

SENATE FINANCE COMMITTEE
March 29, 2022
1:02 p.m.

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CALL TO ORDER

Co-Chair Stedman called the Senate Finance Committee meeting to order at 1:02 p.m.

MEMBERS PRESENT

Senator Click Bishop, Co-Chair
Senator Bert Stedman, Co-Chair
Senator Lyman Hoffman
Senator Donny Olson
Senator Natasha von Imhof
Senator Bill Wielechowski
Senator David Wilson

MEMBERS ABSENT

None

ALSO PRESENT

Neil Steininger, Director, Office of Management and Budget, Office of the Governor; Kate Sheehan, Director, Division of Personnel and Labor Relations; Megan Wallace, Director, Division of Legislative Legal.

PRESENT VIA TELECONFERENCE

Kevin Dilg, Assistant Attorney General, Department of Law, Juneau.

SUMMARY

^PRESENTATION: HIRING BONUSES and RETENTION INCENTIVES BY OFFICE OF MANAGEMENT and BUDGET

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NEIL STEININGER, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, OFFICE OF THE GOVERNOR,

KATE SHEEHAN, DIRECTOR, DIVISION OF PERSONNEL AND LABOR RELATIONS, discussed the document titled, "Bargaining Unit Letters of Agreement for Recruitment and Retention Incentives" (copy on file). She explained that collective bargaining is tasked to the Commissioner of the Department of Administration, who has delegated the authority to her. She said that collective bargaining agreements were generally for three-year periods, never longer, and were submitted to the legislature for approval per the Public Employment Relations Act. She stated that due to the length of the contracts, Letters of Agreement (LOA) were established and incorporated into the bargaining agreement. She said that most of the agreements were monetary; she had signed 250 LOAs in the last fiscal year. She described the various reasons an LOA might be drafted. She said that the reasons for the LOAs currently under discussion were related to public safety and health. She relayed that the LOAs were signed by her and amended and incorporated into the collective bargaining agreement. She stated that most LOAs had an expiration date, either specifically by date or the expiration of a contract. She noted that the LOAs were negotiated with the representative union who provided approval and signatures.

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Co-Chair Stedman asked for background about the problem and issue currently before the committee.

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Mr. Steininger replied that when the administration crafted the budget for state agencies, particularly for personal services, the budget was based on the planned need for positions. The need was determined by considering the level of workload anticipated by the agency, the number of positions to achieve the workload, and the vacancy factor - or the rough approximation of the savings due to turnover. He shared that most agencies operated with a 5 percent vacancy rate. He said that the areas utilizing recruitment and retention incentives were areas of critical need to the operations of state agencies, where difficulty in recruitment or high vacancy factors had been experienced. He said that as a result, LOAs had been drafted to create incentives to address the recruitment and retention needs, mainly in health and public safety fields. He said that the 16 LOAs the administration had entered were done so on a

budget neutral basis. He noted that similar recruitment incentives could be found for the Office of Children's Services in the FY 23 budget proposal, which would require additional funding. Those LOAs had not yet been entered as there was no funding, but the request had been made to the legislature.

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KEVIN DILG, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF LAW, JUNEAU (via teleconference), explained that the department believed that the reallocation of funds within an appropriation was authorized by statute if the initial appropriation for wages had been established. He said that departments would have flexibility to face budgetary and employment realities, he noted the increased need some departments may have faced due to Covid-19. He said that the LOAs were amended and incorporated into the various collective bargaining agreements, which were annually ratified by the legislature. He believed the LOAs were good tools to fill positions in high priority areas. He said that if the incentives did not exceed the appropriation originally granted by the legislature, the allocation would be acceptable.

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MEGAN WALLACE, DIRECTOR, DIVISION OF LEGISLATIVE LEGAL, testified that the division had been asked to review the issue upon learning that the LOAs had been entered into between the administration and different union organizations. She said that the understanding was that the administration had never previously advised the legislature that the bonuses were being paid with funds appropriated by the legislature. She read from the legal opinion drafted by the division on the matter (copy on file):

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."

