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ALASKA STATE EMPLOYEES              )
ASSOCIATION/AFSCME LOCAL 52,        )
AFL-CIO,                            )
                                    )
Complainant,                        )
                                    )
v.                                  )
                                    )
STATE OF ALASKA, DEPARTMENT         )
OF ADMINISTRATION, DIVISION         )
OF PERSONNEL/EEO,                   )
                                    )
Respondent.                         )
____________________________________)
Case Nos. 99-996-ULP & 99-1008-ULP (Consolidated)
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# DECISION AND ORDER NO. 245

This matter was heard on September 22 and 23, 1999, in Anchorage, Alaska, before the Alaska Labor Relations Board, Chairman Alfred L. Tamagni, Sr., and members Raymond Smith and Robert Doyle.[1] Hearing Examiner Mark Torgerson presided. The record closed on September 22, 1999.

**Appearances:**

Margaret A. McCann, Associate General Counsel for AFSCME, for complainant Alaska State Employees Association/AFSCME Local 52, AFL-CIO (ASEA); and Patrick Gullufsen, Assistant Attorney General, for respondent State of Alaska (State).

**Digest:**

Prior to impasse, and absent necessity, a compelling business justification or contractual provisions to the contrary, the State violates AS 23.40.110(a)(5) and (a)(1) by implementing a unilateral change to a mandatory subject of bargaining, such as health benefit costs.

## DECISION

### Statement of the Case

ASEA filed two charges in this consolidated case. In the first charge, ASEA alleges the State violated the Public Employment Relations Act (PERA) by surface bargaining. The second charge concerns the State's notification to Alaska State Employees Association and its members that a change in their cost of health benefits would occur on July 1, 1999, due to an increase in the State's health insurance premium payment on that date. ASEA contends that the State is required to bargain to impasse before it implements changes to the parties' collective bargaining agreement. The State argues, *inter alia*, that due to legislative action, it had no choice but to implement the increased premiums.

In addition to the above charges, ASEA filed a motion to enjoin, at the start of the hearing. The motion requests this Agency to "apply to the Superior Court for an order enjoining the State from engaging in its prohibited unfair labor practice of illegally withdrawing an additional fifty-four dollars ($54) per month" from employee paychecks. This request was made pursuant to AS 23.40 150, which grants the Agency discretionary authority to apply to the superior court to enjoin "prohibited acts" specified in an agency order or decision. We decline to exercise our discretion to do so. The request is denied.

## Issues

1. Whether the State of Alaska committed an unfair labor practice, and therefore violated AS 23.40.110(a)(5) and (a)(1), when it implemented an increase in monthly health care costs to the members of the general government unit without first bargaining to impasse in contract negotiations.

2. Whether the State of Alaska committed an unfair labor practice, and therefore violated AS 23.40.110(a)(5) by engaging in surface bargaining when it failed to submit a health care proposal from January 1999 to May 10, 1999, and then withdrawing the May 10 proposal at the next bargaining session on May 25, 1999, based on a resolution by a third party (the Alaska Legislature).

## Findings of Fact

1. The Alaska State Employees Association/AFSCME Local 52, AFL-CIO (ASEA), is the certified bargaining representative of the State's general government bargaining unit (GGU). The bargaining unit includes employees in all three strike classes set forth in AS 23.40.200.

2. ASEA and the State have entered into two previous collective bargaining agreements. The most recent agreement covered the period July 1, 1996 to June 30, 1999. Article 19 contains the parties' respective responsibilities for payment of monthly medical premiums. It states in pertinent part:

> From the effective date of this Agreement through June 30, 1999, the Employer shall contribute four hundred twenty-three and 50/100 dollars ($423.50) plus one-half of the required premium in excess of $423.50 to a maximum contribution of $473.50 per employee per month. From the effective date of this agreement through June 30, 1999, the employees shall contribute one-half of the required premium in excess of $423.50 to a maximum of $25.00 per pay period through payroll deduction.

In other words, each party agreed to pay up to $50.00 per month per employee in additional premiums if the cost to the program required it during the term of the contract. There was no provision for payment by either party of a higher amount in the event circumstances necessitated it.

3. The Article 19 health care provision in the 1996-99 contract contained defined employer and employee contributions. The State's health care plan is a defined contribution plan. The State became self-insured effective July 1, 1997. Aetna administers the program for the State. Aetna pays the claims and then requests reimbursement from the State's health trust reserve. (Testimony of Janet Parker).

