ALASKA LABOR RELATIONS AGENCY
3301 EAGLE STREET, SUITE 208
P.O. BOX 107026
ANCHORAGE, ALASKA 99510-7026
907-269-4895
FAX 907-269-4898

ALASKA STATE EMPLOYEES ASSOCIATION, AFSCME LOCAL 52, AFL-CIO, PETITIONER,	)
vs.	)
STATE OF ALASKA, RESPONDENT.	)

Case No. 02-1133-CBA

DECISION AND ORDER NO. 261

The board heard this petition on September 19, 2002. Hearing Examiner Mark Torgerson presided. The petition was decided based on the evidence submitted and arguments presented at the hearing.

Digest: The Agency will order the parties to arbitration when their collective bargaining agreement clearly and unmistakably provides that an arbitrator must decide questions of arbitrability, and their contract provides no exception to this procedure.

Appearances: Stan Hafferman, Business Agent for the Alaska State Employees Association; Art Chance, Labor Relations Analyst for the State of Alaska.

Panel: Aaron Isaacs, Jr., Chair; Dick Brickley; and Roberta Demoski.

DECISION

Statement of the Case

The Alaska State Employees Association (ASEA) filed a petition to enforce its collective bargaining agreement (CBA) with the State of Alaska (State). ASEA asks this

Agency to order the parties to arbitration. ASEA contends the State violated Articles 3.01, 6.01, and 12.04 of the parties' collective bargaining agreement (Exh. 4) when the State moved bargaining unit members from classified to exempt service. ASEA argues that the parties' agreement provides that the arbitrator must decide all questions regarding arbitrability, including threshold questions over whether the grievance is arbitrable.

The State disagrees. The State asserts that its action -- to lay off employees of the Alaska Mental Health Trust Authority and move them to exempt status -- was required by legislation signed into law on April 27, 2001. (Respondent's Prehearing Brief at 1-2; Exh. B). The State contends that Article 1.02(A) of the agreement applies to this dispute.

Issues

1. Did the State of Alaska violate the Constitutional prohibition against impairing the obligation of contracts?

2. Should we grant ASEA's petition to compel the parties to arbitration over the Department of Revenue's layoff of employees in ASEA's general government unit?

Findings of Fact

The panel, by a preponderance of the evidence, finds the facts as follows:

1. The Alaska State Employees Association (ASEA) is recognized as the exclusive bargaining representative for employees in the State's General Government Unit. (ASEA/State of Alaska Collective Bargaining Agreement (Exh. A).

2. ASEA and the State of Alaska (State) entered into a collective bargaining agreement for the period July 1, 2000, through June 30, 2003. (*Id.*) The 103-page agreement contains 42 Articles, several appendixes and letters of agreement.

3. Article 1.02(A) provides:

> All new positions and classifications created by the Employer shall be placed in the appropriate bargaining unit, consistent with prior Alaska Labor Relations Agency (ALRA) rulings. All disputes concerning the appropriate bargaining unit placement of a person employed by the Employer shall be decided by the ALRA and no such question shall be subject to the grievance procedure set forth in Article 16 of this Agreement.

(*Id.* at 1).

4. Article 3.01 provides:

> The employer agrees that it will not in any manner, directly or indirectly, attempt to interfere between any bargaining unit member and the Union. It will not in any manner attempt to restrain any bargaining unit member from belonging to the Union or from taking an active part in Union affairs, and it will not discriminate against any bargaining unit member because of Union membership or activity, upholding Union principles, or working under the instruction of the Union or serving on a committee, provided that such activity is not contrary to this Agreement.

(*Id*. at 3).

5. Article 6.01(A) provides:

> The parties agree not to discriminate in employment and membership and will use all due diligence to ensure that bargaining unit members are selected, appointed and promoted from among the most qualified, not on the basis of race, color, religion, national origin, age, sex, physical or mental disability, marital status, change in marital status, pregnancy, parenthood, political affiliation or belief, or union affiliation, or otherwise as specified in law.

(*Id*. at 6).

