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

Case No. 99-1024-CBA

DECISION AND ORDER NO. 250

Digest: (1) Terri Beach was a probationary employee at the time of her separation from State employment. The grievance procedure under Article 16 of the ASEA/State collective bargaining agreement does not apply to the dispute about her separation from employment.

(2) The doctrine of detrimental reliance does not apply.

DECISION

Statement of the Case

On November 17, 1999, Alaska State Employees Association/AFSCME Local 52, AFL-CIO (ASEA) filed a contract enforcement petition requesting that we order the parties to arbitrate, under Article 16 of the ASEA/State collective bargaining agreement, their dispute over Terri Beach's separation from State employment. On December 15, 1999, the State responded that the matter is not appropriate for arbitration because Beach was a probationary employee who was entitled to use only the complaint procedure in Article 15 to resolve issues concerning her separation.

The State filed a motion asking the Agency to either dismiss the petition or order the parties to defer it to the complaint procedure under Article 15. On December 16, 1999,

ASEA opposed the motion, arguing that Beach was given early permanent status by virtue of a June 15, 1999, letter the State issued on her behalf to a lending institution. On December 29, 1999, the State's motion was denied.

Panel: Vice-chair Blair Marcotte and members Robert Doyle and Karen Mahurin were present and participated.

Appearances: J. Michael Robbins, Business Agent for Alaska State Employees Association/AFSCME Local 52, AFL-CIO; and Kent Durand, labor relations analyst for State of Alaska.

Procedure in this case is governed by 8 AAC 97.330, 8 AAC 97.350—8 AAC 97.480. Hearing Officer Jean Ward presided.

The record closed on May 12, 2000.

Issues

1. Was the employee in permanent or probationary status under the collective bargaining agreement when separated from employment?
2. Does the doctrine of detrimental reliance apply in this case?

Stipulation

The parties agreed to the following stipulation: If Mrs. Beach is found to be a permanent employee under the collective bargaining agreement, the State will proceed to arbitration on the merits of the dispute, unless an appeal is filed.

Findings of Fact

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

1. The Alaska State Employees Association/AFSCME Local 52, AFL-CIO is the certified bargaining representative of the general government unit of State of Alaska employees.
2. Terri Beach was a member of the general government unit during her employment as an environmental analyst I.
3. Beach and her family moved from Anchorage to Juneau after she accepted the environmental analyst I position. Beach had not worked previously for the State of Alaska.
4. She was employed as an environmental analyst I from August 16, 1998, until July 23, 1999. Exh. E, at 8, 13, & 18.

5. The environmental analyst I position is a range 14 position. Exh. E, at 15.
6. Beach was a probationary employee at the time of her hire.
7. Article 11 of the ASEA/State collective bargaining agreement addresses the probationary period. Article 11.02 and 11.03 provide in relevant part that,

11.02-Probationary Period

The probationary period shall be regarded as part of the examination process which shall be utilized for closely observing the employee's work and adjustment to the position. Employees who, in the judgment of the Employer, have satisfactorily passed the probationary period shall be retained and given permanent status in the job class at the end of this applicable probationary period. Employees who, in the judgment of the Employer, have not or will not satisfactorily pass the probationary period shall not be retained in the job class.

A. Duration

...

2. The probationary period for employees at range 14 and above shall be twelve (12) months with the provision that:
 - a. Employees at ranges 14 and above who, in the judgment of the Employer, have satisfied the requirements for completion of their probation may, at the discretion of the Employer, be made permanent on the sixteenth (16th) day of any month following six (6) months of probationary service.

...

11.03-Permanent Status

- A. Permanent status in State service shall be attained with satisfactory completion of the initial probationary period. Nonretention during the initial probationary period shall be subject only to the complaint procedure established in Article 15 (Complaint Resolution Process).
- B. There shall be a probationary period following initial appointment to any job class except as provided in the Agreement. Permanent status in the job class shall be obtained on the day following the satisfactory

completion of the probationary period unless an employee has been, in accordance with other provisions of this Agreement:

1. Separated;
2. Demoted during the probationary period;
3. Extended in the probationary period; or
4. Notified in writing by the appointing authority prior to the completion of the probationary period that the employee will not successfully complete the probationary period. In such cases, an employee may, at the discretion of the appointing authority, continue in the position not to exceed ten (10) working days past what would have been the end of the probationary period. Employees retained longer than the ten (10) working days past the end of the probationary period shall be considered to have attained permanent status.

