SB 270

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

May 13, 1989

The Honorable Tim Kelly
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Senator Kelly:

It has come to my attention that the transmittal letter appearing at page 1132 of the 1989 Senate Journal, for Senate Bill 270 relating to dispute resolution for certain public employees, etc., contains an error in the second paragraph. The first point of description in that paragraph, regarding class one employees, describes an earlier version of the bill. It should simply be deleted.

I would suggest that this letter also be printed in the journal to avoid confusing researchers on this point. Thank you.

Sincerely,

Steve Cowper
Governor

cc: Senator Dick Eliason
Chair, Senate Labor and
Commerce Committee

STEVE COWPER
GOVERNOR

270

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

April 10, 1989

The Honorable Tim Kelly
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Mr. President:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill amending the Public Employment Relations Act (PERA) to provide for binding, last best offer/package binding arbitration for those employees who are not permitted to strike ("class one" employees) or employees whose strikes may be enjoined if they begin to threaten the public health and safety ("class two" employees).

The bill would also amend PERA to make it clear that (1) only those employees whose services are essential and whose work directly affects the public health, safety, or welfare are class one employees; (2) an action to enjoin a strike may be brought in the appropriate court; (3) contract terms imposed as a result of interest arbitration are subject to legislative appropriation; and (4) the employer may implement terms and conditions of employment from its last proposal before impasse if, for class two and class three employees, impasse has been reached and mediation has failed.

These proposals were discussed at early budget summits. The first two sections of the bill provide for last best offer/package binding arbitration, which would simplify the procedures that follow impasse; requiring the parties to present their offers as a package will encourage each party to submit reasonable proposals. Currently, there are few guidelines for interest arbitration in PERA and no indication that interest arbitration is actually binding. Section 3 resolves questions pending before the Alaska Supreme Court concerning when a public employer may implement terms and conditions of employment if the parties reach impasse. The language in AS 23.40.200(b) and (c) concerning in which court an injunction may be brought has been amended to avoid conflict with the rules of court concerning venue.

I firmly believe in collective bargaining. However, the current law leaves a number of questions unanswered. This bill provides a simple procedure for binding interest arbitration for those employees not allowed to strike. It resolves questions about when a public employer can implement terms and conditions of employment which have left public employers and employees alike uncertain about how and when they may employ their legal options at impasse. It eliminates any doubt that only essential personnel are forbidden to strike.

By addressing the uncertainties of the current law, this bill strengthens PERA.

I urge your prompt and favorable action on this measure.

Sincerely,

Steve Cowper
Governor

STATE OF ALASKA
1989 LEGISLATIVE SESSION

Bill Version: SB 270
Publish Date: 4/8/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: An Act relating to dispute resolution for certain public employees
Sponsor: Rules Committee
Requestor: Governor

Agency Affected: All
BRU: All
Components: All

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

See attached

Prepared By: Bruce Cummings, Director
Division: Labor Relations
Phone: 465-4403
Date:

Approved by Commissioner: John M. Andrews
Agency: Department of Administration
Date: 4/5/89

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

8/8K1/040416-9/2

Rev: 01/11/88

This bill would amend the Public Employment Relations Act to provide for "last best offer" binding interest arbitration to resolve negotiations impasses for employees who may not legally strike. For employees who may legally strike, the bill also permits the employer to implement new contract terms after impasse. The changes proposed will not, in themselves, have a direct financial effect; however, the application of these changes in future negotiations should result in more effective cost containment or reduction.

NEA-ALASKA

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April 15, 1989

To: Senator Dick Eliason, Chair
Members, Senate Labor & Commerce Committee

Re: Senate Bill No. 270; "An Act relating to dispute resolution for certain public employees and providing for binding interest arbitration for certain public employees."

NEA-Alaska strongly opposes SB 270 for a number of reasons and we encourage your support in opposition to it as well.

Basically, this legislation is not needed in that the apparent primary objective which is being sought, the right to unilateral implementation on certain categories of employees, already exists and is available to employers under the Public Employment Relations Act (PERA), AS 23.40.070-.260.

SB 270 seeks to give an employer the right to unilaterally impose its last offer before impasse on employees in class (a)(2) and (a)(3), those who have the limited right or the right to strike.

