

LEGAL SERVICES

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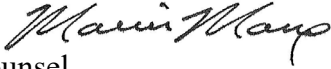
State Capitol
Juneau, Alaska 99801-1182
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MEMORANDUM

March 27, 2022

SUBJECT: Bonuses to public employees in the executive branch
(CSHB 281(FIN); Work Order No. 32-GH2686\F)

TO: Senator Bert Stedman
Co-Chair of the Senate Finance Committee
Attn: Pete Ecklund

FROM: Marie Marx 
Legislative Counsel

You have asked whether the state can award bonuses to employees in the executive branch.

Background

The legislative finance division provided the following information regarding pay incentives and bonuses offered by various departments: the Department of Administration has signed numerous letters of agreement (LOA) with collective bargaining units to offer bonuses and other pay incentives to bargaining unit members. Some departments have requested additional funding for the bonuses. Other departments state they intend to draw money from other sources in the department's existing budget to pay the bonuses. For example, the Department of Administration, Division of Personnel and Labor Relations entered into an LOA with the Public Safety Employees Association (PSEA), representing the Public Safety Officers Bargaining Unit, to implement a bonus for bargaining unit members in the Trooper Recruit or State Trooper job class. The department stated the bonus will be paid through personal services vacancies.

1. Bonuses initiated through an LOA (Letter of Agreement) between a department and a union. An LOA between a department and a bargaining unit to implement a bonus for bargaining unit members likely creates a new monetary term of an agreement entered into under AS 23.40.070 - 23.40.260 that is ineffective without an express legislative appropriation.

a. Payment of bonuses creates a new monetary term. AS 23.40.215(a) of the Public Employee Relations Act (PERA) provides: "The monetary terms of any agreement entered into under AS 23.40.070 - 23.40.260 are subject to funding through legislative appropriation." AS 23.40.250(4) defines monetary terms of an agreement in part as "the changes in the terms and conditions of employment resulting from an agreement that . . . will require an appropriation for their implementation."

AS 23.40.215(b) establishes the following process relating to the monetary terms of an agreement:

The Department of Administration shall submit the monetary terms of an agreement to the legislature within 10 legislative days after the agreement of the parties, if the legislature is in session, or within 10 legislative days after the convening of the next regular session. The complete monetary and nonmonetary terms of a tentative agreement shall be submitted to the legislature no later than the 60th day of the legislative session to receive legislative consideration during that calendar year. . . .

A department's payment of bonuses through an LOA is likely a "monetary term[]" of an agreement" as defined under AS 23.40.250(4). This is because payment of the bonuses would be a change "in the terms and conditions of employment resulting from an agreement" that "will require an appropriation for their implementation." Under AS 23.40.215(a), the monetary terms of any agreement entered into under AS 23.40.070 - 23.40.260 are subject to funding through legislative appropriation. Further, under art. IX, sec. 13 of the Alaska Constitution:

No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law.

AS 37.05.170 also provides:

Payment may not be made and obligations may not be incurred against a fund unless the Department of Administration certifies that its records disclose that there is a sufficient unencumbered balance available in the fund and that an appropriation or expenditure authorization has been made for the purpose for which it is intended to incur the obligation.

b. Payment of bonuses is ineffective without a specific legislative appropriation for the bonuses. Even if a department draws money from other sources in its existing budget to pay bonuses, a court likely would find that payment of bonuses creates a new monetary term that is ineffective without a specific legislative appropriation for the bonuses. A department may take the position that it may shift money between allocations within an appropriation to pay for bonuses under AS 37.07.080(e). While the executive branch may not transfer money between appropriations, the executive branch is authorized to shift money between allocations within a single appropriation. The Executive Budget Act, AS 37.07.080(e), provides in relevant part:

Transfers or changes between objects of expenditures or between allocations may be made by the head of an agency on approval of the office [of management and budget]. Transfers may not be made between

appropriations . . . except as provided in an act making the transfers between appropriations.

For example, the Department of Public Safety may argue that it could use fiscal year (FY) 2022 funds appropriated to the department for "Alaska State Troopers" to pay bonuses to bargaining unit members in the Trooper Recruit or State Trooper job class in FY 2022. The amount appropriated to the Department of Public Safety for "Alaska State Troopers" contains multiple allocations, including allocations for "Training Academy Recruit Salary" and "Alaska State Trooper Detachments," both of which include "personal services" line items. Thus, because the department, after receiving approval from the office of management and budget, may move funds from any allocation within the "Alaska State Troopers" appropriation, the department may take the position that they may use the money to pay bonuses to bargaining unit members in the Trooper Recruit or State Trooper job class.

