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ALASKA PUBLIC EMPLOYEES ASSOCIATION, AFT/AFL-CIO,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

CASE NO. 09-1559-CBA

DECISION AND ORDER NO. 292

The Alaska Labor Relations Agency Board heard this petition to compel arbitration in Juneau, Alaska, on July 29 and 30, 2010, and August 17, 2010. Hearing Examiner Mark Torgerson presided. The record for this case closed on December 6, 2010, after the parties submitted written closing arguments and after the Board completed its deliberations.

Digest: The petition to compel arbitration is granted. Article 19 of the parties' collective bargaining agreement addresses classification disputes. It is unclear whether Article 19 applies here. An arbitrator must apply and interpret the agreement to determine whether Article 19 applies to this particular dispute. The arbitrator must also determine whether the State's realignment action resulted in a demotion of Gregory Patz.

Appearances: Pete Ford, Business Manager for Petitioner Alaska Public Employees Association; Kent Durand, Labor Relations Analyst, for Respondent State of Alaska.

Panel: Aaron T. Isaacs, Jr., Vice-Chair, and Members Will Askren and Matthew R. McSorley.[1]

DECISION

Statement of the Case

The Alaska Public Employees Association/AFT, AFL-CIO (APEA) filed a petition to enforce its collective bargaining agreement (CBA) with the State of Alaska (State). APEA asks this Agency to order the parties to attend arbitration. APEA contends that Gregory Patz, one of its bargaining unit members, was demoted by the State, and its grievance against the State on Patz's behalf should proceed to arbitration. The State disagrees. It maintains that Patz was not demoted and that it took appropriate action pursuant to the classification provisions of Article 19 of the parties' collective bargaining agreement. Further, the State contends that it took appropriate action under the agreement's management rights clause to realign job responsibilities in the Maintenance and Operations section of the state Department of Transportation and Public Facilities' Southeast Region office.

Issues

1. Does the parties' collective bargaining agreement define the term "demotion?"

2. Did the action the State took in the Gregory Patz matter constitute a substantive classification matter under the procedures in Article 19 of the parties' collective bargaining agreement?

FINDINGS OF FACT

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

1. APEA represents the supervisory bargaining unit for employees of the State of Alaska.

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1 Board Member McSorley attended the hearing by telephone. Board Member Askren attended the first two days of hearing in person and the last day by phone. Vice-Chair Isaacs attended the first two days of hearing in person and listened to a recording of the hearing record for the final day's testimony.

2. APEA and the State entered into a collective bargaining agreement for the period July 1, 2007, to June 30, 2010.

3. Gregory Patz is a member of the APEA bargaining unit. He has worked for the Department of Transportation and Public Facilities (Department) for 12 years. He started as a transportation planner for the Department's Southeast Region (Region). He then was appointed to the position of Maintenance and Operations Superintendent for the Region. His "working title" at the time of appointment was Chief of Maintenance and Operations of the Southeast Region. This working title differs from his title under the State's Position Description for his position, which is Maintenance and Operations Superintendent. (APEA Exhibit 3). This latter title is also the title listed in the Class Specification. (State Exhibit 6).

4. A November 2005 "revised" organizational chart for the Department's Southeast Region, Maintenance and Operations Division shows Patz at the top of the chart in a position titled "Transportation Maintenance and Operations Section Chief." Next to his name is another title: "Maintenance Manager." (APEA Exhibit 11, at 2). The chart, which was a proposed organizational change, shows employee Gary Franzen below Patz in the hierarchy, with a position titled "Highway Superintendent." (*Id.*). Patz supervised Franzen and several other employees at that time. On October 7, 2008, Patz requested that the State review his position and perform a desk audit because he believed that a previous classification study contained errors. (State Exhibit 4).

5. Gary Davis was appointed Director of the Region on January 5, 2009. He oversees the Department's operations in the Region. The work of the M&O Section extends outside the region for engineering services for harbors and the marine highway system. After Davis started working for the Region, he commenced a review of the projections for section expenditures. These projections predicted the section would experience a deficit in the fiscal year. In the previous fiscal year, there had been a major over-expenditure in funds in the M&O budget. Davis had been informed of budget concerns when he was hired. The Chief of the M&O component is generally in charge of the section's budget, but Davis added the Director is ultimately the person in charge.

6. Sometime around March 17, 2009, Davis initiated a review of job responsibilities and duties for the M&O section, and he considered making changes. Davis consulted with several department employees about his ideas. He came up with a proposal and testified that sometime around April 5, 2009, he met with Amanda Holland and other staff members from the human resources section of the Department. He testified he wanted to make sure the changes he was making were proper. He then discussed the

proposal with Franzen. Under the proposal, Franzen would replace Patz as Chief. As a consequence of the change, Davis put two employees under Franzen's wing, and this "alleviated" these responsibilities from Patz. Davis did not discuss the realignment with Patz until after he had made his decision to realign duties.

