03/14/16 PRESENTATION: LEGAL OPINION: LEGISLATURE'S LEGAL OPTIONS REGARDING PUBLIC EMPLOYEE COLLECTIVE BARGAINING AGREEMENTS

<TARGET><BILL></BILL><SUBJECT>03-14-16 PRESENTATION LEGAL OPINION LEGISLATURES LEGAL OPTIONS REGARDING PUBLIC EMPLOYEE COLLECTIVE BARGAINING AGREEMENTS</SUBJECT><COMM>HFIN29</COMM></TARGET>

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CORRECTED MEMO: reference to "AS 23.40.215" in paragraph 2, line 7

MEMORANDUM March 12, 2016

SUBJECT: The legislature's role in collective bargaining
(Work Order No. 29-LS1572)

TO: Representative Steve Thompson
Attn: Jane Pierson

FROM: Daniel C. Wayne
Legislative Counsel

You have asked: what is the legislature's role in collective bargaining? This opinion will assume that by "collective bargaining" you mean bargaining between the state and state employee bargaining units.

When the state engages in collective bargaining with public employee organizations, the state is represented by the executive branch. Generally, the legislature's role is to enact law related to collective bargaining. The legislature enacted AS 23.40.070 - 23.40.260, (the Public Employment Relations Act, also known as "PERA") to permit and govern collective bargaining. The legislature gave itself a limited and specific role in collective bargaining under PERA. As explained later in this memorandum, this role is a significant one; under AS 23.40.215, it is the legislature's role to review monetary terms agreed on by the parties and presented to the legislature and either fund or not fund those monetary terms. If the legislature does not fund the terms, the parties must renegotiate and present new terms at a later date.

Beyond this, there are legal and constitutional limitations on the legislature's role in collective bargaining. The state and federal constitutional prohibition of impairment of contracts may be the most substantial limitation. There may be other legal obstacles as well.

Impairment of Contracts

In some instances a legislative enactment changing a negotiated collective bargaining agreement may impair one or more obligations of that agreement. Article II, sec. 1 of the Constitution of the State of Alaska gives the legislature the power to make laws. However, laws that impair the obligation of contracts are prohibited under art. I, sec. 15

of the Constitution of the State of Alaska, and art. I, sec. 10, United States Constitution. The U.S. Supreme Court has said:

> "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. . . . If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract."[1]

The prohibition is not absolute. The U.S. Supreme Court has said: "The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose."[2] The Court explained that when the contract impaired by a law is a contract with the state, and not a private contract, courts should give less deference to a legislature's determination that the disputed law was reasonable and necessary. The Court reasoned as follows:

> . . . complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.[3]

The Court further held that "a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors."[4]

In cases where courts have considered whether a public purpose justified the impairment of a contract, some courts have taken into account whether there were reasonable

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[1] *General Motors Corp. v. Romein*, 112 S.Ct. 1105, 1111, 503 U.S. 181, 189 (U.S. Mich., 1992), citing *McCracken v. Hayward,* 2 How. 608, 612, 11 L.Ed. 397 (1844).

[2] *U.S. Trust Co. of New York v. New Jersey*, 97 S.Ct. 1505, 1519 (U.S.N.J., 1977).

[3] *Id.*

[4] *Id.*, 1521.

alternatives to the disputed law,[5] and if so whether the party arguing in favor of relaxing the constitutional prohibition had given reasonable consideration to the alternatives.[6]

Some courts have determined that even where a disputed law is allowable because it serves an important public purpose -- based on an emergency compelling enough to justify relaxing the constitutional prohibition -- the law should be temporary and expire once the emergency has abated.[7] Unless there is a true emergency, and a showing that reasonable alternatives have not been rejected, courts have tended to uphold the federal constitutional prohibition on impairment of contracts.

