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ALASKA CORRECTIONAL OFFICERS ASSOCIATION,	)
Complainant,	)
vs.	)
STATE OF ALASKA,	)
Respondent.	)

CASE NO. 06-1481-ULP

DECISION AND ORDER NO. 283

The Board heard this charge on January 19, 2007, in Anchorage, Alaska. The Board panel deciding this matter includes Chair Gary P. Bader, and Board Member Dennis Niedermeyer.[1] Panel Members attended the hearing telephonically. Hearing Examiner Mark Torgerson presided. The parties filed written closing arguments on February 14, 2007. The Board deliberated this charge on Friday, March 9, 2007, and the record closed that day, upon completion of deliberations.[2]

Digest: Retirement benefits are not a mandatory subject of bargaining under the Public Employment Relations Act. Even if retirement benefits were a mandatory subject of bargaining, the Alaska Correctional Officers Association waived its right to negotiate the statutory change to state retirement benefits. The Alaska Correctional Officers Association failed to prove by a preponderance of evidence that the State committed an unfair labor practice.

Appearances: Art Chance, Labor-Management Resolutions, for Complainant Alaska Correctional Officers Association; William Milks, Assistant Attorney General, for Respondent State of Alaska.

[1]Former Board Member Gary Atwood was replaced on the Board as his term expired on March 1, 2007. The remaining two panel members decided this matter as a quorum of two members, as authorized by AS 23.05.370(b).
[2]On March 9, 2007, the Board panel deliberated and issued a bench order notifying the parties of its decision and informing them it would later issue this formal decision and order.

DECISION

Statement of the Case

On August 16, 2006, the Alaska Correctional Officers Association (ACOA) filed an unfair labor practice complaint against the State of Alaska (State). ACOA alleges that the State violated AS 23.40.110 by refusing to negotiate a statutory change to retirement benefits. ACOA contends that because retirement benefits are fringe benefits that are a mandatory subject of bargaining, the State's refusal to bargain the change to the benefits constituted an unfair labor practice. The State responds that retirement benefits are not a mandatory subject of bargaining, and even if they were, ACOA waived the right to bargain the change.

Jean Ward, the Agency's Hearing Officer conducted an investigation and found probable cause that the State committed a violation under AS 23.40.110(a)(5), and (a)(1), by refusing to bargain retirement benefits. (October 25, 2006, Notice of Preliminary Finding After Investigation). Hearing Officer Ward deferred the State's defense of waiver to the Board for decision.

Issues

1. Are retirement benefits a fringe benefit and therefore a term and condition of employment that is a mandatory subject of bargaining?

2. Did the State commit an unfair labor practice by refusing to negotiate the statutory change to retirement benefits, enacted July 27, 2005, and effective July 1, 2006, or did ACOA waive any right to negotiate retirement benefits?

Findings of Fact

1. The Alaska Correctional Officers Association (ACOA) is the exclusive representative of "all permanent, probationary, and provisional employees in the Correctional Officers' Bargaining Unit for collective bargaining with respect to wages, hours, and other terms and conditions of employment." (Joint Exh. I at 6).

2. ACOA and the State of Alaska (State) ratified a collective bargaining agreement for the period July 1, 2006, to June 30, 2009. (Joint Exh. I). The parties also had an agreement for the period July 1, 2004, to June 30, 2006. (Joint Exh. II).

3. In May 2005, the Alaska Legislature passed Senate Bill 141, legislation that changed the type of benefits new public employees would receive when they retire from state service. For employees hired on and after July 1, 2006, the effective date of the legislation, retirement benefits under the Public Employees Retirement System (PERS) would be calculated based on the defined contribution method. For employees hired prior to July 1, 2006, employees' retirement benefits would continue to be calculated based on the defined benefit method.

4. Former Governor Frank Murkowski signed Senate Bill 141 into law on July 27, 2005.

5. Melanie Millhorn has been a Deputy Commissioner in the Department of Administration since June 1, 2006. From July 2003 until her appointment to Deputy Commissioner, Millhorn was Director of the Division of Retirement and Benefits. She had fiduciary responsibility for the day-to-day administration of five defined benefit programs, two defined contribution programs, and two "hybrid" defined contribution programs that are "in accords with the Internal Revenue Code 414K." These hybrids provide for some defined contribution benefits and certain fixed income defined benefits. Millhorn testified this plan was "enacted" in May 2005.

6. The Public Employees Retirement System, or PERS, was established in 1961. Since its inception, PERS has undergone four legislative changes. Millhorn testified that the four different plans are called Tiers I, II, III, and IV. Tier I includes employee members hired between 1961 and June 30, 1986. Tier II was established in 1986, Tier III in 1996, and Tier IV in 2006.[3] The retirement Tier that an employee is eligible for is based on the employee's date of hire. Once the employee is enrolled in that particular Tier, the employer may not change the employee's plan to a different Tier.

