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ALASKA PUBLIC EMPLOYEES ASSOCIATION/AFT, AFL-CIO,

PETITIONER,

vs.

STATE OF ALASKA,

RESPONDENT.

Case No. 02-1131-CBA

DECISION AND ORDER NO. 264

The board heard this dispute on August 27, 2002. This decision is based on the evidence submitted and the hearing testimony of witnesses.

Digest: The Agency will decline to interpret a contract and will order the parties to arbitration when the subject of their dispute concerns the interpretation or construction of a term contained in the collective bargaining agreement, the grievance/arbitration provisions of the agreement contain a broad arbitration clause, and there is no specific exclusion of the matter in dispute.

Appearances: Angie Parker, Business Agent for the Alaska Public Employees Association; Doug Carson, Labor Relations Analyst for the State of Alaska.

Panel: Dave Rasley, Vice Chair; and members Dick Brickley and Roberta Demoski.

DECISION

Statement of the Case

The Alaska Public Employees Association/AFT, AFL-CIO (APEA) filed a petition to enforce its collective bargaining agreements (CBA) with the State of Alaska (State). APEA asks this Agency to order the parties to arbitration. APEA contends the parties have not settled their dispute over employee Steve Baseden's job status and reimbursement for damages. APEA argues that since the dispute is not resolved, the Board should order the parties to proceed to arbitration. The State asserts the parties' dispute is settled, it has offered to make Baseden whole, and there is no issue to submit to arbitration.

Issues

1. Did the parties settle their dispute over the employee's discharge?

2. Should we grant APEA's petition and compel the parties to arbitration?

Findings of Fact

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

1. APEA is recognized as the exclusive bargaining representative for the supervisory bargaining unit. (Exh. 1 and 2).

2. APEA and the State entered into a collective bargaining agreement for the period July 1, 1999 to June 30, 2002, and July 1, 2000 to June 30, 2003. (*Id.*).

3. On March 1, 1999, Steve Baseden was hired as an Engineer/Architect III with the State's Department of Transportation and Public Facilities. Baseden, a member of APEA, served a one-year probationary period.

4. On February 29, 2000, the State and APEA agreed to extend Baseden's probationary period to September 1, 2000. The State terminated Baseden on April 14, 2000, contending that Baseden did not complete the probationary period successfully.

5. Baseden filed suit in Alaska Superior Court on October 12, 2000. Baseden alleged that the State terminated him wrongfully. On May 31, 2001, the court granted the State's motion for summary judgment and dismissed Baseden's lawsuit. (Exh. 4). But the court also concluded that the agreement to extend Baseden's probationary period violated State law. The court held that Baseden was a permanent employee. The

court conditioned dismissal of the lawsuit on the State giving Baseden 15 days to file a grievance over his dismissal.

6. APEA filed a grievance on Baseden's behalf. The grievance advanced through the first 2 Steps and on to Step 3 when APEA field representative Angie Parker sent Commissioner of Administration Jim Duncan a letter on July 11, 2001. APEA asserted there was no "just cause" for Baseden's termination. As a remedy, APEA requested that the State reinstate Baseden to his supervisory position in position control number 25-3185, and that the State make Baseden whole "in **all** respects, including, but not limited to wages, HI, PERS, SBS, leave, seniority, personnel records, etc." (Exh. 3 at 8) (bold in original).

7. Article 10.5 of the parties' July 1, 2000, to June 30, 2003, collective bargaining agreement describes the grievance procedure at Step 3, including response time for the State. The Article provides that "[t]he Commissioner of the Department of Administration shall respond in writing to the employee and the APEA/AFT representative within twenty (20) working days after receipt of the appeal." (Exh. 2 at 19).

8. The State responded by letter dated August 10, 2001, and received by APEA on August 13, 2001. (Exh. 3 at 9). The State rejected Baseden's grievance as not "susceptible" to the Article 10 grievance procedure. The State noted that the superior court was reconsidering its decision finding Baseden a permanent employee. Should the court reverse itself, Baseden may not be deemed a permanent employee. Until the court issued its final ruling, the State reserved all substantive and procedural rights granted under the parties' collective bargaining agreement.

9. Subsequent to the above letter, but dated the same day, the State faxed and sent APEA another letter informing APEA that the superior court reaffirmed its earlier ruling. The State rescinded its earlier Step 3 response and said it would respond to APEA's Step 3 filing within "the next five working days." (*Id*. at 11).

10. Parker responded on August 14, 2001, that the State's response was due on August 10, 2001, and APEA had not agreed to an extension of time for the State's response, as required by Article 10.2 of the contract. (*Id*. at 12).

