arbitrator's award does not violate DOC's authority to set hours of operation*

First, this case was not about setting hours of operation. Nothing Arbitrator Gaunt did affected the hours of operation for DOC facilities or DOC's authority to set those hours. Even if "hours of operation" could be a reference to the hours employees worked, the term is ambiguous and the arbitrator's interpretation is reasonable. This issue does not justify a finding of gross error.

2. *The arbitrator's award does not violate DOC's authority to change a CO's "shift"*

Second, the arbitrator's award does not violate DOC's authority to change CO shifts as needed. The DOC may still move COs from one shift to another as it needs, but the meaning of "shift," as applied to security posts, has been narrowed to mean only the time of day the CO works and when the CO's "on" week falls. The arbitrator's extensive review of the agreement and the parties' past practices demonstrates the ambiguity of the term "shift" and the arbitrator's interpretation of that term was not unreasonable. There was no gross error here.

3. *The arbitrator's award does not prevent DOC from temporarily changing a CO's duty assignment*

Third, the arbitrator's award does not violate DOC's authority to change duty assignments as permitted in Section 22.6 of the CBA. Section 22.6 permits DOC to change an employee's duty assignment from an eighty-four hour assignment to a forty-two hour assignment temporarily. DOC may still do so. All the arbitrator's award does is state that eighty-four hour assignments are security posts and forty-two hour assignments are administrative support posts. The

DOC retains its authority to temporarily move COs from one type of post to another.[17] This issue does not support a finding of gross error.

4. The arbitrator did not impermissibly remove the word "overtime" from the CBA

Fourth, the arbitrator did not remove the word "overtime" from the CBA. The State is correct that Section 13 is titled "Overtime" and that the arbitrator, in part, used that section to determine the regular hourly schedules for each type of post. However, defining the regular work hours of security officers and administrative support officers is important in determining when the State will owe them overtime. The fact that the arbitrator did not choose to disregard Section 13 solely because the header indicates it is about overtime does not mean that the arbitrator somehow removed the word "overtime" from the contract or disregarded it. This issue does not support a finding of gross error.

5. The arbitrator did not make an obvious and significant mistake by finding that the DOC lacked the authority to unilaterally move security post COs to the forty-two hour schedule

Fifth and finally, the arbitrator did not commit gross error by interpreting the eighty-four hour schedule and forty-two hour schedule as being restricted to particular types of job responsibilities. The arbitrator specifically noted the CBA's inconsistent terminology. *See* Arb. Op. at 22 ("shift" compared to "schedule"), 23 ("assigned to" compared to "on"). The arbitrator also found that the eighty-four hour schedule was included specifically for COs working security posts. *Id.* at 22. Thus, she found it ambiguous whether Article 22's grant of discretion to the DOC

[17] It is questionable whether the arbitrator's award could have violated this provision notwithstanding the point made above. The DOC was not making "Temporary Duty Assignments," but was implementing a permanent new staffing model.

to change a CO's "shift" as necessary gave the DOC the authority to implement the blended staffing plan. In light of the contract language and the facts before the arbitrator, this finding of ambiguity was reasonable and did not constitute gross error.

The arbitrator then attempted to give effect to the parties' intent when they entered into the agreement, a task in which Alaska court's routinely engage. As even the State appears to have conceded, a past, mutually accepted practice may amend an agreement. The arbitrator specifically found that there was a "mutual understanding that the eighty-four (84) hour schedule . . . was *the* applicable schedule for security officers." Arb. Op. at 27 (emphasis added). The arbitrator further found that the description of the eighty-four hour schedule in Article 13, combined with the parties' past practice and negotiating history placed a restraint on DOC's management authority under Article 4.