Unilateral implementation is already implicitly available to an employer under the PERA, the National Labor Relations Act, and nearly every other collective bargaining statute in which employees have a right to strike in three (3) circumstances:

* When the parties have bargained in good faith, utilized impasse or third party intervention procedures such as mediation, and continued negotiations have resulted in a stalemate, upon notice to employees, the option to unilaterally impose its last and best offer on mandatory subject of negotiations is then available to an employer. Employees may, of course, chose to strike at this time.

* Except for constraints which derive from a collective bargaining agreement, an employer is free to make unilateral changes on issues which are non-mandatory subjects of negotiations.

* Unilateral implementation is available to an employer when the union unnecessarily delays or avoids collective bargaining.

For employees in class (a)(1) with access to binding interest arbitration as the negotiations dispute settlement mechanism, neither the strike for employees nor unilateral implementation for employers is available as part of the process.

SB 270 has the effect of destroying an essential balance or equity which is necessary for the collective bargaining process to be successful. The parties must be able to come to the negotiations table as equals in the process.

To give one party a unilateral advantage in the process destroys the incentive of that party to negotiate in good faith and would effectively negate the strike as an employee option in that an employer would not be legally required to come back to the negotiations table if it already possessed the right of unilateral implementation.

Additionally, SB 270 is substantially inconsistent with the Declaration of Policy in the PERA, AS 23.40.070 where joint decision-making and harmonious and cooperative relationships between government and employees are put forward as the means for achieving effective government.

Finally, this issue comes to the legislature not unencumbered. It is currently before the Supreme Court with the State already having prevailed at the Superior Court level on its right to unilaterally implement terms and conditions of employment.

We strongly encourage that the Committee thoroughly examine all of the issues percipitating this litigation and its attendant conditions before attempting to reach a conclusion that SB 270 best serves the public interest in Alaska.

SB 270 is not necessary from an employer perspective and is extremely negative from the perspective of employees.

Thank you for your consideration of our position.

Respectfully submitted,

Bob Manners
Executive Secretary

x15apl1

NEA-ALASKA

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April 7, 1989

Jim,

Regarding the Governor's proposed legislation to change the PERA and give management the right to unilaterally impose I have discussed it with NEA-Alaska staff, the NEA national General Counsel, NEA national collective bargaining specialists, Bruce Ludwig, Bruce Cummings, Eleanor Andrews and a couple of other labor people.

The consensus is fairly clear that this legislation is <u>not</u> necessary.

PERA is modeled on the National Labor Relations Act and it is a good and comprehensive collective bargaining law.

1. Implicit in PERA is the right of management to unilaterally impose terms and conditions of employment after they have bargained in good faith and reached true impasse.

2. When employees have the right to strike it is implicit that management has the right to unilaterally impose as stated above.

3. If the Governor's legislation were to pass it would have the effect of making strikes by public employees illegal since there would be no reason for management to go back to the negotiations table during a strike if they had, under law, the legal right to unilaterally impose.

   - In other words, the equity or balance in the collective bargaining relationship between management and labor would be clearly tipped in favor of management with the right to unilaterally impose.

4. There is no question that management cannot unilaterally impose when employees (category 1, the essential service employees) have finality through binding interest arbitration as they do in the PERA.

5. If this legislation were to fail, it could be argued that the state (administration or management) would be at a major disadvantage re subsequent efforts to unilaterally impose in that labor could argue that they sought the authority under law and the legislature refused to give it to them, therefore, they cannot unilaterally impose.

The basic labor principle is that management must negotiate in good faith, make proposals and counter-proposals, utilize and exhaust impasse procedures and then when true impasse exists (stalemate with neither party making any substantive moves), management then has the right to unilaterally impose its last and best offer, and then employees have the option of striking, accepting it, or trying to keep negotiations going under the unilateral imposition.

- When the state unilaterally imposed in 10/87 it did not impose its last and best offer but chose to impose an earlier bargaining proposal. This was clearly a bad strategy move on the state's part.

In 10/87 when the state tried to unilaterally impose, APEA challenged it on the basis bad faith, the personnel act, and the merit system. They were able to get a TRO and then entered into a stipulation with the state that there would be no unilateral imposition until the Supreme Court had finally decided the issue.

- This was a bad strategy move by the state since they have tied their own hands by agreeing to the stipulation.

The Superior could ruled that the state could not unilaterally impose on class 1 employees because they have binding interest arbitration and that is where the dispute should be settled but they did rule that the state could unilaterally impose the last and best final offer on class 2 and 3 employees and that is the issue before the Supreme Court.

