

and was correct as a matter of law. The timing of the hearing did not violate Beasley's due process rights. Beasley was not denied the right to call witnesses, nor was he denied exculpatory evidence. Beasley waived his claim that the hearing officer was biased. The ARRC did not breach the Collective Bargaining Agreement, and that the Last Chance Agreement modifies Beasley's rights to review. Beasley cannot raise the issue of retaliation, for the first time, before this Court, when he failed to raise it before the hearing officer.

Beasley replies that the waiver in the Last Chance Agreement was defective. He did not waive his right to a formal hearing, nor did his union have the authority to negotiate his right to an appeal. The ARRC did not meet its burden of proof, as required by ARRC procedures. He also reiterates the other arguments of his opening brief.

Mr. Beasley May Have Waived His Right To An Appeal Of The Termination Decision, But He Did Not Waive His Right To A Meaningful Hearing

If this Court is to adopt the ARRC's reasoning, as stated by counsel at oral argument, then once an employee signed a last chance agreement, and once that employee is accused of committing an action in violation of that last chance agreement, the ARRC would be within its power to provide *any* form of hearing it saw fit, no matter how minimal or absurdly unjust, prior to terminating that employee. Aside from the cost and inconvenience of having to train a new employee to replace the terminated one, there would be no check upon the ARRC's power to terminate what it deemed to be "troublesome" employees. Such an interpretation effectively eliminates the employee's

due process rights. This result cannot be what the parties to the Last Chance Agreement contemplated.

A more rational interpretation can be found in the precise language of the waiver in the Last Chance Agreement. "...neither Beasley nor the UTU may process a grievance...in any forum *regarding the termination*."¹ Under this interpretation, which the Court takes, Beasley may not file any type of appeal regarding the termination *itself*, but he is still free to appeal any lack of due process in his hearing. As a matter of public policy, this interpretation still discourages litigation by the terminated employee, but it also ensures that the ARRC keeps its part of the bargain by providing a fair hearing. With that said, this Court finds that Beasley did not waive his right to appeal any due process deficiencies in the hearing before the ARRC. Beasley is therefore, entitled to Superior Court review of the question of whether there were due process deficiencies before the ARRC hearing officer.

The ARRC Violated Mr. Beasley's Due Process Rights By Failing To Provide A Meaningful Pre-Termination Hearing

Beasley argues that he was not given adequate notice in advance of his termination hearing in order prepare and present his defense. He argues that as a result, he was effectively not afforded the right to call witnesses on his behalf, nor allowed access to exculpatory evidence which was in the ARRC's sole custody and control. The ARRC argues that it gave Beasley more than the minimum amount of time required, by granting extensions of time. Furthermore, the ARRC argues, it was not the ARRC's fault that

¹ A.R., p. 59.

Beasley requested the dispatch tape a day before the hearing, and his witnesses the day of the hearing. Beasley replies that moving the hearing back a few more days would have caused the ARRC no hardship. ARRC would not have incurred any monetary penalty in postponing the hearing. ARRC argues that the Collective Bargaining Agreement between the ARRC and the UTU required *only* that an employee have five days advanced notice of the termination hearing. Furthermore, Beasley's union representative did not object to the hearing proceeding as scheduled, once the hearing officer denied his third request for an extension of time. Beasley notes that once his union representative's request for more time was denied, his only other choice, other than to proceed with the hearing, was to walk out or to refuse to attend. In addition, the Collective Bargaining Agreement does not *require* that the hearing be held merely at the convenience of the employer, or as early as possible. The contract only *requires* that the hearing be held no less than five days after notice of the hearing was given to the employee, and no more than 30 days after the event that gives rise to termination. The Court is inclined to ask the question: why didn't the ARRC just give Beasley the time he requested, once it saw that his discovery requests would require more time?