Further support for the arbitrator's conclusion regarding the use of the eighty-four hour schedule and the forty-two hour schedule to define duties comes from an ambiguity created by Article 22.6. Article 22.6 is titled "Temporary Duty Assignments." CBA at 58. It states "[w]hen the Employer changes the duty assignment of an employee from an 84-hour *assignment* to a 42-hour *assignment*, or vice versa, the Employer . . . will solicit volunteers . . ." *Id.* (emphasis added). The language here indicates that the eighty-four hour and forty-two hour schedules are associated with specific duties. This language further supports the arbitrator's finding that the eighty-four hour schedule and the forty-two hour schedule were used for particular types of posts.

Under these facts, the Court finds that the arbitrator did not commit gross error. A gross error must be obvious and significant. *City of Fairbanks v. Rice*, 628 P.2d 565 (Alaska 1981), provides an example of an obvious and significant error. In *Rice*, an arbitral panel held that two firefighters were not entitled to additional per diem benefits under a collective bargaining agreement because the collective bargaining agreement was entered into after the firefighters took the trip for which they were requesting the per diem. *Rice*, 628 P.2d at 566. The arbitrators overlooked the fact that per diem benefits were explicitly retroactive to a date prior to the firefighters' trip. *Id.*

The superior court reversed the decision and the supreme court affirmed. *Id.* at 567-68.[18] The court held that this oversight was obvious because there was a *specific term* that "clearly applied the per diem allowance retroactively . . ." *Id.* at 567. The court further held that the error was significant because using the per diem rate would "substantially change what [the firefighters] should be paid . . ." *Id.* Thus, "gross error has been demonstrated and judicial interference with the arbitration decision [was] necessary and proper." *Id.*

The error here, if there is an error, does not rise to the level of a gross error. The question is whether any error was sufficiently obvious. Although Article 4 purports to reserve management's rights, it is not sufficiently clear that the arbitrator's conclusion is incorrect given the substantial ambiguities in the CBA and the arbitrator's findings regarding the parties' past practices. That is

[18] The supreme court reversed a portion of the superior court's decision calculating the amount owed to the plaintiffs. *Rice*, 628 P.2d at 567-68.

not to say that the arbitrator was correct or that this Court would have ruled in a similar fashion. It only means that she has not committed such an obvious error that "judicial interference with the arbitration decision is necessary and proper." *Rice*, 628 P.2d at 567.

C. The arbitrator did not commit gross error in finding that the State had an obligation to inform the ACOA of the blended staffing model at the same time it informed the COs

The State claims that the arbitrator committed gross error in finding that the State should have notified the ACOA of the changing schedule at the same time it notified COs. State's Mem. at 38-39. The State argues that the CBA does not impose this requirement because these changes were simply shift changes, which the State has the right to do on its own initiative. *Id.* at 39. The ACOA briefly argues that Arbitrator Gaunt was acting within her authority in finding that the CBA required contemporaneous notification of schedule changes. ACOA's Opp'n and Mem. at 17, n.1.

Article 36 states the parties will "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." CBA at 69. Given the arbitrator's factual findings regarding security posts only using the eighty-four hour schedule and the eighty-four hour schedule's creation specifically for security posts, it was not gross error for the arbitrator to determine that the DOC's decision to make a substantial change in that long-standing policy required notice to the ACOA. The State was significantly changing its past practice regarding staffing. It was not an "obvious and significant" mistake to

require the State to notify the ACOA when it decides to make such changes as a part of the good faith duty to discuss the parties' interpretation of the CBA.

Conclusion

Alaska courts give great deference to arbitration awards. It is irrelevant that the Court may have ruled differently than the arbitrator. The Court's conclusions may well have been substantially different were this a case of first impression. However, the arbitrator committed no errors that rise to the level of gross error and her award does not violate public policy. Therefore, the Court will confirm and enforce the arbitration award. The Court orders the ACOA to submit a final judgment conforming to the Court's opinion and the arbitrator's award within 15 days of the distribution of this order.

DATED at Anchorage, Alaska, this 29th day of July 2014.

/Mark Rindner

MARK RINDNER
Superior Court Judge

I certify that on 7/29/14 a true and correct copy of this order was mailed to:

Wilkerson/Shoup

Administrative Assistant