

1 Art Chance
2 Labor-Management Resolutions
3 8486 Thunder Mtn. Rd.
4 Juneau, AK 99801

5 The Alaska Labor Relations Agency

6 In the Matter of:) Case No.: No. 06-1481-ULP
7 Alaska Correctional Officers' Association,)
8 Complainant,) COMPLAINANT'S PRE-HEARING BRIEF
9 and)
10 State of Alaska,)
11 Respondent)

12
13 "RETIREMENT" BENEFITS ARE BARGAINABLE

14 First, some semantics: the Complainant is using the term retirement as a shorthand term.¹

15 Webster's Collegiate defines "retire" as "to withdraw from one's position or occupation :
16 conclude one's working or professional career" and retirement as "a : an act of retiring : the state
17 of being retired b: withdrawal from one's position or occupation or from active working life."

18 Tellingly, the State distinguishes the scheme established July 1, 2006, by calling it the "Defined
19 Contribution Retirement Plan" in contrast to the prior "Tiers" of the Public Employment
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22 _____
23 ¹ The Association does not admit that the scheme enacted on July 1, 2006, is a retirement plan as that term is
24 commonly understood to mean a pension or other recurring payment for a term after an employee's withdrawal from
25 active work. The State's new scheme is really only a pre-tax savings plan similar to a private sector 401(k); at the
end of an active work career, the employee just gets a check. State rules do not allow for a gold watch as well.

1 Retirement System (PERS). For purposes of the matter at issue, Complainant will use the
2 generalized terms retirement or retirement benefits to include those rights and benefits that
3 accrue from “one’s position or occupation or from active working life...” but which are available
4 only to a person after “...withdrawal from one’s position or from active working life.” Such
5 rights and benefits include but are not limited to: retirement eligibility age or length of service;
6 periodic monetary payments; lump sum payments; rehire rights or preferences; retention of rights
7 or privileges, e. g., seniority accrual and seniority rights; rights to reassignment, promotion, or
8 transfer, eligibility for health or life insurance benefits; and the nature and value of health or life
9 insurance benefits.

10 This Agency holds, and the Courts have concurred, that great weight will be given to National
11 Labor Relations Board (NLRB) decisions. The duty to bargain over wages, hours, and other
12 terms and conditions of employment is substantively identical between the PERA and the
13 National Labor Relations Act (as amended). Consequently, this Agency should give great
14 weight to the NLRB’s decisions on the matter at issue. Since at least 1948, the NLRB has held
15 that pensions and health insurance for retirees are bargainable subjects (See, e.g., *Inland Steel*
16 *Co. v. NLRB*, 170 F 2d 247 and its progeny). The NLRB holds that these are matters of
17 compensation and fall within the ambit of the duty to bargain wages. The PERA is far more
18 explicit in that it specifically includes “fringe benefits” within the duty to bargain at AS
19 23.40.250 (9).
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21 The State avers that it is relieved from the duty to bargain retirement; the State errs. The opinion
22 of the Attorney General was anything but confident when issued in 1978, calling as it does for
23 Legislative clarification. For reasons known only to those who made the decisions not to
24 challenge it, the opinion has remained sacrosanct for almost thirty years, but it is wrong. First,
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1 while admitting the question is complex, the Attorney General boldly states that it is clear that
2 “retirement benefits afforded under PERS are not negotiable.” Let us examine his reasoning: he
3 categorically states that “inclusion in PERS is a condition of employment for state employees,
4 and contributions to it are mandatory.” That was untrue on its face at the time and remains so
5 today, nor is the fact that participation in PERS is mandatory for most employees determinative
6 of the issue now before this Agency. The accepted definition of an employee is a person paid a
7 salary or wage by the State (AS 39.25.990(4)), and this Agency has accepted this definition for
8 purposes of determining whether or not a person is a “public employee” for purposes of coverage
9 by PERA. Using that definition, the “temporary” employees of the State under the scheme in
10 effect in 1978 were employees of the State but were not participants in PERS. Likewise,
11 nonpermanent employees under the scheme in effect today are employees but do not participate
12 in PERS by operation of the PERS statute which limits participation to permanent employees.
13 PERS participation by employees in the “exempt service” (AS 39.25.110) has varied over the
14 years, especially temporary exempt employees employed under authority of AS 39.25.110(9) for
15 “temporary and special inquiries” who have at times been covered, at times not, and at times
16 some covered and some not. Currently, “temporary exempts” are included in PERS only by
17 authority of a determination of a former director of personnel, which determination is of
18 questionable legal vitality inasmuch as the State Personnel Act (AS 39.25 *et seq.* confers no
19 authority to make such determinations upon the director of personnel or the Personnel Board (AS
20 39.25.050-070).