7. Tier I is the most costly retirement plan for the State and the other 159 employers who participate in PERS statewide. Each successive plan costs less than the prior plan. In other words, Tier I is the most costly plan for participating public employers, and Tier IV is least costly.

8. With the parties' collective bargaining agreement due to expire on June 30, 2006, the parties began negotiations for a new agreement in August of 2005.

9. Dianne Kiesel is Director of Personnel and Labor Relations at the State Department of Administration. She was a spokesperson for the State in 2005 during negotiations with ACOA for a new collective bargaining agreement. She testified there were no proposals to bargain retirement benefits during those negotiations.

10. ACOA Business Agent and negotiations spokesperson Brad Wilson agreed that there were no substantive negotiations between the parties regarding Senate Bill 141. ACOA did not request that the parties confer over the changes to the retirement system brought about by enactment of Senate Bill 141. Wilson testified that ACOA was aware of the Senate Bill 141 changes. However, ACOA chose to spend its time and energy trying to overturn the legislation. Wilson felt "very strongly" that the bill could be overturned before its effective date.

11. By November 2005, the parties reached tentative agreement on several contract terms but deadlocked on other terms. They agreed to submit the unresolved contract terms to arbitrator William Greer for hearing and opinion. Arbitrator Greer conducted a hearing on January 17 – 20, 2006, and issued an award on March 6, 2006. [4] (Jt. Exh. III).

12. Subsequent to the award, the parties reached tentative agreement on the remaining

[3] Tier IV was passed by the Legislature and enacted into law on July 27, 2005, when Governor Murkowski signed the legislation. It was made effective for employees hired on and after July 1, 2006.
[4] The Tier IV law was not in effect and was not addressed in of Arbitrator Greer's award.

contract terms that had been in dispute.

13. ACOA bargaining unit members ratified the contract terms, and the Alaska Legislature approved the monetary terms of the agreement prior to the end of the 2005 – 2006 legislative session.

14. The State reduced the 2006 – 2009 collective bargaining agreement to writing. ACOA representatives Danny Colang and Brad Wilson signed the written agreement on July 14, 2006, and Scott Nordstrand and Dianne Kiesel signed the agreement on behalf of the State on July 27, 2006. (Jt. Exh. I at 68).

15. On July 28, 2006, Wilson wrote Dianne Kiesel and requested negotiations over the retirement benefits changes: "On July 1, 2006 the State of Alaska instituted changes in the retirement system that affect[] the entire membership of Alaska Correctional Officers Association, ACOA. ACOA demands bargaining . . . over the changes to the retirement system. ACOA is willing to meet at any reasonable time and place. . . ." (Jt. Exh. VI).

16. Kiesel responded to Wilson's July 28 request on August 1, 2006: "The State declines inasmuch as the referenced legislation does not relate to any ' . . . wages, hours, and terms and conditions of employment . . . ,' to any State '… personnel policies affecting working conditions of the employees...,' nor any 'fringe benefit' within the ambit of the State's duty to bargain under AS 23.40.070 *et seq.* (See, Opinion of the Attorney General J-66-444-78, January 23, 1978)." (Jt. Exh. VII) (punctuation in original).

17. Neither the 2004 – 2006 agreement nor the 2006 – 2009 agreement between the parties mentions anything about retirement benefits or the term "fringe benefits." Both agreements contain provisions addressing life, travel-accident, and health insurance. (Jt. Exh. I at 40; Jt. Exh. II at 40).

18. ACOA filed an unfair labor practice charge on August 15, 2006, alleging that the State failed to bargain in good faith when it refused to negotiate the change to retirement benefits. On October 25, 2006, after conducting an investigation, Hearing Officer Jean Ward found probable cause that the State committed an unfair labor practice violation.

ANALYSIS

1. Are retirement benefits a fringe benefit and therefore a term and condition of employment that is a mandatory subject of bargaining?

The ACOA argues that retirement benefits are a fringe benefit and therefore a "term or condition of employment" and thus a mandatory subject of bargaining. ACOA frames this issue as follows: Does the State have a duty, and does the union have a right to bargain over retirement benefits? ACOA answers in the affirmative. It contends that since 1978, the State has concluded that it was not required to bargain retirement benefits. The State based this conclusion on a 1978 opinion of the Attorney General and on an analysis of mandatory and permissive subjects of bargaining by the Alaska Supreme Court in *Kenai Peninsula Borough School District v. Kenai Peninsula Education Association*, 572 P.2d 416 (Alaska 1977), (*Kenai I*). ACOA asserts that *Kenai I* is "still pretty good law" because in a subsequent opinion, *Alaska Public Employees Association v. State*, 831 P.2d 1245 (Alaska 1992), the Alaska Supreme Court reiterated the test it laid out in *Kenai I*. (ACOA's Opening Statement at hearing).

