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ALASKA STATE EMPLOYEES)
ASSOCIATION, AFSCME LOCAL 52,)
AFL-CIO,)
Petitioner,)
)
vs.)
)
STATE OF ALASKA,)
)
Respondent.)
_____)

Case No. 09-1546-CBA

DECISION AND ORDER NO. 290

This petition to order the parties to arbitration was heard in Anchorage on September 2, 2009. Hearing Examiner Mark Torgerson presided. The petition was decided based on the evidence submitted, witnesses' testimony, and the parties' arguments at the hearing and in written closing briefs. The parties initially agreed to file written closing briefs on October 2, 2009. However, due to a medical issue and surgery for one of the representatives, the filing deadline was extended to Friday, October 29, 2009. The record closed on Friday, October 29, 2009.

Digest:

1. The Agency will not order the parties to arbitration when an alleged violation by the employer is specifically excluded from the arbitration process by the parties' collective bargaining agreement. Classification matters are excluded by Article 17 of the parties' agreement.

2. Establishment of the effective date of the classification action taken by the State on employee Norman Silta's position is a classification matter, excluded from arbitration by Article 17 of the parties' agreement. Further, effective dates for classification matters are provided for in the regulations for personnel matters.

3. The collective bargaining agreement between the Alaska State Employees Association and the State of Alaska provides that an arbitrator shall initially decide procedural arbitrability. The

agreement does not give the arbitrator authority to decide substantive arbitrability. The Alaska Supreme Court has authorized this agency to decide substantive arbitrability unless the parties' agreement provides otherwise.

4. The dispute over Norman Silta's pay following the reallocation of his position or class involves the application and interpretation of Article 21.06(F)(2) and must be submitted to an arbitrator for resolution.

5. The Alaska Labor Relations Agency has not been authorized to enforce merit-system principles.

Appearances: Stan Hafferman, Business Agent for the Alaska State Employees Association; Benthe Mertl-Posthumus, Labor Relations Analyst for the State of Alaska.

Panel: Aaron Isaacs, Jr., Vice Chair; and members Ken Peltier and Will Askren.[1]

DECISION

Statement of the Case

The Alaska State Employees Association (ASEA) filed a petition to enforce its collective bargaining agreement (CBA or agreement) with the State of Alaska (State). ASEA asks this Agency to order the parties to attend arbitration pursuant to the grievance/arbitration clause in the parties' agreement. ASEA contends that the reclassification of general government unit member Norman G. Silta was a demotion, and the State owes the employee back wages because it demoted the employee before the effective date of the change in his position.

The State has refused to arbitrate this dispute, contending that the change to the employee's range and step was the result of a valid classification study, and the parties' agreement excludes classification matters from the grievance/arbitration process. The State is willing to submit a longevity increase dispute to an arbitrator for resolution (Exhibit E), and a dispute over the case closure by the State due to inaction (Exhibit F).

[1] Under 8 AAC 97.370, the board panel appointed the hearing examiner to hear the case alone and prepare a proposed decision.

Issues

1. Is the reclassification of employee Norman Silta's position, as a result of the vocational rehabilitation class study, excluded from the grievance and arbitration process by Article 17 of the parties' collective bargaining agreement?

2. Does the dispute over establishment of the effective date of the State's reclassification action on employee Norman Silta's position reasonably bear on the application or interpretation of a term in the parties' collective bargaining agreement, or is it a classification matter excluded by Article 17 of the parties' agreement?

3. Does the parties' collective bargaining agreement give the arbitrator authority to make all initial determinations of arbitrability, or is the arbitrator's authority limited by Article 16 to making only procedural arbitrability determinations?

4. Should the parties be ordered to attend arbitration for the purposes of resolving a dispute over application and interpretation of Article 21.06(F)(2) of their agreement?

5. Is the Alaska Labor Relations Agency required by AS 23.40.070(3) to maintain merit-system principles?

Findings of Fact

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

1. The State, an employer under AS 23.40.250(7), recognizes ASEA "as the exclusive bargaining representative for all permanent, probationary, provisional and nonpermanent personnel . . . in the General Government Unit (GGU) for collective bargaining with respect to salaries, wages, hours, and other terms and conditions of employment." (ASEA/State Collective Bargaining Agreement (Exhibit 2B, Article 1.01 at 1).