4. The State's health trust reserve contains contributions from all State employees, including collective bargaining units and non-covered employees.

5. In 1997, the first session of the twentieth Alaska Legislature passed HCS for CS for Senate Concurrent Resolution No. 16(RLS) am H. Among other things, it noted that the executive branch has responsibility to negotiate agreements with labor organizations representing employees, that revenues continue to fall short of expenditures, and "it is not advisable to increase the cost of personal services in a time of deficit spending . . . ." (Joint Exhibit 4 at 1). Therefore, the legislature resolved:

> **BE IT RESOLVED** that the Alaska State legislature urges the current state executive branch administration, university administration, and Alaska Court System administration to negotiate collective bargaining agreements that result in a net zero cost increase through reducing salaries, reducing benefits to pay increased salaries, implementing a two-tiered salary structure, restructuring publicly funded health

plans, or other methods; and be it

**FURTHER RESOLVED** that, if general fund revenues remain below expenditures, the Alaska State legislature reserves the right to disapprove the monetary terms of any collective bargaining agreement that results in an increased cost of personal services.

(*Id*. at 2) (emphasis in original).

6. In 1998, the parties discussed solutions for dealing with increased premium costs to the health care plan during the last year of the contract. Charles O'Connell, Business Manager of ASEA, said that there were very few reserves left to cover costs incurred in the plan. After discussions between the parties, they agreed to amend Article 19 on May 7, 1998. Under this amendment, ASEA and the State agreed to each pay monthly increases in their premiums contributions until June 30, 1999, the expiration date of the collective bargaining agreement. The State contributed $488.50 monthly, and the employees contributed $85.00 monthly.[2] O'Connell testified that notwithstanding the legislature's 1997 resolution, the legislature funded this monthly premium increase incurred by the State as a result of the amended Article 19.

7. On January 11, 1999, the parties entered into negotiations for a master collective bargaining agreement to commence on July 1, 1999, immediately after expiration of the 1996-99 contract. Under their ground rules, they agreed to meet, for negotiating purposes, three days every other week until April 1999. In April 1999, they agreed to continue meeting on an every-other-week schedule. (Joint Exh. 2).

8. ASEA and the State agree they have not reached impasse in negotiations for a master collective bargaining agreement beginning July 1, 1999. The parties are continuing to negotiate for an agreement.

9. As early as February 1999, Charles O'Connell asked the State if it had a proposal for health benefits, and the State representatives said they were working on it but did not have one available at that time. Although it had a proposal ready in January 1999, ASEA decided to submit its proposal at the same time as it received the State's proposal. On March 31, 1999, O'Connell again asked State negotiators about a State proposal, and he was told the State was still working on it.

10. In addition to the parties' negotiating teams, the March 31 negotiating session was also attended by Alison Elgee, Deputy Commissioner of Administration, and Janet Parker, Deputy Director of the Department's Division of Retirement and Benefits. According to Stan Kaneshiro, an ASEA member who was on the union's bargaining team, Elgee and Parker attended this and one other session to provide background information on health care benefits. O'Connell described Parker as "quite knowledgeable" about health care benefits. He said they and the union negotiating team discussed ways to address health care costs and options. Kaneshiro testified there was "open give and take" in the health care discussions. The parties also continued to negotiate proposals on other subjects in the contract.

11. ASEA complained that the State did not provide medical data necessary to assist it in its determination of health care costs and projections. Stan Kaneshiro testified the negotiating committee did not receive any health information, facts or figures before March 30, 1999. Janet Parker admitted ASEA was not provided data for the previous year until sometime in September 1999 (prior to the hearing in this matter). ASEA had inquired about data for the July 1999 period. Parker admitted that recently, she "accidentally shredded" a 3000-page report received from Aetna. Parker testified the report contained names and social security numbers on claims submitted by state employees, including non-GGU members. She did not want the report in her office. Further, she did not realize that the report, at page 1226, contained information that the union had requested, until she was reviewing the August report. She has requested another copy of the July report and will provide it to ASEA when available. She asserted she is providing data to ASEA.

12. The State experienced difficulty in obtaining useful medical data to provide to ASEA, and also useful data to project premium costs. Janet Parker testified the State requested information from NYL Care on claims history, but the information provided was not "user friendly." She described it as a "raw data dump" of employee claims, not put in any particular order.