ACOA points out that AS 23.40.250(9)[5] outlines the duty to bargain under Alaska's Public Employment Relations Act (PERA). Under this statute, ACOA claims, even when an employer exercises managerial discretion and is not required to bargain that "exercise of discretion," *if* that exercise of discretion "affects" one of the mandatory conditions of bargaining (wages, hours, and terms and conditions of employment), then the employer is obligated to bargain that effect, "if not the act of discretion itself." ACOA asserts there is federal precedent requiring the duty to bargain effects. (ACOA's Opening Statement).

The State responds that "we are now living under what was essentially the law of the land;" that is, the Attorney General issued an opinion almost 30 years ago, and that opinion has never been challenged. (State's Opening Statement at hearing). The State argues that to raise this issue at this time is "highly disruptive" to labor relations and employers and unions in the state. Regarding the 1978 opinion of the Attorney General, the State argues that the opinion and its rationale are as applicable now as they were in 1978: "Nothing has changed in the last thirty years."[6]

The State asserts that the Attorney General's 1978 opinion concludes that retirement benefits are not a negotiable subject of bargaining in part because contributions to the Public Employees Retirement System (PERS) are by statute a condition of employment for state employees. Further, public employee retirement benefits are specifically addressed in the Alaska Constitution and may not be "diminished or impaired." (Alaska Constitution, Article XII, Section 7). While the State agrees with ACOA that this Agency may generally apply federal precedent (including the NLRB)

[5] At the time *Kenai I* was issued, the pertinent statute was AS 23.40.250(8). However, at the time of the *Kenai I* decision, jurisdiction for labor relations matters regarding school districts was governed by Title 14 of the Alaska Statutes. The Alaska Labor Relations Agency (ALRA) did not take jurisdiction over school districts until passage of HCS CSSB 15 by the Legislature in 1990. Pursuant to section 3 of HCS CSSB 15, ALRA took jurisdiction effective June 22, 1990.

[6] We assume the State means that nothing in the law has changed for the past 30 years. Clearly, based on the evidence submitted, both employer costs per employee and employee retirement benefits have decreased as each of the four-tiered retirement plans has been implemented. These constitute major changes for both public employers and public employees.

for guidance, the State contends, contrary to ACOA's assertion, that pensions in the private sector are not subject to a constitutional guarantee like public employee pensions in Alaska. The State argues that the constitutional guarantee and the comprehensive statute for retirement benefits make employees subject to PERS "completely different from the private sector." On these bases, according to the State, federal law is inapplicable.

Finally, the State asserts that "we do not have an effects bargaining case." It contends that there has been no assertion or finding that the State failed to bargain effects. Therefore, it is not a claim in this case. Regarding waiver, the State maintains that "if there was ever a right to find a waiver, this is it." (State's Opening Statement).

AS 23.40.070 states in part: "The legislature declares that it is the public policy of the 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." The declaration of policy in section 070 further provides:

> These policies are to be effectuated by
> (1) recognizing the right of public employees to organize for the purpose of collective bargaining;
> (2) 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;
> (3) maintaining merit-system principles among public employees.

In *Alaska Public Employees Association v. State*, 831 P.2d 1245 (Alaska 1992), the Alaska Supreme Court discussed the purpose of the Public Employment Relations Act in the context of mandatory bargaining subjects:

> The stated purpose of PERA is to give public employees "the right to share in the decision-making process affecting wages and working conditions." AS 23.40.070. (footnote omitted). Accordingly, PERA specifically requires 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." AS 23.40.070(2). Such matters are "mandatory subjects of bargaining." *Alaska Community Colleges' Fed'n of Teachers, Local 2404 v. University of Alaska,* 669 P.2d 1299, 1305 (Alaska 1983) (*Federation of Teachers*). Another section of PERA provides that "'terms and conditions of employment' means 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." AS 23.40.250(8).

831 P.2d 1245, 1248.[7]

[7] The Alaska Labor Relations Agency has analyzed mandatory subjects of bargaining in several decision and orders, including *International Organization of Masters, Mates and Pilots vs. State of Alaska*, Decision and Order No. 271 (December 28, 2004), citing *Alaska State Employees Association/AFSCME Local 52, AFL/CIO v. State of Alaska*, Decision and Order No. 158 at 15 (May 14, 1993), aff'd. *Alaska State Employees Association v. State of Alaska*, 3 AN-

AS 23.40.070(2) and AS 23.40.110(a)(5) require a public employer to bargain collectively in good faith over mandatory subjects of bargaining. With few exceptions, an employer may not make a unilateral change to a mandatory subject of bargaining without first bargaining to impasse. This rule also applies after the contract expires. On the other hand, an employer generally need not bargain to impasse over terms and conditions involving permissive subjects but may alter them upon contract expiration. *Silverman v. Major League Baseball Player Relations Committee, Inc.,* 67 F.3d 1054 (2d. Cir. 1995), *citing Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187-88 (1971).