2. ASEA and the State entered into a collective bargaining agreement for the period July 1, 2004, through June 30, 2007. (Exhibit 2B). They subsequently negotiated and entered into an agreement for the period July 1, 2007, through June 30, 2010. (Exhibit 2).

3. The action taken by the State that gave rise to this dispute occurred during the parties' 2004 – 2007 collective bargaining agreement. The grievance related to that action was filed during the 2007 – 2010 agreement. (Stipulation by the parties at the hearing).

4. During negotiations for the 2007 - 2010 agreement, the parties retained, without any substantive discussion, the management rights clause contained in the 2004 – 2007 collective bargaining agreement. This management rights clause provides:

> 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:
>
> . . . .
>
> 2. Develop and modify class specifications, assign the salary range for each classification, and allocate positions to those classifications;
>
> 3. Assign and direct the work; determine the methods, materials and tools to accomplish the work; designate duty stations and assign personnel to those duty stations;
>
> . . . .

(Exhibit 2B, Article 4 at 5).

5. At the request of the Alaska Department of Labor and Workforce Development (DOLWD), the Department of Administration's Division of Personnel conducted a "complete class study" and "internal alignment review," taking into consideration a mandated federal certification of incumbents in professional job classes in the DOLWD's Division of Vocational Rehabilitation (DVR). (Exhibit I at 1). This study reviewed 79 technical, professional, supervisory, and managerial positions allocated to various job classes. Among the positions reviewed were Vocational Rehabilitation Counselors I-III. (Exhibit I at 1; Exhibit J at 1).[2]

6. At the time the study was done, Norman G. Silta was a Vocational Rehabilitation Counselor II. Silta's position control number is 052064. (Exhibit K). Silta is a member of ASEA's general government unit.

7. The study commenced in November 2005. The Division of Personnel issued a comprehensive memorandum regarding the results of the study on February 12, 2007. (Exhibit I). The memorandum was sent to Director of Personnel at that time, Dianne Kiesel, from Jackie Dailey, Human Resource Specialist, through Class Studies

[2] Exhibit I provides that 80 positions were reviewed, while Exhibit J provides that 79 positions were reviewed. Exhibit J specifies that "the nature of Actions total 27 Updates; 47 Reclass Ups; and 5 Reclass Downs." We find that 79 positions were reviewed.

Supervisor Sarah Brinkley (*Id.* at 1). Brinkley has final approval authority to make class changes. [3] (Testimony of Nicki Neal, Director of the Division of Personnel and Labor Relations).

8. The February 12, 2007, memorandum states, in the "subject" area: "DVR Job Classes Study (**FINAL Effective 04/16/07)**." (Exhibit I at 1) (Emphasis, capitalization, and bolding in original). The memorandum contains a detailed examination of the scope and method of the study, history of the job class, and class and position analysis. (*Id.* at 1). The class analysis includes explanations of the distinctions between positions in the various series in the class.

9. An April 5, 2007, memorandum from Jackie Dailey to Gale Sinnott, Director of the Division of Vocational Rehabilitation, states that the actions taken as a result of the position allocations for the DVR study had an effective date of April 16, 2007. (*Id.*; Exhibit J at 1).

10. Prior to completion of the study, Vocational Rehabilitation Counselors I – III were paid at Ranges 16, 18, and 19 respectively. After the study, the ranges changed: VR Counselors I were paid at Range 15, VR Counselors II were paid at Range 17, and VR Counselors III were paid at Range 19. (Exhibit I at 19).

11. As a result of the job classes study, Silta's position title remained the same: Vocational Rehabilitation Counselor II. (Exhibit J at 5; Exhibit K). The Division of Personnel's April 5, 2007, report provided the following explanation: "In addition, and at management's request, two VR Counselor II positions remain allocated to the journey VR Counselor II job class, specifically PCN 052041 and 052064 [Silta's position]. (Exhibit J at 5).[4] This resulted in a "reclass down" for Silta's position from Range 18 to Range 17. (Exhibit I at 20; Exhibit K).

