

JOSEPHSON LAW OFFICES, LLC

ATTORNEYS AT LAW
912 WEST SIXTH AVENUE
ANCHORAGE, ALASKA 99501
TELEPHONE (907) 276-0151
1-800-478-3508
FAX (907) 276-0155

JOE P. JOSEPHSON

JODY A. REAUSAW
OF COUNSEL

Date: May 24, 2009

**Opinion Letter Regarding the Effects of the 2009
Legislature's Failure to Appropriate Money
for the Arbitrator's Award in Interest Arbitration**

To Whom It May Concern:

I. *Scope of and Reason for This Opinion.*

I have been asked to consider the contention of the Commissioner of Administration, Hon. Annette Kreitzer, that the monetary terms of the arbitration award rendered on or about March 19, 2009, for Department of Corrections employees represented by Alaska Correctional Officers Association ("ACOA"), are null and void because the 2009 regular session of the Alaska Legislature has adjourned without approving those monetary terms and without appropriating funds to implement them.

II. *Conclusion.*

The contention of Commissioner Kreitzer is erroneous.

III. *Pertinent Facts.*

In March 2009, Arbitrator William Greer rendered his decision, following interest arbitration. The Department of Administration received the decision on March 19, 2009.¹ The Department, in the words of Commissioner Kreitzer, acknowledged that Arbitrator Greer's decision, coupled with provisions agreed upon by the parties,

"will, upon legislative approval, form a collective bargaining agreement in effect from July 1, 2009 through June 30, 2012."²

¹ See Memorandum from Annette Kreitzer, Commissioner of the Department of Administration, to Karen Rehfeld, Director, Office of Management and Budget, dated March 29, 2009.

² *Id.*

Therefore, the Department treated the decision and the agreed-upon provisions, as equivalent to a collective bargaining "agreement", as that term is used in AS 23.40.215(b), a subsection of the Alaska Public Employment Relations Act ("PERA"). In this regard, the Department was correct: the Supreme Court of Alaska has held repeatedly that subsection AS 23.40.215(b), requiring legislative approval, applies to arbitration awards. *Public Safety Employees Ass'n, Local 92, v. State*, 895 P.2d 980, 986 (Alaska 1995), *aff'd on rehearing*, 902 P.2d 1334 (Alaska 1995); *Fairbanks Police Department v. City of Fairbanks*, 920 P.2d 273, 274 (Alaska 1996).

Under AS 23.40.215(b), the Department of Administration must

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. . .".

Under the same statute, the Department, in order "to receive legislative consideration during that calendar year", must also submit the monetary terms of an agreement "no later than the 60th day of the legislative session.. ". *Id.*

The Legislature adjourned on April 19, 2009. (Under present law, as a result of the passage of 2006 General Election Ballot Measure No. 1, the Legislature's regular sessions are limited to 90 days). See AS 24.05.150. Thus, the Legislature, in the 2009 session, having received the monetary terms on the 60th day, had only half the time to consider the monetary terms that it would have had before General Election Ballot Measure became effective in 2007).

The Department of Administration did transmit a report as to the monetary terms of the "agreement" to the Honorable Mike Chenault, Speaker of the House, on March 29, 2009, on the 10th day from the date when the Department received the decision of Arbitrator Greer.³

³ Letter of March 29, 2009, from Commissioner Kreitzer to Speaker Chenault. With that letter, Commissioner Kreitzer attached a copy of her Memorandum to Karen Rehfeld, which set out in detail the monetary terms requiring appropriation.

The Legislature adjourned its First Session of the biennial legislature. It neither approved the agreement by appropriating the monetary terms nor disapproved the agreement by resolution.⁴

IV. *Reasons for Conclusion.*

A. By Law, Rule and Tradition, the Business of the First Session of the Legislative Biennium Carries over to the Second Session; the Commissioner's View Ignores That Law, Rule and Tradition.

1. AS 24.05.090. The pertinent statute, AS 24.05.090, provides that

"each legislature shall have a duration of two years and shall consist of a 'First Regular Session', which shall meet in the odd-numbered years, and a 'second Regular Session', which shall meet in the even-numbered years, and any special session or sessions that the governor or legislature may find necessary to call."

2. *Rule 47 of the Uniform Rules of the Legislature.*

Rule 47 of the Uniform Rules of the Legislature, originally adopted in 1981 and as amended, provides:

"Bills and resolutions introduced in the first regular session of a legislature which are not passed or not withdrawn, defeated, vetoed, or indefinitely postponed, carry over into the second regular session of the same legislature in the same reading or status they were in at the time of adjournment."

