ALASKA LABOR RELATIONS AGENCY
1016 WEST 6th AVENUE, SUITE 403
ANCHORAGE, ALASKA 99501-1963
(907) 269-4895 Fax (907) 269-4898

Office use only	**CHARGE AGAINST EMPLOYER**
Case No -ULP	
Date Filed **Date Amended**	

SEE ATTACHED INSTRUCTIONS and FILING REQUIREMENTS

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT (Respondent)

a. Name of Employer	b. Employer Representative to contact
State of Alaska	Dept. of Administration - Commissioner Hultber
c. Address (street, city, state, and ZIP code) P.O. Box 110200 Juneau, AK 99811-0200	d. Telephone Number Facsimile Number (907) 465-2200 E-mail (907) 465-2135

2a. Full name of party filing charge (if labor organization, give full name, including local name and number)

Alaska Correctional Officers Association

2b. Address (street, city, state, and ZIP code)	2c. Telephone Number
203 E. 5th Avenue Anchorage, AK 99501-2519	Facsimile Number (907) 646-2262 E-mail (907) 646-2286 brad@acoa.us

2d. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

N/A

3. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of AS 23.40.110(PERA) or AS 42.40.760 (Railroad). The employer has committed the practice described in

☒ 23.40.110(a)(1) - or 42.40.760(a)(1) Interference, coercion, restraining exercise of rights guaranteed in AS 23.40.080 or AS 42.40.720

☐ 23.40.110(a)(2) - or 42.40.760(a)(2) Domination or interference with formation, existence or administration of union.

☐ 23.40.110(a)(3) - or 42.40.760(a)(3) Discrimination in hire or tenure or employee or terms of employment to discourage or encourage union membership.

☐ 23.40.110(a)(4) - or 42.40.760(a)(4) Discharge or discrimination against employee for participating in proceedings under P.E.R.A.

☒ 23.40.110(a)(5) - or 42.40.760(a)(5) Refusal to bargain in good faith.

4. Collective Bargaining Agreement — Indicate one:

☐ There has never been a collective bargaining agreement covering the parties involved.

☒ A copy of the current (or most recent) applicable collective bargaining agreement is attached.

5. Status of Grievance Proceedings (check all that apply)

a. ☐ A grievance has been filed and a copy is attached of each grievance step filing and all employer responses.

b. ☐ A copy of the grievance filed at each step and the employer's response(s) is being furnished for investigative purposes only. (Service on employer not required.)

c. ☐ Arbitration is scheduled for _____.

d. ☐ An arbitration award has been issued and is attached, or ☐ will be provided when received.

e. ☒ A grievance was not filed because:

See Statement of Petitioner - Page 6

6. Statement of Facts

Clear and concise statements of the facts claimed by the party filing this charge to constitute the unfair labor practice(s) (including times, dates, places, occurrences, and participants in occurrences) are set forth in numbered paragraphs on separate sheets of paper attached to each copy of this charge.

See Statement of Petitioner

7. Remedy Requested

The remedies requested for the claimed unfair labor practices are set forth on separate sheets of paper attached to each copy of this charge.

See Statement of Petitioner - Page 7

8. DECLARATION

I, Brad Wilson, say on oath or affirm that I have read the foregoing document and believe that all statements made in the document are true.

By _____ (Title or office, if any)
(Signature of representative or person making charge)

SUBSCRIBED AND SWORN TO before me at Anchorage, Alaska, this 11th day of January, 2012.

HEATHER E. GREENOUGH NOTARY PUBLIC STATE OF ALASKA My Commission Expires Oct 17, 2013

Heather E. Greenough
Notary Public in and for Alaska
My Commission Expires: 10/26/13

I certify that on 1/11/2012 (date) I mailed or hand delivered (circle one) a true and correct copy of this charge, to (include employer representative and, if the state is the employer, include the Attorney General and the Commissioner of Administration) Enter the name and address of person(s) served in the space provided below:

State of AK A.G.

_____
Signature

6. STATEMENT OF FACTS

Despite the fact that the Alaska Correctional Officers Association and the State of Alaska are currently engaged in contract negotiations for the parties' 2012-2015 Collective Bargaining Agreement, Department of Corrections Commissioner Joe Schmidt sent an email to all Correctional Officers to alert them of his intention to make significant changes to their shift schedules and patterns. (Attachment A) This occurred seven days ago, on January 4, 2012. Without detailing the changes, but promising that Deputy Commissioner Sam Edwards would "*... post a letter to you* (i.e., Correctional Officers, not the Association) *within two weeks detailing expected changes and a timeline for the changes to be put in place"*, Commissioner Schmidt claimed that the changes *"... will be designed to keep us in compliance with our constitutional mandate, statutes, regulations and budgetary directives."*

Two days ago, January 9th, Deputy Commissioner Edwards emailed a memorandum to all Superintendents revealing more about the nature of the shift changes the Department of Corrections (DOC) intends to make. (Attachment B) In this communication, Deputy Commissioner Edwards indicates that the "*Target date for implementation will be April 1*."