12. On April 16, 2007, the effective date of the DVR job classes study, Silta was at step J on the pay scale. Silta's merit anniversary date with the State that year was June 16, 2007. He was scheduled to receive a merit increase on that date. (Exhibit K). He did not receive the increase, though, because the State froze Silta's pay at Range 18 J pursuant to its interpretation and application of Article 21.06(F)(2) of the parties' collective bargaining agreement.

13. Director Neal testified that the effective date of an allocation action as a result of a classification study is governed by 2 AAC 07.035, which provides:

> The effective date of all allocation and reallocation actions by the director is the first day of the regular pay period following the action, unless the director specifies another date that does not precede the date of the

[3] Neal testified that the class studies supervisor leads the "class studies team" and has authority to give final approval of the class study completed by the team.

[4] We could find no other specific explanation as to why Silta's position or PCN 052041 remained allocated to the vocational rehabilitation counselor II job class.

> director's approval. A personnel action that is required because of an allocation or reallocation must be taken not later than the first day of the second regular pay period following the effective date of the allocation or reallocation.

(Exhibit H at 5). Neal testified that on the effective date of the study, the State allocates all positions. Payroll is just a processing of that action, and payroll is always entered after the fact. Neal asserted that the effective date regulation in 2 AAC 07.035 just means that the State cannot make the effective date of an action prior to approval of the class study.

14. Based on the effective date of Silta's classification action of April 16, 2007, the State reclassified Silta's pay range down from Range 18 to range 17. At that time, Silta was being paid at step J. Therefore, the State placed Silta at Range 17 J.

15. On Silta's June 16, 2007, anniversary date, he did not receive a merit anniversary salary increase. The State asserts that no increase was due because Silta's position had been reclassified down to Range 17, step J effective April 16, 2007. Although the State placed Silta at Range 17, step K on his anniversary date, he did not receive a salary increase because the State applied Article 21.06(F)(2), and the salary for Range 17K on June 16 was less than the salary Silta had received at Range 18 J, where his pay had been frozen, prior to the reclassification down by the State.

16. On April 7, 2008, Silta filed an "Employee Notice of Pay Problem" with his supervisor, Charles Cary. (Exhibit A). He contended that the 2007 reclassification action "failed to grandfather me in at the level of expertise I had earned. Most of my co-workers were placed into the new VRCIII position even though I was doing the same work duties and had the same responsibilities. Adding new requirements and failing to recognize my experience is a form of age discrimination." He added that the reclassification failed to consider the "merit-principle requirement of same pay for the same work." Finally, he asserted that under the merit principle, he was scheduled to receive but did not get a longevity increase to Range 18 K. (*Id*. at 5).

17. The State denied Silta's 'pay problem' request on June 11, 2008. (*Id*. at 4). Among other reasons, the State responded that as a result of the class study, Mr. Silta did not meet the requirements for Vocational Rehabilitation Counselor III and he was therefore allocated to the revised Vocational Rehabilitation Counselor II class. The State added that the "allocations were made based on the new job class requirements . . . without regard to the age of the incumbents. The experience of [Mr. Silta] *was* recognized in this process." (*Id.* at 3) (emphasis in original). The State also responded that the reclassifications did in fact take into account the merit-principle requirement of same pay for same work. The State further responded that Mr. Silta's salary was "correctly frozen" pursuant to "Article 21.06(F)(b)." (*Id*. at 4).

18. ASEA then filed a step II grievance on June 30, 2008,[5] alleging that Mr. Silta "earned a longevity increase but was instead demoted through re-classification" which "failed to take into account his years of experience and added a new educational requirement even though he had been doing journeyman work for years. He is owed back pay and should also be placed in the advanced position." (Exhibit B at 1).

19. The State denied the grievance. (*Id*. at 3). The State contended that it properly applied Article 21.06(F)(2). The State again denied the age discrimination allegation: This process . . . would be applied to any GGU member regardless of age . . . ." (*Id*.).

20. ASEA subsequently requested arbitration. In a January 7, 2009, email between representatives of the parties, the State refused to arbitrate the underlying classification issue but agreed to arbitrate the following that it described as a longevity issue: "Did the State violate . . . Article 21 of the Collective Bargaining Agreement by the manner in which it administered Grievant's earned longevity increase effective June 16, 2007? If so, what is the remedy?" (Exhibit E at 1).