13. Joel Casto, a Labor Relations Specialist II and the chief negotiator for the State, said the State knew ASEA had been asking for a health care proposal, but the State was working on a negotiating a "fairly complex" plan. Essentially, the State wanted to give the same plan to all unions. The proposal eventually became unworkable. However, Casto did suggest to ASEA that it consider adopting a "cafeteria" style of medical benefits already utilized by some bargaining units and non-union state employees. Under this form of benefits, employees could choose among different plans. These plans varied by cost and by the amount of coverage they provided; in other words, the more coverage a plan provided, the more it cost the employees in monthly premiums.

14. Throughout negotiations, the parties disputed whether an increase in monthly premiums was necessary to pay for health care costs beginning July 1, 1999. The State estimated, based on projections and advice provided by Deloitte and Touche, that an increase of $54.00 per month was necessary. Deloitte and Touche consultant Patrick Pechacek testified that based on data provided by the State, the 1998 health cost experience, and on national trends, a premium increase of 9.5% would be required to pay benefits, administrative costs, and maintain an appropriate reserve in the July 1, 1999, to June 30, 2000, period. Mr. Pechacek said that in projecting costs, his firm applied a national trend because the Alaska trend was not credible: it did not have 36 months of trend history and they did not feel comfortable using it.

15. ASEA disagreed with the State’s projections. Stan Kaneshiro testified the negotiating team felt there was "excess padding" in the State’s projections. Instead of the State’s projected increase of 11% in medical costs, ASEA’s team believed the figure should be in the 7-to-8% range.

16. ASEA consulted with Ed Burgan, Senior Vice President for employee benefit services at Brady and Company, insurance brokers. Burgan has consulted on insurance matters since 1971. Among other things, ASEA asked Burgan to advise it on whether it would make sense for ASEA to establish its own medical trust and thus leave the State’s medical benefits program. Burgan said it would make sense to do so. He cautioned, though, that health care costs couldn’t be accurately predicted. "It is not uncommon for a plan to exceed the expected costs in a plan year. This group did that several years ago. It is equally not uncommon for a budget or a forecast to be overstated, and to result in a surplus." However, he added that "as a group grows in size, and in ASEA’s size, it is credible, if you use good data from the prior 12 months and the 12 months before that, you have a reasonably good expectation to being very close to your cost projections for the coming year. As the group size shrinks, the less probable those projections are going to be accurate. There has to be a standard deviation that gets bigger as the head count goes down." He testified that it is necessary to have a reserve to pay the bills in the deficit years.

17. Burgan testified that based on his review of available data provided by the State to ASEA, it was his opinion that the State had sufficient reserves on July 1, 1999, to pay the $54 monthly increase in cost of employees’ medical benefits, as calculated by the State, for a period of at least six months before the reserves would be at a "zero balance." At that point in time, the surplus (or unencumbered reserve) would be spent, and unless contributions were increased or benefits adjusted, the health care plan would start carrying a deficit.

18. Burgan testified that some of the data the State provided ASEA were not in very usable condition. Pechacek agreed.

19. After negotiating for four months with ASEA, the State finally submitted a formal proposal on medical benefits at a May 10, 1999, negotiating session. State negotiators had previously informed ASEA, on approximately April 28, 1999, that the proposal would be submitted. ASEA also submitted its medical benefits proposal to the State on May 10. The State’s proposal would have the State and general government unit members split the increased cost of monthly medical premiums 50/50.

20. Robert Poe, Commissioner of Administration, took the State’s proposal to the legislature and tried to solicit its support.

21. As of the date of hearing, the parties have not reached agreement on the monetary terms for a new collective bargaining agreement beginning July 1, 1999. The parties have not submitted any monetary terms to the Alaska Legislature. On May 17, 1999, shortly before the first session of the twenty-first legislature ended, the legislature passed Senate Concurrent Resolution No. 11 am. This resolution was titled "A resolution relating to legislative review and disapproval of agreements under the Public Employment Relations Act that exceed net zero cost to the state." In the

body of the resolution, the legislature declared "it is the right and duty of the legislature to review and approve the monetary terms of any agreement entered into" between the executive branch and labor organizations representing public employees. It stated that "the legislature informed the executive branch through Legislative Resolve 34 on May 21, 1997, that the legislature reserved the right to disapprove any agreement that failed to achieve net zero cost to the state and resulted in increased costs in personal services as long as general fund revenues remain below expenditures." The resolution then noted that the Department of Administration "has entered into agreements in 1999 with various labor organizations under the authority of the Public Employment Relations Act" and "has failed to adequately report the terms of these agreements to the legislature for review and approval." The legislature then stated the following resolutions:

> **BE IT RESOLVED** that the Alaska State Legislature requires copies of all agreements executed after June 30, 1998, that modify the terms of collective bargaining agreements, copies of collective bargaining agreements tentatively agreed to in 1999, and copies of all work papers and other analyses of the costs of the agreements; and be it
>
> **FURTHER RESOLVED** that the Alaska State Legislature specifically disapproves the monetary terms of all agreements, including but not limited to employer contributions to health benefits, that the Department of Administration may have entered into during 1999 under the authority of the Public Employment Relations Act; and be it
>
> **FURTHER RESOLVED** that the legislature by this action refuses to appropriate any state funds to satisfy the terms of any agreement entered into during 1999 under the authority of the Public Employment Relations Act if the agreement has not been approved by the legislature under AS 23.40.215.

(Joint Exh. 11).

22. After receiving and reviewing SCR 11 am, the State's negotiating team discussed how to proceed with negotiations.[3] Joel Casto testified the team developed the position that because of SCR 11 am, they could not legally pay any more money under a collective bargaining agreement or, in other words, money in negotiated collective bargaining agreements that would exceed "net zero cost."

23. On May 25, 1999, the State withdrew the May 10, 1999, medical benefits proposal. ASEA had neither agreed to nor rejected the proposal as of May 25 when it was withdrawn. The State then submitted a proposal that would require GGU members to pay the entire increased medical premium, rather than the 50/50 split initially proposed. Casto felt that continuing to bargain for a 50/50 split would be bad faith bargaining by the State. The State also again suggested to ASEA that it consider adopting the cafeteria style of health care benefits. ASEA Business Manager O'Connell said the union again rejected this idea. According to O'Connell, the cafeteria style of benefits would cost members more in monthly premiums than ASEA's monthly contribution at the time, for the same coverage. He said the union "would be stupid" to agree to pay even more money for the same benefits.

24. Casto testified that mandatory subjects of bargaining include health benefits, and that under the Public Employment Relations Act (PERA), the parties must bargain to impasse on mandatory subjects. He acknowledged the parties are not currently at impasse. Casto was asked why the State elected to continue providing employees the same level of benefits included in the contract, and keep the State's contribution at the same defined rate, but at the same time think it was "perfectly OK" to increase the employee contribution rate that was in the contract. He testified:

> "Well, you're faced with three things that you have to do, and you cannot do all of them. So what you have to do is pick—what we decided we had to do was pick the lesser of the three evils. In the meeting we discussed what do we do, do you reduce benefits, do you pay for it with State funds.[4] I guess my point is, we determined very quickly we were not going to reduce the level of benefits for health care coverage because that could have very serious consequences for individuals who may be in a treatment program for a very serious illness."

Casto said one of the principles was that it would be illegal for the State to agree to actually pay increased costs without getting legislative approval. It became a choice of whether or not to violate the law. On cross-examination, he said they didn't want to follow the law because they didn't want to ruin the plan. He said it's not the State's money; it's the union's money. Casto acknowledged ASEA never asked the State to pay for cost increases before going to the legislature. Regarding his testimony that it would be illegal to pay increased costs without getting legislative approval, Casto was asked: "In the same vein, wouldn't it be illegal for you or your principals to . . . unilaterally implement an increase in the health insurance premium before bargaining to impasse and going to the legislature?" He responded: "All bad choices. You are correct. All bad choices."

25. On June 1, 1999, ASEA filed an unfair labor practice charge[5] alleging the State violated AS 23.40.110(a)(5) by conducting 1) regressive bargaining; and 2) surface bargaining. (Case number 99-996-ULP). The charge contends the State failed to bargain in good faith when it put a monetary proposal on the table and then later withdrew it. The charge also asserts that the State engaged in surface bargaining by putting a proposal on the table and then withdrawing the proposal based on a resolution by a third party—the Alaska State Legislature.

26. Bargaining sessions continued during June 1999. However, the parties did not meet in June until June 21 and 22. This was the first time the parties had met since the May 25 session when the State withdrew its 50/50 proposal. O'Connell testified ASEA pushed the State hard to meet earlier. However, he acknowledged ASEA's team agreed to postpone the early June sessions due to a family illness of one of the State's negotiators.