A similar constitutional prohibition in art. I, sec. 15, of the Constitution of the State of Alaska says, in part: "No law impairing the obligation of contracts . . . shall be passed." In a case involving the effect of a state law on an existing contract between private parties, the Alaska Supreme Court found that a state statute made retroactive by the legislature in order to prevent a group of pilots from collecting a judgment from their employer after winning an overtime pay claim in court was unconstitutional, because it failed the two-prong test the court applies in cases alleging that a law unconstitutionally impairs a contract. The Court said:

> Because the language of the contract clause of the Alaska Constitution is nearly identical to that of the federal Contract Clause, we apply the same two-part analysis to alleged violations of the Alaska and federal contract clauses. We first ask "whether the change in state law has operated as a substantial impairment of a contractual relationship." If there is a substantial impairment, we then examine "whether the impairment is reasonable and necessary to serve an important public purpose."[8]

The collective bargaining you have asked about concerns contracts between the state and organizations that represent state employee bargaining units. If the state were to adopt a law impairing a collective bargaining agreement a court would apply a two-prong test

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[5] *University of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096, 1107 (C.A. 9 (Hawaii), 1999).

[6] *Association of Surrogates and Supreme Court Reporters Within City of New York v. State of N.Y.*, 940 F.2d 766, 773 - 774 (C.A.2 (N.Y.), 1991).

[7] *Baltimore Teachers Union, American Federal of Teachers Local 340, AFL-CIO v. Mayor and City Council of Baltimore*, 6 F.3d 1012 1021, (Maryland 1993).

[8] *Hageland Aviation Servs., Inc. v. Harms*, 210 P.3d 444, 451 (Alaska 2009) (internal citations omitted).

like the one applied in *Hageland.* The Alaska Supreme Court has said of the first prong:

> Whether a state law operates as a substantial impairment of a contractual relationship is assessed in three parts: (1) whether there is a contractual relationship; (2) whether a change in law impairs the contractual relationship; and (3) whether the impairment is substantial.[9]

Assuming the answer is "yes" to all three parts of the test's first prong, the court would finally consider "whether the impairment is reasonable and necessary to serve an important public purpose."[10] In doing so the court may consider whether there are reasonable alternatives to the disputed law, and if so whether those alternatives were given proper consideration before they were rejected. In addition, the court may take into account factors considered by courts in other jurisdictions, including the state's self interest in the contract(s), the importance of the public purpose served, the amount of harm the non-state party to the contract(s) will suffer, and the duration of the emergency (temporary v. lasting).

Other Legal Obstacles

The contract itself may present opportunities for a legal challenge to legislative action that adversely affects state employees. For example, a party injured by the legislative action might allege breach of contract based on a general duty to perform or a specific contract provision.[11]

And, were the legislature to inject itself into the actual bargaining process, before an agreement is reached, a court may consider that an unconstitutional interference with the power conferred on the executive branch under art. 3, sec. 1 of the Constitution of the State of Alaska, which reads: "The executive power of the State is vested in the

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[9] *Simpson v. Murkowski*, 129 P.3d 435, 444 (Alaska, 2006).

[10] *Hageland,* 451.

[11] *AFT Michigan v. State of Michigan*, 866 N.W.2d 782, 789 - 90 (Mich., 2015) (internal citations omitted). In that case the Michigan Supreme Court said:

> An action for breach of a contract and an action alleging that a law impairs the obligation of a contract are distinct claims. A refusal to perform in compliance with a valid contract amounts to a breach of a contract and may entitle the other party to damages or other forms of relief; however, a breach does not affect the contract's fundamental validity. In contrast, a contract is "impaired" when a law undermines a party's ability to legally enforce that contract; a contractual impairment is typically remedied through invalidation of the impairing law.

governor." Generally, the power to contract on behalf of the state is centered in the executive branch.[12]

Separation of Powers

Legislative power is distinct from executive power. The attorney general's office has long held that legislative approval of individual contracts executed by the executive branch is a violation of the separation of powers doctrine. The attorney general's office, in a 1981 informal opinion, said:

> In approving individual contracts, the legislature does not exercise a lawmaking function. Consequently, in the absence of a constitutional grant of such power or some unique circumstance that we cannot presently contemplate, a statute requiring legislative approval of an individual contract is a violation of the separation of powers. See *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408 (9th Cir. 1980). In *Public Defender Agency v. Superior Court, Third Judicial District*, 534 P.2d 947 (Alaska 1975), the Alaska Supreme Court held that the doctrine of separation of powers, though not expressly set out in the Alaska Constitution, is clearly implied. See also Minutes of the Alaska Constitutional Convention 1955-56, at 2228-29. Furthermore, the court has expressly recognized that it was a purpose of the framers of the Alaska Constitution to create a strong executive branch of government. *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976).[13]

Unfair Labor Practice

A law substantially changing the terms and conditions of employment of state employees who have a right to bargain under the Public Employment Relations Act could lead to allegations of an unfair labor practice, under AS 23.40.110(a)(5), which reads:

> (a) A public employer or an agent of a public employer may not
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> . . .
>
> (5) refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

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[12] Of course, the legislature may also enter into contracts on its own behalf, and does so as a separate branch of state government. For example, the legislature, through the legislative council, leases office space for legislators and the legislative information offices.

