

HB

203

# STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

## DEPARTMENT OF LAW

Office of the Attorney General  
Pouch K - State Capitol  
Juneau 99811

March 10, 1976

The Honorable Terry Gardiner  
Representative  
Alaska State Legislature  
Pouch V  
Juneau, Alaska 99811

Re: Referendum on Ch. 205, SLA  
1975, relating to salaries,  
retirement, and per diem

Dear Representative Gardiner:

You have asked our opinion on the legal consequences which will attend possible passage of the referendum on Chapter 205, SLA 1975. Specifically you have asked that we consider the effect of a repeal of the provisions of Ch. 205 that affect (1) judicial salaries, and (2) retirement plans for both the judiciary and other state officials.

It is our opinion that the referendum, if adopted, will not repeal salary increases given by Ch. 205 to presently appointed judges and justices. The referendum, if passed, will repeal the pay increase for judges appointed after the repeal of the act. Similarly, repeal will revive the old retirement provisions for all judges, that is, incumbents and those appointed either before or after the repeal.



"1776-A TRIBUTE FROM OUR STATE TO OUR NATION 1976"



The Honorable Terry Gardiner  
Representative

March 10, 1976  
-2-

The situation in respect to public officials and employees (other than judges) is complicated. If the referendum passes, it will repeal retirement provisions for employees who do not have vested rights in the retirement system. Those employees who have received vested rights, however, may not have those rights rescinded by the referendum's adoption. The problem is that the makeup of those two classes--those in whom rights are vested and those in whom rights have not vested--is uncertain and could only be determined by extensive litigation.

Our analysis of these issues follows. As you requested, we shall also discuss the alternatives which we believe are available to the legislature at this time concerning possible legislation which would alleviate the legal problems discussed in this opinion.

### DISCUSSION

#### Introduction.

The 1975 Alaska Legislature enacted a law relating to the compensation and retirement of judicial officers, legislators, and public officers and employees and to legislative per diem. Ch. 205, SLA 1975. A referendum petition was duly circulated and filed within the ninety-day period prescribed by law. If a majority of votes cast on the referendum proposition favor rejection of chapter 205, that act will be void.

The Honorable Terry Gardiner  
Representative

March 10, 1976  
-3-

Id., art. XI, §6; AS 15.45.440. This has been characterized by the Alaska Supreme Court as "a procedure whereby the electorate directly votes on whether to repeal existing law." Area Dispatch, Inc. v. City of Anchorage, \_\_\_\_\_ P.2d \_\_\_\_\_ (Alaska 1976), Sup. Ct. Op. No. 1231, Jan. 16, 1976.

The filing of a referendum petition does not, in Alaska, suspend the effect or operation of the law referred. Walters v. Cease, 388 P.2d 263 (Alaska 1964); 4 Proceedings of the Alaska Constitutional Convention 2964-2965. As a result, most of the provisions relating to compensation and retirement in chapter 205, SLA 1975, have been in effect since July 1, 1975, and some of those respecting retirement, since January 1 of this year. Because the law has been in effect, a number of problems arise from provisions of the constitution that provide:

Justices, judges, and members of the judicial council shall receive compensation as prescribed by law. Compensation of justices and judges shall not be diminished during their terms of office, unless by general law applying to all salaried officers of the State. Alaska Constitution, art. IV, §13 (emphasis added).

\* \* \* \*

Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.

Id., art. XII, §7. (emphasis added).

The question raised by these constitutional provisions is whether and how the referendum, if it results in the repeal of chapter 205, SLA 1975, may be in conflict with the constitutional bar against diminution of judges' compensation and of employee retirement benefits.

#### The Legal Nature of the Referendum.

A referendum may be viewed in one of two ways. On the one hand, it may be equated with the gubernatorial veto. On the other, it may be equated with a legislative repeal. In those jurisdictions where the filing of a referendum petition suspends the operation of the referred law, the comparison to a veto is most apt. But in Alaska, where the referred law is not suspended pending the vote on the referendum, the comparison to the veto is inapposite, and the referendum is properly to be considered the equivalent of a repeal. The referendum in Alaska has in fact been characterized as a "repeal" by our Supreme Court. Area Dispatch, Inc. v. City of Anchorage, supra.

The Honorable Terry Gardiner  
Representative

March 10, 1976  
-5-

There are two principal reasons for viewing the referendum in Alaska as a repeal rather than as a veto. The first is that in Alaska a referred law goes into effect and remains in effect until thirty days after the certification by the Lieutenant Governor of the election results rejecting it. Alaska Constitution, art. XI, §6; AS 15.45.440. A vetoed law never goes into effect. Thus, the effect of rejecting a law by referendum is, quite literally, to repeal the law. The second is that, where the power to act by way of the initiative and referendum is reserved to the people, the legislature and the electorate are viewed as coordinate legislative bodies, and aside from constitutional restraints either may amend or repeal an enactment by the other. Klosterman v. Marsh, 143 N.W.2d 744, 748 (Neb. 1966); see, Annotation, 33 A.L.R.2d 1118, 1121. It follows that, in rejecting an act passed by the legislature, the electorate, as a coordinate legislative body, is repealing the act rather than vetoing it.

The distinction is important. The Governor could clearly veto an act setting judicial compensation and employee retirement pay without breaching the constitutional prohibitions quoted above. In case of a veto, the act would never have gone into effect and no diminution of judicial compensation or of accrued employee retirement benefits would occur. On the other hand if a law goes into effect and sets judicial compensation and employee retirement pay at a particular level, the legislature may not subsequently repeal the law and thereby diminish that

The Honorable Terry Gardiner  
Representative

March 10, 1976

-6-

compensation and accrued retirement benefits, at least for incumbents, for to do so would violate the constitutional prohibitions.

The electorate in using the referendum has no greater power under the Constitution than does the legislature. Both are subject to the same constitutional restraints, and indeed, those imposed on the exercise of direct legislation are somewhat greater.

Star v. Hagglund, 374 P.2d 316 (Alaska 1962); compare Alaska Constitution, art., XI, §7, with art., IV, §15 (legislative amendment of rules of court) and art., II, §19 (local and special acts sole restriction on legislature's power).

In reporting to the Constitutional Convention on the prohibition against diminution of judicial salaries, the Committee on the Judicial Branch said:

While compensation for justices and judges should be prescribed by law, it should not be susceptible of arbitrary diminution during office. It . . . should be subjected to decrease only when a general reduction applying to all State officers becomes imperative. 6 Proceedings Alaska Constitutional Convention. App. V, p. 15.

We need not inquire as to the extent of the meaning of the term "all State officers." It obviously includes the Governor and the Lieutenant Governor, and since the repeal of chapter 205, SLA 1975, will not diminish their salaries, that repeal cannot under the constitution diminish the salaries set by chapter 205 for incumbent justices and judges.

The Honorable Terry Gardner  
Representative

March 10, 1976  
-7-

In addition to setting new judicial salaries, chapter 205 also provided a new method for setting judicial salaries by tying those salaries to the salary schedule for state employees. Under this new method, when the salary for Step E, Range 28 is increased, the salaries for justices and judges is similarly increased. Sections 1-3, chapter 205, SLA 1975. It may well be that this new method of setting judicial salaries is subject to repeal by the legislature or by referendum. Repeal would not, per se, diminish the salaries, but it would raise a separate question. That question is what would happen if the salary for Step E, Range 28 were subsequently increased, but judicial salaries were not increased by an amount equal to the increase that would have occurred if chapter 205 had not been repealed. The answer is uncertain.

In Campbell v. Michigan Retirement Bd., 143 N.W.2d 755 (Mich. 1966), certain judges had retired and were benefitted by a law which contained an escalator clause tying their retirement pay to a percentage of the salary paid to sitting judges. Subsequently, the legislature repealed the escalator clause and set the retirement at one-half the amount being paid the retired judges immediately preceding their retirement. The retired judges retirement pay was not immediately affected.