11. The State sent Parker a letter dated August 17, 2001, and received by APEA on August 21, 2001. The letter, by Sharon Barton, Director of the Division of Personnel, states in part:

> Upon the Superior Court's determination that Mr. Baseden was as a matter of law a permanent employee at the time of his non-retention, DOT&PF is faced with the impossible task of acting in the past to afford him a permanent employee's due process and just cause rights at separation. Since it is impossible to effect an after-the-fact cure, I find that the grievance must be granted.

> Consequently, I have determined that Mr. Baseden will be returned to duty and made whole subject to the following conditions:
>
> 1) Mr. Baseden shall be made whole from April 15, 2000, less mandatory deductions and interim earnings. Payment will be made within 30 days of the DOT&PF Human Resources Manager's receipt of an accounting of Mr. Baseden's interim earnings, including but not limited to any unemployment compensation, wages or salary from other employment, and any business earnings;
>
> 2) Mr. Baseden will report for duty at the Southeast Region 7-Mile Building at 8:00 AM on September 17, 2001, and shall directly report to Tracy Moore, Engineering Group Chief;
>
> 3) Mr. Baseden will be paid at Salary Range 24, Step B, with a merit anniversary date of March 15, 2002;
>
> 4) Mr. Baseden will occupy PCN 25-2341 in the job classification of Engineer/Architect III.

(Exh. 3 at 13-14).

12. Barton's letter added: "This decision is voidable in the State's sole discretion if the court order in 1JU-00-1731 CI is vacated, whereupon the State reverts to its decision denying the grievance by letter of August 10, 2001." (*Id*. at 14).

13. Barton wrote Parker on September 4, 2001, noting Parker expressed to Art Chance of Barton's staff that Baseden sought settlement. Barton responded that the State felt it "granted the relief requested in the grievance and there is nothing more to be done." (*Id.* at 18). But Barton added that the State would consider APEA's concerns regarding relief requested if APEA provided specific details.

14. Parker responded to Barton on September 6, 2001. Regarding the voidability of the State's August 17 offer, Parker said: "If Mr. Baseden accepted your return to work offer and then the State reverted to it's previous decision denying the grievance, the State would be in position to terminate Mr. Baseden for a second time. Is this a good faith offer?" (*Id*. at 19). Parker also expressed concern that the State did not address some remedies APEA requested for Baseden, including a return to PCN 25-3185, and make whole for seniority, personnel records, SBS, HI, and other items.

15. Parker requested arbitration by separate letter to Commissioner Duncan on September 6, 2001. The request alleges the State violated Article 5 of the collective bargaining agreement, and the State filed a late response to APEA's Step 3 letter.

16. On September 18, 2001, Barton wrote Parker that the State would not appeal the Superior Court's decision. "In other words, the State is no longer reserving any rights with respect to the legal issues raised by Judge Weeks' order and Mr. Baseden can return to work without concern of further action by the State in that case." (*Id*. at 26).

17. Article 5 of the collective bargaining agreement describes management rights:

> It is recognized that the Employer retains the right, except as otherwise provided in this Agreement, to manage the affairs of the State and to direct its work force. Such functions of the Employer include, but are not limited to:
>
> A. recruit, examine, select, promote, transfer and train employees of its choosing, and to determine the times and methods of such actions;
>
> B. assign and direct the work; develop and modify class specifications as well as assignment of the salary range for each classification, allocate positions to those classifications; determine the methods, materials and tools to accomplish the work; designate duty stations and assign employees to those duty stations;
>
> C. reduce the work force due to lack of work, funding or other cause consistent with efficient management; discipline, suspend, demote or dismiss permanent employees for just cause;
>
> D. establish reasonable work rules; assign the hours of work and assign employees to shifts of its designation.
>
> All of the functions, rights powers and authority of the Employer not specifically abridged, delegated or modified by this Agreement are recognized by APEA/AFT as being retained by the Employer.

(Exh. 2 and Exh. A at 7).

18. Article 10.2 outlines general grievance procedures. Subsection A defines grievance as "any controversy or dispute involving the application or interpretation of the terms of this Agreement arising between APEA/AFT or an employee or employees and the Employer." Subsection B provides in part that, "[i]f the Employer fails to comply in rendering a decision in the allotted time frame, the grievance shall advance without further delay to the next step of the procedure. Alloted time frames may be extended by mutual agreement . . . ." (*Id.* at 27-28).