The DOC's intention to make major changes in an area that significantly affects the economic interests of Correctional Officers, without bringing them to the bargaining table while negotiations are in progress, and its intention to effect these changes prior to the completion of the bargaining process, violates its duty to bargain in good faith and Alaska Statute 23.45.070 which requires the employer to negotiate on matters of wages, hours, and other terms and conditions of employment. When ACOA met to negotiate with the State on December 6th and 7th, we specifically mentioned that we were hearing rumors that the DOC intended to change from 12 to 8-hour shifts and asked if the State's negotiating team could share any information on this with us. The State's bargaining representatives responded that they had no information on this. As of today, the State still has not contacted us.

The propositions of fact, which the Commissioner cited in the DOC's January 4th e-mail to support the intended shift changes, are untrue. The Commissioner has stated, *"We are on track (Fiscal Year 2012) to exceed 300,000 hours of personal leave used – this is nearly triple the hours of personal leave taken in FY 2009 and does not include the cost of leave cash-in."* He then equates overtime costs to his projection that Officers will use 300,000 hours of personal leave and claims he is required by the legislature to mitigate these costs by stating, "*The overtime costs associated with the leave usage is significant and we have clear instruction from the legislature to limit these costs."*

That the Commissioner has misstated the facts is readily demonstrable. First, the DOC currently employs about 780 Correctional Officers. For 780 Officers to use 300,000 hours of personal leave would mean that each Officer, on average, would have to take 385 hours of leave. That would amount to over four and one-half work weeks taken

off by each Officer. Second, using overtime to cover for an Officer who is absent on personal leave is but one of many reasons why overtime is required. Other significant reasons include positions that are vacant; the need for one or two Officers to be posted with hospitalized prisoners; the need to fill shift requirements while other Officers are assigned to the Correctional Academy; and other official duties that require Officers to be away from their institutions. Is the Commissioner counting the leave taken by injured Officers out on Workers' Compensation or federally protected leave taken under the Family Medical Leave Act? The Department's historical data on the amounts of such leave taken are normally calculated into the Staffing Relief Factor that determines how many Officers need to be hired to staff an institution twenty-four hours a day. Leave taken for the preceding reasons has less to do with an arbitrated increase in leave accrual rates and is more indicative of an institution being understaffed.

In regard to the above, Correctional Officer III's, serving as Shift Supervisors, are tasked to report why they call an Officer in to work overtime. Several Shift Supervisors tell us that management has directed them to report leave as the reason for all overtime, regardless of how many other factors apply. Following this directive, a Shift Supervisor whose shift is short because an Officer is attending the Academy, or a position is vacant, or an Officer is on duty at the hospital, will report the resulting overtime as if the Officer had called in sick. This falsely skews the data that the DOC is tracking. Further, the DOC was also denying Officers leave in FY 2009, while no leave was reported as being denied in the past fiscal year. There is evidence that the DOC is intentionally manipulating its data to justify its desire to change shift schedules and to make it appear as if changing these schedules will comply with the Legislative "intent" language from a now-passed fiscal year.

Retired Correctional Officers that remember the days of 8-hour shifts or Correctional Officers who talked to Officers who worked the 8-hour shifts know that burn-out was constant and overtime costs were extremely high. The stresses of 8-hour shifts, with only two days to recover between shifts, resulted in tremendous increases in the number of Officers calling in sick, and the result for those who reported for duty was that many had to work back to back 8-hour shifts to cover for others who took sick leave. The result was an increasing spiral of Officer burn-out and overtime costs. Going to 8's, whether all at once, or in phases, as purported by the DOC, will actually increase costs, not decrease them.

COLLECTIVE BARGAINING AGREEMENT

ACOA believes that the DOC, in proceeding by unilateral *dictat,* is ignoring Article 13.2 A of the Collective Bargaining Agreement (CBA), which reads:

> *"The workweek for employees on the twelve (12) hour schedule shall be a fourteen (14) day work period consisting of eighty-four (84) hours in pay status with a maximum of seven (7) working days and seven (7) consecutive days off, and all employee shall be guaranteed a full workweek."*

Also pertinent is Article 13.2 C, which reads:

> *"...there shall be two (2) shifts, day and night..."*

PAST PRACTICE

In moving from 12-hour shifts to 8-hour shifts, the DOC, unless estopped, will sever **30 plus** unbroken years of past practice that have placed all security shift Officers on seven 12-hour shifts followed by seven consecutive days off, with each work week rotating between day and night shifts, as described in Article 13.2 A.