6. Article 12.04 contains notification requirements. Article 12.04(A) provides:

> In every case of the layoff of any permanent employee, the appointing authority shall make every effort to give written notice to the employee at least thirty (30) calendar days in advance of the effective date of the layoff. The appointing authority shall give at least ten (10) working days written notice.
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> Article 12.04(B) provides that "the appointing authority shall make every effort to give 10 working days layoff notice to probationary employees."
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> Article 12.04(C) requires the employing department's personnel section "to provide counseling and assistance to affected employees. This includes assistance in seeking other employment and advice as to the employee's rights and benefits."

(*Id*. at 21).

7. Article 4 describes management rights:

> It is recognized that the Employer retains the right to manage its affairs, to determine the kind and nature of work to be performed and to direct the work force except as otherwise provided in this Agreement. All of the functions, rights, powers and authority not specifically modified or abridged by the express terms of this Agreement are the sole and exclusive prerogative of the Employer. Such functions, rights, powers and authority include, but are not limited to: 1. Recruit, examine, select, promote, transfer and train personnel of its choosing, and determine the times and methods of such actions; . . . 4. Reduce the work force due to lack of work, funding or other cause consistent with efficient management; … 5. Alter its operations or service . . . .

(*Id*. at 5).

8. Article 16 contains grievance/arbitration provisions. Section A defines a grievance as "any controversy or dispute involving the application or interpretation of the terms of this agreement arising between the Union or employee or employees and the Employer." (*Id*. at 27). The section provides that the grievance procedure in Article 16 is the sole means of settling disputes unless the parties have agreed to an alternative dispute resolution and appeal procedure.

9. Article 16.03(A) describes the arbitrator's authority: "Questions of arbitrability shall be decided by the arbitrator. The arbitrator shall make a preliminary determination on the question of arbitrability. Once a determination is made that the matter is arbitrable or if such preliminary determination cannot reasonably be made, the arbitrator shall then proceed to hear the merits of the dispute."

10. Committee Substitute for Senate Bill No. 122 (Fin) passed the Legislature and was signed into law by Governor Tony Knowles on April 27, 2001. (Exh. B). This legislation moved the chief executive officer and employees (except the ombudsman position) of the Alaska Mental Health Trust Authority (AMHTA) from classified service to exempt service. As classified employees, they were members of the general government unit (GGU) represented by ASEA.

11. On May 29, 2001, the employer notified the affected employees that the employer would abolish their classified positions after June 12, 2001, and it would move their positions to the exempt service. The notice alerted employees that an attached informational packet contained an explanation of their layoff rights. (Exh. 1).

12. On June 5, 2001, ASEA filed a step II grievance over the layoffs. In a letter to the Department of Revenue, ASEA asserted that the layoffs of the employees in the General Government Unit were a "thinly veiled attempt to circumvent" the Constitutional mandate against impairing the obligation of contracts. ASEA also contended that the employer violated 1) the Section 12.04 requirement that every effort

be made to provide a 30-day notice of layoff, 2) the Section 3.01 non-interference language of Section 3.01, and 3) the Article 6.01 language prohibiting discrimination in employment and union membership. (Exh. 2).

13. The State denied the grievance at all steps. ASEA requested arbitration. The State responded that the dispute was not subject to the contract's grievance/arbitration procedure because the State's "actions stem from specific legislative actions to which the executive branch is bound." (Exh. 5).

14. ASEA filed a petition requesting that this Agency compel the parties to arbitration over the layoffs of the Department of Revenue employees. (January 29, 2002, petition)

ANALYSIS

1. Did the State of Alaska violate the Constitutional prohibition against impairing the obligation of contracts?

ASEA contends that the State violated the constitutional prohibition against impairment of the obligation of contracts by laying off the affected bargaining unit employees. The State denied the assertion.

We will not address this issue. Deciding this issue is beyond our jurisdiction or authority. *Dougan v. Aurora Electric Inc.*, 50 P.3d 789 (Alaska 2002); *State Department of Labor, Wage and Hour Div. v. University of Alaska*, 664 P.2d 575 (Alaska 1983). (Administrative agencies have no jurisdiction to decide issues of constitutional law such as a violation of one's right to privacy.)

