

# MEMORANDUM

# STATE OF ALASKA

Department of Administration  
Division of Labor Relations

To: Mila Cosgrove, Director  
Mgmt. Services Teams  
Technical Services Teams  
Administrative Services Directors

Date: February 28, 2005

From: Art Chance,  
Director

Subject: ERRATA  
Non-retention of Initial  
Hire Probationary Employees

This memo supercedes our earlier advice by memo dated June 26, 2001, "Subject: Non-retention of Initial Hire Probationary Employees." The following reiterates prior advice and guidance regarding the evaluation and non-retention of initial hire probationary employees and changes some prior advice in light of the recent Alaska Supreme Court case *Blackburn v. State of Alaska* (Opinion No. 11096-December 17, 2004). The minor, but important change concerns the notice procedure to be used by departments regarding non-retention of a probationary employee. All previous advice is included herein in addition to the important change in procedure regarding notice.

For probationary employees covered under the GGU, SU, CEA, PSEA, AVTECTA, ACSEA and Corrections Unit agreements, it is imperative that probationary employees receive timely interim performance evaluations consistent with the terms of the collective bargaining agreements applicable to the employees. The failure to provide the interim performance evaluation, when required by agreement, may result in the reversal of a department's decision to separate a probationary employee either through the contractual complaint process or an extra-contractual forum.

The treatment of probationary employees under the other collective bargaining agreements varies widely and significantly. Please consult the appropriate agreement when dealing with employees not covered by the GGU, SU, CEA, PSEA, AVTECTA, ACSEA and Corrections Unit agreements.

Our position has not changed regarding the practice of providing probationary employees with the legitimate business reasons why they are not being retained. What has changed is the manner in which the employee is given notice of non-retention. The new practice is that probationary employees be given in writing, the substantiated business reasons why they did not successfully complete probation. As noted in Blackburn, a written statement of the reasons for non-retention is required by 2 AAC 07.415. This regulation is applicable to all bargaining units. Employing

departments' reasons will be closely scrutinized for substantiation. As with our current practice, the department should save supporting documentation after non-retention and be prepared to defend those reasons through the complaint procedure or in an extra-contractual forum.

The language to be used in every comment (written) concerning probationary employees' performance or non-retention is as follows.

1. Non-retention: "The department has determined that you will not satisfactorily complete (or have not satisfactorily completed) the probationary period for the following reasons:..."
2. Evaluation: "The department has determined that you will not satisfactorily complete the probationary period for the following reasons or the department has determined that you are not satisfactorily meeting performance requirements. You will not complete your probationary period unless you can demonstrate substantial improvement in the following areas:...."

Employees covered by the GGU, SU, CEA, PSEA, AVTECTA, ACSEA and Corrections Unit agreements should be provided the opportunity to tell their side of the story prior to non-retention determination by management. This opportunity can take the form of an interview or meeting. This pre-determination meeting will add significantly to the employer's ability to defend the reason(s) for non-retention during the complaint procedure or in the extra-contractual forum.

The pre-determination meeting should not be combined with normal performance counseling or performance evaluation process. Providing the pre determination meeting is not a legal necessity and should not be construed as conveying a property right. The purpose of the pre-determination meeting is as a check for error prior to a non-retention decision by the employer.

Because the pre-determination meeting could be very significant with regard to the probationary employee's continued employment, the employee will have the right to union representation under the Weingarten doctrine, if requested.

Our position has not changed regarding the response to a grievance. Should the union or employee attempt to grieve non-retention, the first level respondent should reject the grievance. There should be no response to the substantive allegations. The grievance should be rejected and the response should state that disputes over non-retention in an initial hire probationary appointment are only susceptible to the complaint procedure.

Please widely distribute this information to your supervisors and managers. Should you have any questions regarding this information please do not hesitate to contact your assigned Labor Relations Analyst. As always, this office is also available for consultation on any specific factual matter.