19. Article 10.6(A) describes Step 4 arbitration procedures:

> A. Any grievance which involves the application or interpretation of the terms of this Agreement, or is an appeal from demotion or dismissal of a permanent employee, or an appeal from dismissal of a probationary employee holding permanent status in another classification, which is not settled at Step Three, may be submitted to arbitration for settlement. APEA/AFT shall state specifically which Article(s) and Section(s) the

State may have violated and the specific manner in which the violation is alleged to have occurred.

(*Id*. at 19).

ANALYSIS

1. Did the parties settle their dispute over the employee's discharge?

APEA contends that the State offered Baseden a return to work, but APEA rejected the offer and requested arbitration pursuant to the parties' grievance procedure. APEA argues: "If the State can violate the provisions of the grievance procedure and can unilaterally impose their own rules when it suits them, then the grievance procedure means nothing nor does the contract." (APEA Hearing Brief at 4-5). APEA contends that the State failed to address some of the issues APEA believes need to be addressed to make Baseden whole. Therefore, APEA contends the parties have not settled their grievance dispute. APEA requests that we enforce the contract and order the parties to arbitration.

The State asks us to dismiss APEA's petition. The State argues that APEA wants to arbitrate a claim for attorney's fees "incurred by an employee in filing a lawsuit against the State that the court ruled the employee lost." The State contends that "absent statutory or contractual authorization, attorney's fees are not recoverable as an element of damages." (State's Brief at 6). The State maintains that it provided Baseden all the relief to which he was entitled under the collective bargaining agreement and in accordance with a practice it utilized for years. (*Id.* at 9).

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 Agency has jurisdiction under AS 23.40.210 to decide issues of arbitrability. *Fairbanks Fire Fighters Ass'n v. City of Fairbanks*, 48 P.3d 1165 (Alaska 2002).

We reviewed the record and considered the issue of settlement. We conclude that the parties dispute whether they have reached settlement over the grievance dispute, as the term "settlement" is normally used. Settlement normally means that parties have reached "mutually satisfactory resolution" of their dispute. *See Catalytic, Inc.* 301 NLRB 380, 385; 137 L.R.R.M. (BNA) 1113 (1991). We conclude that the State contends it has offered to provide employee Baseden everything he is entitled to, and the dispute is therefore settled. But APEA has rejected the State's terms and disagrees that the parties resolved this dispute. We conclude that the parties have a dispute over the interpretation of the term "settle" or "settlement" as used in Article 10 of their collective bargaining agreement.

2. Should we grant APEA's petition and compel the parties to arbitration?

APEA asks us to order the parties to arbitration. The State requests that we dismiss APEA's petition. The question is whether the parties' dispute is subject to their collective bargaining agreement's grievance/arbitration procedures. We conclude that the grievance/arbitration article is broad in nature, and the parties' disputes over the amount of employee Baseden's compensation due, and whether they have settled their grievance, must be submitted to arbitration.

Several cases in the United States Supreme Court address arbitrability. These include the *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 another case, *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 121 L.R.R.M. (BNA) 3329 (1984), the Court shed further light on arbitrability and the principles announced in the *Steelworkers* cases. The issue in *AT&T Technologies* was whether the parties intended to arbitrate layoffs predicated on a "lack of work" determination by AT&T. The Court held that under the first trilogy principle, "arbitration is a matter 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 held 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).

In 5 N. Peter Lareau, *National Labor Relations Act: Law & Procedure*, at section 41-41 (2d ed. 2002), Lareau provides that:

> In determining whether a duty to arbitrate exists, courts look first to the language of the arbitration clause. Courts, however, also must examine any other terms of the contract bearing on arbitration. Although the arbitration clause itself may appear to require arbitration, other provisions of the contract may clearly and unambiguously negate or limit the applicability of the arbitration clause.

We conclude, under the particular contractual provisions and facts of this dispute, that the parties are compelled to arbitration. There is a presumption of arbitrability, and we find no express provision excluding this particular grievance from arbitration.

We find three factors supporting our conclusion. First, the State failed to comply with the time limits specified in Article 10.2, for responding to APEA's appeal of the grievance. This failure occurred at Step 2.

Second, the parties dispute whether they have settled employee Baseden's grievance by written agreement at Step 3 of the grievance procedure in the contract. The contract states that if the parties do not settle a grievance at Step Three, the grievance may be advanced to arbitration for settlement. The parties disagree whether they have settled the grievance as the term is used in the contract; therefore, since the parties cannot agree whether they have reached settlement, we conclude they dispute the interpretation of the term "settle" or "settlement."