Such a change affects Correctional Officers economically and psychologically. Correctional Officers have made important decisions as to the location of their housing, child care, and transportation based on this past practice, as well as on the explicit language of the CBA. Ironically, the DOC has itself, recently, and in the past, used the week on/week off schedule as a hiring tool for recruitment.

At one point, the DOC even created business cards that showed Correctional Officers fishing on their week off as a testament to the benefit of the week on/week off schedule and as an inducement to consider a career in Corrections.

The disruption in the lives of Correctional Officers that 8-hour shifts would cause is not unknown to management. On January 30, 2009, Director Bryan Brandenburg spoke to the House Judiciary standing committee on the subject of the 12-hour shifts. Director Brandenburg made two very important points: Correctional Officers plan their lives around the week on/week off shifts and that the week off is needed to recover.

According to the Judiciary Committee records for January 30, 2009, at approximately 2:54:05 pm,

> *"MR. BRANDENBURG opined that the last thing a correctional officer would ever willingly give up is the 12-hour shift, especially due to the week off aspect. Officers plan their lives around the week on week off schedule, which allows them to do more. Furthermore, he recalled comments that two days aren't enough to recover from an eight-hour work week whereas the week off is."*

The CBA does have provisions for 42-hour employees in Article 13.1. The majority of 42-hour Officers works four 8.5-hour days and (1) 8-hour day per week, however some work four (4) 10.5-hour days each week. It is important to note that these are not security shift positions; they are generally specialized positions, and that they exist only in limited numbers. Although these positions compliment security, they do not specifically exist to provide and enforce security. Representative examples of 42-hour positions are: Institutional Security Sergeants, Housing Unit Supervisors, Institutional Training Officers, Institutional Compliance Officers, Disciplinary Sergeants, Records Sergeants, Special Projects Officers, Commissary Officers, and combinations of such job functions.

NATURE OF THE CONTROVERSY

We emphasize that this controversy is not about a management decision to assign an individual Officer to this or that correctional facility. It is also not about a decision to move any individual Officer from a day shift to a night shift or *visa versa*. Rather, this controversy is about management's announced determination to curtail 12-hour shifts and to adopt 8-hour shifts instead. Management's thesis is that such a change, if implemented, will reduce payroll costs – a thesis which ACOA and Correctional Officers believe is incorrect and, even if correct, requires negotiation between management and the union.

If such a change in shift schedules is adopted, ACOA believes a great hardship will be imposed on Correctional Officers and there will be a programmatic crisis for the mission of the DOC. ACOA, however, has not been invited to explain how shift schedule changes might adversely affect Officers and their families or facilities, or to suggest how changes might be implemented so as to achieve management's declared objectives without severe consequences to Officers and their families or damage to the DOC mission.

THE DOC'S PURPORTED JUSTIFICATION

The DOC tries to justify its unilateral action by citing "intent" language inserted in the 2010 Alaska State Legislature, in the Budget Bill that retroactively funded the CBA. That language called upon the DOC and the Department of Administration to "*take all responsible actions necessary*" to reduce "*financial and other exposure*" resulting from the supposed "*50 percent increase in personal leave accrual caused by the March 19, 2009 decision of the arbitrator.*" The DOC has not explained, and ACOA believes it cannot explain, how its intended shift schedule changes will reduce the "*financial and other exposure*" that comes from the increased leave accrual awarded by the arbitrator or how this qualifies as "*responsible actions*".

In addition, the DOC has not explained, and ACOA believes it cannot explain, why it took no action to change shift schedules from the date of the Legislature's

insertion of "intent" language in 2010, through the remainder of 2010, and throughout 2011, or into FY 2012. In fact, this DOC administration has had six years to institute change and has, until now, not done so. ACOA believes the DOC changes have nothing to do with Legislative "intent" language and have everything to do with negotiations. The DOC's purpose is similar to their purpose during the previous negotiating process, when after the arbitration, they and others, conspired to delay legislative funding, and then attempted to declare the arbitrated award null and void. Now, as was the case then, their actions are intended to undo the arbitrator's award on leave accrual.

The DOC has not explained, and ACOA believes it cannot explain, why if it believes the Legislature's "intent" language has created conditions specifically covered in the CBA, it never asked ACOA "to confer immediately for the purpose of arriving at a mutually satisfactory supplement" to the CBA, as required by Article 32.3 of the CBA and the accepted conventions of "good faith bargaining".