21. Article 16 contains a grievance/arbitration process. 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 an employee or employees and the Employer." (Exhibit 2B, Article 16.01A at 30). The section provides that the grievance procedure in Article 16 is the "sole means of settling grievances, except where alternative dispute resolution and appeal procedures have otherwise been agreed to in this Collective Bargaining Agreement, in which case the applicable alternative procedure shall be the exclusive appeal process available to the employee or employees." (*Id.*).

22. Article 17 addresses classification reviews: "The procedures in this Article shall be the sole and exclusive method for settling any dispute concerning classification matters."

23. Article 21.06 of the parties' collective bargaining agreement is titled "General Pay Administration." The sections in this article describe procedures for beginning pay (A), rehire employees (B), promoted employees (C), transferred employees (D), and reallocation of position or class (F).

24. Article 21.06(F), reallocation of position or class, provides in pertinent part:

> 1. The merit anniversary date, status and step assignment of an employee whose position is reallocated from one (1) class to another class at the same salary range shall remain unchanged.

[5] The grievance letter is dated June 27, 2008, but date-stamped by the Division of Personnel on June 30, 2008. The grievance was filed at step II with the State's permission.

2. An employee occupying a position which is assigned to a lower pay range or reallocated to a classification which carries a lower pay range and who continues in the same position shall be treated as follows:

a. If the employee's current salary is the same as any step in the new range, the employee shall enter the new range at that step.

b. If the employee's current salary falls within the lower range but between steps, the employee's salary shall remain frozen until the employee's next merit anniversary date which results in the award of performance incentive, at which time the employee shall be placed at the next higher step.

c. If the employee's current salary exceeds the maximum of the new range, it shall remain frozen until it is the same as any step or falls between steps which appear on the salary schedule at the lower range, whichever is earlier. Salaries which are frozen shall not be subject to any salary increase including contractually negotiated adjustments or cost-of-living adjustments to the salary schedule.

d. For purposes of subsection F.2 (a,b,c), employees whose positions are subject to a reallocation from one (1) class to another may not be paid at a longevity step unless they have earned such step in the class occupied prior to the reallocation action or until said step is earned in the class to which the position is reallocated. Time served at the final step or a longevity increment of the higher range shall be counted as time served at the final step or a longevity increment of the lower range.

25. The parties dispute whether Article 21.06(F)(2)(b) or Article 21.06(F)(2)(d) applies to the treatment of Mr. Silta's salary following the reclassification down of his position.

26. Article 16.03 of the parties' agreement describes the authority of an arbitrator:

> Questions of procedural 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.

ANALYSIS

1. Is the reclassification of employee Norman Silta's position, as a result of the vocational rehabilitation class study, excluded from the grievance and arbitration process by Article 17 of the parties' collective bargaining agreement?

AS 23.40.210(a) provides that the parties' collective bargaining agreement "shall include a grievance procedure which shall have binding arbitration as its final step. Either party to the agreement has a right of action to enforce the agreement by petition to the labor relations agency." AS 23.40.210 grants this Agency jurisdiction to decide issues of arbitrability. *Fairbanks Fire Fighters Ass'n v. City of Fairbanks*, 48 P. 3d 1165 (Alaska 2002) (*Fairbanks Fire Fighters*).

"The common law and statutes of Alaska evince 'a strong public policy in favor of arbitration.'" *Department of Public Safety v. Public Safety Employees Ass'n*, 732 P. 2d 1090, 1093 (Alaska 1987), citing *University of Alaska v. Modern Construction, Inc*., 522 P.2d 1132, 1138 (Alaska 1974). This Agency supports a policy of promoting arbitration by deferring to arbitration in appropriate cases. *Public Safety Employees Association v. State of* Alaska, Decision and Order No. 253, at 6 (April 25, 2001), citing *Alaska Public Employees Association v. Alaska State Housing Authority*, Decision and Order No. 133 (May 29, 1991).