- This issue is complicated by the fact that it includes the personnel act and the merit system as additional considerations for the Court.

In talking with Ludwig, it is my impression that the state can change the personnel act administratively so that they can accomplish their goals and that they can change the merit pay scales legislatively (see HB 241 and HB 242) but may not have to since these seem to apply more to exempt employees and not bargaining unit

people. This should probably be checked out more thoroughly.

The bottom line, in my opinion, is that the state, after good faith bargaining and reaching true impasse, could unilaterally impose re work week, pay, health insurance coverage or caps, and other basic conditions of employment. The employees could then decide whether or not they wished to strike.

I think a major problem, among many for the state, is that they did not reach true impasse in negotiations and that they did not try to impose their last, best final offer. This was clearly bad faith.

I think that the state is also a victim of incredibly bad advice and no negotiations plan or strategy, and, as a result of this, no credibility or trust with their employees as to the legitimacy of the problems which are facing the state.

For whatever it is worth.

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May 1, 1989

The Honorable
Richard I. Eliason
Alaska State Legislature
P. O. Box V - MS 3100
Juneau, Alaska 99811

Re: Senate Bill 270

Dear Senator Eliason:

Thank you for your patient attention during my presentation at the April 19 hearing on S.B. 270. To assist you in your determination, I have included a memorandum which summarizes the points which I presented.

To reiterate, I cannot overemphasize the disruptive impact the proposed amendments will have upon public sector collective bargaining if they are permitted to occur. The potential for litigation prompted by such amendments occurs at a time when the Public Employment Relations Act, as presently constituted, is becoming a "mature" statute through years of interpretive court decisions. Injecting a new twist at this late date tends to upset the balance that has evolved.

Furthermore, accepting such an amendment from a governor whose tenure in office is definitely finite provides him with the opportunity to impose a statutory change that will burden all of us who rely on it for guidance far into the future, after he is no longer part of the political scene.

I would request each member of the committee to carefully scrutinize this piece of ill-conceived legislation to uncover the negative ramifications it will impose upon public sector employees for years to come.

For that reason, I would urge that you not recommend the amendments to the full Senate or, at a minimum, conduct further legislative review at another committee level.

Should you have any additional questions or would like to discuss the matter further, I am available at your convenience.

Most sincerely,

JERMAIN, DUNNAGAN & OWENS, P.C.
Counsel to the Alaska Public
Employees Association

James A. Gasper

JAG:jg

Enclosure

M E M O R A N D U M

TO: Senators Elliason, Rodey, Faiks, Coghill, and Kerttula / Senate Labor and Commerce Committee

FROM: James A. Gasper of Jermain, Dunnagan & Owens, Counsel to the Alaska Public Employees Association

DATE: May 1, 1989

RE: S.B. 270 - Legal Deficiencies

Senate Bill 270, as submitted by Governor Steve Cowper, proposes changes to the Public Employment Relations Act, AS 23.40.070-.260, which primarily focus upon the interest arbitration section of that Act at AS 23.40.200. Close scrutiny of the language in the bill reveals that it is not only ill-conceived for policy reasons but is legally defective and raises the possibility for tension with other constitutional and statutory principles.

1. The Unilateral Implementation Provision Has The Potential To Violate Alaska's Constitutional "Taking" Clause.

The Alaska Supreme Court held in Storrs v. Municipality of Anchorage, 721 P.2d 1146 (Alaska 1986), that a public employee has a "property interest" in his/her employment which requires that minimum procedural due process standards be met prior to any deprivation of that interest. Article I, § 18 of Alaska's Constitution specifically prohibits the state from acting in a manner whereby "private property shall not be taken or damaged for public use without just compensation." The Alaska Supreme Court, which has been inclined to liberally construe this provision in favor of the private property holder, determined in the case of DeLisio v. Alaska Superior Court, 740 P.2d 437 (Alaska 1987), that an individual's labor is a substantial interest protected by Alaska's constitutional due process clause, Article I, § 7, and that the taking of such labor without just compensation violates Article I, § 18.

A collective bargaining agreement establishes basic wage, hours, and terms and conditions of employment for public employees. It creates an expectancy which is equivalent to a "property interest" under the Storrs decision. If a public employer is permitted to unilaterally implement its last offer prior to impasse under subsection (h)(2) of S.B. 270, a strong

argument could be made that such an action results in a "taking" contrary to Alaska's express constitutional prohibition. Therefore, subsection (h)(2) has great potential to violate Alaska's Constitution.

