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BEFORE ARBITRATOR KATRINA I. BOEDECKER

AUG 30 2011

Simpson, Tillinghast & Sorenson, P.C.

In the matter of the arbitration )  
of a dispute between: )  
) )  
STATE OF ALASKA, ) ARBITRATION DECISION  
Employer, ) )  
) )  
and ) CSO Shift Bid  
) )  
PUBLIC SAFETY EMPLOYEES )  
ASSOCIATION, )  
) )  
Union. ) Union Grievance No. G-A10-01  
) )

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Human Resource Manager Dallas S. Hargrave, appeared on behalf of the employer.

Stephen F. Sorensen, General Counsel, appeared on behalf of the union.

**JURISDICTION**

The undersigned Arbitrator was notified on December 14, 2010, that she had been selected to hear a contract interpretation grievance that ultimately involved an employer direction about shift bidding for Court Security Officers. The arbitration hearing was held May 23 and 24, 2011, in Anchorage, Alaska.

The arbitration was conducted pursuant to the parties' July 1, 2008 through June 30, 2011 collective bargaining agreement. The parties submitted their post-hearing briefs to the Arbitrator by July 18, 2011.

**STATEMENT OF THE ISSUE**

The parties could not stipulate to a statement of the issue. The employer presented the issues as:

Did the State violate Article 11, Section 9 of the CBA by not allowing Anchorage Court Service Officers to bid for job assignments?

If so, what is the appropriate remedy?

The union proposed the issues as:

Did the State violate Article 11, Section 9, of the Collective Bargaining Agreement, the Letter of Grievance Resolution dated February 05, 2002, and past practice, when it changed the shift bidding procedure for Court Service Officers?

If so, what should the remedy be?

I adopt the employer's proffered statement of the issues. This approach achieves two goals: First, it acknowledges that my authority as an arbitrator is limited to determining whether the employer violated a term or condition of the contract; second, as the employer stated in its brief, it still allows me to examine the Letter of Grievance Resolution and past practice as relevant considerations when assessing the employer's action.

**RELEVANT CONTRACT LANGUAGE**

**ARTICLE 6 - MANAGEMENT'S RIGHTS**

Except - and only to the extent - that specific provisions of this Agreement expressly provide otherwise, it is hereby mutually agreed that the Employer has, and

shall continue to retain, regardless of the frequency of exercise, rights to operate and manage its affairs in each and every respect. However, this right shall not abridge the CBA or and Federal or State statute.

Nothing in this Article shall be considered as superseding those rights granted to the Association in the articles and/or amendments of this Agreement.

#### **ARTICLE 10 - GRIEVANCE - ARBITRATION PROCEDURE**

##### Section 1 - General

###### Definition of Grievance:

A grievance is defined as a dispute over the meaning or interpretation of this Agreement. However, it is recognized that discussion and interpretation of the applications of other rules and regulations of the Employer may be necessary for the resolution of the grievance.

##### Section 5 - Arbitration

\* \* \*

. . . The decision of the Arbitrator shall be final and binding upon all parties. The Arbitrator shall not be empowered to rule contrary to, to amend or add to, or to eliminate any of the provisions of this Agreement. The Arbitrator shall furnish his/her findings of fact and rationale for his/her decision. Expenses incident to his/her services shall be assigned by the arbitrator to the losing party. If, in the opinion of the Arbitrator, neither party can be considered the losing party, then such expenses shall be apportioned as in the arbitrator's judgment is equitable.

It is agreed that the above arbitration procedure shall be the sole method of settling disputes, differences or controversies referred to arbitration. It is further agreed that the parties covered hereunder shall be bound by any decisions, determinations, agreements or settlements that may be effectuated pursuant to invoking the arbitration procedures.

\* \* \*

**ARTICLE 11 - SENIORITY**

\* \* \*

Section 9 - Shift Assignments and Regular Days Off

Management shall establish a shift, including available RDO, for each position in the bargaining unit except at posts with flexible schedules. Article 15, Section 11, shall govern scheduling at posts with flexible schedules. Airport Screening Officers shall normally work four (4) ten (10) hour shifts followed by three (3) days off. For the remainder of the bargaining unit, unless otherwise mutually agreed between the Employer and the Association, each shift shall consist of no more than five (5) workdays followed by a minimum two (2) consecutive days off and shall specify the hours of the day to be worked.