Ms. Wallace furthered that the Alaska Supreme Court had stated that a new monetary agreement entered under PERA was

ineffective without specific legislative appropriation for the new monetary term. She relayed that, based on specific Alaska Supreme Court precedent, an agreement to pay bonuses to union employees created a new monetary term - regardless of whether the administration intended to use existing funds to pay for the bonuses. She furthered that because the terms had never been presented to the legislature for consideration, the LOAs were legally ineffective. She asserted that the Alaska Supered Court had held that, regardless of the department's ability to pay for, or reallocate resources, to pay collective bargaining agreements, the terms must be brought before the legislature for specific appropriation and inclusion in the operating budget. She posed the question of whether the legislature could authorize bonuses through its appropriation power for union bonuses or bonuses for other potential partially exempt employees. She shared that the division advised that the option with the least legal risk under statute was to pass substantive legislation that was a companion to a budget that funded the appropriations. She stated that payment or authorization to allow departments to continue implementing hiring bonuses or incentive was a policy decision that needed to be made by the legislature. She advised that the best practice would be for the budget and the supporting budget documents to include details on the bonuses or hiring incentives. She understood that until recently the legislature had not been provided with information on bonuses or hiring incentives, which made it difficult to concluded that the legislature had historically ratified the agreements through the appropriation process as the legislature had not been presented anything to ratify. She believed that there were tools that the legislature had in terms of language that could be included in the operating budget to allow the incentives to continue to be offered and paid; includeing specific information as part of the appropriation process as well as crafting language like the language already used in the budget to expressly approve collective bargaining agreements, language could be drafted to authorize the terms of the LOAs. She said that the language could be as narrow or as broad as the legislature deemed fit. She recognized that her division had differing opinions than the Department of Law (LAW) in terms of whether the current practice met prior Alaska Supreme Court precedent on the issue; it was her understanding that the bonuses would continue to be paid regardless of whether the legislature too specific action. She related that her division thought

that a lawsuit related to the issue was a possibility; the risk was that if the legislature did not act it would continue to be left in the dark in terms of how the money it appropriated was being spent, which was counter to the legislative power of appropriation.

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Senator Wielechowski spoke of an earlier presentation from the Department of Public Safety (DPS), which had informed of the reallocation of a series of funds totaling \$1 million to pay for increases in trooper wages. He wondered whether the reallocation was allowed under statute.

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Ms. Wallace replied that the Executive Budget Act allowed for departments to reallocate money amongst allocations. She added that the issue with respect to the bonuses, or hiring incentives, for union employees was that there are other statutory provisions that cover collective bargaining agreements and require that new monetary terms be submitted to the legislature. She was not concerned about transfers amongst allocations as it related to non-union items.

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Senator Wielechowski thought that the troopers were members of a union.

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Ms. Wallace agreed and explained that if the reallocation included retention bonuses or incentives, they would face the same legal issues as the other departments under discussion. She said that the general idea of money being transferred for other purposes not related to monetary terms of a bargaining agreement was permissible under the Executive Budget Act.

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Senator Hoffman believed that the issue with DPS was one of cost differentials; it was more expensive to live in rural Alaska, which required higher pay for those relocating to rural areas. He thought that the problem was when the LOAs were entered into when hiring someone above the step range

allowable under the salary structure. He said that the budget was set on a specific salary structure and there had been several instances where the guidelines were not followed, which limited the legislatures appropriation power and opened the door to potential abuse throughout the system. He referred to the table, "Bargaining Unit Letters of Agreement for Recruitment and Retention Incentives" and wondered whether item 9, "Bonus Step" indicate payment above the salary structure.

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Ms. Wallace stated that the bonus step, regardless of how substantial the increase to the collective bargaining agreement, would likely be considered a new monetary term. She said that stature could allow for a deminimis exception, without substantial financial impact, but without any differential or a budget request with accompanying documents that detailed small increments and larger increments, item 9 would be considered a new monetary term.

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Senator Wielechowski was curious about the boundaries for reallocation and discussed the various way that reallocations occurred within departments. He queried the different when it came to reallocation of funds for wages.

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Ms. Wallace agreed that money was shuffled around after appropriation and that the Executive Branch should be given the tools to manage funds as they deemed necessary. She countered that the Alaska Supreme Court had investigated union issues and had weighed in on when the legislature needed to approve collective bargaining agreements or monetary terms. She contended that the Alaska Supreme Court had ruled that a state agency could not circumvent legislative approval by reallocating its existing resources.

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Co-Chair Bishop asked about the wage openers in the bargaining agreements.

Ms. Sheehan responded that there were reopeners within the contracts, not necessarily for wages.

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Co-Chair Bishop surmised that wages could be considered under the reopeners.

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Ms. Sheehan replied that the reopeners were generally for something in the collective bargaining agreement that conflicted with state or federal law or regulation. She said that most things would be changed through a LOA.

Co-Chair Bishop noted that the issue was before the committee because the state had a problem with recruitment and retention.

Ms. Sheehan agreed.

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Co-Chair Bishop wondered whether the administration was working in conjunction with the bargaining units to alleviate the problem. He thought that the problem could be solved during contract negotiations.