7. Davis testified that he met with Patz and discussed the realignment on or about April 5. Davis does not recall the details but he emphasized he wanted Patz to spend more time on fiscal responsibilities because of the "over-expenditures." Davis said Patz was very concerned and asked why the change was happening. Davis was unsure but does not believe they discussed the specifics of the fiscal issue. He testified he does not recall the details of the conversations, but he recalled he told Patz that the decision was already made and he was going to make the changes. Patz responded he did not agree with the changes.

8. Davis testified he met a second time with Patz and discussed the change. Patz said he still did not understand why the change was being made. Davis emphasized the desire for Patz to spend more time on budget issues. Davis believes, but is unsure, if the two met for a third time. Davis does not recall the specifics of the concerns he relayed to Patz, but he testified he expressed concern about budget issues and "over-expenditures." Davis does not recall if Patz asked if this was a disciplinary matter. Davis did not consider it discipline.

9. An organizational chart, dated April 17, 2009, and subtitled "Office Overview," shows the supervisory hierarchy of the Department's Southeast Region Construction, Maintenance and Operations Division. (APEA Exhibit 7, at 1). It shows Gary L. Davis as Director of the Region. Just below him on the chart is Patz, with the title "Transportation Maintenance and Operations Section Chief, Maintenance Superintendent." Below Patz on the chart are several positions, including employee Gary Franzen, whose position is titled "Regional Engineer Maintenance Specialist." Two other charts also show Patz at the top of the chart for the section. (*Id*. at 2-3).

10. On April 17, 2009, Davis issued a memorandum to Maintenance and Operations staff titled "Southeast Region M&O Realignment." (State Exhibit 1). In it, he announced the reorganization of section responsibilities and supervision. As a result of the reorganization, Franzen became Chief of the M&O Section, with supervisory responsibility over Patz and other employees. This change in command is illustrated in another organizational chart, also subtitled "Office Overview," that is dated April 1, 2009. (APEA Exhibit 8, at 1-3). In this chart, Franzen is listed with the title "Transportation M&O Chief." (*Id*. at 4). Patz's name is below Franzen's on the chart.

11. Patz testified he did not know about the realignment until it was announced on April 17, 2009.

12. As a result of the realignment, Franzen's and Patz's pay range remained the same but their duties and responsibilities changed. Patz was no longer Chief of the section, a working title he had held since 2005. He supervised fewer staff members but maintained budget responsibilities.

13. APEA filed a Step One grievance on behalf of Patz on June 1, 2009 (APEA Exhibit 1). The grievance provides:

> The realignment of the department's SE Region M&O staff (announced by 17Apr09 Memorandum . . .) results in the de facto demotion of Grievant, which demotion is not justified or supported by Grievant's evaluations or work record, which demotion is accomplished without Grievant having been provided due process and opportunity to respond to and appeal the negative personnel action. Moreover, the alleged realignment contravenes the state's existing classification plan, does not comport to the existing classification plan and further violates the state's philosophical and contractual commitment to Merit Principles. Finally, during the course of Grievant's 16APR09 discussion with his supervisor, SE Director Gary L Davis, Davis made statements to Grievant which indicated that Davis had dissatisfactions with Grievant's "performance", and those dissatisfactions were the primary impetus of the realignment. However, Davis' issues with Grievant's performance, if any, have never been discussed with Grievant, have never been documented and have never been reflected or recorded in any evaluation of Grievant's job performance, as required by contract and the operation of due process and just cause. The supervisor cannot be permitted to evade his duty and responsibility as a supervisor, especially the duty and responsibility to identify performance issues and to provide direction and positive assistance in the remediation of those performance issues. A "realignment", whether contrived or based on genuine business decisions, cannot be utilized to circumvent and deny a subordinate's due process rights and appeal rights.

(Grievance Form attached to June 1, 2009, letter to Gary Davis from Pete Ford. Underlining, quotes, spacing, punctuation, and dating in original).

14. The State denied the grievance in a June 15, 2009, letter from Gary Davis to Pete Ford. The State cited Article 5, the Management Rights article of the parties' collective bargaining agreement. Davis denied evading responsibility as a supervisor. Regarding the supervisory change, Davis stated: "It is within management's rights to make an organizational change to improve the productivity and fiscal performance of Southeast Region Maintenance & Operations after a review of operational efficiencies." Davis added:

> The organizational realignment did not result in the grievant being demoted. He continues to supervise all of the Southeast Regional Maintenance Stations and the staff located there. He continues to plan and direct the maintenance Stations and the staff located there. He continues to plan and direct the maintenance and repair of transportation infrastructures for his assignment maintenance district. There is no violation of the complainant's due process rights because the alleged *de facto* demotion is not reality as the union alleges.