Beasley was entitled to a process that gave him adequate time to prepare and present his defense. "[I]dentification of the specific dictates of due process generally involve consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the

fiscal and administrative burdens that additional or substitute procedural requirements would entail.”²

The private interest affected here by official action was Beasley’s continued employment. The Court recognizes a high risk of erroneous deprivation through the procedures used, since the hearing officer did not hear a substantial portion of what constituted Beasley’s defense.³ The Government’s interest and administrative burdens that it would have incurred had additional time been granted was virtually nil. The ARRC’s actions here fail the *Matthews v. Eldridge* test, which has been adopted in Alaska.

Mr. Beasley Has Waived His Right To Argue Retaliation and Bias On The Part Of The Hearing Officer

Beasley failed to raise retaliation and bias arguments before the hearing officer, despite the fact that these arguments were known to him. Further, the presentation of these arguments were not dependent upon the witnesses and evidence Beasley did not have in time to present to the hearing officer. These arguments were waived and cannot be argued here or upon remand.⁴

² *City of Homer v. State, Dept. of Natural Resources*, 566 P.2d 1314, 1319 (Alaska, 1977) (following *Matthews v. Eldridge*, 424 U.S. 319 (1976)).

³ The Court makes no finding regarding the weight of Beasley’s proposed evidence or that the hearing officer would have made different findings if he had heard all of Beasley’s proposed evidence. The Court only finds that the hearing officer could reasonably have come to a different decision had the proposed evidence been presented.

⁴ “In general, we will not consider arguments raised for the first time on appeal. This rule applies with equal force to arguments never presented to an agency whose decision is appealed. However, application of this rule ‘presupposes an opportunity to present objections to the agency before a decision is rendered by that agency.’ *Pasco v. State, Dept. of Admin., Div. of Motor Vehicles*, 45 P.3d 325, 329 (Alaska, 2002) (quoting *Amerada Hess v. Alaska Pub. Utils. Comm’n*, 711 P.2d 1170, 1181 n. 22 (Alaska, 1986)).

Beasley Is Entitled To An Opportunity To Present His Defense, But He Is Not Entitled To A Hearing *De Novo*.

With regard to a remedy for the due process violation, this Court cannot ignore Beasley's procrastination in preparing his defense and failing to provide timely notice to the ARRC of employees needed to testify. Simply put, Beasley's hands are not that much cleaner than the ARRC's. The appropriate remedy is to send this case back to the hearing officer to hear Beasley's additional evidence.

This Court finds that the ARRC, at a minimum, made a prima facie case that Beasley violated the conditions of his last chance agreement. A remand will allow the hearing officer the opportunity to consider the additional evidence Beasley wanted to present. The hearing officer will then re-weigh the totality of the evidence and determine whether or not the ARRC has met its burden.

This hearing will not be a completely new hearing on all of the issues brought up before the ARRC hearing officer and the Superior Court. This hearing will provide Beasley with the opportunity to present the evidence he was unable to present at the previous hearing, namely the dispatch tape and the witnesses he was unable to call at the first hearing. Beasley has 10 days from the date of the distribution of this order to provide the ARRC with his requests for the dispatch tape and the names of the witnesses he wishes to call. The ARRC will schedule a new hearing no sooner than 15 days from the date of the distribution of this order, and will ensure that the scheduling of the hearing accommodates the appearance of the witnesses.⁵ The dispatch tape, if requested in a

⁵ The ARRC has no duty to compel the appearance of a witness; however, it does have a duty to resolve any scheduling conflicts that may prevent an employee from testifying.

timely fashion by Beasley, must be produced to Beasley at least 5 days before the scheduled hearing. The hearing will be completed within 40 days from the date of the distribution of this order. After hearing and considering the new evidence, the ARRC hearing officer will issue a ruling within 50 days of the date of distribution of this order.⁶

This appeal is REMANDED to the ARRC for a hearing consistent with the instructions in this order..

DATED at Anchorage, Alaska this 10th day of July, 2008.


ERIC A. AARSETH
Superior Court Judge

*I certify that on July 10, 2008, a
copy was mailed to: Johnson and
Zappas.*


Shane Neldner, Law Clerk

⁶ If the original hearing officer is not available or cannot adequately refresh his memory based upon his review of the record, an entirely new hearing must be conducted.