21
22 The Attorney General candidly admits that the plain meaning of AS 23.40.250(7) “...standing
23 alone, clearly would make both group life and health insurance benefits and retirement benefits
24 subject to collective bargaining since they both are ‘fringe benefits.’” He then goes on to assert
25 that “[U]nder the Kenai Peninsula Borough School Dist. Analysis, changes in public employee

1 retirement benefits involve questions of fundamental public policy.” Kenai Peninsula Borough
2 School Dist. v. Kenai Peninsula Ed. Assn., 572 P.2d 416, 97 LRRM (BNA) 2153 (Alaska 1977),
3 hereinafter Kenai He opines that since “Article XII, Section 7 of the Alaska Constitution ...”
4 provides: “Membership in employee retirement systems of the State ... shall constitute a
5 contractual relationship. Accrued benefits of these systems shall not be impaired.” ... retirement
6 benefits are not negotiable under PERA.” He candidly admits that he “cannot be certain,” but
7 believes “... that the Alaska Supreme Court would conclude, as we have, that retirement benefits
8 are not negotiable under PERA.” On this thin reed, the State has refused to bargain retirement
9 benefits for almost thirty years. It was wrong then, and it is wrong now. Kenai was decided
10 under the now superseded teacher bargaining authorization at AS 14.20.550. However, the
11 balancing test articulated in Kenai was adopted in Alaska Public Employees Ass’n. v. State, a
12 bargaining duty case decided under the PERA, 831 P.2d. 1245 (Alaska, 1992), hereinafter APEA
13 v. State, in which the Alaska Supreme Court considered this Agency’s Decision and Order 110.²
14 The Supreme Court further elaborated on the contours and limits of the Kenai balancing test in
15 Moore v. State, Dept. of Transp. and Public Facilities, 875 P.2d 765 (Alaska, 1994), hereinafter
16 Moore.

17
18 We turn now to analyzing how the Attorney General’s opinion would actually fare under the
19 balancing test articulated in Kenai and its progeny. The fundamental premise of the balancing
20 test is that the more a matter relates to the “...economic well-being of the individual ...”
21 employee the more it is susceptible to bargaining. Retirement benefits unquestionably go to the
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23 ² This writer has some familiarity with the matters at issue in D & O 110, inasmuch as he developed the State’s
24 theory and, in concert with Assistant Attorney General Susan Cox, wrote the State’s briefs to this Agency, though,
25 as was required in that day, they are signed by then-Director of Labor Relations, Bruce Cummings.

1 economic benefit of the employee. Since the State does not participate in the federal Social
2 Security System, State retirement is the only way directly related to employment that a State
3 employee can insure his economic well-being after he withdraws from active working life. It is
4 Black Letter Law under the federal law that retirement benefits are bargainable as wages. It is
5 even clearer under PERA which includes fringe benefits in the bargaining duty and the Attorney
6 General candidly admits that a plain reading of the bargaining duty would require the State to
7 bargain retirement benefits. Consequently, the State avers that its public policy obligations
8 remove retirement benefits from the ambit of the duty to bargain.