(APEA Exhibit 1, June 15, 2009, letter from Gary Davis to Pete Ford.).

Davis further affirmed that Patz would no longer be supervising Franzen and two other positions in the division.

15. APEA took the grievance to Step 2, and the State denied the grievance at Step 2. In a July 15, 2009, letter to Pete Ford from Amanda Holland, the State asserted:

> [T]he organizational realignment did not result in the grievant being demoted. He continues to supervise all of the Southeast Regional Maintenance Stations and the staff located there. He continues to plan and direct the maintenance and repair of transportation infrastructures for his assigned maintenance district. There is no violation of the complainant's due process rights because the alleged *de facto* demotion is not reality as the union alleges. "Demotion" means the movement of an employee from one salary range to a lower salary range. The supervisory differential is an additional premium pay designated to supervisors who have a subordinate employee in the same or higher range than the supervisor – the removal of which is not considered a "demotion."[2] Mr. Patz' position classification remains that of Maintenance and Operations Superintendent.

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2 APEA did not argue that this aspect of the action taken by the State was a demotion.

(State Exhibit 1, July 15, 2009, letter from Amanda Holland to Pete Ford).

The State reiterated in the July 15 letter that the organizational change was within management's rights to improve the productivity and fiscal performance of the division's operational efficiencies.

16. On July 22, 2009, APEA responded to the State's Step Two response with a Step Three Grievance. APEA repeated its Step One and Two arguments. Further, APEA responded to the State's definition of "demotion":

> It should be noted that the contract does not express a "pat" or sole definition of "demotion", or a requirement that a "demotion" must involve a reduction of salary range. The Step Two's attempt to narrow the definition of "demotion" in the second paragraph is contradicted by the fourth paragraph's expansive and inaccurate assertion that Mr. Patz's "status remain(s) the same." Mr. Patz's "status" does not, in fact, "remain the same"; the fact that a former subordinate now supervises Mr. Patz and holds the job title and duties Mr. Patz previously held destroys that "same status" defense.

(APEA Exhibit 1, July 22, 2009, letter to Commissioner Kreitzer from Pete Ford).

17. The State denied APEA's Step Three Grievance, and APEA requested that the parties proceed to arbitration. The State denied the request, and APEA filed this petition to order the parties to attend arbitration pursuant to the collective bargaining agreement.

18. The collective bargaining agreement does not contain a definition of demotion. Nicky Neal, Director of the Department of Administration's Division of Personnel and Labor Relations, testified that in the context of discipline, demotion would include reclassifying an employee to a lower position, and removing all supervisory duties.

ANALYSIS

1. Does the parties' collective bargaining agreement define the term "demotion?"

APEA contends we should find this matter arbitrable and order the parties to proceed to arbitration. Among other contentions, APEA argues that Gregory Patz sustained a "defacto" demotion pursuant to the State's realignment of the M&O Section in April 2009.

The State denies that it demoted Gregory Patz and insists that the realignment that changed Patz's assigned duties was valid and was not a demotion. The State contends the action was a classification matter under Article 19 of the collective bargaining agreement, and under that Article, grievance arbitration is not an option.

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 (1960); 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).
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> *Id.* at 650. (Citations omitted).

In Lareau, National Labor Relations Act: Law & Practice, Ch. 41, §41.09[1][b] (Matthew Bender, 2d ed.), Lareau provides that:

> In determining whether a duty to arbitrate exists, courts look first to the language of the arbitration clause. The presumption favoring arbitration is particularly applicable where the arbitration clause is broadly written. In such cases, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."
>
> 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 relevant contractual provisions and the facts of this dispute, that the parties must advance to arbitration. There is a presumption in favor of arbitrability, and we find no express provision in the parties' agreement that clearly and unambiguously overcomes this presumption to exclude this particular grievance from arbitration. We further find that the parties' arbitration clause is broadly written.

The parties differ with respect to their interpretation of the term "demotion" as it is used in their agreement. While the agreement contains several definitions of various other terms in Article 1, and also specific definitions of additional terms in other articles, the agreement does not contain a definition of the term "demotion" anywhere. In its July 15, 2009, denial of Mr. Patz's grievance at Step Three, the State provided a definition of "demotion," but it did not disclose the source of this definition. Director Neal also provided testimony regarding the State's interpretation of that term, but the contract is silent as to its specific meaning as it applies to the agreement. APEA disputed the State's

definition in a July 22 letter. APEA argues that the term demotion could include the action the State took with respect to Patz's change in duties, and that demotion in the agreement could be "de facto" in nature.