32.3 Conditions Not Specifically Covered

> *"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 part of this Agreement.*"

EQUITABLE ESTOPPEL AGAINST THE DOC

From ACOA's perspective, the DOC should be equitably estopped from changing shift schedules, unilaterally, at a time when 83% of the term of the CBA has already passed and during the period the parties are negotiating for the successor Agreement which has given them, and continues to give them every opportunity to bring their proposal to the bargaining table where it belongs.

CASE LAW – ALASKA SUPREME COURT

ACOA believes that its position is consonant with decisions of the Alaska Supreme Court which have dealt with the Alaska Labor Relations Act and management failures or refusals to bargain, and the authority of the ALRA.

For example, in *Kenai Education Association v. Kenai Peninsula Borough School District,* 572 P.2d 416, 422 (1977), the Supreme Court, fashioning a general balancing test to determine whether an issue is negotiable, said that "*a matter is more susceptible to bargaining the more it deals with the economic interest of employees and the less it concerns professional goals and methods*".

In *Alaska Community Colleges' Federation of Teachers v. University of Alaska*, 669 P.2d 1299, 1305 (1983), the Supreme Court pointed out that the Alaska Labor

Relations Agency is empowered, under AS 23.40.140, to "*issue and serve*" on a person named in a written complaint or accusation who has "*engaged in a prohibited practice*", an

> *"… order or decision requiring him to cease and desist from the prohibited practice and to take affirmative action which will carry out the provision of AS 23.40.070 – 23.40.260."*

The same case, to be sure, states that *"[e]mployers are free to make unilateral changes on matters which fall outside … mandatory subjects of bargaining*", *i.e.* subjects which do not implicate "*wages, hours and other terms and conditions of employment*". But the opinion, following *Kenai Peninsula Education Association v. Kenai Peninsula Borough School District, supra*, recalls that "*salaries, fringe benefits, number of hours worked and amount of leave time*" must be negotiated. The DOC is bent on changing the number of hours worked unilaterally, without negotiating with ACOA.

In this case, the DOC could hardly argue that its unilateral changes to the shifts of Correctional Officers will not affect "*wages, hours, and other terms and conditions of employment*" because it purports to justify it, by its theory that payroll expenses will be reduced. Thus, the DOC in effect has admitted that it is proceeding unilaterally in subject matter which requires bargaining.

In *Public Safety Employees Association (PSEA) v. State*, 799 P.2d 315 (1990), the Supreme Court stated that the ALRA is vested by statute with a measure of discretion to adjudicate disputes in furtherance of its statutory prerogative to investigate and remedy unfair labor practice claims. Moreover, a union is not required to exhaust grievance and arbitration procedures, but instead it has the statutory right to press an unfair labor practice claim before the ALRA.

Management's actions violate AS 23.40.110(a) (1, 2, 5). Given management's failure to bring this issue to the bargaining table, which likely signifies that management regards these changes as nonarbitratable and nonnegotiable, it would be futile to require the Association to follow the contractual dispute resolution process.

7. REMEDY REQUESTED

ACOA respectfully requests that the ALRA investigate ACOA's complaint of unfair labor practices and, pursuant to AS 23.40.120, "*try to eliminate the prohibited practice(s) by informal methods of conference, conciliation, and persuasion*." However, if the ALRA fails to eliminate the prohibited practice(s), ACOA requests that the ALRA issue an order requiring the Department of Corrections and its Commissioner to cease and desist from the prohibited practice(s) and to take affirmative actions, which carry out the provisions of AS 23.40.070-23.40.260. ACOA also requests that the ALRA, if needful to prevent the conversion of shifts from 12- hours to 8- hours, promptly seek an injunction against such conversion from the Superior Court, as contemplated by AS 23.40.150.

ACOA anticipates a possible argument from the DOC that the ALRA should do nothing until the new shift changes are actually promulgated. ACOA believes that since the announcement of imminent changes has already been made - spreading anxiety and uncertainty in the workplace - the union's request for the ALRA to investigate is proper and timely. Furthermore, if ACOA's position as to unfair labor practices is correct, it is in the employer's interest to recognize this now, rather than to recognize it after it proceeds, in an effort that is illegal and challengeable.

Finally, in response to a DOC claim that the ALRA should do nothing until the new shift changes are actually promulgated, ACOA observes that it is the DOC which should do nothing until a new collective bargaining agreement has been negotiated. The bargaining table is already available. There can be no good faith reason why the employer should be allowed to unilaterally implement a change to Officers' shifts, which is contrary to the existing three-year collective bargaining agreement, particularly when it seeks to do so for the first time less than five months before that collective bargaining agreement is scheduled to expire.