2. Unilateral Implementation As Permitted Under S.B. 270 Has The Potential to Violate Constitutional Merit Principles and the State Personnel Act.

Alaska's Constitution demands, at Article XII, § 6, that "[T]he merit principle will govern employment of persons by the state." The legislature has implemented that constitutional mandate by promulgating the State Personnel Act, AS 39.25.010-.220. The State Personnel Act prescribes "regular integrated salary programs based on the nature of the work performed . . . ." as one of the elemental parts of the state's merit principle. AS 39.25.010(b)(2).

Overall, the State Personnel Act establishes wage, hour, and terms and conditions of employment for state employees who are not represented by a labor organization. Merit principles provide state employees with a certain minimum expectation as established by statute. Since the Storrs court held that a public employee has a "property interest" in his/her employment, the potential for a public employer's imposition of wages, hours, and terms and conditions of employment which are less than the minimums established under the State Personnel Act would violate constitutional merit principles as articulated under the State Personnel Act. This argument is further bolstered by language within the Public Employment Relations Act, which provides at AS 23.40.070 that merit system principles are likewise to be advanced in collective bargaining.

This potential for a statutory conflict and constitutional problems makes the proposed unilateral implementation amendment under S.B. 270 a suspect piece of legislation. It presents an opportunity to abuse well-established Alaskan legal principles. Further legislative scrutiny is necessary to determine whether or not the proposed amendments can be reconciled with these other statutory concerns.

3. The Unilateral Implementation Provision of S.B. 270 Is Inconsistent with PERA As A Whole.

The Public Employment Relations Act (PERA) is a carefully crafted, well-balanced piece of legislation. It has evolved over the past 17 years and, through decisional interpretation by the courts, is reaching a mature, balanced

state which is now subject to a great potential for disruption by the proposed unilateral implementation provision of S.B. 270.

PERA specifies at AS 23.40.070 that,

> The legislature finds that *joint decision-making* is the modern way of administering government. If *public employees have been granted the right to share* in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. (Italics supplied.)

Providing a public employer with the opportunity to unilaterally implement wages, hours, and terms and conditions of employment which are less than those in effect under contracts contradicts the fundamental purpose behind the Public Employee Relations Act as articulated in the foregoing excerpt. It should also be carefully noted that the prologue of PERA states that,

> [I]t is the public policy of this state to promote *harmonious and cooperative relations* between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are to be effectuated by:
>
> *Requiring 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. . . . (Italics supplied.)

AS 23.40.070(2).

Unilateral implementation contradicts this express policy. It also removes any incentive for an employer to bargain with the representative of public employees. What actually happens is that a greater likelihood arises that the public employer will engage in "sham bargaining," i.e., the employer appears to negotiate in good faith but, in actuality, ultimately intends to reach impasse so that unilateral implementation may occur. The National Labor Relations Board has struggled with this reality for many years but accepts it as a valid and necessary counterpart to employees' unlimited right to strike. As one circuit court of appeals noted, the circumstances of collective negotiations are so complex and esoteric, determining the unlawful negotiations tactics of a party who is sophisticated in such endeavors is extremely difficult from a mere examination of the facts surrounding bargaining. NLRB v. Wright Motors,

Inc., 603 F.2d 604 (7th Cir.1979). Such an observation is applicable here.

S.B. 270 has a great potential to encourage a public employer to circumvent its bargaining obligation by pursuing sham bargaining, and then unilaterally implementing its version of a contract. APEA would submit that this very real prospect contradicts the entire scheme as advanced by PERA.

It is also noteworthy that the concept of unilateral implementation as it arises in the private sector is subject to an entirely different set of influences which do not find easy application in public sector collective bargaining. Unilateral implementation by a private sector employer after impasse in negotiations can be effectively answered by the employees through an immediate strike action.