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10 That proposition is worthy of very close examination. The US Supreme has examined a general
11 notion of public policy exceptions to collective bargaining processes and held:

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13 We must then decide whether a contractual reinstatement requirement would fall within
14 the legal exception that makes unenforceable "a collective-bargaining agreement that is
15 contrary to public policy." [W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766, 103](#)
16 [S.Ct. 2177, 76 L.Ed.2d 298 \(1983\)](#). The Court has made clear that any such public policy
17 must be "explicit," "well defined," and "dominant." *Ibid.* It must be "ascertained 'by
18 reference to the laws and legal precedents and not from general considerations of
19 supposed public interests.'" *Ibid.* (quoting [Muschany v. United States, 324 U.S. 49, 66,](#)
20 [65 S.Ct. 442, 89 L.Ed. 744 \(1945\)](#)); accord, [Misco, supra, at 43, 108 S.Ct. 364.](#)

21 **Eastern Associated Coal Corp. v. United Mine Workers of America,**
22 **Dist. 17, 531 U.S. 57, 121 S.Ct. 462 U.S., 2000.**

23
24 In the instant matter, we are not dealing with "... general considerations of supposed public
25 interests," we are dealing with the explicit language of the Alaska Constitution and the Public

1 Employment Relations Act. The Association submits that the public policy implications in this
2 matter are “explicit,” “well defined,” and “dominant.” In this matter, we can be guided by the
3 positive law that defines the public policy that impinges on this question. On the one hand, it is
4 given that whether defined as wages or fringe benefits, retirement benefits are a bargainable
5 subject under the bargaining duty language of PERA. On the other hand, the Association does
6 not contest that the State has some right to refuse bargaining on public policy grounds. So, the
7 question turns on just what are the “well-defined” public policy grounds on which the State may
8 rely to refuse bargaining.

9
10 First, AS 23.40.075 explicitly articulates certain subjects that are removed from bargaining.
11 Second, various statutes articulate exceptions from bargaining, impose limitations on bargaining,
12 or articulate a specific duty to bargain, e.g., AS 39.27.011, the State Pay Plan, and several others.
13 Clearly the Legislature knows how to remove a subject from bargaining or commit a subject to
14 bargaining and has done so on numerous occasions. The Attorney General also opines that he
15 “... believes(s) the Legislature intended PERS to apply to all state employees“ Well, they
16 did not apply to all State employees even when the opinion was written. In addition to those
17 specifically excluded or subject to specific exclusions, e.g., State-employed teachers and marine
18 highway employees, the PERS statutes by their own terms exclude all temporary or non-
19 permanent employees.³ Interestingly, the State seems to have no aversion to bargaining
20 retirement benefits with at least one of the marine highway units as evidenced by its agreement
21 with the Marine Engineers providing PERS retiree health insurance to employees who retire

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23 ³ One may be permitted to wonder in light of this fact where former director of personnel, Bev Reaume, found the
24 authority to confer PERS benefits on §110(9) Exempt employees who are by statute temporary
25 employees.(Complainant’s Exhibit 1)

1 under MEBA's union sponsored retirement plan.⁴ (Complainant's Exhibit 2) Also interesting is
2 the fact that there is no record of either the 1997 or 1999 agreements having been submitted to or
3 approved by the Legislature pursuant to AS 23.40.215.

4
5 It is noteworthy that despite calls from the Attorney General and the Courts, the Legislature has
6 never explicitly removed retirement benefits from bargaining. The changes in the State's
7 retirement schemes leading to this dispute were made in a comprehensive amendment to the
8 PERS statutes and amid much controversy and debate. Had it desired to do so, the Legislature
9 could have explicitly submitted retirement to bargaining or explicitly removed it from
10 bargaining. The PERS statutes remain silent on this issue. Consequently, the only place upon
11 which the State can stand in this dispute is the language at AS 23.40.250 (9), which exempts
12 those policies "describing the essential functions and purposes of a public employer", from the
13 bargaining duty.