...

Exh. 1, at 14 & 15.

8. The late, mid-probation evaluation Beach received on May 13, 1999, recommended that her probation be continued. Exh. E, at 8. Although the evaluation was acceptable, it did indicate that there were some areas Beach could work on improving. However, it did not indicate that she was in danger of failing probation.

9. Beach and her husband began looking for a house to buy in approximately May of 1999. They made an offer on a house they located, but did not purchase this house because Residential Mortgage Company, the first financial institution they contacted for the purpose of becoming prequalified, overestimated by \$40,000 the amount of money they would be able to obtain.

10. At the time the Beaches tried to buy the first house, Residential Mortgage Company had asked Terri Beach to obtain a letter from the State that addressed her employment status. At that time, Ruben Yost was her supervisor. Yost had begun supervising Beach on May 20, 1999. Her former supervisor was William Ballard. Beach asked Yost to sign a letter for Residential Mortgage Company. Beach and Yost dispute what information Beach wanted Yost to include in the letter.

11. Because she was still a probationary employee, Yost was not willing to sign a letter indicating that Beach had been granted permanent status, or that the grant of permanent status was guaranteed. However, he discussed with her the suggested contents of a letter he would be willing to consider signing. Beach prepared a letter for his signature based on their discussion. Yost consulted his supervisor, Loren Rasmussen, prior to signing

the letter to make sure that Rasmussen did not object to Yost's signing it. Rasmussen approved the letter.

12. On June 15, 1999, Yost signed a letter to Beth Galea, of Residential Mortgage Company, which consisted of the following statement: "Terri Beach has worked for the State of Alaska since August 13, 1998. As a new employee with the State, Ms. Beach has been in a one-year probationary status, which is scheduled to end on August 16, 1999. At this time, there are no indications that Ms. Beach will not satisfactorily complete her probationary period." Exh. 4.

13. Yost believed this was the most information he could legitimately provide regarding Beach, and that it would be up to the lending institution to determine if the information was sufficient for it to grant her a loan.

14. Beach advised Yost that arrangements to purchase the first house fell through. Yost was not aware that Beach continued to look for another house to purchase. Around the end of June, Beach started looking for a rental, but did not find one to meet her families' needs. However, during the first week in July, she did find a house that she was interested in purchasing.

15. After the prequalification mistake by Residential Mortgage, Beach and her husband changed financial institutions, and the National Bank of Alaska (NBA) handled their prequalification paperwork.

16. Milt Brown, a NBA mortgage loan originator, received a copy of the June 15, 1999, letter Yost signed on behalf of Beach. The June 15, 1999, letter was one of several factors Brown considered in deciding to approve the loan for Beach and her husband. As a former State employee, and someone who approved loans for State employees, Brown was familiar with probationary and permanent status with the State. The June 15, 1999, letter influenced his decision to approve the loan.

17. The Beaches made an offer on the second house they located. They incurred some expenses that were not reimbursed in their second attempt to buy a home.

18. Shortly after Yost began supervising Beach on May 20, 1999, he discussed with her some expectations he had about her work. Those concerns included fitting into the team that he supervised, the procedures he expected her to follow concerning leave, lunch hours, and not conducting personal business while on work time, following established formats, and asking leads questions when they were at a break point instead of just whenever she wanted an answer. Beach expressed some concerns about her evaluation and what she felt were negative comments in it. She also wanted to know if there was some kind of plan not to make her permanent. Yost told her he knew of no such plan, and that the supervisor's comments in the evaluation were an attempt to communicate things that may need to be fixed.