By contrast, AS 23.40.200 imposes upon so-called Class 2 and Class 3 employees the prerequisite that a strike may occur only if "a majority of the employees in a collective bargaining unit vote by secret ballot to [engage in a strike]." The limitations upon such a procedure are well documented in the Labor Relations Agency's regulations at 2 AAC 10.270-.280. Prompt resolution of such a petition is not possible for the format requires a prior determination by that Agency that (1) impasse has actually been reached, (2) mediation has been exhausted, (3) objections by the public employer are first resolved, (4) an eligibility list is established, and (5) the voting mechanics are prescribed by the Agency. The deliberately ponderous nature of this scheme imposes a delay element which necessarily advances public sector concerns, *i.e.*, it gives the parties time to resolve their differences without actually forcing the union to initiate a work stoppage. Posturing plays as much a role as does the use of coercive influences. Unilateral implementation upsets this balance. The opportunity to unilaterally implement at any time while the employees only enjoy a limited and protracted right to strike suggests that PERA was deliberately structured to impose a limitation upon the right to strike for the purpose of encouraging negotiations rather than permitting self help by each side.

Furthermore, Class 2 employees are not only permitted to strike after exhausting the delaying procedures of the Labor Relations Agency but may also face injunctive action after a showing that the public health, safety, or welfare is jeopardized by the work stoppage. The issuance of an injunction then requires that the parties continue negotiations again to impasse, at which point Class 2 employees are entitled to interest arbitration. However, the existence of the limited right to strike/injunctive relief/subsequent negotiations/interest arbitration mechanism for Class 2 employees is designed in such a manner that unilateral implementation is inconsistent with this scheme. There is little incentive for the state to negotiate in

good faith after the issuance of an injunction if it has implemented wages, hours and terms and conditions of employment which are to its own liking. Any post-injunction negotiations prior to impasse and the delay inherent in the selection of an interest arbitration panel and the issuance of an award subjects the employees to the inequity of employer-generated contract terms with little serious hope that the parties will reconcile their differences. There is little victory in obtaining an interest arbitration award which is favorable to public employees where the employer has been permitted to disregard the entire process by imposing its version of a collective bargaining agreement knowing that the process is structured to favor its interests through the delaying time table imposed by statute. Under such circumstances, the public employer's approach will be a "rush to impasse" so that it may unilaterally implement, knowing the public employees are bogged down in the restrictive time frames of the statute.

Within the scheme of the Public Employees Relations Act as presently constituted, unilateral implementation has little practical value other than as a preemptive device for employers to undermine the entire collective negotiations process. S.B. 270 has a great potential in this sense to directly undermine the express purposes of this act.

4. <u>The Unilateral Implementation Portion of S.B. 270 Permits the Public Employer To Impose Its Version of A Collective Bargaining Agreement Even During the Term of A Labor Contract</u>.

A very common practice in negotiations is for the parties to mutually extend the terms of a collective bargaining agreement and maintain the status quo to give some stability to the entire process. Subsection (h)(2) clearly states that the public employer may implement after impasse but does not address the situation where the parties are engaged in collective negotiations during the term of a collective bargaining agreement which has either not expired or been mutually extended. Under such circumstances, the collective bargaining agreement continues in full force and effect. However, the statute as drafted permits a public employer to unilaterally implement notwithstanding the existence of a valid collective bargaining agreement.

This result is contrary to practice even in the private sector and confers the employer with an advantage which cannot effectively be answered by an employee association, especially where the collective bargaining agreement in full force and effect contains a no-strike provision or, in the case of an acknowledged breach of that agreement, would constitute an unfair

labor practice and require the time consuming exhaustion of administrative procedures before the Labor Relations Agency.

S.B. 270 fails to address this potential disruptive influence and confers upon the employer an unprecedented opportunity for over-reaching and an incentive to engage in sham negotiations for the purpose of reaching impasse as quickly as possible.

5. The Issues Raised by the Unilateral Implementation Provision of S.B. 270 Are Premature.

Currently pending before the Alaska Supreme Court is the precise question of whether or not the Public Employment Relations Act confers on a public employer the opportunity to unilaterally implement its last best offer prior to impasse. The court has an opportunity to resolve this issue without amendment to the statute and to create a rule of law which will resolve the exact issue being raised by the amendments. To proceed with a legislative approach to this problem would effectively deprive the judiciary of its opportunity to interpret the statute. It would also suggest to the Supreme Court that the state lacks a good faith motive in bringing the unilateral implementation issue before it on appeal where its actual motive was to secure an express amendment to this statute and reach the same result without the benefit of the judiciary's analytical process. Amendment at this time would constitute an affront to that judicial process and would suggest legislative contempt for the judiciary's legitimate function in resolving this interpretive matter.