14
15 In AS 23.40.250(9) we have an explicit and well-defined articulation of public policy; a
16 bargaining proposal that impinges on a policy "describing the essential functions and purposes of
17 a public employer" is excluded from the ambit of mandatory bargaining. In Article XII, Section

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19 ⁴ Vessel employees covered by a union sponsored plan are specifically excluded from PERS coverage by AS
20 39.35.680(22)(C)(v). The PERS statute goes on to provide that vessel employees may be included in PERS by
21 collective bargaining agreement. However, AS 39.35.535 limits "Medical Benefits" to persons receiving a monthly
22 benefit from PERS. The State has bargained with MEBA to circumvent this requirement by paying PERS retiree
23 medical benefits to persons who are not receiving a PERS monthly benefit but rather receive benefits from the union
24 sponsored plan. These agreements were signed by the commissioner of administration or his designee who is by law
25 the administrator of the PERS system and is presumed to know the System's legal requirements.

1 7 of the Alaska Constitution we have that explicit articulation of public policy. Any union
2 proposal that impairs the “contractual relationship” mandated by the Constitution or diminishes
3 the “accrued benefits” thereof is without the ambit of the mandatory duty. That is not the same
4 as a blanket denial of any duty to bargain retirement benefits.

5
6 The Association concedes that should it make a proposal that would impair the contractual
7 relationship or impair the accrued benefits; the State would be within its rights to refuse to
8 bargain or bargain only permissively. The Association has made no such proposal; the
9 Association has made no proposal at all, since the State has only offered a blanket refusal to
10 bargain retirement benefits at all.

11
12 There is a clearly articulated public policy; a contract provision that would impair the State’s
13 contractual relationship with participants in a retirement program or diminishes the value of the
14 benefits that might accrue to the participants is within the ambit of the State’s public policy right
15 to refuse bargaining. That, however, is the limit of the State’s right to refuse bargaining on
16 public policy grounds. A general refusal to bargain retirement benefits is a *per se* unfair labor
17 practice. The State, and ultimately this Agency and the Courts, must analyze a specific proposal
18 to make a determination as to whether or not that proposal might impinge on the “general
19 policies describing the essential functions and purposes...” of the State. In the instant matter, the
20 State has simply made the naked assertion that it is not obligated to bargain retirement benefits
21 and has refused to negotiate or consider proposals, and, thus, has committed a *per se* violation of
22 AS 23.40.110(a)(5). Hardin, 773, See also, NLRB v. Katz, 369 US 736, 60 LRRM 2177 (1962).

23
24 The Courts have not provided bright line guidance on what subjects are within the ambit of the
25 essential functions exclusion at §250(9). Thus, the Agency must be guided by the balancing test

1 first articulated in Kenai and expanded upon in APEA v. State. In the Attorney General's
2 defense, as he wrote his opinion in 1978, he did not have the benefit of any guidance from the
3 Courts on the duty to bargain under PERA, inasmuch as Kenai was decided under the now-
4 defunct teacher bargaining law. APEA v. State squarely confronted the same issue as that
5 confronting this Agency; a union bargaining demand alleged to be in conflict with a
6 Constitutional provision. In APEA v. State, the Court confronted the Constitutional requirement
7 of a merit system of employment as articulated in the State Personnel Act. As the Court
8 admitted, the merit system is enormously complex and the Constitution only dictates that there
9 be a merit system without defining it. In the instant matter, the Constitution does not mandate
10 that there be a State retirement system but does dictate that should there be one membership in
11 the system "shall be a contractual relationship" and that "accrued benefits ... shall not be
12 diminished or impaired." This Constitutional constraint is the limit of the State's ability to resort
13 to the "essential functions and purposes" exception to the duty to bargain retirement. Under the
14 Supreme Court's APEA v. State analysis, some proposals regarding retirement benefits may be
15 mandatory, others permissive, and in the unlikely event that the Association should make such a
16 proposal, some may be illegal, but that determination must be based on an analysis of the
17 specific proposal in light of the Supreme Court's balancing test.