Thereafter, the legislature increased the salaries of sitting judges. The retired judges at that time received less than they would have if the escalator clause had still been in effect. Their retirement pay had not been cut, it simply had not been increased to keep pace with the salary paid sitting judges. They thereupon brought suit, arguing that they had a contract, that the repeal of the escalator clause impaired the contract, and that it was, therefore, void as to them. The court agreed.

The court ruled that the State's agreement to pay certain benefits vested the judges with rights upon retirement and that those rights could not be impaired. 143 N.W. 2d 757, 758. In effect, the court said that the judges who retired under the act which contained the escalator clause were entitled to receive benefits as provided by that clause and that the repeal of the clause was ineffective as to them.

The significance of the ruling is that the court viewed the escalator clause as creating a right and not as a mere expectancy. The legislature had not expressly reduced the retirement pay. But the court did not even refer to that fact, apparently considering it irrelevant. What it looked at was the actual increase in the salary of sitting judges and the failure to increase the retirement pay for retired judges because of the repeal of the escalator clause. It found the failure to increase retirement pay as an impairment of the right to such an increase.

The Honorable Terry Gardiner  
Representative

March 10, 1976  
-9-

Campbell involves contractual rights to retirement pay, not judicial salaries, and it is not necessarily applicable to the instant situation. However the Campbell court's analysis could be applied to a repeal of the escalator clause for judicial salaries. It is conceded that repeal of chapter 205, SLA 1975, cannot reduce the salaries set in that act for judges in office at the time of the repeal. Repeal will be effective with respect to the salary escalator clause if it is viewed as an expectancy. But it may be viewed otherwise. Paraphrasing the Campbell court:

Judges who are in office when a statute is in effect providing that their salary shall be a certain percentage above that of Step E, Range 28, are entitled to that salary despite the repeal of the statute containing the escalator clause.

The reason for that conclusion is that, despite the absence of any express reduction in salary, there would be a reduction in fact if the salary paid the judges is less than the amount set for them by the 1975 act.

Put another way, any act--including a repeal by referendum--which results in judges receiving a lesser salary than that provided for under chapter 205 could constitute a constitutionally barred reduction in salary and would be without effect as to judges in office at this time. Incumbent judges are entitled to the salary provided for by chapter 205, and the entitlement may not be reduced indirectly any more than it may be reduced directly.

The Honorable Terry Gardiner  
Representative

March 10, 1976

-10-

See also, Abbott v. City of Los Angeles, 326 P.2d 484 (Cal. 1958) (retirement pay, same result as Campbell).

Of course, a repeal which provides for another mechanism for setting salaries for the judiciary may not result in such a reduction, since all judges may in fact receive a salary which is equal to or greater than the one to which they would be entitled under chapter 205. If that occurred, repeal of chapter 205 would be of no moment. It is also possible that the members of the judiciary would accede to a new mechanism for setting salaries and not dispute a salary less than the one to which chapter 205 entitled them. It must be recognized, however, that a dispute may arise and that the outcome is uncertain.

Finally, chapter 205, SLA 1975 provided for the first time that justices and judges contribute to their retirement program. Because contribution would constitute a diminution in the salary paid incumbents, the requirement was applied solely to judges appointed after the law's effective date. See, Sylvestre v. State, 214 N.W. 2d 658, 666 (Minn. 1973); but see, Cook v. Chilton, 390 S.W.2d 656 (Ky. 1965). If chapter 205 is repealed by the referendum, the repeal will be effective as to this requirement, and new judicial appointees will qualify under the old system which required no contribution.

We turn next to the other provisions of chapter 205, SLA 1975, relating to retirement. These provisions affect two distinct classes of persons: elected public officials, and public employees. We discuss them separately.

Elected Public Officials.

The constitution provides that "[m]embership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired." art. XII, §7. This provision was placed in the constitution to "assure state and municipal employees who are now tied into various retirement plans that their benefits under these plans will not be diminished or impaired when the Territory becomes a state." 6 Proceedings Alaska Constitutional Convention, App. V, p. 140.

By statutory definition, "elected public officials" are not "employees." They are the Governor, Lieutenant Governor, and members of the legislature. AS 39.37.150. Each is an officer expressly provided for by the constitution, and they hold the only elective state offices provided for by the constitution.

Begich v. Jefferson, 441 P.2d 27 (Alaska 1968), held that the constitutional prohibition against holding any other office or position of profit extended to any salaried employment with the State. But Begich did not rule that the terms "employee" and "officer" are interchangeable or that the term "employee" as used to modify the term "retirement system" in article XII, section 7, includes the Governor, Lieutenant Governor, and members of the legislature. Indeed, in analyzing the constitution's use of the terms "employment" and "employee," the Begich court appeared to accept the conclusion that elected officials were

The Honorable Terry Gardiner  
Representative

March 10, 1976  
-12-

not covered by those terms. 441 P.2d 33. And in fact, the words "employees" and "officials" are distinguished by the constitution, art. VI, §8, and this too was recognized by the Beigich court. Id. n. 14.

Given that the constitution distinguishes between "employees" and "officials," that it expressly applies the protections of section 7 of article XII only to the former, and that it was expressly intended that the constitutional protection would apply to "state and municipal employees," 6 Proceedings Alaska Constitutional Convention, App. V, p. 140, it is our opinion that elected public officials are not covered by the protections of article XII, section 7.

The specific constitutional protection aside, persons enrolled in any retirement system may have contractual rights, and those rights may not be impaired under the state and federal constitutions. With respect to "elected public officials", the existence, nature, and extent of those rights are uncertain. Arguably, any "elected public official" who enrolled in the system has vested rights which may not be impaired. See, e.g., Yeazell v. Copins, 402 P.2d 541 (Ariz. 1965); Baker v. Retirement Bd. of Allegheny County, 97 A.2d 231 (Pa. 1953); Abbott v. City of Los Angeles, 326 P.2d 484 (Cal. 1975); Bakenhaus v. City of Seattle, 296 P.2d 536 (Wash. 1956); Annotation, 52, A.L.R.2d 437. This would almost certainly be so for any "elected

public official" who retired or died prior to the repeal of chapter 205. See, King County Employees Ass'n. v. State Emp. Retire. Bd, 336 P.2d 387 (Wash. 1959).

On the other hand, it may well be that the legislature, and the electorate by referendum, may effectively repeal the retirement provisions as they apply to elected public officials. The theory would be that, as a matter of public policy, and because the constitutional protection for public employee retirement systems does not apply to them, the terms of their employment rest in legislative policy rather than contractual obligation. See, Spina v. Consolidated Police, Etc. Pension Fund Com., 197 A.2d 169 (N.J. 1964). Under this view, the repeal or alteration of the law would be effective as to elected public officials if they are not (and we believe they are not) covered by article XII, section 7, of the Alaska Constitution. This would also be so if the electorate repeals chapter 205. 1/

In Spina v. Consolidated Police, etc. Pension Fund Com., 197 A.2d 169 (N.J. 1964), amendments to a retirement law were applied to persons who were employed prior to adoption of the amendments. The retirement programs prior to amendment were actuarially unsound. (at 170). The plaintiffs in Spina had lost the specific benefits complained of some 18 years before the suit was brought. And the Spina plaintiffs, through continuing contributions, indicated "in an affirmative way that they accepted or at least yielded to" the alterations. (at 172)

1/ This would not be the rule as to public employees. The people, in article XII, section 7, of the Alaska Constitution, have made a contract with them which could be revoked, if at all, only by constitutional amendment.

Spina did not rule against the plaintiffs on those grounds, however. Its ruling was as follows:

[I]n our State the terms and conditions of public service in office or employment rest in legislative policy rather than contractual obligation, and hence may be changed except of course insofar as the State Constitution specifically provides otherwise.