However, this position is unlikely to prevail in a legal challenge because, as discussed below, payment of bonuses arising from an LOA is ineffective unless the Department of Administration submits the LOA to the legislature and the legislature specifically appropriates money for the bonuses. In *University of Alaska Classified Employees Association, APEA/AFT, AFL-CIO v. University of Alaska*, a CBA included negotiated pay increases but the legislature failed to take any action on the state's request for funding the increases.¹ The unions contended that when the legislature appropriated funds for the university's budget, "the university received unrestricted funds in several budget categories that it could properly have applied to pay the CBA's cost-of-living increases."² The unions argued that "absent a specific vote by the legislature refusing to fund these increases, they must be deemed to have been appropriated when the legislature approved the university's budget."³ The Alaska Supreme Court rejected this argument, stating:

The Public Employment Relations Act (PERA) governs collective bargaining agreements between public employees and public employers in Alaska. Alaska Statute 23.40.215(a) specifically provides that "[t]he monetary terms of any agreement entered into under [PERA] are subject to funding through legislative appropriation." The plain language of this provision suggests that the monetary terms of [a] CBA do not become effective unless and until the legislature *specifically* funds them.⁴

¹ 988 P.2d 105 (Alaska 1999).

² *Id.* at 107.

³ *Id.*

⁴ *Id.* at 107 - 08 (emphasis added) (citations omitted) (first and second alteration in original).

In support of its conclusion, the court cited *Public Safety Employees Association, Local 92 v. State*, a case in which the state agreed to pay union members statutorily mandated geographic-differential salary increases.⁵ The CBA in that case provided, "For pay shortages exceeding \$400 above the normal base rate of pay, or shortages to the normal base rate of pay, and/or *geographic pay levels, not received within the five (5) days, there shall be a penalty of \$40 per day.*"⁶ However, despite this penalty language, the state did not pay the geographic-differential salary increases. The state instead decided that before it implemented the increases, it would seek funding from the legislature when it next convened.⁷ The CBA's deadline for payment passed without legislative funding of the increases, and an arbitrator penalized the state for late payment.⁸ The arbitrator ruled that the state could have paid the salary increases by the CBA's deadline by drawing money from other sources in its existing budget.⁹ The Alaska Supreme Court overruled the arbitrator's decision, "expressly disapproving the notion that a state agency can 'circumvent the requirement of legislative approval' by reallocating its existing resources."¹⁰ The court explained:

The superficial appeal of this [position] is undercut by understanding its practical effect. Were the State either free or required to reallocate its present appropriation and resources in this manner, the appropriation power of the legislature would be frustrated.¹¹

The court in *University of Alaska Classified Employees Association* then went on to find that, "PSEA thus directly conflicts with the unions' argument here that the [negotiated] salary increases, which the legislature never specifically funded, should nonetheless be deemed 'appropriated' because the university could have paid them out of its general budget."¹²

⁵ 895 P.2d 980, 983 (Alaska 1995).

⁶ *Id.* at 982 (emphasis in original).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 982 - 983.

¹⁰ *Univ. of Alaska Classified Emps. Ass'n*, 988 P.2d at 108 (quoting *Pub. Safety Emps. Ass'n*, 895 P.2d at 986).

¹¹ *Univ. of Alaska Classified Emps. Ass'n*, 988 P.2d at 108.

¹² *Id.* at 108 - 109.

The attorney general has opined that, "only those contract terms that actually require funding are subject to AS 23.40.215."¹³ The attorney general stated that, "[the legislature] cannot act in an administrative capacity to approve or disapprove those provisions of contracts which do not require an appropriation to be implemented."¹⁴ However, as discussed above, the payment of bonuses to members of a bargaining unit through an LOA likely creates a monetary term of an agreement entered into under AS 23.40.070 - 23.40.260 that is ineffective without a specific legislative appropriation for the bonuses. The Alaska Supreme Court "expressly [disapproved] the notion that a state agency can 'circumvent the requirement of legislative approval' by reallocating its existing resources."¹⁵ If the executive branch or the University of Alaska was free to reallocate its existing resources to pay bonuses to its union employees, the "appropriation power of the legislature would be frustrated."¹⁶

Where the legislature has intended to pay bonuses to state employees, it has done so through either express language in the budget or through the background documents for an appropriation.¹⁷ Nothing in the express language of past appropriations bills indicates that the legislature intended to fund the payment of bonuses through the LOAs at issue here relating to union employees.¹⁸ According to the legislative finance division, nothing

¹³ 2000 Inf. Op. Att'y Gen., 2000 WL 1579745 at *1(Apr. 7; 883-00-0013).