The primary question in this case is whether retirement benefits are "wages, hours, or terms and conditions of employment" and therefore a mandatory subject of bargaining under the Public Employment Relations Act. If retirement benefits are not a mandatory bargaining subject, the State's unilateral implementation of the Tier IV retirement plan was valid.

In *Kenai Peninsula Borough School District v. Kenai Peninsula Education Association*, 572 P.2d 416 (Alaska 1977), (*Kenai I*) the Alaska Supreme Court maintained that determining whether a subject of bargaining is mandatory or permissive is a "complex" question. In *Kenai I*, the Court was faced with several actions between various school districts and teachers' unions over what is or is not a mandatory, negotiable subject of bargaining. The Court analyzed items of bargaining by separating economic issues from policy issues.

The Court noted that if it looked to the law regarding bargaining in the private sector, it "would conclude that the scope of negotiable issues is broad." *Id.* at 418. The Court added: "But the general trend has been to require that employers bargain in good faith on a wide range of items with respect to wages, hours, and other conditions of employment, without regard to whether the employers consider the items bargained for to be within the prerogatives of management." *Id.*

The Court then turned to the issue in *Kenai I* and stated that,

> In the public sector, and particularly in education, the question of what is properly bargainable is thrown into more doubt. If teachers' unions are permitted to bargain on matters of educational policy, it is conceivable that through successive contracts the autonomy of the school boards could be severely eroded, and the effective control of educational policy shifted from the school boards to the teachers' unions.

Id. at 419.

The Court laid out the following test and rationale as a way of separating economic (bargainable) from policy (non-bargainable) items:

> Put another way, a matter is more susceptible to bargaining the more it deals with the economic interests of employees and the less it concerns professional goals and methods. Bargaining over the latter topics presents particular problems because there is less likely to be any politically organized interest group other than the union

> concerned with these issues. The salaries of public employees have a direct financial effect on the taxpayers; on the other hand, a question such as teacher evaluation of administrators is unlikely to have any impact sufficiently direct to be discernible by laymen.

Id. at 422.

The Court then addressed several disputed items and even listed, in an appendix to its opinion, 9 items it deemed non-negotiable and 38 items it deemed negotiable. Included in the negotiable items were life, health, and liability insurance, but the Court did not list or address pension or retirement benefits. The Court expressed frustration regarding lack of "specific guidance on a number of the items which the unions seek to negotiate." *Id.* at 423. "We are confronted, then, with a situation in which the legislature has not spoken with clarity and concerning which we possess no expertise. We can only conclude that salaries, fringe benefits, the number of hours worked, and the amount of leave time are negotiable." *Id.*

Regarding pension or retirement benefits in the private sector, the National Labor Relations Board (NLRB) and federal courts have concluded that these benefits are mandatory subjects of bargaining. In *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Company, Chemical Division*, 404 U.S. 157 (1971), the United States Supreme Court held: "Under the National Labor Relations Act, as amended, mandatory subjects of collective bargaining include pension and insurance benefits for active employees, and an employer's mid-term unilateral modification of such benefits constitutes an unfair labor practice." *Id*. at 159.[8]

State laws and cases differ on the question whether retirement benefits are a mandatory subject of bargaining for public employees. In some states, pension benefits are deemed a fringe benefit but are specifically excluded by statute. For example, Minnesota's Public Employee Labor Relations Act defines "terms and conditions of employment" as "the hours of employment, the compensation therefore including fringe benefits *except retirement contributions or benefits* other than employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay, and the employer's personnel policies affecting the working conditions of the employees." Minn. Stat § 179 A.03, subd. 19 (2004) (emphasis added). *See West St. Paul Federation of Teachers v. Independent School District No. 197*, 713 N.W. 2d 366, 375 (2006). In *City of Johnstown and Johnstown Police Benevolent Association*, 99 N.Y. 2d 273, 784 N.E. 2d 1158 (2002), the New York state Court of Appeals discussed retirement benefits under New York's statutes: "Civil Service Law § 201(4), a provision of the Taylor law, expressly differentiates between retirement matters and all other issues subject to collective bargaining by excluding retirement benefits from the definition of terms and conditions of employment subject to collective bargaining." 99 N.Y. 2d 273, 282, 784 N.E. 1158, 1164.

Pennsylvania statutes, however, specifically provide that retirement and pensions, at least for police or fire fighters, are a mandatory subject of bargaining. The Commonwealth Court of

[8] In *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Company, Chemical Division*, 404 U.S. 157 (1971), the United States Supreme Court held that, contrary to active employees' pension benefits, already-retired employees' pension benefits were not a mandatory subject of bargaining.

Pennsylvania cited to the statutory provision: "Section 1 of Act 111, 43 P.S. § 217.1, provides: Policemen or firemen employed by a political subdivision of the Commonwealth or by the Commonwealth shall, through labor organizations . . . have the right to bargain collectively . . . concerning the terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions and other benefits . . . ." *F.O.P Rose of Sharon Lodge No. 3 v. Pennsylvania Labor Relations Board*, 729 A.2d 1278 (1999).