197 A.2d 173 (emphasis added, citations omitted).

While rejecting the contract theory, the Spina court nonetheless recognized that in some jurisdictions, constitutional language defines the rights of employees as "contractual." (at 175) One of those jurisdictions is Alaska.

Alaska's Constitution expressly provides that "[m]embership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship." art. XII, §7. This provision does not, however, appear to apply to "officers." Accordingly, while the Spina rule may not be applied to the public employees retirement system, which by the constitution is made contractual, it could, perhaps, be applied to the elected public officials retirement system, which is not. See, Yeazell v. Copins, 402 P.2d 541 (Ariz. 1965) dissent of Udall, J. at 547, for an examination of the distinctions. See also, Cohn, "Public Employees Retirement Plans -- The Nature of Employees' Rights," 1968 U.Ill. L.F. 32, for a general review of the contract-no contract dispute.

The Honorable Terry Gardiner  
Representative

March 10, 1976  
-15-

An additional problem is raised with respect to repealing the retirement benefits of the Governor and Lieutenant Governor. Section 15, article III, of the Alaska Constitution provides as follows:

The compensation of the governor and the lieutenant governor shall be prescribed by law and shall not be diminished during their term of office, unless by general law applying to all salaried officers of the State.

(emphasis added)

While the Spina rule would avoid contractual problems, it does not afford a shelter from this constitutional bar. Arguably, retirement is a form of compensation, more particularly, deferred compensation. See, Annotation 52 A.L.R.2d 437. If the benefits bestowed on the Governor and the Lieutenant Governor by chapter 205 were characterized by the state Supreme Court as compensation, repeal of chapter 205 would be ineffective as to the incumbents.

Arguably, since a repeal could have no real effect on their retirement benefits until after they have completed their terms of office, a repeal is not within the scope of the prohibition. But that might not be so if either left office prior to the end of his term. It would appear, however, that there would be no conflict if, in fact, compensation is not diminished during their term. See, Abbott v. City of Los Angeles, 326 P.2d 484 (Cal. 1958).

The Honorable Terry Gardiner  
Representative

March 10, 1976

-16-

Spina suggests that it would be erroneous to characterize retirement benefits as "deferred compensation" and thereby compel an unintended but then inevitable result. See also, the dissent of Justice Udall in Yeazell v. Copins, 402 P.2d 541, 547 (1965). This better view, according to these sources, would be to look at the facts and rule in accordance with them. If, in fact, the compensation is not diminished, or if, in fact, the purpose of the prohibition is not frustrated, then the dictates of the Constitution are not offended. See, Cook v. Chilton, 390 S.W.2d 656 (Ky. 1965). Since the purpose of the prohibition (as is the purpose of the prohibition discussed above relating to justices and judges) is to prevent the legislature from reducing incumbents' compensation, 6 Proceedings of the Alaska Constitutional Convention App. V at 123, and since that purpose is "to secure the independence" of the incumbents, Evans v. Gore, 253 U.S. 245, 264 (1920) (Holmes, J. dissenting), repeal of chapter 205 could be viewed by the state Supreme Court as not within the terms of the prohibition.

There is no certainty as to the effect of a repeal of chapter 205 on the retirement benefits of "elected public officials," i.e., the Governor, Lieutenant Governor, and legislators. However, unlike the thousands who would be affected by repeal of chapter 205 as it relates to state and municipal employees, and the multitude of law suits which could arise from that situation, we are dealing here with a handful of people. If arbitrary distinctions arise, they will be short lived. If litigation

ensues, it will involve only a few people and a few cases. Accordingly, repeal of chapter 205 with respect to "elected public officials," while creating some uncertainties, does not pose a major problem.

Public Employees.

Chapter 205, SLA 1975, bestowed certain retirement benefits not only on elected public officials but also on public employees. Public employees have contractual rights, and their accrued benefits may not be impaired under our constitution. Art XII, §7. What is uncertain is whether the Alaska Supreme Court will rule that the benefits of Chapter 205 are vested in all employees, or in those with five years service, or in those now eligible to retire, or in those who have retired or died since the law went into effect. The prevailing view in those jurisdictions which treat employee retirement as contractual in nature is that the rights vest in everyone who is employed or becomes employed while the law is in effect. See, e.g., Mt. Clemens Fire Fighters Union, Local 838, I.A.F.F. v. City of Mt. Clemens, 228 N.W. 2d 500 (Mich. App. 1975); Birnbaum v. New York State Teachers Retirement System, 152 N.E. 2d 241 (N.Y. 1958); Yeazell v. Copins, 402 P.2d 541 (Ariz. 1965); Abbott v. City of Los Angeles, 326 P.2d 484 (Cal. 1958).

In some "contractual" jurisdictions, law governing retirement may be amended and the amendments will apply to persons employed prior to the amendment if the amendment is materially related to the principles of a retirement system and its successful operation, i.e., actuarial in nature, and the detriments imposed by the amendment are accompanied by comparable new advantages. See Abbott v. City of Los Angeles, 326 P.2d 484, 489 (Cal. 1958). Some jurisdictions do not require off-setting advantages, if the amendments are actuarially proper. See, King County Employees Ass'n. v. State Emp. Retire. Bd., 336 P.2d 387 (Wash. 1959). But these are not jurisdictions with express constitutional protection for public employee retirement systems. The leading case from such a jurisdiction stands for the proposition that detrimental changes, even actuarially necessary ones, may be imposed only on employees who enter service after the effective date of the change. Birnbaum v. New York State Teachers Retirement System, 152 N.E. 2d 241 (N.Y. 1958).

The Alaska Supreme Court might well conclude that the repeal of Chapter 205 would not change the rights of those public employees who were in service while chapter 205 was in effect. The reason for this is that the repeal is not actuarially required and that it does not provide any off-setting benefits. Thus, even under the more flexible California and Washington rules, the repeal of the law would not be applicable to anyone employed while the law was in effect.

The Honorable Terry Gardiner  
Representative

March 10, 1976  
-19-

Of course, the law on this subject has yet to be announced definitively in Alaska. Suffice to say that, even with a constitution which provides that employee retirement benefits are contractual, the Alaska Supreme Court has more than one path to follow. See, Annotation, 52 A.L.R. 2d 437 (1957).

There is a case which holds that a contract made under an ordinance which was subject to initiative and referendum was conditional to the extent that either might be used to repeal the ordinance. Duncan Parking Meter Corp. v. City of Gurdon, 147 F. Supp. 280 (D. Ark. 1956). But the holding depends on the peculiar facts of the transaction and the law of Arkansas, and it is not likely to be followed in Alaska. A constitution which vests employees with a right to accrued benefits without diminution or impairment is not likely to be interpreted as allowing their impairment by referendum. If the legislature may not repeal (without conferring off-setting benefits) neither may the people.

#### General Effect of Repeal by Referendum

In sum, the referendum on chapter 205, SIA 1975, will unquestionably create some difficulties if it results in the repeal of chapter 205. With respect to some matters covered by chapter 205, the repeal will be effective. As to them the pre-existing law will be revived. Dawson v. Tobin, 24 N.W.2d 737 (N.D. 1946). But with respect to others, constitutionally protected rights will have vested, and the repeal cannot impair them. The result would be, for example, that commissioners' salaries

The Honorable Terry Gardiner  
Representative

March 10, 1976  
-20-

will be restored to what they were prior to the effective date of chapter 205 but incumbent judges' salaries will not. The retirement benefits for some public employees will be governed by the revived, pre-existing law, but those for others (those in whom rights vested) will be governed by the provisions adopted by chapter 205, SLA 1975. It is fair to say that, if chapter 205 is repealed by referendum, there will be a confused legal situation at the least.