Courts favor arbitration of collective bargaining grievances to such an extent that, in contracts containing an arbitration clause 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." *Ahtna, Inc. v. Ebasco Constructors, Inc*., 894 P.2d 657, 662, n.7 (Alaska 1995), citing *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S.Ct. 1347, 1352-53, 4 L.Ed. 2d 1409 (1960).[6]

In *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986) (*AT&T Technologies*), the United States Supreme Court held that "[w]hether 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." Still, a request to compel arbitration should only be granted if the parties have agreed in their collective bargaining agreement to arbitrate the specific dispute. "[A]rbitration 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." *Id. at 649*. Otherwise, there would be no reason to define the parameters of arbitration in the contract. Further, the "presumption . . . does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts *to interpret the*

[6] This Agency gives great weight to relevant decisions of the National Labor Relations Board and the federal courts. 8 AAC 97.450.

terms of a CBA." *Wright v. Universal Maritime Service Corporation*, 525 U.S. 70, 78 (1998) (italics in original).

The Alaska Supreme Court recently provided that "if a dispute is not, under a plausible interpretation, covered under the arbitration clause of a collective bargaining agreement, it should not be arbitrated because 'a party cannot be required to submit to arbitration any dispute which he had not agreed so to submit.'" *Classified Employees Association v. Matanuska-Susitna Borough School District*, 204 P.3d 347 (Alaska 2009), citing *AT&T Technologies*, 475 U.S. at 648, 106 S.Ct. 1415 (quoting *Warrior & Gulf Navigation*, 363 U.S. at 582, 80 S.Ct. 1347); *accord Lexington Mktg.*, 157 P.3d 470, 477 (Alaska 2007).

In this case, Article 16 of the agreement defines a grievance as "any controversy or dispute involving the application or interpretation of the terms" of the agreement. Therefore, we must determine if there is a dispute regarding the application or interpretation of a term of the parties' agreement. "If such a dispute is involved, or if it is reasonably arguable that such a dispute is involved, then the claim would be arbitrable." *Public Safety Employees Association v. State of Alaska*, 658 P.2d 769, 773 (Alaska 1983).

ASEA seemed to concede in its brief that it was not challenging the classification issue per se:

> The ASEA requests the Agency recognize only one part of the merits issue of the SOA that is the classification issue. The classification is for the position, not the person. The ASEA has not and is not challenging the classification of the Grievant [Mr. Silta]. The ASEA is challenging the pay of the Grievant. In doing so, the arbitrator will have to decide if the classification action ended with the memo to the Director, Dianne Kiesel, or if classification issues continue on until it, the SOA in its alleged unfettered discretion, decides the matter may belong in arbitration.

(ASEA Post-Hearing Brief at 9).

If we understand ASEA's argument correctly, it is contending that the grievant's *pay* as a result of the classification action should be arbitrable. We find that the assignment of a position to a given pay range as a result of a reclassification like Mr. Silta's is a "classification matter" under the parties' agreement. Therefore, those aspects of any dispute over a pay issue dealing with the salary range assignment for Mr. Silta must be resolved through Article 17 procedures the parties agreed to in bargaining.[7]

[7] See *Alaska Public Employees Ass'n v. State*, 831 P.2d 1245 (Alaska 1992), where the Alaska Supreme Court concluded that the Alaska Public Employees Association's agreement with the State "contained no provision for mandatory arbitration of classification plan and pay range assignment disputes, and no basis [existed] for the implication of such a remedy." 831 P.2d at 1252.

Article 17 procedures allow ASEA to challenge classification matters up through the Commissioner of Administration. Arbitration is not an option.

We conclude that ASEA has not met this burden of proof. We find that the subject matter of the dispute is the reclassification of the position the employee occupies, and the resulting change in range to that position. The parties negotiated and agreed that Article 17 of their collective bargaining agreement would be the "sole and exclusive method for settling any dispute concerning classification matters." This language makes it clear that disputes over classification matters must be decided within the confines of the language of Article 17, and not through the Article 16 grievance/arbitration process or some other provision of the agreement. Accordingly, we deny ASEA's petition to compel arbitration of the reclassification of Mr. Silta's position as a Vocational Rehabilitation Counselor II.

2. Does the dispute over establishment of the effective date of the State's reclassification action on employee Norman Silta's position reasonably bear on the application or interpretation of a term in the parties' collective bargaining agreement, or is it a classification matter excluded from arbitration by Article 17 of the parties' agreement?