The Alaska Supreme Court stated that "[i]t is often difficult to characterize an issue as either mandatory or permissive." The Court added:

> The practical challenges of this process were elucidated in *Alaska Public Employees Ass'n v. State*, a case in which we considered whether job classification and salary range assignments were mandatory subjects of bargaining. Because of the close relationship between the job classification plan and the state merit principle, we held that job classification should be exempt from bargaining. With respect to the assignment of positions to salary ranges, we determined the issue to be a *permissive* subject of bargaining - - one on which state employees could be heard at the State's discretion - - but not a *mandatory* subject of bargaining under existing state salary programs. In reaching this conclusion, we adapted the test for negotiability set out in *Kenai I*, creating instead a "division between mandatory and permissive subjects of bargaining in cases, such as this one, where the government employer's constitutional, statutory, or public policy prerogatives significantly overlap the public employees' collective bargaining prerogatives." Under this modified test, "a matter is more susceptible to categorization as a mandatory subject of bargaining the more it deals with the economic interests of employees and the less it concerns the employer's general policies."

State of Alaska v. Public Safety Employees Association, 93 P.3d 409, at 414-415 (Alaska 2004).

The Alaska Constitution specifically addresses retirement benefits for public employees. Article XII, Section 7 of the Alaska Constitution 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."

On January 23, 1978, then Alaska Attorney General Avrum M. Gross issued an opinion regarding the negotiability of group life and health insurance benefits, as well as retirement benefits, under the Public Employees' Retirement System (PERS).[9] The opinion, addressed to B.B. Allen, Commissioner of the Department of Administration, framed the question as follows:

> You requested an opinion whether the Public Employment Relations Act (PERA), AS 23.40.070 – 23.40.260, supersedes the group life and health insurance statute, AS 39.30.090, and the statutes establishing the Public Employees['] Retirement System (PERS), AS 39.35. Restated, the question is whether group life and health insurance benefits and retirement benefits [are]

[9] 1978 WL 18305 (Alaska A.G.), File No. J-66-444-78, Opinion No. 3.

subject to collective bargaining.

(Alaska A.G. Opinion No. 3 at 1).

Attorney General Gross cited to AS 23.40.070(2)'s language that PERA "is 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.'" Gross also cited to the definition of "terms and conditions of employment" in AS 23. 40.250(7) and concluded: "These provisions, standing alone, clearly would make both group life and health insurance benefits and retirement benefits subject to collective bargaining since they both are 'fringe benefits.' This also fits the analytic distinction between matters subject to collective bargaining and those not subject to bargaining adopted by the Alaska Supreme Court in Kenai Peninsula Borough School Dist. v. Kenai Peninsula Education Ass'n., No. 1537 (Alaska 1977)." (underscore in original opinion). The Attorney General's opinion then reiterated the *Kenai I* test that an item is subject to bargaining "the more it deals with the economic interests of employees and the less it concerns questions of fundamental policy."

The Attorney General expressed the belief that,

> [b]ecause health insurance deals with the economic interests of employees and does not deal with fundamental policy, because AS 39.30.090 authorizes the Department of Administration to obtain 'a policy or policies,' and because AS 39.30.090 does not specify what levels of coverage or benefits must be included in the policy (or policies) obtained, we believe the issue of group life and health insurance benefits is negotiable under PERA. To the extent the cost of this negotiated coverage exceeds what the State would have paid under its employer-sponsored plan, the negotiated coverage is subject to legislative approval under AS 23.40.215.

(Alaska A.G. Op. No. 3 at 1).

The Attorney General then turned to the question of retirement benefits:

> The negotiability of retirement benefits is more complex. At the outset, it appears clear that retirement benefits afforded under PERS are not negotiable. Inclusion in PERS is a condition of employment for state employees, and contributions to it are mandatory. AS 39.35.120(b); AS 39.35.170. Given these statutory provisions, we believe the legislature intended the statutory provisions of PERS to apply to all state employees, and benefits under PERS may not be negotiated under PERA.
>
> Under the Kenai Peninsula Borough School Dist. analysis, changes in public employee retirement benefits involve questions of fundamental public policy.

(*Id.* At 1-2) (underscore in original).

ACOA contends that the Attorney General's opinion, relied on by the State, is flawed for several reasons and should be given little, if any weight. The State argues that from 1978, when the Attorney General issued the opinion, until ACOA's 2006 request to bargain retirement benefits, no union has ever contested the validity of the opinion. Further, the State asserts that under *Allison v. State*, 583 P.2d 813 (Alaska 1978), attorney general's opinions should be given great weight in matters of statutory construction.