19. Yost was on vacation from June 29, 1999, to July 15, 2000. Exh. E, at 5. On June 28, 1999, before he left, Yost conducted a staff meeting with Beach and the other two team members. At the meeting, Yost felt that Beach was resentful, and noticed that she appeared to be aggrieved. He chose to talk to Beach alone, rather than in the staff meeting, and Beach raised some of her concerns. She wanted to know what she needed to do to be flexed to an environmental analyst II position, and she was concerned about the new environmental analyst II position that was being filled because she felt she would be competing for work with the person in that position. Beach felt that a team member was treating her in a condescending manner, and she also wanted suggestions on how to get along with her. With her family responsibilities, she was concerned about how she would learn to identify nearly 300 wetlands plants on her own time. Yost told Beach he would get back with her after his vacation.

20. Shortly before he left on vacation, Yost had some concerns about Beach's performance and her ability to fit into the team. Yost's concerns continued after he returned from vacation.

21. Yost did not advise Beach at any time that she had become a permanent employee. Beach concedes that she did not receive any paperwork from the State that specifically stated she had become a permanent employee, and she did not receive any notice under Article 11.02(A)(2)(a) of the contract, which pertains to early permanent status, that advised her she was being granted early permanent status on the 16th day of any month following six months probationary status.

22. Beach believes the June 15, 1999, letter signed by Yost should have had the effect of granting her early permanent status. However, the document does not state that she had been granted early permanent status.

23. On July 21, 1999, Beach left a note for Yost that advised him she might need longer than one hour for lunch because she was going to go sign papers to close on a house. Yost was in a meeting at the time Beach left the note for him. When Yost found the note, he came to talk to her about it. He learned that her lunchtime appointment had been postponed and that Beach had worked through lunch and was expecting use the hour she had worked to go later in the afternoon to sign the loan papers. Yost was upset that she had changed her lunch hour without his permission, and even more upset that she was intending to sign loan paperwork to purchase a house. He told her that it might not be advisable to commit herself to a loan because a decision had not been made to grant her permanent status.

24. Because Beach was going to commit to buying a house, Yost felt that a decision needed to be made immediately about whether she would be granted permanent status and continue in the position. He discussed the matter with his supervisor and Janet Rider, the human resource manager. A decision was made to terminate Beach during the probationary period. Exh. 5.

25. Beach was separated from State service on July 23, 1999. Exh. 5.

26. Beach was not granted early permanent status by virtue of the June 15, 1999, letter to Galea or any other document, nor did a State representative verbally grant Beach permanent status. She was a probationary employee when she was terminated on July 23, 1999.

DISCUSSION

Petitioner ASEA alleges that the dispute involving Beach should be submitted to the arbitrator under Article 16 of the parties' collective bargaining agreement to allow the arbitrator to determine whether the dispute is arbitrable. The State contends that the dispute is not arbitrable because Beach was a probationary employee at the time of her separation and that the dispute can only be processed as a complaint under Article 15.

While it is true that Article 16.03 of the grievance procedure states that "Questions of arbitrability shall be decided by the arbitrator," ASEA ignores another relevant section of the contract, Article 15.01 A. Article 15.01 A states that

A complaint is defined as: (1) any controversy, dispute or disagreement arising between the Union or an employee(s) and the Employer which does not concern the application or interpretation of the terms of this Agreement, or (2) **is the appeal of the discharge, demotion or suspension of a probationary employee not holding permanent status in another classification** or (3) is a controversy, dispute or disagreement with respect to long-term nonpermanent employment. **Such matters are not included in the definition of grievances as set out in Article 16.** The following shall be the sole means of settling complaints.

Exh. 1, at 23. Emphasis added. Thus, the parties have agreed that the complaint procedure is the sole means of settling issues involving the discharge of probationary employees who do not have permanent status in another classification. We have found that Beach was a probationary employee at the time of her separation from State service on July 23, 1999. Since this was her first job with the State, she did not hold permanent status in another classification. Therefore, she is not entitled to use the grievance procedure under Article 16 of the parties' agreement.