¹⁴ *Id.* at *2.

¹⁵ *Univ. of Alaska Classified Emps. Ass'n*, 988 P.2d at 108 (quoting *Pub. Safety Emps. Ass'n*, 895 P.2d at 986).

¹⁶ *Univ. of Alaska Classified Emps. Ass'n v. Univ. of Alaska*, 988 P.2d at 108.

¹⁷ See, e.g., sec. 11, ch. 53, SLA 2005 ("In addition to compensation authorized under AS 24.10.200 and 24.10.210, an employee of the legislature may be awarded and paid a bonus to reward extraordinary effort, competency, job performance, or uncompensated overtime. However, after January 1, 2005, the authority to award and pay a bonus under this section is terminated, and bonuses may not be awarded or paid after that date"); sec. 20, ch. 173, SLA 1988 ("The sum of \$100,700 is appropriated from the general fund to the Department of Military and Veterans' Affairs to pay for additional costs of the National Guard reenlistment bonus program for the fiscal year ending June 30, 1988"). See also, 2021 Legislature, Operating Budget, Transaction Detail - Conf Committee Structure, Alaska Permanent Fund Corporation (APFC), APFC Operations, which explained that the appropriation for APFC operations included money for an "Investment Staff Incentive Compensation Program."

¹⁸ Sec. 20, ch. 173, SLA 1988 provided: "The sum of \$100,700 is appropriated from the general fund to the Department of Military and Veterans' Affairs to pay for additional costs of the National Guard reenlistment bonus program for the fiscal year ending June 30, 1988," but this is not relevant to the issues discussed in this memorandum.

in the background documents for past appropriations bills indicate that the legislature has previously funded such bonuses. In fact, with regard to the LOA to implement a bonus for bargaining unit members in the Trooper Recruit or State Trooper job class, the Department of Public Safety expressly stated that the bonus will be paid through personal services vacancies.

The executive branch recently provided to the legislature copies of numerous LOAs the executive branch has entered into with collective bargaining units over the years, but it is unclear which of these LOAs are currently included in the budget process. According to the legislative finance division, only LOA # 22-LL-120, between the Department of Administration and the Public Employees Local 71 to pay incentives to specific employees of the Department of Transportation and Public Facilities, was submitted as background documentation for a budget request in the current budget cycle.

In sum, if the legislature has not specifically appropriated money for bonuses, it is unlikely that a department and a bargaining unit may implement bonuses for bargaining unit members through an LOA, even if the department draws money from other sources in its existing budget to pay for the bonuses. Under the express language of AS 23.40.215 and 23.40.250(4), and the reasoning of the Alaska Supreme Court's decisions in *University of Alaska Classified Employees Association* and *PSEA*, it is likely a court would find that such LOAs for the payment of bonuses creates a new monetary term of an agreement entered into under AS 23.40.070 - 23.40.260 that is ineffective without a specific legislative appropriation for the bonuses. As a monetary term of an agreement, under AS 23.40.215(b), the Department of Administration is required to submit the LOA to the legislature so that the legislature may decide whether to fund the bonuses in an appropriation bill.

If the legislature wishes to allow a department and a bargaining unit to implement a bonus for bargaining unit members for FY 2023, the course of action with the least legal risk would be for the legislature to appropriate money in the FY 2023 operating budget for the bonuses, and ensure the budget documents supporting the appropriation clearly document that the appropriation is for the bonuses. The budget should also include language similar to that typically used for CBAs.¹⁹ For example, the language section of the budget could provide that, "the operating budget appropriations made in sec. 1 of this Act include amounts for bonuses for public employees of the executive branch and to implement the monetary terms for the fiscal year ending June 30, 2023, of the following letters of agreements" and then list out the specific LOAs that the legislature intends to fund in the budget. If the legislature wishes to provide funding for FY 2022, the legislature may use similar language for a supplemental appropriation.

Alternatively, the legislature could include more general language in the operating budget stating that the legislature's appropriations to the departments made in the budget

¹⁹ See, e.g. sec. 74(a), ch. 1 SSSLA 2021 (making an appropriation to implement the monetary terms of the PSEA CBA for FY 2022).

includes amounts for bonuses for public employees of the executive branch and to implement the monetary terms of LOAs. However, this alternative course of action creates ambiguity over which LOAs the legislature is specifically funding and therefore carries a greater legal risk.