Alternatives Available to the Legislature.

Chapter 205, SLA 1975, was referred because of objections to several of its provisions. Specifically, these were (1) the amount of the legislative pay raise and, perhaps, the amount of the increase in legislative per diem; (2) the escalator effect of tying salaries of high ranking officials to the merit system salary scale; (3) the period for vesting of retirement benefits for elected public officials, and, perhaps, the increase in the amount of their retirement pay. It is possible, but doubtful, that the amount of the salary increase for justices, judges, and commissioners was also objectionable. Objections to the increases for incumbent judges are irrelevant, since nothing can be done. That the increase for commissioners triggered the referendum seems questionable, as the increase largely retained the status quo ante in relative salaries. There does not appear to have been serious objection to the other features of chapter 205.

The Honorable Terry Gardiner  
Representative

March 10, 1976

-21-

The question is what, if anything, the legislature may do to alleviate this situation by eliminating the need for a referendum election and the legal problems that will result if the electorate repeals chapter 205, SLA 1975. Two things are immediately clear. First, if legislative action were taken in bad faith to evade the referendum, the action would be invalid. State v. Becker, 240 S.W. 229 (Mo. 1922); In re Opinion of the Justices, 174 A. 853 (Me. 1933); Leach v. State, 188 Pac. 118 (Okla. 1920) (dicta). 2/ Second, if the referred law is simply amended and not repealed, then the referred law, as amended, will go on the ballot. Klosterman v. Marsh, 143 N.W.2d 744 (Neb. 1966); Utah Power & Light Co. v. Ogden City, 79 P.2d 61 (Utah 1938).

Because the problem created by the referendum is the likely creation of different classes of judges and public employees based on arbitrary distinctions and because the referred law as amended might also be repealed by the referendum and lead to the same result, we would advise against amendment.

If the legislature wishes to take curative action, the case law on the subject indicates that the following steps are required:

---

2/ While the decisions in these cases are stated to be on other grounds, analysis indicates that they are predicated on an awareness that in those jurisdictions, unless it were held that the legislature may not repeal a referred act and enact a new one on the same subject, the legislature could totally frustrate the use of the referendum. The same is not true in Alaska. Unless the subject matter is not referable, Alaska Constitution, art. XI, §7, any act of the legislature may be referred. Id. art. XI, §1.

First, a bill should be passed to repeal chapter 205, SLA 1975, specifying that in doing so the laws repealed or amended by chapter 205 are revived. The bill may then address the subject matter of those features of chapter 205 which were considered not objectionable, i.e., public employee retirement, judicial salaries, and perhaps, commissioners' salaries, and the legislature would be free to enact new legislation on those subjects identical to the provisions of chapter 205.

Second, if desired, a separate bill could be passed enacting legislation with substantial differences from those features of chapter 205, SLA 1975, which were obviously objectionable. These would not include the salary increases for the judiciary because--whether objectionable or not--they are not repealable with respect to incumbents absent a general reduction in salaries of all state officers. Alaska Constitution, art. IV, §13. The method for setting future judicial salaries could, however, be included, but that repeal may not be effective with respect to incumbent judges.

Both bills should act on the revived law, i.e., refer to the provisions of the Alaska Statutes as they existed prior to the enactment of chapter 205, SLA 1975.

The repeal of chapter 205, SLA 1975, would cause the referendum on it not to be held. Keigley v. Bench, 63 P.2d 262 (Utah 1936). Since the repeal and the revival of the old law would void chapter 205, there would be nothing more the referendum

could do. There would be nothing left to repeal. The legislature may then enact new legislation on the same subject which is substantially altered in a good faith effort to meet the objections made to the referred law. 3/

According to most courts, good faith is crucial to the legislature's acting on the subject matter of a referred act. Anderson v. City of Duluth, 155 N.W.2d 281 (Minn. 1967); Trumbull v. Ehrasam, 166 A.2d 844 (Conn. 1961); Gilbert v. Ashley, 209 P.2d 50 (Cal. App. 1949); Ex parte Statham, 187 Pac. 986 (Cal. App. 1920); Ginsberg v. Kentucky Utilities Co., 83 S.W.2d 497 (Ky. App. 1935). That "good faith" is basically to be determined by the words of the new law itself. Gilbert v. Ashley, 209 P.2d 50 (Cal. App. 1949). If substantial changes in the essential features to which objections arose have been made, and there is no attempt to evade the people's use of the referendum, good faith will be implied. Cf., Ginsberg v. Kentucky Utilities Co., 83 S.W.2d 497 (Ky. App. 1935).

None of the cases from other jurisdictions involved a finding that the legislature had acted in bad faith. But the implication is that an act taken in bad faith to evade a referendum would be held to be invalid. Anderson v. Duluth, supra; Trumbull v. Ehrasam, supra; Gilbert v. Ashley, supra;

3/ By placing those subjects which were objectionable in one bill and those which were not in another, the legislature will divide the subjects, and each can be considered separately by the public. Since, it is the repeal of the legislation on the unobjectionable subjects which would create the arbitrary distinctions and legal problems, separate treatment affords the best means of avoiding those problems.

The Honorable Terry Gardiner  
Representative

March 10, 1976  
-24-

Ex parte Statham, supra; Ginsberg v. Kentucky Utilities, supra.  
And in State v. Becker, 240 S.W.229 (Mo. 1922), where the court was confronted with an obvious bad faith effort to evade a referendum, the rule was adopted that the legislature was without authority to act on a referred law until after the referendum election. Since the legislature's good faith is to be determined from the words of its new enactment, truly substantial changes in the features which triggered the referendum would appear to be essential. See, Ginsberg v. Kentucky Utilities Co., supra; Anderson v. City of Duluth, supra.

#### Conclusion

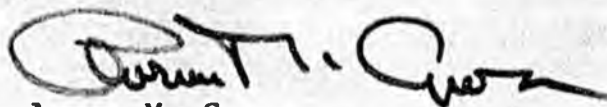
In sum, it is our view that the legislature may avoid the legal problems which will result from an outright repeal by referendum of chapter 205, SLA 1975, by itself repealing chapter 205 and simultaneously enacting new legislation, in separate bills, one which will amend the pre-existing provisions of the law identically to the unobjectionable amendments made by chapter 205 and one which will amend the pre-existing law in a manner substantially different from the objectionable amendments made by chapter 205.

The Honorable Terry Gardiner  
Representative

March 10, 1976  
-25-

If chapter 205 stays on the referendum ballot and is repealed, the result will be, on the one hand, tremendously complex and nearly endless litigation of very uncertain result and, on the other, arbitrary distinctions among public employees with respect to their retirement. The procedure we have described will avoid that result and at the same time allow the public an opportunity to refer the new enactments if their essential features remain objectionable.

Yours very truly,



Avrum M. Gross  
Attorney General

AMG:jeh

*Add retirement*

Introduced: 2/25/75  
Referred: State Affairs and  
Finance

1 IN THE HOUSE

BY GARDINER AND MILLER

2 HOUSE BILL NO. 203

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 NINTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act creating the Alaska Salary Commission; pres-  
7 cribing its organization, powers and duties; and  
8 providing for an effective date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 \* Section 1. AS 39 is amended by adding a new chapter to read:

11 CHAPTER 23. ALASKA SALARY COMMISSION.

12 Sec. 39.23.010. CREATION OF COMMISSION; COMPOSITION. (a) There  
13 is created the Alaska Salary Commission consisting of five members, none  
14 of whom may be public officers or employees. *except for the Com. of Admin.* Appointees to the commis-  
15 sion are not subject to legislative confirmation.