The Alaska Supreme Court has analyzed the weight to be given opinions of Alaska's Attorney General. "In general, the attorney general's opinion is entitled to 'great weight,' because the attorney general is 'the officer charged by law with advising the officers charged with the enforcement of the law as to the meaning of it." *Myers v. Alaska Housing Finance Corporation*, 68 P.3d 386, 392 n.25 (Alaska 2003), citing *Allison v. State*, 583 P.2d 813, 816-17 n. 15 (Alaska 1978) (quoting *Smith v. Mun. Ct. of Glendale Jud. Dist.*, 167 Cal. App. 2d 534, 334 P.2d 931, 935 (Cal. App. 1959). However, in *State v. Dupier*, 118 P.3d 1039, 1050 (Alaska 2005), the Court held that "[t]he weight accorded to opinions of the Attorney General is largely within our discretion. In general, they are not controlling but are entitled to some deference." *State v. Kenaitze Indian Tribe*, 83 P. 3d 1060, 1066 n. 22 (Alaska 2004). The Court has also held that opinions of the Attorney General "do not have precedential effect . . . ." *Greenpeace, Inc., v. State*, 79 P.3d 591, 596 n.26 (Alaska 2003). Finally, the court may consider the Attorney General's opinions "for guidance." *Grimes v. Kinney Shoe Corporation*, 938 P.2d 997, 1000 n.7 (Alaska 1997).

The Alaska Supreme Court has not yet ruled specifically on whether public employee retirement benefits are a mandatory subject of bargaining. As noted, other jurisdictions have addressed this issue. It seems clear that retirement and other pension-type benefits are considered a fringe benefit or term of employment – and therefore a mandatory subject of bargaining -- at least regarding private pensions, both in cases before the NLRB and in the federal courts.

Under the opinions of the Alaska Supreme Court, we find we must give some deference to opinions of the Attorney General, and we will consider the opinions for guidance, but they do not have precedential value. However, we find no other Alaska legal authority that specifically addresses the negotiability of public employee retirement benefits. On this basis, we give weight to the 1978 opinion. Still, answering the question whether retirement benefits must be bargained is indeed more complex than the analysis provided by the Attorney General.

At the outset, we disagree with the Attorney General's opinion insofar as it concludes that "health insurance does not deal with fundamental policy" and only deals with economic interests of employees. We believe that the question of the level of medical coverage that the Public Employees' Retirement System provides for public employees not only raises important questions for public employees and public employers from an economic standpoint, but it also goes to the very heart of public policy regarding the extent of medical coverage public employers should or could provide for members of their retirement programs. In our experience, medical costs have risen dramatically the past ten years. The question of how much public employers can or are willing to pay for medical costs deals with basic public policy.

While the Attorney General in 1978 found it apparently "clear" that retirement benefits

were not a fringe benefit or a mandatory subject of bargaining, the Alaska Supreme Court expressed more prudence when analyzing whether a seemingly less significant issue – salary range assignments – was a mandatory subject of bargaining, or not. "Thus, on the issue of salary range assignments, employee and governmental interests substantially overlap. It is precisely this overlapping of interests that we recognized when we recently called the problem of categorizing the issue a 'close and difficult question.'" *Alaska Public Employees Association v. State*, 831 P.2d 1245, 1250 (Alaska 1992), citing *State v. Public Safety Employees Ass'n*, 798 P.2d 1281, 1287 (Alaska 1990). Categorizing retirement benefits is likewise a close and difficult question.

If we relied on cases and statutes from other states and from the federal courts, the term "fringe benefits" or "terms and conditions of employment" under PERA would include retirement benefits. The Attorney General even suggested such a conclusion. Based on our review of federal case law, the private sector clearly deems retirement benefits a mandatory subject of bargaining. State law is more mixed. Although some states exclude retirement benefits from the definition of "fringe benefits" and from mandatory bargaining subjects, they do so via specific statutory exclusion. The Public Employment Relations Act (PERA) specifically includes "fringe benefits" among mandatory subjects of bargaining, but it does not explicitly exclude retirement or other benefits from the definition of "fringe benefits" or from mandatory subjects.

The extent of retirement benefits a public employer provides for its public employees carries significant policy considerations. Retirement benefits also have economic implications for both employers and employees. The question then gets down to whether economic or policy issues prevail with respect to retirement benefits, pursuant to the *Kenai I* test.

There are clearly economic implications for public employees regarding retirement benefits and statutory alterations to those benefits. Public employees contribute to a retirement system that is constitutionally protected. The employees reap the benefits of those contributions when they retire. The amount and type of benefits they receive upon retirement clearly impacts their economic well-being. Legislative changes to the retirement system could increase or decrease retirement benefits for employees hired after the effective date of such changes, but benefits for already-hired employees are constitutionally protected and therefore may not be diminished. This protection creates a significant future financial obligation for public employers.