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Ms. Sheehan shared that the administration was looking for permanent contract additions to assist with retention and recruitment. She added that the bonuses and incentives were a tool that had initially been used in the nursing field during the Covid-19 pandemic.

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Senator Olson recognized the problem with recruitment and retention. He wondered whether there were possible solutions to the issue that would avoid litigation.

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Ms. Wallace replied that once solution the legislature could consider would be inserting language into the budget that recognized that appropriations to departments could

include appropriations necessary to carry out the terms of LOAs.

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Senator Olson asked whether the language would withstand a court challenge.

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Ms. Wallace replied in the affirmative.

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Senator Wielechowski asked whether it was possible that the legislative practice of allowing the executive branch to reallocate resources was in violation of the constitution.

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Ms. Wallace replied that she would need to consider the question before taking a position on the record.

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Senator Wielechowski felt that the court did not differentiate between bonuses to employees and other reallocations.

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Mr. Dilg replied that specificity on the use of incentives in the budget could be helpful. He felt that the LOAs under discussion were small enough and were still being spent on staff wages with was in line with statute.

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Senator Hoffman asked how long the bonus and incentive process had been going on.

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Ms. Sheehan replied approximately 15 years. She said that LOAs of this nature had not historically been sent to the legislature for approval.

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Senator Hoffman asked whether the administration had ever received confirmation of the practice of issuing such LOAs from LAW.

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Ms. Sheehan replied that she had not know of such confirmation during her tenure.

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Senator Hoffman wondered whether she had ever reached out to LAW for confirmation of the legality of the LOAs not coming before the legislature.

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Ms. Sheehan replied in the negative.

Co-Chair Stedman asked whether LAW had issued an opinion on the matter.

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Mr. Dilg related that this was the first time the issue had come before him. He believed that there was an informal opinion from the attorney general cited in the Legislative Legal memo that spoke broadly to the definition of monetary terms. He was unaware of any specific guidance from LAW.

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Senator Hoffman wondered whether there would be changes regarding LOAs because of the Legislative Legal memo.

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Ms. Sheehan replied that she had been in discussion with OMB and LAW on the matter.

Senator Hoffman queried the validity of the agreements currently before the committee.

Ms. Sheehan asked him to restate the question.

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Senator Hoffman wondered whether the LOAs were legal. He probed how the administration planned proceed in honoring the LOAs.

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Ms. Sheehan deferred to Mr. Steininger.

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Mr. Steininger said that the LOAs that had ben signed by the administration would be honored. He noted that LAW had determined that the agreements were entered into legally and they would be honored.

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Senator Hoffman asked whether the administration planned to approach the legislature to have the LOAs ratified.

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Mr. Steininger replied that that member of the executive, and legislative branches, had been in discussion surrounding the LOAs and how they would be best addressed. He said that a formal amendment had not been issued because the position of LAW was that the agreements had been entered into legally and within the current budgetary authority. He stated that the only recruitment incentive before the legislature as an official request was the item for OCS, where additional authority was needed. He relayed that the administration was open to including language in the budget that would clearly state the allowability of the items. He reiterated that the administration would honor the agreements made with state employees. He spoke of similar language in the budget that could serve as the model for the new language. He thought a balance could be struck between the legislature's appropriation authority and the executive branch's ability to deliver state services.

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Senator Wielechowski asked about other types of LOAs that did not require legislative approval. He guessed that they

were regarding terms of particular agreements like payment for holidays, which would be terms under the collective bargaining agreement.

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Ms. Sheehan agreed. She said that the state was agreeing to pay the contract but amending it slightly.

Senator Wielechowski understood that the difference with the LOAs under discussion was that they included wholly new terms, that adding bonuses was not something negotiated during collective bargaining. He wondered what sort of damages the state would be exposed to if the executive branch agreed to pay the bonuses.

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Ms. Wallace doubted that a court would rule that an employee would have to pay back a bonus that the state and the union had agreed to pay. She thought that the risk to the state was a court, relying on prior holdings, would reaffirm that the legislature would need to include the terms in an appropriation.

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Senator Hoffman hoped that any solutions that the administration could be considering would be brought before the committee. He argued that the administration should not have the ability to spend as they please for the benefit of a specific individual's salary. He thought that the salary, including the legislatively approved bonus, should be advertised to attract higher quality candidates.

Co-Chair Stedman agreed.

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AT EASE

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RECONVENED

Co-Chair Stedman discussed housekeeping.

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ADJOURNMENT

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The meeting was adjourned at 1:50 p.m.