[13] 1981 Inf. Alaska Atty. Gen. Op. (file no. J66-159-82) November 3.

It can be argued that the Public Employment Relations Act, and its definition of "collective bargaining" under AS 23.40.250(1), reserve "wages, hours, and other terms and conditions of employment" as subjects for bargaining between the state and labor or employee organizations representing employees who belong to state bargaining units. The definition reads:

> (1) "collective bargaining" means the performance of the mutual obligation of the public employer or the employer's designated representatives and the representative of the employees to meet at reasonable times, including meetings in advance of the budget making process, and ***negotiate in good faith with respect to wages, hours, and other terms and conditions of employment,*** or the negotiation of an agreement, or negotiation of a question arising under an agreement and the execution of a written contract incorporating an agreement reached if requested by either party, but these obligations do not compel either party to agree to a proposal or require the making of a concession;

(Italics added for emphasis).

Legislative Power Over Monetary Terms

AS 23.40.215(a), provides that "the monetary terms of any agreement entered into under AS 23.40.070 - 23.40.260 are subject to funding through legislative appropriation," consistent with the legislative power to appropriate.[14] AS 23.40.215(b) provides, in part, as follows:

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

For purposes of the Public Employment Relations Act, AS 23.40.250(4) defines "monetary terms of an agreement" as follows:

> (4) "monetary terms of an agreement" means the changes in the terms and conditions of employment resulting from an agreement that
> (A) will require an appropriation for their implementation;

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[14] The power to appropriate state funds is conferred solely upon the legislature by art. IX, sec. 13, Constitution of the State of Alaska, which states: "No money shall be withdrawn from the treasury except in accordance with appropriations made by law."

> (B) will result in a change in state revenues or productive work hours for state employees; or
>
> (C) address employee compensation, leave benefits, or health insurance benefits, whether or not an appropriation is required for implementation;

The phrase "terms and conditions of employment," above, is defined by AS 23.40.250(9) to mean:

> . . . the hours of employment, the compensation and fringe benefits, and the employer's personnel policies affecting the working conditions of the employees; but does not mean the general policies describing the function and purposes of a public employer.

In some instances prior legislatures have not funded salary increases mandated by state collective bargaining agreements and such action was upheld by the Alaska Supreme Court.[15] In *Public Employees' Local 71 v. State,* a three-year contract with Public Employees' Local 71 included salary increases of zero percent in the first year, five percent in the second year, and 3.8 percent in the third year. The legislature funded the second-year increase of five percent during the 1985 legislative session, but passed Legislative Resolution No. 19 stating that it was not going to fund the third-year salary increase in the next legislative session. The following year, during the 1986 legislative session, the legislature included a section in the operating budget that rejected the third-year salary increase of 3.8 percent. The language of the budget section read, in part: "[F]ailure of the legislature to adopt a separate appropriation item for the pay raise constitutes rejection of the monetary terms of the collective bargaining agreements in accordance with AS 23.40.215."[16] In upholding the legislature's action, the Alaska Supreme Court simply stated that "it is clear that the monetary terms of a collective bargaining agreement are not effective until the funds are appropriated by the legislature. Each year the monetary terms of a collective bargaining agreement are subject to independent legislative approval."[17]

Conclusion

The legislature's role in collective bargaining is to enact the laws that permit and govern collective bargaining. Although the legislature may not have a role in the actual negotiation of a collective bargaining agreement, and legislative alteration of an existing contract may invite a constitutional challenge, the legislature clearly holds the power of the purse, and the definitions in AS 23.40.250(1), (4), and (9), cited above, suggest that

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[15] *Public Employees' Local 71 v. State*, 775 P.2d 1062 (Alaska 1989).

[16] *Id.* at 1062 - 63.

[17] *Id.* at 1063.

AS 23.40.215 gives the legislature the power of final approval over funding for a range of conceivable collective bargaining agreement terms.

If I may be of further assistance, please advise.

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