We have a concern similar to that expressed by the Attorney General in 1978: "From both policy and administrative viewpoints, we believe that a single, unified system of group life and health insurance benefits and retirement benefits for public employees is desirable." (Alaska A.G. Opinion No. 3, at 2). We believe that if retirement benefits were a mandatory bargaining subject, the result could be a wide array of differing retirement plans, not only from the state employee level, but also from the other 159 participating public employers. We find such an assortment of plans would not further the policy of promoting "harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government." AS 23.40.070.

We believe that an orderly, constitutionally guaranteed system of retirement benefits is

better left to government and the political process and not to negotiation through collective bargaining. The policy considerations are substantial and complex. We conclude that under *Kenai I*, retirement benefits have more significant policy implications than they have economic implications.

Therefore, retirement benefits are not a bargainable subject for negotiation.[10] ACOA's complaint is denied and dismissed on this basis. We will determine "effects" bargaining in the next section on waiver.

2. Assuming retirement benefits are a mandatory subject of bargaining, did ACOA waive its right to bargain the statutory change to retirement benefits by failing to request bargaining for an unreasonably lengthy period after enactment of the statutory change?

The State argues that even if retirement benefits are deemed a fringe benefit or otherwise a mandatory subject of bargaining, ACOA waived the right to bargain a change when it failed to request bargaining on this issue during the period the parties bargained for a new collective bargaining agreement. We have concluded that retirement benefits are not a fringe benefit or otherwise mandatorily bargainable subject under the Public Employment Relations Act (PERA). However, assuming the benefits were a mandatory subject, and ACOA had a right to bargain the benefits change, we would conclude the State committed an unfair labor practice under AS 23.40.110(a)(5) and (a)(1) because it refused to bargain the change to retirement benefits.[11] Even so, the State's refusal may be excused if ACOA waived its right to bargain the benefits change.

In *Hardin and Higgins, The Developing Labor Law*, the authors discuss waiver in the context of discontinuance of pension contributions: "In general, if the employer gives reasonable notice of its intention to discontinue pension contributions, and the union fails to request bargaining regarding that change, the union waives its right to bargain over the change." *1 The Developing Labor Law* 1176 (Fourth Edition 2001). The Alaska Supreme Court has defined waiver as "the intentional relinquishment of a known right." *Milne v. Anderson*, 576 P.2d 109, 112 (Alaska 1978). The Court added:

> However, waiver is: 'a flexible word, with no definite, and rigid meaning in the law . . . . While the term has various meanings dependent upon the context, it is, nevertheless, capable of taking on a very definite meaning from the context in which it appears, and each case must be decided on the facts peculiar to it.' *United States v. Chichester*, 312 F.2d, 281-82 (9th Cir. 1963) [FN5] See also 5 W. Jaeger, *Williston on Contracts*, § 678, pp. 238-44 (3d ed. 1961). A waiver can be accomplished either

[10] Despite our conclusion in this decision and order, we concur with the 1978 Attorney General's opinion and the Alaska Supreme Court that clarification by the Legislature of this and other mandatory subjects would be helpful to employers and employees who participate in PERS.

[11] AS 23.40.110(a)(5) requires a public employer "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." Therefore, the refusal to negotiate in good faith over terms and conditions of employment with the exclusive representative of a bargaining unit may constitute an unfair labor practice under the Public Employment Relations Act. In addition, "[c]onduct that violates AS 23.40.110(a)(5) can also interfere with rights protected under AS 23.40.110(a)(1)." *Alaska Community Colleges' Federation of Teachers, Local 2402, AFT, AFL-CIO v. University of Alaska,* Decision and Order No. 191, at 8 (Sept. 26, 1995) *aff'd* 3 AN-95-9083 CI (Alaska Super. Ct. September 26, 1995).

> expressly or implicitly. An implied waiver arises where the course of conduct pursued evidences an intention to waive a right, or is inconsistent with any other intention than a waiver, or where neglect to insist upon the right results in prejudice to another party. (citations omitted). To prove an implied waiver of a legal right, there must be direct, unequivocal conduct indicating a purpose to abandon or waive the legal right, or acts amounting to an estoppel by the party whose conduct is to be construed as a waiver. (citations omitted).

Id., 576 P.2d 109, 112. *See also Anchorage Chrysler Center, Inc. v. Daimlerchrysler Corporation*, 129 P.3d 905, 917 (2006) ("But the standard for an implied waiver is high and factual findings are required.")

We find evidence in the record of an implied waiver. Business Agent Brad Wilson admitted that ACOA did not request bargaining of the change to the Tier IV plan during the 2005 – 2006 negotiating period, despite the fact ACOA was aware of the enactment of the legislation. Wilson testified that ACOA contemplated -- but did not -- raise the issue. Wilson further testified that ACOA hoped to overturn the change to the defined contribution plan with legislation. Wilson said they felt "very strongly" that they could overturn the bill before the effective date of July 1, 2006. ACOA's failure to raise the issue during the 2005 – 2006 negotiations period constitutes a waiver.