27. Joint exhibit 12 is a June 21, 1999, letter from Joel Casto to Charles O'Connell. In it, Casto noted that the parties' contract and the May 7, 1998, Article 19 letter of agreement would be expiring on June 30, 1999. He further noted that as the parties had discussed in several negotiating sessions beginning with one in March, health care premiums would be increasing by $54.00 per month beginning July 1, 1999. The letter then stated that under the State's interpretation of the current contract language, its health care contribution will remain at $488.50 monthly. Additionally, since the State had to maintain the same level of benefits, these benefits cannot be adjusted to "offset premium increases. This situation creates an impossibility of performance – we cannot maintain the current level of benefits without an increase in premiums. Moreover, the State cannot absorb premium increases without Legislative authority." Casto concluded by urging O'Connell to again consider the cafeteria (select benefits) option. "Failing an agreement, deductions for the increased premiums will begin the first pay period in July."

28. Beginning with the first pay period in July 1999, the State deducted an additional $54.00 from general government unit employees' monthly paychecks to cover the increase in monthly medical premiums.

29. On July 9, 1999, Hearing Officer Jean Ward issued a "Notice of Preliminary Finding of Probable Cause," and the Agency issued an Accusation in Case No. 99-996-ULP.

30. On July 1, 1999, ASEA filed a second charge alleging a violation of AS 23.40.110(a)(5). This charge alleges the State unilaterally changed the monthly medical premium for general government unit employees without negotiating to impasse. On July 21, 1999, Hearing Officer Ward issued a notice of preliminary finding on this charge, Case No. 96-1008 (consolidated with Case No. 99-996-ULP). The State responded that it bargained hard but did not commit bad faith bargaining. It contended that its "proffered basis for this change was in direct response to the twenty-first Legislature's Senate Concurrent Resolution No. 11 am passed on May 17, 1999." It contended that circumstances had changed due to this resolution, and it was justified in taking the action it took. (State's *Notice of Defense* filed July 29, 1999).

31. ASEA and the State agree they have not reached impasse in negotiations for a master collective bargaining agreement beginning July 1, 1999. The parties are continuing to negotiate for an agreement. (Testimony of Charles O'Connell and Joel Casto).

## Discussion

I. Unilateral Change.

ASEA contends the State violated the Public Employment Relations Act's prohibition against bad faith bargaining by unilaterally changing a mandatory subject of bargaining. Specifically, ASEA asserts that the State increased the union's general government unit members' monthly health care costs without negotiating to impasse.

The State responds that it could not pay for the increase due to the Alaska Legislature's resolution disapproving collective bargaining agreements containing increases in cost to the State. The State argues that it would be illegal for it to pay an increased premium in health benefits without approval from the legislature. ASEA replies that it is illegal for the State to require bargaining unit members to pay the increased premium without negotiating to impasse.

AS 23.40.110(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." Moreover, "[c]onduct that violates AS 23.40110(a)(5) can also interfere with rights protected under AS 23.40.110(a)(1). *See generally I Patrick Hardin, supra*, at 75 (discussing derivative section 8(a)(1) violations)." *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).

It is undisputed that the parties bargained for approximately four months from January to May before the State presented its proposal for medical benefits on May 10, 1999. The State acknowledges, and we have previously concluded, that health benefits are a mandatory subject of bargaining. *Alaska State Employees Ass'n/AFSCME Local 52, AFL/CIO v. State of Alaska*, Decision and Order No. 158 at 15 (May 14, 1993); *aff'd*. *Alaska State Employees Ass'n v. State of Alaska*, 3 AN-93-05800 CI. AS 23.40.070(2) and AS 23.40.110(a)(5) obligate the State to bargain collectively in good faith with ASEA over the terms and conditions of employment for general government unit (GGU) employees. Fringe benefits, such as health benefits, are "terms and conditions of employment." AS 23.40.250(8) (1992 Supp.). A change in health benefits is a change in a term or condition of employment.

It is also undisputed that the State withdrew its May 10 50/50 proposal on May 25, 1999, and offered another proposal that required GGU members to pay the increase in health care costs effective July 1, 1999. The State notified ASEA on June 21, 1999, of the above increase to each member's monthly cost, and this increase was implemented effective July 1, 1999, immediately after the previous contract expired.