2. Bonuses initiated by the legislature for members of a bargaining unit. If the legislature unilaterally initiates bonuses to members of a bargaining unit outside the bargaining process, this action could be an unfair labor practice. The better practice would be to follow the typical CBA process and allow the executive branch and bargaining unit to bargain for bonuses. The legislature can then decide whether to specifically appropriate money for the bonuses.

Under AS 23.40.110(a), it is an unfair labor practice for a public employer or an agent of a public employer to "discriminate in regard to hire or tenure of employment or a term or condition of employment to encourage or discourage membership in an organization," or "refuse to bargain collectively in good faith with an organization that is the exclusive representative of employees in an appropriate unit" If the state unilaterally imposes on a bargaining unit a retention bonus or other salary increase for certain employees that is higher than the pay increase the state provides to other employees, the disparate treatment may "discriminate in regard to a term or condition of employment." However, it may be difficult for a complainant to prove that the discrimination would "encourage or discourage membership" in an organization representing that bargaining unit, or that the employer intended it to have that effect.

The unilateral action by the employer might also be seen as an unfair labor practice by the state for refusing "to bargain collectively in good faith." Employee compensation is a mandatory subject of bargaining.²⁰ In addition to the prohibition against refusing to bargain in good faith under AS 23.40.110(a), the Alaska Labor Relations Board has interpreted AS 23.40.070 as also requiring the state to bargain collectively in good faith with organizations representing bargaining units.²¹ Employee compensation is a "term and condition of employment," under AS 23.40.250(9). The legislature's unilateral payment of a bonus would circumvent the state's requirement to bargain collectively in good faith with organizations representing bargaining units.

²⁰ AS 23.40.070(2); *State v. Pub. Safety Emps. Ass'n*, 93 P.3d 409, 417 (Alaska 2004) ("Alaska Statute 23.40.070(2) 'requir[es] public employers to negotiate with and enter into written agreements with employee organizations on matters of wages, hours, and other terms and conditions of employment.' These are the mandatory subjects of bargaining on which the parties must bargain in good faith, although they need not reach agreement.").

²¹ *Alaska State Employees Association/AFSCME Local 52, AFL-CIO, Complainant, v. State of Alaska, Department of Administration, Division of Personnel/EEO, Respondent*, Labor Relations Agency, State of Alaska, Case No. 93-173-ULP, Decision and Order No. 158, 1993 WL 13633680, at *11 (May 14, 1993).

3. Bonuses for non-unionized, exempt state employees. Substantive legislation may be necessary to provide bonuses to some nonunion employees but not others. The analysis below evaluates nonunion executive branch employees who are subject to the salary schedule in AS 39.27.011, as well as different groups of exempt executive branch employees who are not subject to the salary schedule.

a. Employees covered by AS 39.27.011. AS 39.27.011(a) establishes "the pay plan for classified and partially exempt employees in the executive branch of the state government who are not members of a collective bargaining unit established under the authority of AS 23.40.070 - 23.40.260 (Public Employment Relations Act) and for employees of the legislature under AS 24." AS 39.25.120(a) expressly provides that "[p]ositions in the partially exempt service are included in the position classification plan established under this chapter and are compensated according to the pay plan under AS 39.27.011." AS 39.27.011(k) provides:

Notwithstanding (a) - (j) of this section, the governor or a designee of the governor may, on a case-by-case basis, authorize for a partially exempt employee in the executive branch a higher pay than Step F. The authorization must be based on a determination that the action serves a critical governmental interest of the state, the employee possesses exceptional qualifications, recruitment difficulties exist, or the action is necessary due to competitive salaries in the relevant labor market. A determination made under this subsection must be in writing.

AS 39.27.011(k) was enacted in sec. 14, ch. 47, SLA 2013, through a governor's bill (SB 95 from the 28th Legislature). In describing the purpose of this provision, then-Deputy Commissioner of the Department of Administration Curtis Thayer stated that partially exempt positions are subject to classification and pay plans, which limits flexibility.²² He explained the state is often not competitive for top talent and needs some flexibility for mission critical positions, and that under what is now AS 39.27.011(k), the governor or designee may pay a partially exempt employee outside Step F of the pay scale under the circumstances and procedures outlined in AS 39.27.011(k).²³ In a hearing on the house companion bill (HB 195), Deputy Commissioner Thayer stated that under this provision, the department would attempt to attract people into state service for a particular position.²⁴ Only when a commissioner or director had a difficult time filling a position, would they go to the governor's office to ask for a variance, and the process to

²² Minutes of Senate Finance Committee, SB 95, testimony of Deputy Commissioner of the Department of Administration Curtis Thayer (April 8, 2013).