2. Should we grant ASEA's petition to compel the parties to arbitration over the Department of Revenue's layoff of employees in ASEA's general government unit?

AS 23.40.210 provides that "[e]ither party to the [collective bargaining] agreement has a right of action to enforce the agreement by petition to the labor relations agency." This provision grants jurisdiction in this Agency to decide issues of arbitrability. *Fairbanks Fire Fighters Ass'n v. City of Fairbanks*, 48 P. 3d 1165 (Alaska 2002). A preliminary question in these disputes is whether the parties' agreement addresses the arbitrator's authority to determine arbitrability issues. If the agreement does so provide, the Agency generally applies the contractual provision to the dispute.

Article 16.03(A) of the ASEA/State collective bargaining agreement describes the arbitrator's authority: "Questions of arbitrability shall be decided by the arbitrator. The arbitrator shall make a preliminary determination on the question of arbitrability." On its face, this provision is clear: the arbitrator, not the Agency or a court, decides arbitrability. The sentence following the above provision also supports this conclusion: "Once a determination is made that the matter is arbitrable or if such preliminary determination cannot reasonably be made, the arbitrator shall then proceed to hear the merits of the

dispute." In other words, this provision grants the arbitrator authority to proceed with the merits of the parties' dispute even if the arbitrator "cannot reasonably" determine preliminary arbitrability of the dispute. We conclude that this provision authorizes the arbitrator, not this Agency, to determine arbitrability of ASEA's grievance over the State's action to abolish the classified positions at the Alaska Mental Health Trust and move them to exempt service.

Therefore, we will not determine arbitrability or rule on the underlying contract issues unless the collective bargaining agreement clearly and unmistakably provides an exception to the above provision. We reviewed the parties' agreement and we do not find a provision providing an exception to the arbitrator's authority in Article 16.03(A).

The State contends that "this type of battle" was decided in *Alaska State Employees Association, AFSCME Local 52, AFL-CIO vs. State of Alaska*, Decision and Order No. 200 (February 9, 1996). In that unit clarification dispute, the State reclassified a position in the general government unit, represented by ASEA, from clerical to a natural resource officer II. This reclassification changed the status of the position from classified to exempt service. ASEA filed a petition for unit clarification, contending that the position shared a community of interest with other natural resource officers II in the general government unit. ASEA did not challenge the exempt status or reclassification of the position.

We concluded, among other things, that exempt status does not exclude a position from bargaining rights or placement in a bargaining unit. However, exempt status might affect community of interest in and placement into a particular bargaining unit. (Decision and Order No. 200 at 9). In analyzing the specific position, we found it had a more significant community of interest with exempt positions in the Alaska Oil and Gas Conservation Commission than with similar natural resource officer positions in the GGU.

But we are not required to analyze community of interest or bargaining unit placement here in deciding this petition to enforce the collective bargaining agreement. Instead, we must decide whether to order the parties to arbitration. We have already determined that Article 16.03(A) of the parties' collective bargaining agreement gives the arbitrator authority to decide initial arbitrability. We find nothing in Decision and Order No. 200 that establishes an exception to this grant of authority.

We agree with the State that one facet of this type of "battle" may have been decided in Decision and Order No. 200.[1] But that decision did not address the arbitrability facet before us now. Decision and Order No. 200 addressed community of interest, an issue we are not required to address.

[1] We decided in Decision and Order No. 200, Conclusion of Law No. 6, page 8, that "this Agency has no jurisdiction over the application of personnel rules to employees. Movement of positions between exempt and classified status is under the jurisdiction of the personnel board. See AS 39.25.070 and AS 39.25.130. APEA v. State. Thus, the exempt status of the natural resource officer II position is a given in this case."

The State also argues that Article 1.02(A) applies to this dispute. Article 1.02(A) provides:

> All new positions and classifications created by the Employer shall be placed in the appropriate bargaining unit, consistent with prior Alaska Labor Relations Agency (ALRA) rulings. All disputes concerning the appropriate bargaining unit placement of a person employed by the Employer shall be decided by the ALRA and no such question shall be subject to the grievance procedure set forth in Article 16 of this Agreement.