"The expiration of the parties' bargaining agreement does not release the employer from the duty to provide health benefits under the agreement." (Decision and Order No. 158 at 15.) Moreover, the parties must continue to bargain in good faith if they have not reached agreement on a new contract. The duty to bargain in good faith requires the parties to maintain the status quo until they negotiate to impasse. *Id.*, *citing to Intermountain Rural Electric v. NLRB*, 984 F.2d 1562, 1566, 142 L.R.R.M. (BNA) 2448, 2452 (10th Cir. 1993). Both ASEA and the State acknowledge they are not at impasse.

The State does not dispute that it started charging GGU members an additional $54.00 in monthly premiums beginning July 1. However, it claims that it could not pay any more than the premiums required in the contract, due to the legislature's May 17, 1999 resolution SCR 11am. It contends it would be illegal to pay beyond the contract requirements when the legislature has not approved an increase. The State further argues that its conduct should not be evaluated in the private context as in cases under the National Labor Relations Board (NLRB) where an employer may not generally change a mandatory bargaining subject until impasse. The State asks us to dismiss the unfair labor practice complaint and order the parties back to the bargaining table.

Our regulation 8 AAC 97.450(b) states that "[r]elevant decisions of the National Labor Relations Board and federal courts will be given great weight in the decisions and orders made under this chapter and AS 23.40.070 – 23.40.260 . . . ." We find the decisions of the NLRB highly relevant for this dispute. We are not persuaded by the State's arguments against applying decisions from the NLRB. We will therefore give great weight to those decisions as well as related decisions from the federal courts.

An employer's unilateral change in a term or condition of employment before the parties reach an impasse in negotiations is an unfair labor practice even if the parties' agreement has expired. *Litton Financial Printing Div. V. NLRB*, 111 S. Ct. at 2221, 137 L.R.R.M. (BNA), at 2444-2445. A unilateral change by an employer on a mandatory subject of bargaining is normally considered a *per se* refusal to bargain. This is so even "though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end." *NLRB v. Katz*, 369 US 736, 743 (1962); 50 L.R.R.M. 2177 (1962). *See generally* I Patrick Hardin, *The Developing Labor Law*, at 596-99 (3d. ed. 1992).

In this case, we find the legislative resolution SCR 11 am does not have the same weight as a resolution by the legislature under AS 23.40.215 to disapprove the monetary terms of an agreement, and that it is a nonbinding expression of opinion that applies only to the legislature.[6] AS 23.40.215 contemplates resolutions that the legislature utilizes to advise parties regarding negotiated agreements submitted by the Department of Administration. Here, the parties have not reached an agreement; therefore, the Department of Administration has not submitted one to the legislature relating to these two parties. Accordingly, the legislature has not refused to fund an agreement under AS 23.40.215.

Further, we disagree with the State's contention that due to the legislature's resolution, it cannot pay for any increased costs under its most recent collective bargaining agreement with ASEA. As we stated, the parties were required to maintain the status quo after their agreement expired. As stated by the United States Supreme Court: "Freezing the status quo ante after a collective bargaining agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n. 6, 127 L.R.R.M. (BNA) 2657, 2659 n. 6 (1988) quoting the decision below, 779 F. 2d 497, 500; 121 L.R.R.M. (BNA) 2276, 2278-79 (9th Cir. 1985) (citations omitted). Similarly, the legislature's declared policy under PERA is to "promote harmonious and cooperative relations between government and employees . . . ." AS 23.40.070. We find that policy is best met by preserving the status quo.

Under the facts of this case, we find the status quo requires the State to continue paying for any increases in health benefit premiums until the parties reach impasse. "Unless an agreement provides otherwise, the employer may not make any changes and must pay any increases in the premiums unless or until the parties negotiate to impasse." Decision and Order No. 158 at 16; *citing to Intermountain Rural Electric*, 142 L.R.R.M. (BNA) at 2452. The parties' agreement in this case contains a premium maximum, or cap, for both parties.[7] Unfortunately, the agreement does not provide for the contingency they now face, i.e., premium costs exceeding the contract cap after contract expiration.

Nevertheless, we believe that absent impasse, necessity, or some compelling business justification, the State should not have the discretionary authority to implement a unilateral change to a mandatory subject of bargaining in an expired collective bargaining agreement without negotiating to impasse. *See* Decision and Order No. 158, at 17. To the contrary, the State should continue to provide the benefits required under the contract, and should pay the increased costs of those benefits.