18 19 THE STATE'S UNILATERAL CHANGE IS UNLAWFUL

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21 It is undisputed that the Association's agreement has no provision relating to retirement, nor did
22 the Association make or receive any proposal relating to retirement in the most recent (or any
23 other) round of bargaining. If any aspects of retirement benefits are lawfully bargainable, the
24 State is barred from unilaterally implementing changes in the retirement system "without
25 affirmative assent by the union" (Hardin, 1177; citing Mead Corp., Fine Paper Div. 318 NLRB

1 201, See, also, Allied Mills Inc., 82 NLRB 854, 23 LRRM 1632 (1949)). The Agency must note
2 that this decision was made in the face of a zipper clause that stated that the agreement “is
3 complete” and “excludes all matters from further bargaining.” It is most noteworthy that the
4 Board imposed the same bar on the employer as on the union where the zipper clause foreclosed
5 further bargaining; a foreclosure of bargaining prohibits unilateral change (See also, Trojan
6 Yacht, 319 NLRB 741, 150 LRRM 1321 (1995). Thus, even if the State is correct in its assertion
7 that the zipper clause, Article 30, prohibits the Association from bargaining retirement benefits,
8 it likewise prohibits the State from unilaterally changing retirement benefits and renders the
9 State’s unilateral implementation of its Defined Contribution scheme a *per se* unfair labor
10 practice and the State must return to the *status quo ante*.

11
12 THE EFFECTS OF THE CHANGE IN RETIREMENT BENEFITS ARE BARGAINABLE

13
14 Whether or not this Agency or the Courts should ultimately conclude that retirement benefits are
15 a mandatory subject of bargaining, it is uncontestable that the effects of the July 1, 2006,
16 unbargained change are mandatorily bargainable as to their effects on members of the bargaining
17 unit, especially, *inter alia*, as the changes relate to hiring, seniority, promotion, transfer, and
18 nondiscrimination. (Hardin, 1163, See also, Allied Chemical & Alkali Workers Local 1 v.
19 Pittsburgh Plate Glass Co., 177 NLRB 911, 71 LRRM 1433 (1969) and its progeny for a
20 discussion of the “vitally effects” doctrine.)

21
22 It is so well accepted that seniority, promotion, and transfer are mandatory subjects that litigation
23 on these subjects is rare. See, generally Patrick Hardin and John E. Higgins, Jr., *The Developing*
24 *Labor Law*, Fourth Edition (BNA Books, Washington), 1202 – 1205, hereinafter Hardin. As is
25 typical, the agreement between the State and the Association has specific provisions relating to

1 these subjects at Article 9. The Association will show that the current year costs to an operating
2 department are so much lower for an employee in the Defined Contribution scheme than for an
3 employee in the Defined Benefit plan that this cost advantage must come to have an effect on a
4 manager's decisions regarding hiring, promotion, and transfer.⁵ State personnel policies and
5 most State labor agreements, including the Association's, generally give the employer discretion
6 to choose whether to promote from within or recruit from without State service. Likewise, the
7 employer has considerable discretion as to whether to accept a transfer or make a new hire or
8 promotion. The provisions of the Association's current agreement were bargained at a time
9 when there was no cost difference in current year operating costs between employees in the
10 various "Tiers" of PERS, and the Defined Contribution scheme was not yet enacted.⁶

11 Consequently, the Association had neither reason nor opportunity to bargain guarantees that its
12 members in the Defined Benefit plans would receive adequate consideration in the face of much
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17 ⁵ The Association only received the State's response on January 4, the day before the agreed upon filing date for
18 briefs and evidence in this dispute, three days before the agreed upon extension date. Further, the State's data is
19 downloaded from its automated budgeting system into Excel spreadsheets in a format neither readily verifiable nor
20 reproducible on normal office computers and printers. Consequently, the Association will corroborate this evidence
21 at hearing.

22 ⁶ There was and is a significant difference in the cost to the PERS system for members of Tiers I – III, but that
23 difference is reflected in the aggregate contribution rate that the employer makes on behalf of those employees; there
24 is no distinction in the ongoing or current year operating cost between Tiers I – III. There is a dramatic difference
25 between the current year costs of Tier I – III employees and those in the new Defined Contribution scheme.