Shift Preference and RDO Preference

a. For Department of Public Safety, excluding Trooper Recruits and Court Services Officers during the FTO program, shift and RDO preference by units within a detachment shall be determined by the following:

Shift Preference: Shift preference shall be by bargaining unit seniority within that classification; however, realizing that contract language is clear in that shift and regular days off assignments are to be bid and assigned according to seniority, it is recognized by both parties that there are times when a reassignment of a shift or RDO is required or desirable; (sic) the following shall apply in those cases:

Emergency or special assignment: In an emergency or special assignment situation where a member is reassigned to a shift that is different than that which was awarded, the supervisor or Commander involved shall notify the Association concurrent with the action taken or within the next working day. The Association shall be provided, at that time, with an explanation of the reassignment. It is further understood that a reassignment of an emergency or special assignment nature shall not exceed ten (10) working days except in those instances where the Commander or designee and the Association have, prior to the end of the ten (10) day limit, mutually agreed to an extension of a specified duration. The affected member(s), for the tenure of the reassignment, shall not

experience any loss in their wages unless otherwise mutually agreed to by the parties.

Training or personal leave situations: For purposes of training or shortages of personnel due to members being on approved personal leave, a change of shift is authorized to cover another shift. Such shift reassignments shall not be for more than two (2) weeks, unless a longer period is agreed to by the reassigned member. The Employer shall first solicit volunteers for the reassignment before directly assigning a member to a different shift. If there are no volunteers, the member with the least seniority on the impacted shift shall be selected first and then in progressive order. Members shall not be required to change their shift more than twice a year. The affected member(s), for the tenure of the reassignment, shall not experience any loss in their wages unless otherwise mutually agreed to by the parties.

#### EXAMPLES

- 1) Should a member agree to be temporarily reassigned from a shift that pays shift differential pay to a shift that pays less or no differential pay, the member would receive the differential pay allowable from the shift held prior to the temporary assignment.
- 2) Should a member agree to be temporarily reassigned to a shift that allows a greater differential pay than currently receiving, the member shall receive the greater differential pay.
- 3) Should the member agree to be temporarily reassigned to another shift, the overtime entitlements shall be in accordance with the temporary shift.
- 4) Should the member not agree to a temporary shift change and is directed to work such, the member has the right to grieve the reasonableness of the decision that an emergency or special assignment situation exists, and to seek whatever relief the member may believe is appropriate.

Finally, it is understood that management has the ultimate right to assign and direct the work unless prohibited by the Collective Bargaining Agreement, statutes or regulations. Should management reassign a

shift or RDO without agreement with the member(s) and Association, then it is further understood that the member(s) and Association have the ultimate right to challenge the actions taken through the grievance procure.

RDO Preference: Once the shifts have been selected, the member shall then select RDOs from those days off allowed on that shift and the classification by the Employer, by bargaining unit seniority.

Regularly established shift changes are considered to occur not more frequently than once every three (3) months or less frequently than once every six (6) months.

\* \* \*

In addition, the Employer may reassign any member to a different shift. No loss in shift differential shall occur for the first thirty (30) days of such reassignment unless mutually agreed. Unless the reassignment is mutually agreed, the reassignment is grievable through the grievance/arbitration process contained in the Agreement.

The Employer shall notify the Association concurrent with the action taken or within the next working day. The Employer shall provide the Association with an explanation of the reassignment with the notice, and shall provide the Association with a copy of any written agreements addressing shift reassignments.

### **FINDINGS OF FACT**

The State of Alaska has a Department of Public Safety. Within that department is the Alaska State Troopers (AST) division which has a Judicial Services unit. Judicial Services supports the state's court system by transporting prisoners, serving writs or other

court issued legal documents, providing security in the courts, and protecting judges. There are 11 Judicial Services units across the state.