We find no necessity or compelling business justification in this case. The parties started negotiations in January 1999. The State knew early in 1999 that its projections showed a premium increase was necessary. Yet, it failed to submit a proposal until May 10, 1999, and it withdrew that proposal approximately two weeks later. It then submitted a second proposal but allowed only three days to negotiate on the proposal before implementing it on July 1, 1999. We find the period of time from January to contract expiration on June 30, 1999, was adequate to negotiate meaningfully on health benefits. *See* Decision and Order No. 158, at 17-18, and cases cited therein. Thus, the premium increase was not an unforeseen occurrence. *Angelica Healthcare Services*, 284 N.L.R.B. 844, 852-53 (1987).

In addition, we find no necessity or excuse due to legislative resolution. Were it otherwise so, the legislature could undermine the collective bargaining process by dictating the terms and conditions of contracts by simply passing resolutions. The executive branch could then give the resolution to the labor organization, and tell it to take it or leave it. There would be no need to negotiate. In short, employees would lose their right to collectively bargain this or any other mandatory term or condition whenever the legislature passed a resolution expressing its opinion about what the outcome of negotiations on that particular term ought to be. We do not interpret the legislature's resolutions to provide such a regressive policy. Nor do we construe PERA to sanction it. Such a policy -- negotiation by resolution -- would go counter to the very policy declared by the legislature when it created the Public Employment Relations Act in 1972. AS 23.40.070.

If, under the contract before us, the State could unilaterally change mandatory terms of bargaining prior to impasse, employees would in effect be required to bear the increased costs resulting from misguided projections they had no part in making. Moreover, a mandatory subject of bargaining would be removed from the bargaining process without completing the negotiating process required under PERA and longstanding decisions of the NLRB. "To change unilaterally an item which is a mandatory subject of bargaining . . . is legally tantamount to a refusal to bargain." *House of the Good Samaritan*, 268 N.L.R.B. 236, 114 L.R.R.M. (BNA) 1254 (1983).

We find nothing in the evidence or arguments presented to justify what the State did here. The State's actions, in unilaterally requiring employees to pay increased health care costs prior to bargaining to impasse, violate AS 23.40.110(a)(5) and (a)(1).

II. Surface or Regressive Bargaining.

ASEA contends the State committed unlawful surface bargaining by failing to submit a health care proposal until May 10, 1999 and then withdrawing the May 10 proposal on May 25, 1999. When deciding whether an employer has engaged in surface bargaining, we examine the "totality of the employer's conduct, both at an away from the bargaining table." *People Care, Inc.*, 327 N.L.R.B. 144 (1999), *citing to Overnite Transporation Co.*, 296 N.L.R.B. 669, 671 (1989). Surface bargaining is addressed in I *Patrick Hardin, The Developing Labor Law,* 3d ed. (1992) at 616:

> When examination of the "totality" of a party's conduct during bargaining discloses that the forms of negotiation have been employed to conceal a purpose to frustrate or avoid mutual agreement, the party is said to have engaged in "surface bargaining." Any single factor, standing alone, is usually insufficient to support such a conclusion, but its "persuasiveness grows as the number of issues increases."
>
> Although an employer may be willing to meet at length and confer with the union, the Board will find a refusal to bargain in good faith if it concludes the employer is merely going through the "motions of bargaining."

Under the "totality" of the conduct standard, we find that the State did not engage in surface bargaining. Regarding the State's delay in submitting a health care proposal, we find the State met with ASEA on a regular basis from January, 1999, to the date of the hearing; exchanged proposals on items other than health care; reached tentative agreement on several items; and kept ASEA advised of its progress, or lack thereof, on its health care proposal. Notably, ASEA did not provided its own health care proposal to the State until May 10, even though the proposal had been prepared for several months. Had ASEA actually submitted a proposal in January, we may have viewed the State's delay differently.[8]

We are troubled, though, by the State's delay in submitting its proposal on such an important and mandatory subject of bargaining. The State knew the contract was going to expire in June, and it knew that it needed legislative approval to fund a contract. It also knew, based on its projections in early 1999, that monthly medical premiums would increase effective July 1, 1999. Yet, it waited until May 10, 1999—less than two weeks before the legislature's adjournment--to even submit a health care proposal to ASEA. The State's timing in bargaining this important issue was inopportune.