The State contends this article authorizes this Agency to decide this dispute. ASEA responds that the arbitrator should decide whether Article 1.02(A) applies.

We reiterate that the parties' collective bargaining agreement authorizes the arbitrator, not this agency, to decide the threshold issue of arbitrability. The provision does not limit this authority to procedural determinations, as provided in some collective bargaining agreements. Article 16.03(A) is broad. The arbitrator must therefore decide the arbitrability of Article 1.02(A) and other disputed contract articles.[2]

The arbitrability provision before us is identical to the contract provision in a dispute decided in *Public Safety Employees Association v. State of Alaska*, Decision and Order No. 253, (April 25, 2001). PSEA and the State disputed whether a promotional interview process was subject to the grievance/arbitration provision in their collective bargaining agreement. We analyzed arbitration under AS 23.40.210 and a contract provision, also numbered Article 16.03(A), that was identical to Article 16.03(A) here:

> This statute [AS 23.40.210] supports resolving disputes through the grievance-arbitration procedure. In this regard, this Agency has consistently concluded that parties should resolve their disputes through their contractually agreed-upon process. For example, we stated: "This Agency's policy is to promote arbitration by deferring to arbitration in appropriate cases." *Alaska Public Employees Association v. Alaska State Housing Authority*, Decision and Order No. 133 (May 29, 1991). See also *Anchorage Education Ass'n v. Anchorage School District*, Decision and Order No. 128 (Dec. 10, 1990), *Alaska Public Employees Ass'n & Thompson v. Alaska*, Order & Decision No. 69 (Oct. 23, 1981); and *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, DOLLRA Decision & Order No. 90-4 (April 11, 1990).
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> . . . .
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> The Agency's authority to enforce the agreement under AS 23.40.210 can be analogized to the courts' authority under Section 301 of the Labor Management Relations Act. Under Section 301 the United States Supreme

[2] One potential issue for determination could be whether the positions moved from classified to exempt are "new positions and classifications," or are they existing positions.

Court defined a relationship that recognizes arbitration as the principal mechanism to resolve disputes arising under the bargaining agreement.[3]

Decision and Order No. 142 at 7. (citations omitted).

We cautioned, however, that this Agency should not substitute itself for the parties' dispute resolution process, including the authority given to the arbitrator under the parties' grievance-arbitration procedure. "Those procedures, required in AS 23.40.210 to be a part of every agreement bargained under PERA, are a core element of PERA's labor relations scheme to provide a rational method for the parties to resolve their disputes." *Id.*

We went on to cite a United States Supreme Court case that stressed the importance of the grievance-arbitration process as a central part of the collective bargaining process:

> [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for all their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement. . . . The grievance procedure is, in other words, a part of the continuous collective bargaining process.

Id., citing *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581, 46 L.R.R.M.(BNA) 2416, 2419 (1960), quoted in 1 Charles J. Morris, The Developing Labor Law 914-915 (2d ed. 1983).

Warrior & Gulf is one of the Supreme Court's *Steelworkers* trilogy cases: *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 L.R.R.M. (BNA) 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 L.R.R.M. (BNA) 2416; and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 L.R.R.M. (BNA) 2423 (1960). In *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 121 L.R.R.M. (BNA) 3329 (1984), the Court elaborated on arbitrability and the *Steelworkers* cases. In *AT&T Technologies*, the issue concerned whether the parties intended to arbitrate layoffs predicated on a "lack of work" determination by AT&T. The Supreme Court explained the principles announced in the *Steelworker* trilogy and elaborated on arbitrability. It noted that the first principle from the *Trilogy* is that "arbitration is a matter

[3] This view is consistent with that of our predecessors. See, e.g., *Fairbanks Fire Fighters Ass'n v. City of Fairbanks*, DOLLRA Decisions and Order No. 90-4 (April 11, 1990); and *United Transportation Union Local 1626 v. Alaska Railroad Corporation*, Order and Decision No. RR-2 (July 30, 1986).

of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." 475 U.S. 643 at 648. (citation omitted).

Secondly, "the question of arbitrability--whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.* at 649.