This arbitration involves shift bidding by Court Service Officers (CSOs) in the Anchorage Judicial Service unit. All CSOs have been in the Public Safety Employees Association (PSEA) bargaining unit since 1988. Currently there are 59 CSOs in the bargaining unit. In Anchorage, the CSO's duties historically have included transporting prisoners from the jail for court appearances, medical appointments, or to other destinations as required; maintaining the security of the prisoners during the transport and appointments; serving certain legal documents; being a presence in the courthouse for general security and specifically for domestic violence cases; working in the Anchorage city jail to move prisoners for district court; supporting C Detachment, which is western Alaska; and working in the control room, making daily assignments. CSOs have limited law enforcement authority.

The Anchorage Judicial Services unit is the largest in the state. Twenty-six CSOs work in the Anchorage office. The Anchorage unit is unique in that the CSOs there generally perform only one specific duty: prisoner transport, serving writs, court security, being at the Anchorage city jail, working the control room or working C detachment. CSOs in the other, smaller, units around the state would usually perform all the duties of the job classification within the work week. The Anchorage unit is supervised by two AST Sergeants, one AST Lieutenant and one AST Captain.

Since at least 1982, the CSOs in Anchorage have bid, by seniority, for their shifts, regular days off (RDOs), and duty assignment/position.

## 2001 Change

Lieutenant Dan Lowden was assigned to oversee the Anchorage Judicial Services in 1998. He was aware that the CSOs bid their shifts, RDOs, as well as their job assignments, by seniority. In May, 2001, Lowden issued a memo announcing that CSOs would have their job duties assigned.

Lowden was concerned that all the CSOs should have up-to-date skills in each assignment area. He believed that if a CSO remained in the same assignment for years, his/her skills in the other assignment areas would diminish. He issued another memo soon thereafter stating that assignment of work is a management responsibility along with other reasons for the change.

The union filed a grievance about the change.

## Letter of Grievance Resolution

On February 5, 2002, the employer and the union resolved the grievance concerning assignment bidding by the Anchorage CSOs. They entered into a Letter of Grievance Resolution (LGR). Under the LGR, the employer retained the right to manage and direct the workforce and to reassign CSOs who do not adequately perform their job duties.

The LGR stated: "On the next bid cycle, CSOs shall be allowed to bid for specific job assignments; however, management retains the right to reassign employees to specific job tasks when necessary." Through the LGR, the Anchorage CSOs retained the right to bid for assignments by seniority, except for the control room positions. The control room CSO directs the work of other Anchorage CSOs, so it is quasi-supervisory in nature. The control room CSO also has a

high level of interactions with other court staff. The employer believed that previous CSOs bidding into the control room position had had some performance problems.

The LGR has no expiration or end date. Lowden testified that he believed the LGR was still in effect in 2010.

#### Bargaining History

The parties entered into negotiations for a successor collective bargaining agreement in 2003 and 2004. The union presented proposals that would incorporate the terms of the LGR permanently into the contract two times. The employer continuously rejected the proposal. The language of the LGR is not incorporated into the successor 2005 - 2008 collective bargaining agreement.

After 2002, Anchorage CSOs bid by seniority for shifts, RDOs and assignments every ninety days, with the exception of the control room. The parties continued to follow the terms of the LGR after the contract negotiations.

From February 2002 to January 2010, the employer did not reassign any employee to a specific job task due to necessity. Nor did the employer reassign a CSO because he or she was not adequately performing the job duties. The employer did not discipline any CSO for performance problems. It did not require any CSO to attend remedial training to refresh job skills nor address any performance problems in a CSO's annual evaluation.

#### Lowden's New Orders

Lowden left Anchorage Judicial Services in 2003. He returned as a Captain, now having oversight of the statewide Judicial Services

unit, in 2008. In autumn, 2009, Lowden had a discussion with Major Glick about the Anchorage operations. Glick was surprised that the Anchorage CSOs had the ability to bid on work assignments by seniority. About this same time, Glick met with PSEA President Rob Cox, along with PSEA Business Manager Jake Metcalf. Glick voiced a need to change how work assignments were being done by seniority bidding in the Anchorage judicial services office. The men discussed the terms of the LGR. The PSEA representatives were not aware of the background of the LGR. Cox advanced that it appeared under the terms of the LGR that the employer could reassign job tasks when necessary.