It is also significant that the State has stipulated to continue the status quo, *i.e.*, the terms of the expired agreement pending the Supreme Court's resolution of this issue. For the Governor to initiate legislation to circumvent this stipulation reveals a total lack of good faith on his part. The legislature would want to avoid becoming entangled in such a questionable practice.

6. The Unilateral Implementation Provision Constitutes Illegal 'End-Run" Bargaining.

In many other jurisdictions where statutes regulate public employee collective bargaining, an attempt by either the employer or the employee organization to obtain a result which cannot be accomplished at a bargaining table by petitioning the legislature to change the law is denominated "end-run bargaining" and is an unfair labor practice. This is precisely what S.B. 270 attempts to do; imposing an amendment to the Act to unilaterally implement a last best offer constitutes a violation of the

principle that collective bargaining agreements are reached at the bargaining table, with the ancillary assistance of mediation and/or arbitration, rather than through legislative enactment. This principle is based upon the belief that the public sector statutes as established are sufficient to provide adequate guidelines for negotiations. That presumption has not been rebutted by the governor in his presentation of S.B. 270. In effect, what the governor has done is unlawful under the Public Employment Relations Act to the extent it constitutes a "refusal to bargain" under AS 23.40.110(a)(5) and instead seeks to create a negotiating advantage by changing the law.

Fundamental principles of fair play require that the Legislature reject this approach for if the Senate "opens the door" on this type of circumvention, every negotiation session in which one of the parties is unsuccessful will lead to lobbying before the legislature, introduction of proposed legislation, and other assorted efforts which take the focus of this process away from the bargaining table and instead require the legislature to intervene for the purpose of creating an advantage for one side or the other. Unless the Legislature wants to become regularly immersed in the collective bargaining process, this would be unwise precedential policy.

JAG:jg

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

ALASKA PUBLIC EMPLOYEES ASSOCIATION, Plaintiff, v. STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, DIVISION OF LABOR RELATIONS, Defendant.	Case No. 3AN-87-10148 Civ.

STIPULATION

IT IS HEREBY stipulated by and among Alaska Public Employees Association ("APEA") and the State of Alaska, Department of Administration, Division of Labor Relations ("State"), through their respective counsel that:

1. A case of actual controversy in the state exists between APEA and the State.

2. The controversy, as evidenced in the pleadings on file with Superior Court for the State of Alaska, Third Judicial District, at Anchorage in Case Number 3AN-87-10148 and Case Number 3AN-87-10090 includes:

a. Whether the State has the power in the collective bargaining process, in the absence of a valid existing collective bargaining agreement, upon the reaching of impasse to

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implement unilaterally terms and conditions of employment, affecting employees in collective bargaining unit represented by APEA;

b. Whether the State, in the absence of a valid existing collective bargaining agreement, may upon the reaching of impasse implement a pay plan inconsistent with A.S. 39.27.011-.025 covering employees in collective bargaining units represented by APEA;

c. Assuming that the State has the power to implement unilaterally terms and conditions not contrary to statute or regulation after impasse, may the State selectively implement terms and, if so, what effect does such implementation have upon the remaining terms and conditions of the prior, expired collective bargaining agreement;

d. May the State upon impasse implement terms affecting Class 1 employees, as that term is defined in A.S. 23.40.200, or must the State maintain the status quo of the expired collective bargaining agreement prior to submission of unresolved issues to arbitration under A.S. 9.43.030 and prior to submission to the Alaska Labor Relations Agency under A.S. 23.40.190 and A.S. 23.40.200;

e. May the State upon impasse implement terms affecting either Class 2 or Class 3 employees, as those terms are defined in A.S. 23.400.200, or must the State maintain the status quo of the expired collective bargaining agreement prior to the

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union receiving final results of a strike authorization vote conducted pursuant to 2 AAC 10.270-.280;

3. The State agrees that it will not, in the absence of a valid existing collective bargaining agreement, implement unilateral changes in terms and conditions of employment affecting employees in the collective bargaining unit represented by APEA contrary to A.S. 39.25.150(17), 2 AAC 07.805 and A.S. 44.12.010-.025, and therefore the State will not contest the legality of such unilateral implementation in the Declaratory Judgment proceedings.