This is the crux of the parties' dispute: APEA contends that Patz was demoted, and the State disagrees. APEA asserts that Patz's demotion was "de facto" in nature because he lost his working title of Chief and some supervisory and job responsibilities. The State contends its action was a valid realignment of duties. APEA argues that this change went beyond a mere realignment and effectively amounted to a "de facto" demotion.

The State argues that the April 2009 realignment of responsibilities was clearly not a demotion but was simply the result of a realignment of responsibilities. As noted, the State provided a definition of "demotion" in its July 15, 2009, response to APEA's Step Two Grievance, but the State did not provide a contractual or other source for the definition. We agree that the collective bargaining agreement does not contain a definition of demotion, and its meaning and application to contractual Articles is unclear. Further, the State's definition of "demotion" is not exclusive. For example, *Roberts' Dictionary of Industrial Relations*, Fourth Edition (1994) defines demotion as follows: "The process of moving an employee to a position lower in the wage scale or in rank. It may be involuntary, resulting from inefficient or careless work in the form of a penalty, or voluntary resulting from a curtailment of production, and without prejudice to the employee. It is similar to downgrading." *Id.* at 167.

With no definition of "demotion" in the collective bargaining agreement, we do not know what the parties intended when they included this term in the agreement. They clearly disagree over the contractual meaning of the term. Since this dispute concerns a grievance involving the alleged demotion of a permanent employee (Mr. Patz), and given there is no clear definition to apply, this issue must be submitted to arbitration under Article 10.6 for application and interpretation of this term by an arbitrator.

2. Did the action the State took in the Gregory Patz matter constitute a substantive classification matter under the procedures in Article 19 of the parties' collective bargaining agreement?

The State also argues that the action it took in April 2009 was simply a realignment of job duties and responsibilities. The State contends that this action occurred pursuant to the classification provisions of Article 19 of the agreement, which provides in relevant part:

> It is the obligation of the Employer to establish and maintain a classification system and a pay plan. The pay plan will include the principle of like pay for like work. All positions subject to this Agreement will be classified on the basis of job duties and responsibilities. The procedures outlined in this Article will be the only method of settling any dispute concerning substantive classification matters.

(State Exhibit 3, at 42).

The State contends that under the facts in this dispute, the procedures in Article 19 apply, and Article 19 is the exclusive method for settling this dispute. Therefore, the State argues, the dispute is not subject to the Article 10 grievance procedures.

It is unclear to us whether Article 19 applies here. It is unclear whether the review of Patz's and Franzen's positions occurred due to Patz's October 7, 2008, request for review of his position description, or whether it occurred due to Director Davis's initiating a review of section responsibilities in March 2009. The Article may or may not be applicable to a scenario in which the State initiated a classification review. It is unclear. The Article could be construed to be applicable only when APEA requests review of a classification of an employee's position, or review of a class series. However, even if Article 19 is indeed applicable, it is unclear if this dispute involves a "substantive classification dispute"; that phrase is not defined in the parties' collective bargaining agreement. While the State has the right to manage its affairs and direct the work force under Article 5 of the parties' agreement, it is unclear whether the action it took falls under one of the designated management rights or whether it is an Article 19 substantive classification issue.

Either way, it is not this Agency's province to interpret or apply the collective bargaining agreement to this dispute. Article 10.6 requires that grievances involving the application or interpretation of any terms of the parties' agreement may be submitted to arbitration. Therefore, an arbitrator must determine (1) whether the grievance here involves a "substantive classification dispute" under Article 19, (2) whether Article 19 applies only when APEA initiates a request for review of an employee's position, (3) the meaning and application of the term "demotion" under the parties' agreement, and (4) whether the action the State took represents a management right under Article 5.

Resolution of this particular grievance lies in the hands of the arbitrator, not with this Agency. APEA's petition is therefore granted, and the parties must proceed to arbitration in accordance with their collective bargaining agreement.

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 regarding enforcement of the grievance/arbitration provisions in the parties' 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 involves the application or interpretation of terms of the parties' collective bargaining agreement, specifically Articles 5, 10, and 19.

5. There is no clear definition of the term "demotion" in the parties' collective bargaining agreement.

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 is granted. The parties are ordered to proceed to arbitration in accordance with Article 10 of their collective bargaining agreement.

2. The State of Alaska is ordered to 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. 8 AAC 97.015.

Dated: _____.

ALASKA LABOR RELATIONS AGENCY

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Aaron T. Isaacs, Jr., Vice Chair

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Matthew R. McSorley, Board Member

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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 Alaska Rules of Court, Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of mailing or distribution of this decision.

This is to certify that on the 1st day of March, 2011, a true and correct copy of the foregoing was mailed, postage prepaid to:
Pete Ford, APEA
Kent Durand, State of Alaska

_____
Signature