²³ *Id.*

²⁴ Minutes of Senate Finance Committee, HB 195, testimony of Deputy Commissioner of the Department of Administration Curtis Thayer (April 8, 2013).

achieve the variance would be long and rigorous.²⁵ This legislative history shows that the governor and the legislature intended AS 39.27.011(k) to be the mechanism a department must use to compensate employees covered by AS 39.27.011 outside the pay plan, and that this provision was intended to only allow flexibility for partially exempt employees. Other than the authorization allowed in AS 39.27.011(k), I have not identified any other authority allowing an agency to compensate employees covered by AS 39.27.011 outside the pay plan.

If the legislature wishes to allow an agency to compensate employees covered by AS 39.27.011 outside the pay plan, the course of action with the least legal risk would be to enact temporary or permanent law. The legislature has typically accomplished this through the enactment of temporary legislation. For example, in sec. 1, ch. 1, TSSLA 2000, an appropriation bill included a statement of legislative intent that certain appropriations in the bill be used to pay certain nonunion executive branch employees a lump sum payment of \$1,200, subject to some reductions. This bill was introduced by the governor in the 21st Legislature as HB 3001. At the same time, the governor also introduced a companion bill, HB 3002, which was enacted in ch. 2, TSSLA 2000. The companion bill made the substantive changes in temporary law that were necessary to authorize the lump sum payments outside the nonunion executive branch employees' pay scale. As the governor explained in his transmittal letter, "I am transmitting two bills to this third special session of the Twenty-First Legislature of the State of Alaska which provide necessary appropriations and statutory authorizations to honor our collective bargaining agreements and to extend similar provisions to non-covered employees in the executive, legislative, and judicial branches."²⁶

In sec. 11, ch. 53, SLA 2005, the legislature enacted a temporary law authorizing, for a specific period of time, bonuses for legislative employees "[i]n addition to compensation authorized under AS 24.10.200 and AS 24.10.210" Those sections provide that legislative employees are to be compensated under the salary schedule in AS 39.27.011. Section 11, ch. 53, SLA 2005, expressly prohibited the payment of bonuses under the uncodified law after January 1, 2005. This prohibition was later codified in AS 24.10.220. The effect of sec. 11, ch. 53, SLA 2005, was to allow bonuses for legislative employees only for a specific period of time.

b. Exempt executive branch employees. Exempt executive branch employees are compensated in a variety of ways. For example, compensation for the governor, lieutenant governor, and principal department heads is established by the State Officers Compensation Commission (commission) under AS 39.23.²⁷ Because compensation is expressly set by the commission in statute, paying bonuses to exempt

²⁵ *Id.*

²⁶ 2000 House Journal 3795 - 3796.

²⁷ AS 39.20.010, 39.20.030, and 39.20.080.

executive branch employees would likely require substantive legislation. Other exempt employees have compensation directly tied to the salary schedule in AS 39.27.011 and, as explained above, bonus payments for these employees would also likely require substantive legislation.²⁸ Finally, some exempt employees are compensated based on the policies of the executive branch agencies or corporations.²⁹ A statement in the operating budget that an appropriation is intended to fund bonuses for such employees, or a similar explanation in the background documents applicable to the appropriation,³⁰ is likely sufficient for the employing agencies to pay bonuses to these exempt employees. Furthermore, if these agencies or corporations adopted policies that provided for bonuses, the bonuses would likely be effective as long as the appropriation for the agency did not expressly preclude expenditure of the appropriation on bonuses.

Please let me know if I may be of further assistance.

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²⁸ *See, e.g.*, AS 39.20.080(b) (setting the salary for deputy department heads as a "step in range 28" of the salary schedule in AS 39.27.011).

²⁹ *See, e.g.* AS 39.25.110 (listing the fully exempt positions in state service, including employees of the Alaska Permanent Fund Corporation); AS 37.13.100 ("The [Alaska Permanent Fund Corporation] board may employ and determine the salary of an executive director. The executive director may, with the approval of the board, select and employ additional staff as necessary. . . . The executive director and the other employees of the board are in the exempt service under AS 39.25.").

³⁰ *See e.g.*, 2021 Legislature, Operating Budget, Transaction Detail - Conf Committee Structure, APFC, APFC Operations, which explained that the appropriation for APFC operations included money for an "Investment Staff Incentive Compensation Program."