16 (b) ~~two~~ *two* member of the commission shall be appointed each by the  
17 governor, *one of which will be the Com. of Admin.* the chief justice of the supreme court, ~~the president of the~~  
18 ~~University of Alaska,~~ *one by the* the president of the senate and the speaker of the  
19 house of ~~representatives.~~ *will each appoint one*

20 (c) An appointee of the chief justice and the president of the  
21 university shall be registered to vote either as an "independent," "non-  
22 partisan," or shall have "declined to state" his party affiliation when  
23 registering to vote.

24 Sec. 39.23.020. TERM OF OFFICE; VACANCIES. (a) Commission members  
25 serve at the pleasure of the appointing authority for four-year, stag-  
26 gered terms. However, three of the first members appointed to the com-  
27 mission shall serve two-year terms to be determined by lot at the first  
28 meeting of the commission.

29 (b) Vacancies shall be filled in the same manner as original ap-

1 pointment, and a person appointed shall serve the balance of an unexpired  
2 term.

3 Sec. 39.23.030. OFFICERS; STAFF. The commission shall select a  
4 chairman from among its members annually. The ~~director of the legisla-~~  
5 ~~tive finance division of the Legislative Budget and Audit Committee~~ <sup>Director of Division of</sup>  
<sup>Personnel</sup> shall  
6 serve as ex-officio secretary to the commission and shall provide all  
7 research, technical and administrative services. He shall record and  
8 transcribe the minutes of commission meetings and prepare all corres-  
9 pondence, meeting notices, reports and recommendations as directed by  
10 the commission chairman.

11 Sec. 39.23.040. MEETINGS; QUORUM. (a) A majority of the commis-  
12 sion members present is sufficient to transact business to come before  
13 the commission. However, a majority of the commission members is neces-  
14 sary to approve the commission's recommendations to the legislature.

15 (b) The commission shall meet at the call of the chairman. Notice  
16 of meeting dates shall be mailed to each commission member at least 20  
17 days before the date scheduled for a meeting.

18 (c) The commission shall meet to discuss its findings and recom-  
19 mendations at least twice before submitting its final report to the  
20 legislature under sec. 80 of this chapter.

21 Sec. 39.23.050. COMPENSATION. Members of the commission serve  
22 without compensation but are entitled to per diem and travel expenses  
23 authorized by law for boards and commissions.

24 Sec. 39.23.060. DUTIES. The commission shall conduct an on-going  
25 review of compensation for members of the legislature, the governor and  
26 lieutenant governor <sup>com, deputy com + division directors</sup> and the judiciary to determine its appropriateness  
27 and report its findings and recommendations to the governor, the legis-  
28 lature and the judiciary. ~~include other also~~

29 Sec. 39.23.070. STUDIES; REPORTS. The commission may request

Sept 1  
30 Oct 1  
Alaska

*include Section on Legis policy*

1 reports or studies from any state department or agency concerning com-  
2 pensation of the governor, lieutenant governor, the members of the legis-  
3 lature or of the judiciary. A state department or agency from which that  
4 report or study is requested shall furnish it within a period of time  
5 prescribed by the commission. *work together*

*Nov 15 -*  
~~Dec 1~~

*Page 7*

6 Sec. 39.23.080. RECOMMENDATIONS. (a) Before ~~December~~ 1, 1976, and  
7 every two years thereafter, the commission shall submit its proposed  
8 findings and recommendations to the governor, the members of the legisla-  
9 ture and of the judiciary and make them public.

10 (b) *By statute change* The commission shall ~~submit its findings and recommendations~~ *adequately notify the public of its proposed*  
11 ~~findings and recommendations~~ *and receive & consider public comment* before sub-  
12 mitting a final report of its findings and recommendations to the legis-  
13 lature under (c) of this section.

14 (c) The commission shall make a final report of its findings and  
15 recommendations as to the rate and form of compensation for the governor,  
16 lieutenant governor, members of the legislature and of the judiciary  
17 during the first 10 days of the first regular session of a legislature.  
18 The recommendations shall become effective 45 days after presentation to  
19 the legislature or at the end of a session, whichever is earlier, unless  
20 disapproved by a resolution concurred in by a majority of the members  
21 of each house.

*Clause  
Allow Com  
Submit  
New Rec.  
&  
add'l  
20 days*

22 (d) A commission member who does not concur in the proposed or  
23 final recommendations may attach written objections to the commission's  
24 report of its findings and recommendations.

25 Sec. 39.23.090. DEFINITIONS. In this chapter, "members of the  
26 judiciary" includes the justices of the supreme court and judges of the  
27 superior and district courts.

28 \* Sec. 2. AS 22.05.140(a) is amended to read:

29 (a) The chief justice and each associate justice shall receive

1 annual [\$44,000 ANNUALLY AS] compensation prescribed in accordance with  
2 AS 39.23. The compensation is payable monthly in 12 equal installments.  
3 Compensation of the chief justice or of an associate justice shall not  
4 be diminished during his term of office, unless by general law applying  
5 to all salaried officers of the state.

6 \* Sec. 3. AS 22.10.190(a) is amended to read:

7 (a) Each superior court judge shall receive annual [\$40,000 AN-  
8 NUALLY, AS] compensation prescribed in accordance with AS 39.23, payable  
9 monthly in 12 equal installments. The compensation of a judge shall not  
10 be diminished during his term of office, unless by general law applying  
11 to all salaried officers of the state.

12 \* Sec. 4. AS 22.15.220(a) is amended to read:

13 (a) Each district judge shall receive annual [\$33,500 ANNUALLY AS]  
14 compensation prescribed in accordance with AS 39.23, payable monthly in  
15 12 equal installments. The compensation of a judge shall not be dimi-  
16 nished during his term of office, unless by general law applying to all  
17 salaried officers of the state.

18 \* Sec. 5. AS 24.15.010 is amended to read:

19 Sec. 24.15.010. LEGISLATIVE PER DIEM. The rate of per diem  
20 instead of subsistence for each member of the legislature is a rate pre-  
21 scribed in accordance with AS 39.23 [\$35.00] for each day of a legisla-  
22 tive session. The per diem is also payable for those days of necessary  
23 travel to and from sessions.

24 \* Sec. 6. AS 24.15.020 is amended to read:

25 Sec. 24.15.020. ANNUAL LEGISLATIVE SALARIES. The annual salary for  
26 each member of the legislature is prescribed in accordance with AS 39.23  
27 [\$9,000] to be paid in approximately equal monthly installments [PAY-  
28 MENTS]. The president of the senate and speaker of the house of repre-  
29 sentatives are each entitled to an additional sum prescribed in accor-

1 dance with AS 39.23 [\$500] a year during tenure of office.

2 \* Sec. 7. AS 24.15.030 is amended to read:

3 Sec. 24.15.030. ADDITIONAL ALLOWANCES. In addition, each member  
4 of the legislature is entitled to an annual allowance prescribed in  
5 accordance with AS 39.23 [OF \$4,000] for postage, stationery, stenogra-  
6 phic services and other expenses.

7 \* Sec. 8. AS 39.20.010 is amended to read:

8 Sec. 39.20.010. ANNUAL SALARY OF GOVERNOR. The annual salary of  
9 the governor is prescribed in accordance with AS 39.23 [\$50,000]. The  
10 salary shall be paid in equal monthly installments.

11 \* Sec. 9. AS 39.20.030 is amended to read:

12 Sec. 39.20.030. ANNUAL SALARY OF LIEUTENANT GOVERNOR. The annual  
13 salary of the lieutenant governor is prescribed in accordance with  
14 AS 39.23 [\$44,000]. The salary shall be paid in equal monthly install-  
15 ments.

16 \* Sec. 10. The first appointments to the commission shall be made within  
17 ~~30~~ 30 days after the effective date of sec. 1 of this Act.

18 \* Sec. 11. Sections 1 and 10 of this Act take effect immediately in  
19 accordance with AS 01.10.070(c). Sections 2 - 9 of this Act take effect on  
20 the effective date of the first recommendations submitted to the legislature  
21 under AS 39.23.080(c).