ACOA contends that the parties' collective bargaining agreement also requires the parties to negotiate the changes to Tier IV. Article 32.3 of the parties' 2004 - 2006 collective bargaining agreement provides: "In the event of any enactment by the Legislature, which creates conditions not specifically covered by this Agreement, the parties agree to confer immediately for the purpose of arriving at a mutually satisfactory supplement covering such action. Such supplement shall become a part of this Agreement." (Jt. Exh. I at 67).

AS 01.10.070 describes how and when a bill becomes law and is enacted. It provides, in subsection (f): "In this section . . . . (4) 'becomes law' means is enacted; 'enactment' occurs when any one of the following takes place: (A) a bill which is passed by the legislature is signed by the governor; (B) the period specified in art. II, § 17 of the Alaska Constitution expires without gubernatorial action; (C) the legislature overrides the governor's veto of a bill[.] The governor signed Senate Bill 141 into law on July 27, 2005. We find July 27, 2005, is the date of enactment.

ACOA did not request bargaining from the start of negotiations in August 2005 until July 28, 2006, some 28 days after Senate Bill 141 became effective, and one day after the State representatives signed the new collective bargaining agreement. ACOA argues that,

> [w]aiver must be clear and explicit, and the contract language is neither. Further, the agreement expressly provides for negotiation should there be a legislative enactment. The State attempts to weave a web of sophistry by claiming the Association should have acted in the last round of bargain[ing] because the legislation had passed the Legislature. The only date that matters, if it matters at all, is the effective date of the legislation, which was July 1, 2006.

(ACOA February 14, 2007, Closing Argument at 9).

We find that the date that matters is July 27, 2005, the date of enactment. ACOA was aware of the Tier IV statutory change when Senate Bill 141 was enacted by the Governor's signature. ACOA contemplated, but did not request bargaining on this issue for approximately one year after the bill's enactment. Under the 2004 to 2006 collective bargaining agreement, ACOA failed to "confer immediately" after enactment. We find this length of delay constitutes direct conduct of waiver of the request to bargain the statutory change to retirement benefits, which the State unilaterally implemented without negotiation. Therefore, even if we were to find that retirement benefits are a mandatory subject of bargaining, we would dismiss ACOA's complaint based on the State's assertion of a waiver defense. Having concluded that waiver is a valid defense on the obligation to bargain a mandatory subject, we also find the waiver defense valid for "effects" bargaining for the 2006 to 2009 collective bargaining agreement.

Moreover, we do not find that Article 32.3 of the parties' current collective bargaining agreement required the parties to confer on Senate Bill 141 because we have found the enactment date to be July 27, 2005. The parties were already in negotiations in August of 2005, and ACOA did not seek to bargain the matter.

CONCLUSIONS OF LAW

1. The State of Alaska is a public employer as defined by AS 23.40.250(7) and the Alaska Correctional Officers Association is a labor organization under AS 23.40.250(5).

2. The Alaska Labor Relations Agency has jurisdiction to consider and hear unfair labor practice charges under AS 23.40.110.

3. Complainant Alaska Correctional Officers Association has the burden to prove each element necessary to its cause by a preponderance of the evidence.

4. Fringe benefits do not include retirement benefits under the Public Employment Relations Act.

5. Retirement benefits are not a fringe benefit or term and condition of employment under AS 23.40.250(9) and are therefore not a mandatory subject of bargaining.

6. Even if retirement benefits were deemed a fringe benefit and mandatory bargaining subject, the Alaska Correctional Officers Association waived its right to bargain over the statutory change to retirement benefits under the Public Employees' Retirement System, and over the effects of the change for the 2006 to 2009 collective bargaining agreement.

7. The State of Alaska did not violate AS 23.40.110(a)(5) and (a)(1) when it refused to bargain the statutory change to retirement benefits enacted on July 27, 2005, and effective July 1, 2006.

8. The Alaska Correctional Officers Association failed to prove its case by a preponderance of the evidence.

ORDER

1. The unfair labor practice complaint by the Alaska Correctional Officers Association is denied and dismissed.

2. The State of Alaska is ordered to post a notice of this decision and order at all work sites where members of the bargaining unit affected by the decision and order are employed or, alternatively, personally serve each employee affected. 8 AAC 97.460.

ALASKA LABOR RELATIONS AGENCY

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Gary P. Bader, Chair

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Dennis Niedermeyer, Board Member

APPEAL PROCEDURES

This order is the final decision of this Agency. Judicial review may be obtained by filing an appeal under Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of mailing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of *Alaska Correctional Officers Association v. State of Alaska*, Case No. 06-1481-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 10th day of May, 2007.

_____
Margaret L. Yadlosky
Human Resources Specialist I

This is to certify that on the 10th day of May, 2007, a true and correct copy of the foregoing was mailed, postage prepaid to:
Art Chance, ACOA
William Milks, State

_____
Signature