4. Effective November 6, 1987, the State shall reinstitute the status quo existing as of October 15, 1987, with respect to wages, hours, and terms and conditions of employment as it affects the APEA collective bargaining units. This implementation shall be prospective only and shall not affect any action taken from October 16, 1987, through November 6, 1987. The parties expressly recognize that no party is required or may be compelled to grieve and/or arbitrate any disputed action taken between these dates; the parties may agree on a case by case basis to grieve and/or arbitrate any such dispute. The status quo shall be maintained until any one of the following events occur: a) a decision is rendered by the Alaska Superior Court, or if appealed, the Supreme Court, regarding the Declaratory Judgment to be filed pursuant to this Stipulation; b) legislation is passed

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into law which affects any issue identified herein, or c) the parties reach an agreement.

5. For purposes of this Stipulation and the Declaratory Judgment based hereon only, the parties agree that negotiations were at impasse between the State and APEA as of October 16, 1987. Stipulation of impasse for purposes of the Declaratory Judgment shall not prevent APEA from seeking a determination before the Labor Relations Agency, through an unfair labor practice charge, that the State was not at impasse with APEA as of October 16, 1987.

6. The State and APEA are free to file alleged unfair labor practices with the Alaska Labor Relations Agency which may have occurred during negotiations.

7. The parties are free to seek binding arbitration for Class 1 employees pursuant to A.S. 23.40.200.

8. It is the desire of the parties to return to bargaining and to seek mediation without those negotiations being used in any way before a court or the Alaska State Labor Relations Agency. Therefore, any negotiations after the date of this stipulation may not be used to prove that there was no impasse between the parties on October 16, 1987.

Date: November 6, 1987

William K. Jermain
Attorney for Public Employees Association

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Date: November 6, 1987

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OF COUNSEL
MITCHELL D. GRAVO

MEMORANDUM

TO: Bruce Ludwig

FROM: William K. Jermain

DATE: April 12, 1989

RE: PERA Amendments/Legal Deficiencies

This office has reviewed S.B. 270 which proposes certain changes to the Public Employment Relations Act, particularly, AS 23.40.200 of that Act pertaining to interest arbitration and have noted substantial constitutional and legal problems with these amendments. Of particular concern is the addition of language under subsection (h)(2) of the bill which states, "The public employer may implement the terms and conditions of employment contained in the employer's proposal last offered before impasse to the employees in the class in (a)(2) or (a)(3) of this section."

1. Unilateral Implementation Violates Alaska's Constitution.

Article I, § 18 of Alaska's Constitution specifically prohibits that State from acting in a manner whereby "private property shall not be taken or damaged for public use without just compensation." Because the Supreme Court has been inclined to liberally construe this provision in favor of the private property holder, it determined in DeLisio v. Alaska Superior

Court, 740 P.2d 437 (Alaska 1987), that an individual's labor is a substantial interest protected by the due process clause of the Alaska Constitution, Article I, § 7, and that such a taking of an individual's labor without just compensation violates Article I, § 18.

To the extent unilateral implementation permits the public employer to put into effect wages, hours and terms and conditions of employment which deviate from those established under a prior collective bargaining agreement or the State Personnel Act, the State would be engaged in a "taking" contrary to Alaska's express constitutional prohibition. On this basis, the amendment proposed in S.B. 270 has the potential to violate that constitutional provision and requires legislative scrutiny to determine an alternative solution.

2. Unilateral Implementation Under PERA Has The Potential To Violate the State Personnel Act.

Alaska's State Personnel Act, Title 39, Chapter 25, AS 39.25.010-.220, establishes minimum wage, hour, and terms and conditions of employment for State employees who are not represented by a labor organization. The thrust of these provisions is that State employees have certain minimum expectations established by statute. The Alaska Supreme Court has held that an employee has a "property interest" in his/her employment which requires that procedural due process minimum

standards be met prior to the deprivation of that interest. Storrs v. Municipality of Anchorage, 721 P.2d 1146 (Alaska 1986).

There is a potential that the position of the State in collective bargaining with an exclusive representative will propose wages, hours, and terms and conditions of employment which are less than the minimums established under the State Personnel Act. Since both PERA and the Personnel Act intend to advance "merit principles," any attempt by the State to impose through unilateral implementation a collective bargaining agreement which varies from those minimums presents a possible violation of the State Personnel Act. As such, this character of the unilateral implementation amendment suggested by S.B. 270 requires further legislative scrutiny to determine whether it can be reconciled with other statutory concerns.