## MEMORANDUM

State of Alaska

TO: Avrum M. Gross  
Attorney General

DATE: September 26, 1975

FILE NO:

TELEPHONE NO:

FROM: Robert M. Johnson  
Assistant Attorney General

SUBJECT: Impact of Compensation-  
Retirement Referendum on  
1976 Legislation

Chapter 205, SLA 1975, amended and enacted a number of statutes concerning compensation and retirement of state officers and employees. This bill is now subject to referendum vote on an election date following the 1976 legislative session. What impact would a successful referendum rejection of Ch 205, SLA 1975 have on legislation passed during the 1976 legislative session? Further, what impact would a successful referendum rejection have upon wages and benefits due state officers and employees covered by Ch 205, SLA 1975? This memorandum addresses these questions.

I. THE 1976 REFERENDUM ELECTION WILL NOT AFFECT 1976 LEGISLATIVE SESSION ALTERATIONS TO SUBJECT MATTER COVERED BY CH 205, SLA 1975.

A referendum may be used to approve or reject acts of the legislature. Alaska Constitution Art. XI, §1. Rejection of a referred act voids all sections of the act. 1963 Op. Atty. Gen. No. 18. Would alterations to sections of the referred act also be voided by rejection through referendum? Alterations to a referred act could include simple amendment of sections of the act; repeal of certain sections of the act; or a repeal of certain sections and identical re-enactment of those sections. The Alaska Supreme Court has never addressed the impact of a referendum on these alterations. However, the court has held that referral of an act does not suspend its effectiveness. An act is not voided until 30 days after its rejection in an election. Walters v. Cease, 388 P.2d 263 (Alaska 1964). This finding clearly implies, as will be demonstrated, that good faith alterations to a referred act are not subject to the referendum.

The Walters case clearly excludes judicial interpretations which prevent any legislative action on an act once it has been referred. These interpretations are based on the premise that an act's effectiveness is suspended by referral.

12-23-75  
Refiled  
el  
0904-1

See, for example, Ex Parte Haley, 210 P.2d 653 (Okla, 1949); State ex rel. Drain v. Becker, 240 SW 229 (Mo, 1927). Walters, of course, renders the suspension-of-effect theory inapplicable.

Some jurisdictions except amendments or repeal-reenactments of "emergency" measures from a general prohibition against legislative alteration of a referendum. Ex Parte Stratham, 187 P 986 (Cal App, 1920); First Continental S & L Ass'n v. D Directors, etc., 183 A.2d 347 (Md, 1962). Frequently, courts have held that permissible alterations must be referred as part and parcel of the originally referred act. McBride v. Kerby, 260 P. 435 (Ariz, 1927); Farris ex rel. Dorsky v. Goss, 60 A.2d 908 (Me, 1948). A limitation on the type of permissible alterations and a requirement that alterations, when permitted, must be referred concurrently with the original act suffer defects in the Alaskan context:

First, a restricting permissible alterations of an act, which in Alaska is effective even though referred, flies in the face of the legislature's inherent powers to enact, repeal, and amend all legislation. Constitution Art. II, §1; State ex rel. O'Connell v. Meyers, 319 P.2d 828 (Wash, 1957): legislative amendment of an initiative. In any case the "emergency" exception noted above has been flexibly interpreted to give the legislature broad deference. Ex Parte Stratham, supra; Gilbert v. Ashley, 209 P.2d 50 (Cal App, 1949).

Second, requiring alterations to be referred concurrently with the original act reduces the Alaska Legislature's flexibility in removing objectionable legislation. Since a referendum can reject all or none of an act, the good as well as the bad portions would be rejected. Further, the Alaska Constitution and statutes (AS 15.45.250 et seq) speak of referring specific acts of the legislature, not all acts dealing with the same subject matter. Here only Ch 205, SLA 1975 is being referred, not all legislative acts concerning retirement and compensation.

The effectiveness of a referred act under Walters and the legislature's inherent power to amend, repeal, and enact legislation give the Alaska legislature the tools to avoid popular rejection of all of the subject matter of Ch 205. However, these tools are restricted to good-faith efforts intended to remove objectionable sections of a referred act. The tools must not be employed in a bad-faith effort to evade the referendum. Amendment and repeal with or without re-enactment of the same subject matter has been permitted, when in good faith, in jurisdictions with more restricted referendum pro-

visions than Alaska. Re Stratham, supra; First Continental S & L, supra; 42 Am Jur 2d 706-7; and 33 ALR 2d 1118, 1132-3 (and as supplemented). Since alterations are subject to the judiciary's inquiry into good faith — an inquiry giving broad deference to the legislature — the interests of the public are protected. In fact, the legislature's ultimate responsibility to the electorate was intended as the real check on the extent of the legislature's unrestricted amendment of initiatives. Al Const. Conv. Minutes at 1084-7. The same check implicitly restricts legislative alteration of referred acts.

As presented above, a referendum election would consider only the original act referred. Subsequent amendments and repeals to the act would not be considered. Identical re-enactment of repealed sections would similarly not be subject to the referendum. Rejection of Ch 205, SLA 1975 would therefore have the effect of voiding only those sections of the act which remained unaltered by good-faith legislative modifications.

## II. EFFECTS OF THE REFERENDUM AND/OR 1976 LEGISLATIVE AMENDMENTS ON WAGES AND BENEFITS.

Ch 205, SLA 1975 has specified effective dates for different classes of people. As noted in Walters v. Cease, supra, filing a referendum petition does not suspend an effective statute. As a legislative act currently in effect, Ch 205, SLA 1975 grants wages and benefits, some of which cannot be modified or abolished by a subsequent amendment or referendum.

### A. WAGES AND BENEFITS CONFERRED ON CURRENT JUDGES CANNOT BE DIMINISHED BY REFERENDUM OR AMENDMENT.

Ch 205, SLA 1975 altered the compensation and retirement scheme for judges and justices. Wages and benefits may be raised for judges currently in office, but diminution of wages and benefits is unconstitutional. Art. IV, §13 provides:

Justices, judges, and members of the judicial council and the commission on judicial qualifications shall receive compensation as prescribed by law. Compensation of justices and judges shall not be diminished during their terms of office, unless by general law applying to all salaried officers of the State.

Diminished compensation includes both wages and expected retirement benefits. Sylvestre v. State, 214 NW.2d 658, 666 (Minn, 1973). Any increases in benefits under Ch 205, SLA 1975 may not be reduced for office-holding judges by a later referendum or amendment. The referendum, like the initiative, is an injection of the public into the legislative branch such that the public

and the legislature are co-equal partners. Prohibiting diminution of compensation would therefore preclude a diminution by referendum as well as by legislation. Art IV, §13 prohibits diminution generally, without specifying the source of diminution. Thus, rejection of Ch 205, SLA 1975 by referendum (or modification by amendment) cannot effect those judges receiving the benefits of that act after its effective date. Only judges taking office after the referendum (or amendment) would be bound by a modification in their compensation.

**B. MAY NON-JUDICIAL RETIREMENT BENEFITS CONFERRED BY CH 205, SLA 1975 BE ALTERED.**

Ch 205, SLA 1975 modifies existing terms for retirement benefits due state officers and employees. Rejection of Ch 205 by referendum would void the modification. The effect of the referendum, however, is subject to two constitutional guarantees. First, Alaska Constitution Art. XII, §7 provides: "Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired." Second, the U.S. Constitution, Art. I, §10 precludes a state from passing any "law impairing the obligation of contracts." These restrictions require a distinction between three classes of people affected by a referendum voiding an increase in expected benefits.