ASEA argued at the hearing that the "effective date of a pay action is after approval." It contends that in Mr. Silta's reallocation action, the 'pay action,' or reallocation by the State, was not approved until September 5, 2007. The State argues that it clearly provided for an effective date for the reclassification of all positions affected by the vocational class study, and that date, April 16, 2007, was announced as early as February 12, 2007, two months before the effective date, in the memorandum to Personnel Director Dianne Kiesel. (Exhibit I). The State also provided for this effective date in the April 12, 2007, memorandum to the Division of Vocational Rehabilitation's Director, Gale Sinnott.

ASEA contends that the effective date of the pay action on Mr. Silta's reclassification could have been as late as September 5, 2007, when "appointing authority" Ampy Cruz signed a personal action on Mr. Silta's reallocation. However, as explained by current Personnel Director Nicki Neal, Cruz was only certifying that review of the personnel action outlined on the document "is in compliance with the Personnel Act and the rules adopted under it." The action reviewed was described in remarks: "Effective 4/16/07 reallocation to a lower range. Step placement and status per GGU Article 21.06.F.2" (Exhibit 5 at 1). As the State explained, Cruz was not declaring an effective or approval date but was merely certifying that the earlier personnel action on Mr. Silta's position complied with the Personnel Act. Cruz's certification in no way created a new effective or "approval" date.

Further, the personnel regulations clearly provide for effective dates of reallocation actions. The effective date of an allocation action as a result of a classification study is governed by 2 AAC 07.035, as provided for in Finding of Fact

number 13, at page 5 of this decision and order. ASEA's request for arbitration over the effective date of Mr. Silta's reallocation is denied.

3. Does the parties' collective bargaining agreement give the arbitrator authority to make all initial determinations of arbitrability, or is the arbitrator's authority limited by Article 16 to making only procedural arbitrability determinations?

In its written closing arguments, ASEA agrees that Article 16.03 of the parties' agreement gives the arbitrator authority to decide issues of procedural arbitrability. (October 29, 2009, Post-Hearing Brief at 5-6.) ASEA then states: "That is what the parties bargained for, not to have the Agency decide procedural issues." (*Id*. at 6). Further, "[t]he Agency should follow the procedures of the agreement and have the arbitrator decide the procedure. (*Id.* at 9). Finally, "[i]f a matter is not subject to the grievance procedure, as the SOA argues, the complaint procedure may be the proper procedure to use. That determination is up to the arbitrator, not the SOA." (*Id*. at 10).

If we understand these assertions correctly, ASEA seems to be arguing that procedural arbitrability jurisdiction in Article 16.03 gives the arbitrator authority to decide all issues regarding arbitrability, not just procedural issues. If this is so, we disagree. The contract grants the arbitrator authority to initially decide procedural arbitrability issues. Disputed issues related to substantive arbitrability, then, are determined by a court or this Agency.[8]

The United States Supreme Court analyzed arbitrability in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). The Court stated that the "question whether the parties have submitted a particular dispute to arbitration, *i.e.*,, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" 537 U.S. at 83 (citations omitted). The Court in *Howsam* was faced with determining whether a time limit provision in an arbitration clause should be decided by the court or an arbitrator.

The Supreme Court provided that, "[l]inguistically speaking, one might call any potentially dispositive gateway question a 'question of arbitrability,' for its answer will determine whether the underlying controversy will proceed to arbitration on the merits . . . Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." *Id*. at 83-84. The Court cited as one case example *Atkinson v. Sinclair Refining Co*., 370 U.S. 238, 241-243 (1962), holding that a court should decide whether a clause providing for arbitration of various "grievances" covers claims for damages for breach of a no-strike agreement.

However, the Court noted that procedural questions that "grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." 537 U.S. at 84. The Court cited procedural examples of whether the first two

[8] The parties can always agree to have the arbitrator decide substantive arbitrability.

steps of a grievance procedure were completed, where these steps are prerequisites to arbitration, and allegations of waiver, delay, or a like defense to arbitrability. *Id.*

Here, the parties only "clearly and unmistakably" agreed to submit procedural arbitrability issues to an arbitrator. ASEA attempts to broaden the term "procedural" in the parties' arbitration clause to include all issues of arbitrability. We find that the disputes at issue here are substantive in nature. Determining whether issues related to classification and longevity pay must be arbitrated are the type of gateway issues the Court in *Howsam* found were to be determined by the courts. Under *Fairbanks Fire Fighters*, this Agency, and not the arbitrator, is authorized to make that determination. ASEA's request in this regard is denied.