1 cheaper new hires subject to the Defined Contribution scheme.⁷ See, Attachment A,
2 Complainant’s Exhibit 3, for a cost comparison.

3
4 Likewise, the Association’s agreement contains a non-discrimination clause at Article 6 that
5 includes age among its protected classes. It is likely that a participant in Tiers I – III will be
6 older than a participant in the Defined Benefit scheme. This fact gives the Association an
7 objective basis for believing that the cost advantage of hiring younger employees in the Defined
8 Benefit scheme may lead the employer to discriminate against older workers (Hardin, 1223 –
9 24).⁸ As with hiring, transfer, and promotion, the Association has had no opportunity to bargain
10 the effects of this change on its membership.

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13 ⁷ Had the Association presumed that the Defined Contribution scheme would become law and attempted to make
14 proposals, it is unquestionable that the State would have relied on the Opinion of the Attorney General and refused
15 to bargain; that was considered to be the state of the law at the time.

16 ⁸ There is a further issue of discrimination that the Association does not specifically raise, inasmuch as this Agency
17 has held that the workings of the merit system are not within its authority (See, D & O 157, reversed on other
18 grounds). Nevertheless, one of the aims of the PERA is to “strengthen merit principles” AS 23.40.070. The State’s
19 merit principles are articulated at AS 39.25.010, among which are; (1) recruiting, selecting, and advancing
20 employees on the basis of their relative abilities;” and, “(2) equal treatment of applicants and employees with regard
21 only to consideration within the merit principles of employment ...” While the Moore court held that economics are
22 a valid consideration in whether or not the State may choose to use its own employees to perform a given body of
23 work, it is clear that where the State does perform the work, it must adhere to the merit principle as articulated in the
24 State Personnel Act. Selecting applicants and employees based on economic advantage rather than relative abilities
25 clearly violates the merit principle.

1
2 THE ASSOCIATION HAS NOT WAIVED ITS RIGHT TO BARGAIN
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4 The Association points the Agency to the express language of Article 30: "...each had the
5 unlimited right and opportunity to make proposals with respect to any subject or matter not
6 removed by law from the area of collective bargaining ..." (emphasis added). It has been the
7 State's position for almost thirty years that the matter of "retirement benefits" is "removed by
8 law" from collective bargaining. With the State's unilateral imposition of its new "retirement"
9 scheme, the Association has chosen to challenge the question of whether or not "retirement
10 benefits" are indeed "removed by law" from collective bargaining.

11
12 As is its right, this Agency has chosen to construe the current labor agreement and determine
13 whether or not the Association has waived its right to bargain. The Association submits that
14 even by common arbitral standards of construction absent the "removed by law" provision, it has
15 not waived its right to bargain the State's unilateral change of retirement benefits. Article 30, the
16 so-called zipper clause must be read in concert and harmonized with other contract provisions,
17 specifically with Article 32, "Superseding Effect of this Agreement." Article 32.2 states in
18 pertinent part: "This Agreement may be amended by supplemental agreements at any time
19 during the life of this Agreement. Should either party desire to negotiate a matter of this kind, it
20 shall notify the other party in writing of its desire to and of the specific subjects it wishes to
21 negotiate." That pretty much unzips the zipper clause! There is no limitation on the subjects
22 about which a party may "desire" to negotiate. The Association notified the State that it desired
23 to negotiate retirement benefits and the State refused, thus violating the labor agreement. Were
24 that not enough, Article 32.3, "Conditions Not Specifically Covered" explicitly requires the
25 parties to "confer immediately" should "... any enactment of the Legislature ..." create "...

1 conditions not specifically covered by this Agreement.” On July 1, 2006, the Legislature enacted
2 an entirely new retirement benefits scheme which fundamentally altered the economic interests
3 of the members of this bargaining unit and the assumptions which underlay the negotiations
4 leading to the agreement now in effect. Because of this Legislative enactment, the State incurs
5 an immediate duty to bargain this change not specifically covered by the agreement. By refusing
6 the Association’s request to bargain, the State violates Article 32.3.