Thereafter, Glick ordered Lowden to change the way work assignments were handled at the Anchorage office along with changing the bid cycle from three months to four months. Lowden worked with the sergeants to develop a new shift bidding sheet for the January 4, 2010 to April 4, 2010 bid cycle. Lowden met with the five most senior CSOs in the Anchorage office. He expressed the need for the change citing essentially the same reasons as in 2001. Although he did not refer to any specific performance problem, he continued to advance that he did not want CSOs continually bidding for the same positions over and over again because their skills in other positions might stagnate. Lowden did not require any Anchorage CSO to attend remedial training to refresh job skills.

Currently, sometimes a supervisor will ask a CSO for his/her preference before assigning duties. Supervisors do not always ask all Anchorage CSOs for their preferences, nor do they assign all employees their expressed preference. Since January of 2010, not all of the CSOs have cycled through all assignments. Some senior officers have been reassigned from positions that they had occupied for ten years or more. Senior officers testified that the ability

to bid their assignments, along with their shifts and RDOs, was a great benefit.

On January 4, 2010, the union filed this class action grievance on behalf of the Anchorage CSOs, disputing the employer's claimed right to assigned work outside of seniority.

### **RATIONALE**

Since the union has claimed that the employer violated the parties' collective bargaining agreement, the union has the burden of proof in this language interpretation case.

The employer argues that the language of Article 11, Section 9 grants that union members may bid on shifts and regular days off, only. It then points to a dictionary definition of "shift" as "a scheduled period of work or duty". It argues that a shift is not the same thing as a job or duty assignment. The employer contends that PSEA members have never had a contractual right to bid on job or duty assignments. The employer then asserts that the parties agreed in their contract language that management would have the right to assign the work.

The employer's approach misses what has actually occurred in the Anchorage judicial services office. Over approximately the last 30 years, the Anchorage CSOs have always used seniority to bid their work assignments as well as their shifts and RDOs. When the employer tried to eliminate seniority based bidding for work assignments ten years ago, the union filed a grievance. The parties resolved that grievance with their LGR. Since the Anchorage CSOs continued bidding on work assignments by seniority after the LGR was signed, I conclude that the parties understood

that the LGR did not prohibit that procedure. Thus, I disagree with the employer's argument that the LGR did not give the CSOs the right to bid on job assignments.

The parties' collective bargaining agreement specifically states in Article 10 Grievance-Arbitration Procedure, Section 5 - Arbitration: "... It is further agreed that the parties covered hereunder shall be bound by any decisions, determinations, agreements or settlements that may be effectuated pursuant to invoking the arbitration procedures." The LGR was a settlement "pursuant to invoking the arbitration procedures." The employer is bound by it.

I also disagree with the employer's claim that the LGR is not still binding. The employer bases its claim on the following language of the LGR: "[T]his agreement ... does not establish any practice or precedent between the parties... [and] shall not be referred to in any grievance, complaint, hearing, arbitration or other matter to arise between the parties, except as may be necessary to implement the terms of this resolution." In the arbitration before me, the union was clearly wanting to "implement the terms of this resolution" (i.e. the LGR). Additionally, the LGR had no expiration date or any reference to its termination.

The employer wanted me to find, if I determined that the LGR is still binding, that management never gave up the right to assign job duties and functions. I cannot make that finding. Again, after the employer and the union signed the LGR, the Anchorage CSOs continued to use seniority to bid on work assignments, so the union preserved this right in the LGR.

## Past Practice

The employer argues that I need not look at past practice because the language of Article 11, Section 9, is clear and unambiguous. However, the parties had a conflict over that very language in 2001 which was resolved by the LGR. Now, in the face of the LGR, the parties again have a conflict about what the language means.