4. Should the parties be ordered to attend arbitration for the purposes of resolving the dispute over application and interpretation of Article 21.06(F)(2) of their agreement?

Having found that classification matters are not subject to the parties' grievance/arbitration process, we now turn to a somewhat related but still separate issue arising out of Article 21. There was considerable testimony during the hearing regarding the application of Article 21.06(F)(2) to the employee's salary following the reclassification of his position.

Director Neal testified at length about the classification process and how that process unfolded and resulted in Mr. Silta's reclassification down. During cross-examination, ASEA's hearing representative, Mr. Hafferman, asked Neal several questions about the application and interpretation of Article 21 of the parties' agreement. Among those questions, he asked: "We [ASEA] believe that [Article 21] b applies and the State believes that [Article 21] d applies, correct?" Neal responded: "Correct. I believe that's what you believe."

In essence, each party contends that a different subpart of subsection (F)(2) applies to Mr. Silta. We must determine whether we should decide this dispute or whether, in doing so, we would be usurping the arbitrator's jurisdiction to decide a dispute over the application or interpretation or a term or terms of the parties' agreement. In doing so, we must be mindful that we are not to pass judgment on the nature of the union's claim, even if it appears to be frivolous. We must guard against intruding into the parties' contractual relations and avoid deciding the merits of the dispute in our evaluation of arbitrability.

First, we find the parties' arbitration clause is broad.[9] A broad clause implies a strong presumption of arbitrability which should be denied only where the parties specifically agree to exclude an item. There is no language in the agreement that provides evidence that the parties meant to exclude arbitration of disputes over pay administration of reallocation of position or class in Article 21. Therefore, we must

[9] The language of the clause is the same in both the 2004 - 2007 and 2007 – 2010 clauses.

presume that the parties intended to arbitrate all such disputes, frivolous or not. Accordingly, the Article 21 dispute over Mr. Silta's pay as a result of the reallocation of his position or class is arbitrable.

5. Is the Alaska Labor Relations Agency required by AS 23.40.070(3) to maintain merit-system principles?

ASEA contends that this Agency "must recognize its duty to provide a check and balance for the constitutional mandate of the merit principle for state employment." (ASEA Post-Hearing Brief at 10). ASEA notes that Article XII, section 6 of the Alaska Constitution provides: "Merit System. The legislature shall establish a system under which the merit principle will govern the employment of persons by the State." ASEA further notes that the Personnel Act was adopted "for the express purpose of implementing the constitutionally mandated merit principle in state employment." (ASEA Post-Hearing Brief at 11, citing *APEA v. State of Alaska*, 831 P.2d 1245, 1249 (1992)).

ASEA argues that after issuance of Executive Order 77, which established this Agency in 1990:

> [S]state employees no longer had access to the State Personnel board to appeal labor relations matters. The Alaska Labor Relations Agency is mandated by the very terms of its enabling statute to maintain merit-system principles among public employees. The powers, duties and functions of the Alaska Labor Relations Agency are listed in AS 23.05.370 as follows: (a) The agency shall (4) serve as the labor relations agency under AS 23.40.070 – 23.40.260 . . . and carry out the functions specified in that Act; and . . . .

(ASEA Post-Hearing Brief at 12).

ASEA goes on to cite the legislative declaration of policy in the Public Employment Relations Act, AS 23.40.070. Subsection (3) provides that the legislatively-declared policies of the State are to be effectuated by "maintaining merit-system principles among public employees." (*Id*. at 13). Contending that this "case is a prime example of the abuse of power by the Personnel Director," ASEA contends:

> The ALRA is charged with maintaining merit-system principles and yet there are no procedures available to ensure compliance with the merit-system principle and it is left to the unfettered discretion of the Personnel Director. The plain meaning of the Statute is to have a check and balance to ensure equality and due process, both of which are lacking in this case.

Id.