7
8 The other common NLRB and arbitral standards are waiver by inaction or acquiescence. The
9 Association has neither been inactive nor acquiescent. The State implemented its unilateral
10 change in retirement benefits on July 1; the Association demanded bargaining on July 28. This
11 satisfies any reasonable standard of timeliness, including the timeliness standard in the grievance
12 procedure set out in the current agreement. Likewise, the Association has not acquiesced to the
13 State’s unilateral change as evidenced by its timely demand to bargain. As to the long duration
14 of the disputed AG’s opinion, this Association has no idea why representatives of many different
15 labor organizations over many years did not challenge the opinion. We may speculate that since
16 there was no direct impact on the State’s personal services budgets, the representatives were
17 willing to let retirement be the State’s problem. The new scheme has fundamentally changed
18 that; there will be a dramatic effect on personal services budgets as the result of the July 1, 2006,
19 changes. This Association must react to those changes in the fundamental economics of State
20 employment and the effects on the bargaining unit’s contractual rights.

21
22 **CONCLUSION**
23

24 Whether considered as a term and condition of employment under federal precedent or as a
25 fringe benefit under PERA, there is no doubt that retirement benefits are a mandatory subject of

1 bargaining; the Attorney General also admits as much. Consequently, the State's only defense to
2 a bargaining duty is the limited public policy exception at §250(9). The Association admits that
3 the State does indeed have some public policy prerogatives because of the Constitutional
4 guarantees inherent in the State's retirement system. That said, no reading of applicable law and
5 precedent gives the State the right to issue a blanket refusal to negotiate at all regarding
6 retirement benefits. Under the APEA v. State balancing test, it is entirely conceivable that some
7 proposals regarding retirement benefits might be mandatory, some permissive, and some illegal,
8 but any determination is totally fact specific. Consequently, the State must accept and consider
9 proposals regarding retirement benefits and should it determine that a specific proposal impinges
10 on its public policy prerogatives, it has remedy available through this Agency and the Courts
11 should persuasion not prevail.

12
13 Even if the State's retirement benefits are not mandatorily bargainable, the unbargained
14 unilateral changes effective on July 1, 2006, vitally effect the interests of members of the
15 bargaining unit in matters that are mandatorily bargainable. Consequently, the State must
16 bargain the effects of its changes on the seniority, transfer, promotion, and non-discrimination
17 provisions *inter alia*.

18
19 The Association has not waived its right to bargain retirement benefits and if the zipper clause is
20 interpreted to preclude the Association from bargaining, it must also be read to preclude the State
21 from making changes in the system or making changes that vitally effect the wages, hours, terms
22 and conditions of employment, or fringe benefits of members of the bargaining unit. That said,
23 the Association is confident that when the so-called zipper or waiver clause is harmonized with
24 other provisions of the agreement, the Agency will conclude that the State has violated the labor
25 agreement as well by refusing to bargain regarding retirement benefits.

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REMEDY SOUGHT

For the reasons set out herein and to be more fully developed at hearing the Alaska Correctional Officers' Association respectfully requests that the Alaska Labor Relations Agency find and determine that:

- The State has violated AS 23.40.110(a) (5) by refusing to bargain retirement benefits; and,
- The State has violated AS 23.40.110(a) (5) by unilaterally implementing changes in retirement benefits and must return to the *status quo ante*; and,
- The State has violated AS 23.40.110(a) (5) by refusing to bargain the effects of its unilateral changes in retirement benefits; and,
- The Association has not waived its right to bargain retirement benefits; and,
- The State has violated the labor agreement by refusing to bargain retirement benefits; and,
- The Association is entitled to other and further remedy as the Agency might find just and equitable under the circumstances.

Respectfully submitted this 8th Day of January, 2007, on behalf of Complainant, Alaska Correctional Officers Association by:

Art Chance
ACOA Representative