3. The Unilateral Implementation Provision of SB 270 Is Inconsistent With Other Portions of PERA.

Under AS 23.40.200(c), so-called "Class 2" employees may strike subject to the requirement that they (1) first conduct a strike vote by secret ballot, AS 23.40.200(d), and (2) subject to the possibility that the public employer or the Labor Relations Agency successfully enjoins the strike after a showing that the public health, safety, or welfare is jeopardized by the work stoppage. The issuance of an injunction then requires that the parties continue negotiations once again to impasse, at which

point Class 2 employees are entitled to interest arbitration.

Clearly, the statutory scheme contemplates a limited right to strike and post-injunction negotiations. However, there is little incentive for the State to negotiate in good faith after the issuance of an injunction if they have unilaterally implemented wages, hours, and terms and conditions of employment which are to their own liking. The entire process is thus rendered superfluous, and any post-injunction negotiations prior to deadlock and the delay of interest arbitration subjects the employees to the inequity of employer-generated contract terms with little hope for serious possibility that the parties will reconcile their differences.

This potential is even more probable for so-called "Class 3" employees who have a right to strike after conducting a strike vote. Once the public employer has unilaterally implemented terms and conditions of employment to its own liking, there is no incentive to negotiate in good faith with Class 3 employees where it can preclude Class 1 and Class 2 employees from engaging in a strike action. On this basis, the employee solidarity usually associated with a strike action is successfully circumvented by compartmentalizing employees into different groups and using economic pressures which cannot be effectively combatted, as is the case in private sector strikes.

Therefore, the scheme of PERA for the different classes of employees has little value if unilateral implementation can be used as a device to defeat the supposed economic benefit conferred by strike action. The amendment to PERA set forth in S.B. 270 has the potential of directly undermining the expressed purposes of the Public Employment Relations Act.

4. Conclusion.

The amendments contained in S.B. 270 raise substantial constitutional and legal problems. It is imperative that these issues be more specifically reviewed vis-a-vis these constitutional impairments.

WKJ:JAG:jg

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MEMORANDUM

TO: Senator Dick Eliason
Chair Senate Labor & Commerce Committee

FROM: Don Clocksin
Chief Counsel, ASEA

DATE: April 17, 1989

RE: Senate Bill 270 - PERA Amendments
Our File No. 3039.28

The Alaska State Employees Association ("ASEA") totally opposes SB 270.

I. BACKGROUND

The Public Employment Relations Act ("PERA") was adopted in 1972. It allowed public employees to collectively bargain and to either strike or engage in mandatory arbitration regarding wages and working conditions.

In 1988 the Governor attempted to unilaterally impose new working conditions on some state employees. His actions were challenged and the case has been appealed to the Alaska Supreme Court. We expect a decision this summer.

II. SB 270

Senate Bill 270 will do three things:

A. Implement "last best offer/total package" arbitration for those employees who cannot strike;

B. Render arbitration decisions advisory rather than binding by allowing the Legislature to reject a monetary award.

C. Allow the Governor to unilaterally impose new wages and work rules on employees who can strike well before those employees can exercise the right to strike.

III. DISCUSSION

ASEA is neutral on the first provision (II.A. above; Sections 1 and 2 of the bill) at this time.

By allowing the Legislature to reject an arbitration award, this bill will make arbitration binding on the employees and advisory for the Governor. Therefore, the reference to "binding" arbitration in Sections 1 and 2 is misleading.

The third proposed change is the one with the most devastating effect. Right now, once the parties cannot agree on wages and work rules (i.e., "impasse"), it takes as much as several months before employees can get the right to strike. They must: 1) petition the State Labor Relations Agency to schedule a strike vote; 2) participate in additional mediation if ordered by the Agency; 3) participate in a formal administrative hearing if the State objects to a strike vote; and 4) conduct a statewide strike vote election. See 2 AAC 10.270-280 and .400-.430.

Because of necessary notices, time periods, disputes about which employees may strike, etc., the employees would receive permission to go on strike months after the Governor had imposed new work rules.

This imbalance in the use of economic weapons will destroy the balance contained in PERA. If the Governor can refuse to reach agreement and impose, for example, a 12-hour work day at a 50% wage cut -- and do so without immediate fear of a strike or an arbitrator's decision -- the right of collective bargaining will be irreparably damaged.

DC:bls/I01