Finally, Article 10.6 provides that a "grievance which . . . is an appeal from demotion or dismissal of a permanent employee, or an appeal from dismissal of a probationary employee holding permanent status in another classification, which is not settled at Step Three, may be submitted to arbitration for settlement." Since the parties cannot even agree on the definition of "settlement," the dispute must proceed to arbitration because APEA has requested it.

The collective bargaining agreement does not authorize one party to unilaterally set the terms of the settlement. The underlying dispute in this case is determining the appropriate compensation to make the wrongfully discharged employee whole. The CBA is silent on how an employee is made whole. The Article 5 "Management Rights" provision does not specifically grant or recognize a right in the Employer to unilaterally decide appropriate compensation when a discharged employee is reinstated by court order. In that regard, the arbitrator may determine his or her authority to award

compensation, including attorney's fees. Regardless of the merits of APEA's grievance, resolution of the grievance lies in the hands of the arbitrator, not with this Agency. APEA's petition is therefore granted.

CONCLUSIONS OF LAW

1. The Alaska Public 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 has jurisdiction under AS 23.40.210 to consider this dispute over enforcement of the parties' grievance/arbitration provisions in their collective bargaining agreement.

3. As petitioner, APEA has the burden to prove each element of its case by a preponderance of the evidence.

4. APEA has proven by a preponderance of the evidence that the parties' dispute concerns the application or interpretation of a term of the parties' collective bargaining agreement, specifically Articles 5 and 10.6. The parties' dispute has not been settled.

5. The grievance and arbitration provision in the parties' collective bargaining agreement is a broad provision.

6. AS 23.40.210 requires that all collective bargaining agreements include a grievance procedure that culminates in binding arbitration. An arbitrator rather than this Agency must decide the parties' disputed grievance.

ORDER

1. The petition by the Alaska Public Employees Association/AFT, AFL-CIO is granted. The parties shall proceed to arbitration in accordance with the procedures provided in their collective bargaining agreement.

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

_____
Dave Rasley, Vice Chair

_____
Roberta Demoski, Board Member

Dissent of Member Dick Brickley

I respectfully dissent from the majority's decision for several reasons. First, if the majority implies that all disputes, not settled by the parties, must proceed to arbitration, I find this is contrary to general principles of labor law as I know them. In *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), the United States Supreme Court held that parties may waive the right to arbitrate disputes provided that the collective bargaining agreement clearly and unmistakably excludes that issue from the grievance and arbitration procedure in the agreement. APEA filed a grievance under Article 5 of the collective bargaining agreement. This Management Rights provision grants broad rights in the employer to "manage the affairs of the State and direct its work force." In my view, this managerial authority would include determining the compensation and benefits due an employee who is wrongfully discharged, as was the individual Mr. Baseden.

If APEA is seeking attorney fees under the civil suit the individual filed, APEA should file a request with the Alaska Superior Court where the suit was filed. There is no provision in the contract for payment of attorney fees in this situation. If the collective bargaining agreement is construed to include payment of attorney's fees in Article 5, this opens up a Pandora's Box for arbitration claims on any number of unknown disputed items. It is almost impossible to include everything in a collective bargaining agreement.

To require arbitration in this instance is mistaken. In the first place, both APEA and the State were at fault in not following the collective bargaining agreement. The court just ruled on what was clearly stipulated in the agreement. The State did make the corrections initially requested by APEA. Now APEA says that the State should cover the individual's legal fees as well. That was never mentioned in their earlier request. I say again the individual would never have had to retain an attorney had the union and the State followed what was clearly stipulated in the agreement. In my view both parties were at fault in that regard. Nevertheless the State did give the individual everything requested initially by APEA. I do not agree with adding the legal expense after the fact.

Finally, the grievance procedures in Article 10.6A require that APEA "shall state specifically which Article(s) and Section(s) the State may have violated and the specific manner in which the violation is alleged to have occurred." I would find that APEA did not specify the manner in which the violation occurred. APEA appears to disagree with the manner in which the State offered to reinstate the individual. But the State has applied these terms for reinstated employees for years. I believe this is a mathematical calculation not subject to dispute.

_____

Dick Brickley, 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 Public Employees Association/AFT, AFL-CIO vs. State of Alaska*, Case No. 02-1131-CBA, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 21st day of April, 2003.

_____
Margie Yadlosky
Personnel Specialist

This is to certify that on the 21st day of April, 2003, a true and correct copy of the foregoing was mailed, postage prepaid, to
Angie Parker, APEA
Doug Carson, State of Alaska

_____
Signature