Petitioner ASEA also asks the Agency to determine if the doctrine of detrimental reliance applies in this case. *Black's Law Dictionary* defines detrimental reliance as "Response by promisee by way of act to offer of promisor in a unilateral contract. *See also* Promissory estoppel." Promissory estoppel is defined as "That which arises when there is a promise which promisor should reasonable expect to induce action or forbearance of a definite and substantial character on part of promisee, and which does induce such action or forbearance, and such promise is binding if injustice can be avoided only by enforcement of promise. Elements of a "promissory estoppel" are a promise clear and unambiguous in its terms, reliance by the party to whom the promise is made, with that reliance being both reasonable and foreseeable, and injury to the party asserting the estoppel as a result of his reliance." (Citations omitted).

Promissory estoppel does not apply in this case because there was no clear and unambiguous promise to Beach that she would become or had become a permanent employee. She did not receive any paperwork from the State that advised her she had been granted permanent status, nor did any State representative tell her she had attained permanent status.

This case is one that should have been resolved under the procedure the parties agreed to in their collective bargaining agreement, i.e. ASEA should have submitted the dispute to the complaint process under Article 15. This case did not merit the Agency's expenditure of resources to conduct a hearing. The June 15, 1999, letter Yost wrote to Galea clearly did not grant Beach early permanent status, nor did it guarantee that permanent status would be conferred at the end of the probationary period.

Having received her evaluation prior to June 15, 1999, Beach was aware there were some areas that her former supervisor believed could be improved. As late as June 28, 1999, Beach expressed some reservations about her job and ability to get along with one of the team members to Yost. Under these circumstances, it may have been prudent to wait until the end of the probationary period before purchasing a house to insure that permanent status was going to be attained and the job was going to be satisfactory.

CONCLUSIONS OF LAW

1. The State of Alaska is a public employer under AS 23.40.250(7), and the Alaska State Employees Association is an organization under AS 23.40.250(5). This Agency has jurisdiction to consider ASEA's petition to enforce its collective bargaining agreement with the State under AS 23.40.210(a).
2. As petitioner, ASEA has the burden to prove all elements of its case by a preponderance of the evidence. 8 AAC 97.350(f).
3. AS 23.40.210(a) authorizes this Agency to determine the arbitrability of a dispute.
4. The parties' agreement contains a grievance-arbitration procedure in Article 16 that culminates in binding arbitration.
5. Article 15 of the parties' agreement provides an alternative dispute resolution procedure for non-retention disputes involving probationary employees who do not hold permanent status in another classification. This Article provides the sole and exclusive means of resolving non-retention disputes for probationary employees who do not hold permanent status in another classification.
6. As a general rule to promote self-governance, this Agency will enforce a bargaining agreement by requiring the parties to follow the procedures they have agreed to for resolving disputes. In this case, the complaint procedure in Article 15 of the parties'

collective bargaining agreement, rather than the Article 16 grievance-arbitration procedure, governs resolution of this dispute.

7. The doctrine of detrimental reliance does not apply because no clear and unambiguous promise was made to Beach that granted her early permanent status. She was a probationary employee at the time of her termination on July 23, 1999.

ORDER

1. The petition by the Alaska State Employees Association to enforce the bargaining agreement and compel arbitration is DENIED.

2. If ASEA desires to proceed with Beach's separation dispute under the Article 15 complaint process, it must do so within 15 days from the date this decision is issued.

3. 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.

ALASKA LABOR RELATIONS AGENCY

Blair Marcotte, Vice-chair

Karen Mahurin, Board Member

Robert A. Doyle, Board Member

APPEAL PROCEDURES

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

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the order in the matter of *ALASKA STATE EMPLOYEES ASSOCIATION, AFSCME LOCAL 52, AFL-CIO*, vs. *STATE OF ALASKA*, Case No. 99-1024-CBA, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 19th day of June, 2000.

Donna Bodkin
Administrative Clerk III

This is to certify that on the 19th day of June, 2000, a true and correct copy of the foregoing was faxed and mailed, postage prepaid, to

Mike Robbins, ASEA

Kent Durand, State

Signature