The State, on the other hand, argues that this Agency has a duty to consider petitions for certification as bargaining representative (AS 23.40.100) and charges of unfair labor practices (AS 23.40.110), as well as enforcement power over terms of a collective bargaining agreement (AS 23.40.210), determination of strike eligibility of workers (AS 23.40.200), and authority to rule on religious exemptions from the obligation to pay fees to a bargaining representative (AS 23.40.225). (State's Closing Brief at 7).[10] However, "nowhere in [the Public Employment Relations Act] does it state that the Agency shall [investigate] complaints or accusations over the maintenance of the merit system principle under AS 39.25.080." (*Id.* at 7-8). The State asserts that there is therefore no duty by this Agency to enforce merit-system principles among public employees. "To say otherwise would usurp the duty of other agencies like the Division of Personnel." *Id.*

We essentially agree with the arguments presented by the State. We first address ASEA's argument that prior to the establishment of this Agency by Executive Order 77, public employees appealed labor relations matters to the Personnel Board. That is not our recollection of the history and structure of labor relations prior to Executive Order 77. Labor relations issues under the Public Employment Relations Act for state employees were previously administered and enforced by the State Labor Relations Agency, a separate entity from the state's Personnel Board. Executive Order No. 77 did not change procedures for contesting decisions by the Division of Personnel. Those statutes and regulations are separate and apart from the labor relations statutes and regulations administered by this Agency under the Public Employment Relations Act.

ASEA's assertion that this Agency is "charged with maintaining merit-system principles among public employees" misconstrues AS 23.40.070(3). This statute is a declaration of legislative policy, and nothing else. AS 23.40.070(1) is also a declaration of policy. It recognizes "the right of public employees to organize for the purpose of collective bargaining." However, the legislature did provide this Agency with jurisdiction to consider and enforce disputes related to the right to collective bargaining. This authority extends to such disputes as investigating petitions for election and conducting elections related to organizing (AS 23.40.100), and investigating and hearing complaints on unfair labor practices related to organizing for collective bargaining (AS 23.40.110).

Further, the legislature provided this Agency with jurisdiction over the second stated legislative policy, in AS 23.40.070(2), which requires public employers to negotiate with and enter into written agreements with employee organizations. The legislature established authority in this Agency to enforce the policy in subsection 2, for example, by authorizing the Agency to investigate unfair labor practice charges that allege refusal to bargain collectively in good faith (AS 23.40.110(a)(5)).

[10] We note that we are also charged with deciding appropriate units under AS 23.40.090, deciding questions of representation and conducting elections under AS 23.40.100.

On the contrary, we can find no statute in our Act that requires or authorizes us to enforce the legislative policy of maintaining merit-system principles among public employees. We find that the reason is the legislature recognized that it had already established statutory authority over merit-system principles in the Personnel Act. We find no authority to interject this Agency into matters related to maintaining merit-system principles among public employees.[11]

For these reasons, we reject ASEA's assertion that we must enforce the legislative policy contained in AS 23.40.070(3).

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

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

4. ASEA has failed to prove by a preponderance of the evidence that classification matters related to reclassification of Norman Silta's position are arbitrable.

5. ASEA failed to prove by a preponderance of the evidence that the dispute over establishment of the effective date of Norman Silta's reclassification is arbitrable.

6. ASEA has proven by a preponderance of the evidence that the parties' dispute over the application and interpretation of Article 21.06(F)(2) is arbitrable.

7. The collective bargaining agreement between the ASEA and the State limits the arbitrator's authority to determining procedural arbitrability.

8. ASEA has failed to prove by a preponderance of the evidence that this Agency has statutory authority to enforce the legislative policy, in AS 23.40.070(3), of maintaining merit-system principles among public employees.

[11] We certainly concur with this legislative policy in principal, but we decline to interject ourselves into enforcement absent express statutory authority to do so.

ORDER

1. The petition by the Alaska State Employees Association to compel arbitration over reclassification matters is denied and dismissed.

2. The petition by the Alaska State Employees to compel arbitration over Article 21.06(F)(2) of the parties' collective bargaining agreement is granted.

3. 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., Vice Chair

_____
Ken Peltier, Board Member

_____
Will Askren, 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 mailing 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. 09-1546-CBA, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 22nd day of January, 2010.

_____
Colin Milstead
Office Assistant III

This is to certify that on the 22nd day of January, 2010, a true and correct copy of the foregoing was mailed, postage prepaid, to
Stan Hafferman, ASEA
Benthe Mertl-Posthumus, State of Alaska

_____
Signature