The Commissioner's view, were it to prevail, would be

⁴ According to Commissioner Kreitzer, "(p)ursuant to AS 23.40.215 the monetary terms of that agreement must be submitted to the Legislature for approval through appropriation or disapproval by resolution within 60 days for receipt of this report." Memorandum to Karen Rehfeld, March 29, 2009.

incompatible with legislative tradition and the Legislature's rules, because it would deprive the Legislature of the right to complete unfinished business in the second session. An arbitrator's award or a tentative agreement would be unique: all other business would carry over. Commissioner Kreutzer, as far as this writer is aware, has not cited any controlling authority to support her view.

Moreover, as pointed out above in footnote 4, Commissioner Kreitzer herself, in her memorandum of March 29, 2009, identified two possible courses of legislative action, to wit, appropriation of the necessary monetary amount for the first year of the contract, or "disapproval by resolution within 60 days of receipt of this report". Neither action has been taken by the legislature. Notwithstanding both her reference to "60 days of receipt of this report", and her statement that the Legislature could manifest its approval or disapproval in one of two ways, the Commissioner has now taken a different tack altogether, claiming that legislative inaction in 30 days destroys the monetary terms of the award.

B. The Commissioner's View Would Seriously Undermine PERA, and Have Major Consequences to Bargaining Units which Cannot Strike.

In addition to curbing legislative power and authority, the administration's view would seriously undermine the statutory scheme established in PERA. Given the brevity of legislative sessions, there are expected to be many future cases when unions and state government would labor through interest arbitration, and reach a conclusion, only -- if Commissioner Kreitzer's view were to prevail -- to find all of their work (and the arbitrator's work) rendered useless should the Legislature, given a very short number of days to consider a tentative agreement or an arbitrator's award, fail to either approve or disapprove an agreement or award before adjournment of the first session of a biennium. The result would be very wasteful of both governmental and bargaining unit dollars, and would create uncertainty, and harm employee morale -- results which are just what PERA was designed to avoid.

PERA declares that "to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government", "public employers" must

"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.

"(C)orrectional institution employees" do not have the right to engage in strikes. AS 23.40.200(b). For that reason, the law provides that if there is an impasse or deadlock, and mediation has been utilized without resolving the deadlock, "the parties shall submit to arbitration. . .". *Id.* According to the Supreme Court of Alaska, this section unambiguously extends the right to compulsory arbitration to employees who are forbidden from striking. *Alaska Public Employees Association v. City of Fairbanks*, 753 P.2d 725 (Alaska 1988). If an administration or a union can avoid the results of compulsory arbitration merely because of one legislative First Regular Session's failure to approve or disapprove those results, the right to compulsory arbitration becomes a matter of form rather than substance, especially in this era of statutorily short regular legislative sessions.

III. Conclusion.

The notion that Arbitrator Greer's decision is no longer extant and available for the Legislature to approve by appropriation is incorrect. There is no suggestion that the administration has any controlling precedent for its view.

The proposition that the monetary terms of the award are no longer available for legislative consideration and affirmative acceptance or definitive rejection would undermine legislative prerogatives. It would reduce the effectiveness of PERA (with its long history of promoting labor peace in the public sector). It would encourage parties to manipulate the calendar so as to achieve outcomes not available through the arbitration process itself or to avoid the results of fair arbitration.

The Legislature has nowhere expressed its wish to deny to itself the power to approve funds for an arbitrator's award following interest arbitration, just because the first session of a two-year legislature has adjourned.

It is relevant to note that AS 23,49,215(b), which relates to the submittal of the monetary terms, speaks entirely of the duties and tasks of the Department of Administration, and in no place limits the time for legislative consideration. Thus, for example,

JOSEPHSON LAW OFFICES, LLC

ATTORNEYS AT LAW

-6-

the first sentence of subsection 215(b) begins: "The Department of Administration shall submit. . . ". The second sentence begins by commanding the executive to submit the "complete monetary and non-monetary terms of a tentative agreement." Nowhere does the law provide deadlines, either mandatory or directory, for legislative action.

The failure of the Legislature to do anything, in the short time available to it in the recently concluded session, with respect to Arbitrator Greer's award, cannot be successfully claimed as being the equivalent of a rejection by the Legislature of the monetary terms or as a limitation on the Legislature's authority to consider the matter when it meets again.

AS 24.050 and Uniform Rule 47 render the Commissioner's view manifestly incorrect.



Joe P. Josephson