First: Those persons who have in fact retired after the effective date of Ch 205, SLA 1975 have a presently vested right which may not be cut off by a change in the law. The contract clause of the U.S. Constitution would prohibit such a change in expectation after the final act necessary to receive benefits. Even if the benefits so received are unfair, or impose a heavy burden on the state, the U.S. Supreme Court has upheld a right which has ripened into a full contractual obligation. Lynch v. U.S., 292 U.S. 571 (1934). Sections 7 and 8 (Elected Public Officers Retirement Plan) of Ch 205, SLA 1975 take effect January 1, 1976; the remainder take effect on July 1, 1975. Thus, any person retiring after the applicable date and prior to the enactment of a modification cannot have his benefits reduced.

Second: Those persons who have more than five years of creditable service applicable to a state retirement plan have a "vested right" to defined benefits upon retirement. See, AS 39.37.020 (§8, Ch 205, SLA 1975); AS 39.35.380(a) (§11, Ibid.); AS 39.35.680(11) (§15, Ibid.), and other sections in effect prior to Ch 205, SLA 1975. A vested right to retirement

benefits assures the participant of an annuity-type of expectation. Chapter 205, SLA 1975 increases the amount and availability of these vested rights. A rejection of that act would return the holder of the vested right to the status he enjoyed when he entered into state employment. The readoption of the rights existing prior to Ch 205, SLA 1975 would not constitute an unconstitutional impairment of contract. Several theories support this argument;

(a) The employee entered into his employment with certain expectations. A subsequent increase in these expectations may be revoked. The employee did not bargain for these advantages when he entered into state service. Robinson v. Police Pension Bd. for City of Tucson, 339 P.2d 739 (Ariz, 1959).

(b) Even if an employee achieves a vested right in the additional benefits immediately upon the statute's effective date, the California courts have upheld the right of the state to make reasonable alterations in the amounts, terms, and conditions of benefits. Abbott v. City of Los Angeles, 326 P.2d 484 (Cal, 1958); Kern v. City of Long Beach, 179 P.2d 799 (Cal, 1947).

(c) Assuming rejection by referendum or legislative modification, no person will achieve five years of creditable service during the effective period of Ch 205, SLA 1975. Thus a vested right would not accrue in any situation. No person's expectation in achieving benefits under Ch 205, SLA 1975 would have ripened into a contractual right.

(d) Eliminating Ch 205, SLA 1975 would not diminish "accrued benefits" noted in Constitution Art. XII, §7. Employees in all cases could get the benefits earned under prior statutes, and would certainly not diminish a return on the employee's contribution. Art. XII, §7 guarantees that retirement pension schemes will be treated contractually rather than as a gratuity. However, under contract interpretation, no violation occurs in the rejection of Ch 205, SLA 1975 as it applies to non-retired employees with a "vested right" to defined benefits.

Third. Those persons who have not achieved five years of creditable service have no vested interest in retirement benefits. They do have, of course, a right to an undiminished return on their contributions. However, until they have achieved the final step which entitles them to retirement benefits --

Avrum M. Gross  
Attorney General

September 26, 1975  
- 6 -

that is, five years of service — their benefits are inchoate. Employees with an inchoate might have no cause of action whatsoever against a change in conditions, terms, and amounts of their benefits. McBride v. Retirement Bd., 199 A 130, 133 (Pa, 1938); Kern v. City of Long Beach, supra.

A rejection of Ch 205, SLA 1975 would have the effect of returning effected parties to the status quo ante. There would be no diminution in the contractual expectations and rights granted under the law pre-existing Ch 205. Only those persons who, in fact, retire during the existence of Ch 205, SLA 1975 would be free from a diminution of an increase.

§ 102.10

RMJ:jf

12-  
12



HB 203 - Warwick; Petersen  
 & Judges will be reduced if initiative  
 passed -  
 1. across the board

Judges & Art will give letter on this subject  
 Analy list

Federal National Labor Relations Board

(2) list on employees

(1)

(3) 205 sections for re-enactment  
 Sec 9-135 of SHA 205

ROUGH DRAFT

1  
2  
3  
4  
5  
6 For an Act entitled: "An Act creating the Public Officers Compensation  
7 Board and relating to compensation and collective  
8 bargaining of public officers; and providing for an  
9 effective date."

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

11 \* Section 1. AS 16.43.060 is amended to read:

12 Sec. 16.43.060. COMPENSATION OF MEMBERS OF THE ALASKA COMMERCIAL  
13 FISHERIES ENTRY COMMISSION. Members of the commission are in the  
14 exempt service and shall receive an annual salary as established under  
15 AS 39.27.150 [EQUAL TO THAT OF A DISTRICT COURT JUDGE, PAYABLE IN  
16 EQUAL MONTHLY INSTALLMENTS].

17 \* Sec. 2. AS 39.20.010 is amended to read:

18 Sec. 39.20.010. ANNUAL SALARY OF GOVERNOR. The annual salary of  
19 the governor shall be established under AS 39.27.150. [IS \$50,000.  
20 THE SALARY SHALL BE PAID IN EQUAL MONTHLY INSTALLMENTS.]

21 \* Sec. 3. AS 39.20.030 is amended to read:

22 Sec. 39.20.030. ANNUAL SALARY OF LIEUTENANT GOVERNOR. The  
23 annual salary of the lieutenant governor shall be established under  
24 AS 39.27.150. [IS \$44,000. THE SALARY SHALL BE PAID IN EQUAL MONTHLY  
25 INSTALLMENTS.]

26 \* Sec. 4. AS 39.20.080 is amended to read:

27 (a) The annual salary of the head of each principal executive  
28 department of the state upon appointment and confirmation shall be  
29 set out in [IS 10 PER CENT ABOVE STEP E, RANGE 28 OF] the salary

1 schedule established under AS 39.27.150 [IN AS 39.27.010 FOR ANCHORAGE,  
2 ALASKA. THIS SALARY SHALL BE PAID IN EQUAL MONTHLY INSTALLMENTS].

3 (b) The [MONTHLY] salary of the deputy head of each principal  
4 executive department of the state shall be set out in [, UPON HIS  
5 APPOINTMENT IS NOT LESS THAN STEP A, RANGE 28, NOR SHALL IT EXCEED  
6 STEP E, RANGE 28, OF] the salary schedule established under AS 39.27.150  
7 [SET OUT IN AS 39.27.010, DURING THE TERM OF HIS APPOINTMENT.

8 \* Sec. 5. AS 39.27 is amended by adding new sections to read:

9 ARTICLE 2. PUBLIC OFFICERS' COMPENSATION BOARD.

10 Sec. 39.27.100. BOARD ESTABLISHED. There is established within  
11 the Department of Administration a public officers' compensation  
12 board.

13 Sec. 39.27.110. MEMBERSHIP OF THE BOARD. (a) The board is  
14 composed of the commissioner of administration and four public members  
15 appointed by the governor and confirmed by the legislature in joint  
16 session. Initial appointments of two of the public members shall be  
17 made for terms of three years and two for six years to assure staggered  
18 terms. Subsequent appointments are for six-year terms. A vacancy  
19 shall be filled by appointment by the governor for the remainder of  
20 the term. The appointment is subject to confirmation in the same  
21 manner as a full term appointment.

22 (b) Public members of the board must be qualified electors of the  
23 state who are not employees or officers of the state. Not more than  
24 two public members may be of the same political party.

25 (c) A public member holds office at the pleasure of the governor  
26 notwithstanding the member's term.

27 (d) A member of the board is entitled to the per diem allowance  
28 established under AS 39.20.180 and transportation expenses incurred in  
29 carrying out official duties.

2

1 (e) The commissioner of administration and two public members  
2 constitute a quorum for the transaction of business. A majority  
3 consisting of any three members is necessary in order to adopt a board  
4 determination to be transmitted to the legislature.