I will look at the past practice to see if the parties' behavior meets the tests of a binding past practice. As the employer cites, "Where practice has established a meaning for language contained in past contracts and continued by the parties in a new agreement, the language will be presumed to have the meaning given it by that practice." Elkouri & Elkouri, How Arbitration Works, p. 623 [citing *Barrett Paving Materials*, 78 LA 819, 822 (Murphy, 1982)].

To be binding, a past practice must be clear, consistent and acceptable. Elkouri p. 632. The practice of allowing seniority bidding for work assignments in the Anchorage Judicial Service unit existed for about 30 years - a reasonably long time. It occurred repeatedly - every 3 months during all those years. It was clear and consistent. The practice was known by both the union and the employer. The employer prepared the bid shift forms for use by the Anchorage CSOs when bidding. The sheets made by the employer, listed the regular shift times and the RDOs, as well as the assignments. Seniority bidding was accepted for nearly 20 years. When the employer sought to change it, the parties reverted back to the past practice to settle a grievance. They have continued the practice for another 10 years.

### Bargaining History

The employer argues that the union proposed putting the language of the LGR into the bargaining agreement during negotiations, but the employer resisted. The language of the LGR does not go away just because it was not incorporated in the collective bargaining agreement. There is no expiration date in the LGR. If the employer wanted to change the bidding process, it could have proposed language during negotiations that the Anchorage CSOs could not use seniority for bidding on work assignments. It did not do so, much less get the union to agree to the concept.

I have extensively quoted the language of Article 11, Section 9, in this Arbitration Decision. It appears that the parties put a lot of details into the shift assignment section, even going so far as to list four examples of different scenarios. Moreover, the parties put the shift section under the article entitled "seniority". By this structure, the parties acknowledged that seniority is an important umbrella. One that the parties allowed, in the LGR, to be used by the Anchorage CSOs for job assignments. If the employer wants to change this seniority bidding, it must do so at the bargaining table, not by unilateral action.

### Employer Business Need

The employer contends that it has legitimate business reasons for implementing the change. It wants all the CSO's to know how to do the entire job, not just part of the job. It needs to ensure that new employees learn the skills they need to know in order to do the full range of work. It claims that without the ability to move job assignments around, there is no way for management to tell who is good at which assignments.

I agree with the union's arguments that the employer has not exercised its management right that exist within the collective bargaining agreement to address these issues. Article 11 allows the employer to send any CSO to training, if the employer believes that training is necessary for performance. It has not done so for any CSO - newly hired or more senior. The union also asserts that the employer has the right to note performance issues in annual evaluations, but that it has not done so with any CSO.

#### State Statute

Finally, the employer contends that if this Arbitration Decision finds in favor of the union, it would undermine a statutory requirement for the employer to maintain a classification system in which state employees must be paid like pay for like work. If the employer believes that a statute has been violated, it should make that argument to a court of competent jurisdiction, not to an arbitrator. As the employer points out in its brief, as the arbitrator, my authority is limited to interpreting the terms of the agreement.

#### REMEDY

If the union can provide documentation that under the changed bidding procedure, any Anchorage CSO lost any wages or benefits, the employer must make that CSO whole.

Under the language of Article 10 - Grievance-Arbitration Procedure, Section 5 - Arbitration, the expenses of the arbitrator are to be assigned to the losing party. I find that the employer is the losing party in this arbitration. Therefore, the employer is directed pay for my costs and fees.

CONCLUSION

The union has met its burden of proof to establish that the employer violated the parties' Letter of Grievance Resolution that interpreted Article 11, Section 9 to allow the Anchorage Court Service Officers to use their seniority to bid for work assignments, as well as shifts and regular days off.

AWARD

Any facts or arguments presented at the hearing or in briefs which are not cited within this Award, I found to be non-persuasive or immaterial. Based on the sworn testimony of the witnesses, the documents admitted into evidence, and the record as a whole, I award:

The grievance is SUSTAINED.

ISSUED in Chehalis, Washington, this 24<sup>th</sup> day of August, 2011.

  
KATRINA I. BOEDECKER, Arbitrator