The third principle is that, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether 'arguable' or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but *as the parties have agreed*, by the arbitrator." (emphasis added). The Supreme Court added that courts "have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is a particular language in the written instrument which will support the claim." *Id.* at 650.

Finally, the Court stated:

> [W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. (citations omitted). Such a presumption is particularly applicable where the clause is as broad as the one employed in this case which provides for arbitration of 'any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder . . . .' In such cases, '[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.' (citation omitted).

Id. at 650. (citations omitted).

. . . .

A federal district court has pointed out that the Supreme Court in *Warrior and Gulf* focused on the parties' contract language in determining

> the extent of the arbitrator's authority. In *Johnson v. United Food and Commercial Workers, International Union Local No. 23,* 828 F.2d 961, 964; 127 L.R.R.M. (BNA) 3018 (1987), the court cited to *Warrior & Gulf* in holding that the parties may voluntarily decide to resort to arbitration as an alternative form of dispute resolution. "Because an arbitrator's jurisdiction is rooted in the agreement of the parties, they may agree to submit even the question of arbitrability to an arbitrator." *Id*., 828 F.2d at 964, citing to *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583, n.7, 80 S. Ct. 1347, 1353 n.7, 4 L.Ed.2d 1409 (1960); *George Day Constr. Co. v. United Bhd. of Carpenters and Joiners of America, Local 354*, 722 F.2d 1471, 1474-75 (9th Cir. 1984).[4] In *AT &T Technologies*, the Supreme Court put it this way: "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies*, 475 U.S. at 649, citing to *Warrior & Gulf*, 363 U.S. at 582-583, 80 S.Ct, at 1352-1353. (Other citations omitted).

Public Safety Employees Association v. State of Alaska, Decision and Order No. 253, 6-9 (April 25, 2001).

In crafting Article 16.03(A) of their collective bargaining agreement, the parties clearly and unmistakably provided the arbitrator with authority to decide questions of arbitrability. The parties must therefore submit their arbitrability dispute to the arbitrator.

CONCLUSIONS OF LAW

1. The Alaska State Employees Association is an organization under AS 23.40.250(5), and the State of Alaska is a public employer under AS 23.40.250(7).

2. This Agency does not have jurisdiction to decide the constitutional issue in ASEA's petition.

3. This Agency has jurisdiction under AS 23.40.210 to consider ASEA's petition to enforce the grievance/arbitration provisions in the parties' collective bargaining agreement.

4. As petitioner, ASEA must prove each element of its case by a preponderance of the evidence. 8 AAC 97.350(f).

5. ASEA has proven by a preponderance of the evidence that the parties'

[4] In *Antioch Building Materials Co.*, 323 N.L.R.B. 73, 155 L.R.R.M. (BNA) 1041 (February 25, 1997), Chairman Gould, in a concurring opinion stated that the Third Circuit's conclusion in *Johnson* "is compatible with Justice White's opinion in AT&T to the effect that the parties may indeed submit the issue of arbitrability to the arbitrator." *Id.* at 75 (citations omitted).

collective bargaining agreement requires the arbitrator to hear all questions of arbitrability, including whether the parties' dispute is arbitrable.

ORDER

1. The petition by the Alaska State Employees Association is granted. The parties shall proceed to arbitration.

2. The State of Alaska shall post a notice of this decision and order at all work sites where members of the bargaining unit affected by the decision and order are employed or, alternatively, serve each employee affected personally. 8 AAC 97.460.

ALASKA LABOR RELATIONS AGENCY

_____
Aaron Isaacs, Jr., Chair

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Dick Brickley, Board Member

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Roberta Demoski, Board Member

APPEAL PROCEDURES

This order is the final decision of this Agency. Judicial review may be obtained by filing an appeal under Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of filing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the order in the matter of *Alaska State Employees Association, AFSCME Local 52 AFL-CIO vs. State of Alaska*, Case No. 02-1133-CBA, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 31st day of December, 2002.

_____
Margie Yadlosky
Personnel Specialist

This is to certify that on the 31st day of December, 2002, a true and correct copy of the foregoing was mailed, postage prepaid, to
Stan Hafferman, ASEA
Art Chance, State of Alaska

_____
Signature