5 Sec. 39.27.120. POLICY OF THE LEGISLATURE. It is the policy of  
6 the legislature that the board determine the salary schedule for  
7 public officers based upon the following principles:

8 (1) equitable relationships shall be maintained among state  
9 positions;

10 (2) the classified, partially exempt, and exempt services  
11 shall be maintained as viable systems where collective bargaining is  
12 not employed; and

13 (3) the public shall be encouraged to provide input into  
14 the establishment of salaries for public officials.

15 Sec. 39.27.130. REPORT BY DIRECTOR OF PERSONNEL. (a) In order  
16 to carry out the policy established in sec. 120 of this chapter, the  
17 director of personnel shall prepare and submit to the board a report  
18 on the status and condition of the salary schedule used in compensating  
19 public officers of the state.

20 (b) In preparation of the report, the director shall consider:

21 (1) the effect of cost-of-living factors on the fairness of  
22 compensation paid public officers; and

23 (2) the competitive position of the state relative to  
24 salary levels, including fringe benefits, of comparable classes in  
25 private enterprise, in other government agencies throughout the  
26 state, and in other states constituting prime recruitment areas.

27 (c) The director shall use United States Department of Labor  
28 statistics or other reliable statistical data in carrying out his  
29 responsibilities under this section. If reliable statistics are not

1 available, the director shall gather acceptable data by the use of  
2 field studies in carrying out those responsibilities.

3 (d) The director shall make a report required by (a) of this  
4 section within 60 days after the effective date of this Act; sub-  
5 sequent reports shall be made each October 1.

6 Sec. 39.27.140. PUBLIC COMMENT. Public officers and members of  
7 the public may offer written or oral testimony to the board regarding  
8 proposed determinations.

9 Sec. 39.27.150. DETERMINATIONS BY THE BOARD. (a) After con-  
10 sideration of the report of the director of personnel, including the  
11 fiscal implications of the report, and other presentations as may be  
12 made to the board at public hearings or in writing, the board shall:

13 (1) make determinations as to appropriate adjustments in  
14 salary schedules for public officers;

15 (2) make determinations as to appropriate adjustments in  
16 benefits granted public officers.

17 (b) The board shall transmit its determination under this  
18 section to the legislature no later than the 10th day of each regular  
19 session of the legislature.

20 (c) The board may modify or reverse its determinations. Deter-  
21 minations become effective, retroactive to January 1, 45 days after  
22 transmittal to the legislature or at the end of a session, whichever  
23 is earlier, unless disapproved by concurrent resolution.

24 Sec. 39.27.160. "PUBLIC OFFICER" DEFINED. As used in secs.  
25 100--160 of this chapter, "public officer" means all officers and  
26 employees in the executive branch of the state government who are not  
27 covered by a collective bargaining agreement negotiated under AS  
28 23.40.

29 \* Sec. 6. AS 42.05.091 is amended to read:

4

1           Sec. 42.05.091. COMPENSATION OF MEMBERS OF THE ALASKA PUBLIC  
2 UTILITIES COMMISSION. Members of the commission are in the exempt  
3 service and shall receive an annual salary as established under AS  
4 39.27.150 [EQUAL TO THAT OF A DISTRICT COURT JUDGE TO BE PAID IN EQUAL  
5 MONTHLY INSTALLMENTS].

6 \* Sec. 7. AS 42.06.090 is amended to read:

7           Sec. 42.06.090. COMPENSATION OF MEMBERS OF THE ALASKA PIPELINE  
8 COMMISSION. Members of the commission are in the exempt service  
9 decribed in AS 39.25 and receive an annual salary as established  
10 under AS 39.27.150 [EQUAL TO THAT OF A DISTRICT COURT JUDGE TO BE PAID  
11 IN EQUAL MONTHLY INSTALLMENTS].

12 \* Sec. 8. AS 42.07.071 is amended to read:

13           Sec. 42.07.071. COMPENSATION OF MEMBERS OF THE ALASKA TRANSPORTA-  
14 TION COMMISSION. The commissioners are in the exempt service under AS  
15 39.25 and shall receive an annual salary as established under AS;  
16 39.27.150 [EQUAL TO THAT OF A DISTRICT COURT JUDGE PAYABLE IN EQUAL  
17 MONTHLY INSTALLMENTS].

18 \* Sec. 9. AS 23.40.250 is repealed and re-enacted to read:

19           Sec. 23.40.250. DEFINITIONS. In secs. 70--260 of this chapter,  
20 unless the context otherwise requires,

21           (1) "collective bargaining" means the performance of the  
22 mutual obligation of the public employer or his designated representa-  
23 tives and the representative of the employees to meet at reasonable  
24 times, including meetings in advance of the budget-making process, and  
25 negotiate in good faith with respect to wages, hours and other terms  
26 and conditions of employment, or the negotiation of an agreement, or  
27 negotiation of a question arising under an agreement, and the execution  
28 of a written contract incorporating an agreement reached if requested  
29 by either party, but these obligations do not compel either party to

1 agree to a proposal or to make a concession;

2 (2) "confidential employee" means an employee who assists and  
3 acts in a confidential capacity to a person who formulates, determines  
4 or effectuates management policies in the area of collective bargaining;

5 (3) "election" means a proceeding conducted by the labor  
6 relations agency in which the employees in a collective bargaining unit  
7 cast a secret ballot for collective bargaining representatives, or for  
8 any other purpose specified in secs. 70--260 of this chapter;

9 (4) "labor relations agency" means the state personnel board  
10 with regard to the state and employees of the state, and means the De-  
11 partment of Labor with regard to all other public employees and all  
12 other public employees;

13 (5) "managerial employee" means a person who exercises signi-  
14 ficant responsibilities for the public employer in the area of policy  
15 formulation and who is not a confidential employee;

16 (6) "organization" means a labor or employee organization of  
17 any kind in which employees participate and which exist for the primary  
18 purpose of dealing with employers concerning grievances, labor disputes,  
19 wages, rates of pay, hours of employment and conditions of employment;

20 (7) "public employee" means any classified employee of a  
21 public employer, except confidential employees, managerial employees,  
22 supervisory employees, and teachers and noncertificated employees of  
23 school districts;

24 (8) "public employer" means the state or a political sub-  
25 division of the state, including without limitation, a village, city,  
26 borough, district, board of regents, public or quasi-public corporations,  
27 housing authority or other authority established by law, and a person  
28 designated by the public employer to act in its interest in dealing  
29 with public employees;

6

1 (9) "supervisory employee" means an individual having sub-  
2 stantial responsibility on behalf of the public employer regularly to  
3 participate in the performance of all or most of the following functions:  
4 appoint, promote, transfer, suspend, discharge, evaluate or adjudicate  
5 grievances of subordinate employees, except supervisors aboard vessels  
6 of the Marine Transportation System;

7 (10) "terms and conditions of employment" means the hours  
8 of employment, the compensation and fringe benefits, and the employer's  
9 personnel policies affecting the working conditions of the employees;  
10 but it does not mean the general policies describing the functions and  
11 purposes of the public employer.

12 \* Sec. 10. AS 23.40.215 is repealed.

13 \* Sec. 11. AS 39.27.010, 39.27.012, 39.27.015, 39.27.020, 39.27.022(c),  
14 39.27.030, 39.27.035, 39.27.040, 39.27.045, and 39.25.150(2) are repealed.

15 \* Sec. 12. Secs. 1--<sup>4, 6-8</sup> and 11 of this Act take effect on the effective  
16 date of the first salary schedule established under AS 39.27.150.

17 \* Sec. 13. Sec. <sup>5</sup>~~8~~ of this Act takes effect 30 days after certification  
18 of the results of the balloting for the referendum proposing the rejection  
19 of ch. 205 SLA 1975.

20 \* Sec. 14. Secs. 9 and 10 of this Act take effect July 1, 1976.