ASEA contends that the State committed surface or regressive bargaining by withdrawing its first health care proposal, two weeks after presenting it, without allowing ASEA to approve or reject it. We disagree with such a contention. We find the State was sincere in its belief that it had to withdraw its May 10 proposal due to the legislative resolution.

The State's actions in the bargaining process, while less than efficient, do not constitute surface or regressive bargaining under the totality of the circumstances test. Accordingly, ASEA's petition to find the State committed surface or regressive bargaining is denied and dismissed.[9]

## **Conclusions of Law**

1. The State of Alaska is a public employer under AS 23.40.250 and this Agency has jurisdiction under AS 23.40.110 to consider this matter.

2. The Alaska State Employees Association is an organization under AS 23.40.250(5).

3. The expiration of the parties' bargaining agreement does not release the State from the duty to provide health benefits under the parties' collective bargaining agreement. The duty to bargain in good faith, under AS 23.40.110(a)(5), requires the parties to maintain the status quo on mandatory subjects of bargaining until they negotiate to impasse.

4. The cost of health benefits is a mandatory subject of bargaining.

5. Unless an agreement provides otherwise, the employer may not make any changes in mandatory subjects of bargaining and must pay any increases in the premiums unless or until the parties negotiate to impasse.

6. The ASEA/State agreement contains no provision for payment of premium increases after the contract expired on June 30, 1999. When the health care premium is capped for both the employer and employees in the bargaining unit, the employer must maintain health benefits and pay premium increases, after the contract expires, unless and until the parties reach impasse.

7. The State's failure to negotiate an increase in health premiums to impasse, but instead to unilaterally implement the increase prior to impasse is an unfair labor practice under AS 23.40.110(a)(5) and (a)(1).

8. The State did not commit surface bargaining or regressive bargaining.

## ORDER

1. The State of Alaska is ordered to **CEASE AND DESIST** the July 1, 1999 changes to health benefits premiums of general government employees in violation of AS 23.40.110(a)(5) and AS 23.40.110(a)(1);

2. The State of Alaska must make the members of the general government unit whole, including repayment of premiums as appropriate;

3. The parties are ordered to begin bargaining immediately on health benefits;

4. ASEA's charge against the State for surface or regressive bargaining (case no. 99-996-ULP) is denied and dismissed; and

5. The State of Alaska is ordered to post notice of this decision within 14 days after service in workplaces of unit members at locations, such as employee bulletin boards, reasonably chosen to give members actual notice of the decision.

ALASKA LABOR RELATIONS AGENCY

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Alfred L. Tamagni, Sr., Chairman

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Robert Doyle, Board Member

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Raymond Smith, Board Member

APPEAL PROCEDURES

This order is the final decision of this Agency. Judicial review may be obtained by filing an appeal under Alaska Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of filing 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 State Employees Ass'n/AFSCME Local 52, AFL-CIO v. State of Alaska, Department of Administration, Division of Personnel/EEO, case nos. 99-996 & 99-1008 (consolidated)-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 17th day of November, 1999.

____________________

Donna Bodkin
Administrative Clerk III

This is to certify that on the 17th day of November 1999, a true and correct copy of the foregoing was mailed, postage prepaid to

Margaret A. McCann, ASEA

Patrick Gullufsen, State

Signature

1Member Doyle was ill the first day of the hearing. He was provided copies of hearing tapes and the hearing record.

2The amendment required the State to increase its monthly contribution by $15.00, and the employees to increase their monthly contribution by $35.00 above the previously agreed maximum.

3Commissioner Poe said SCR 11 am was "a bit of a surprise."

4The State chose a third option—require employees to pay the entire cost increase.

5This charge was amended on June 14, 1999.

6"A concurrent resolution, unlike a statute, is binding only on the members and officers of the legislative body. It resembles a statute neither in its mode of passage nor in its consequences." *State of Alaska v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 774 (Alaska 1980).

7In Decision and Order No. 158, we did not require the State to pay for premiums in excess of the contract cap. In that case, however, only the State's contribution was capped. Here, both parties' contributions are capped.

8*See, e.g., Irvington Motors*, 147 N.L.R.B. 565 (BNA), 56 L.R.R.M. 1257, *enforced per curiam*, 343 F.2d 759, 58 L.R.R.M. 2816 (CA 3 1965), *cited in* I Patrick Hardin, *The Developing Labor Law* at 618: "[T]he employer was held to have violated the Act by engaging in surface bargaining where its offer merely reiterated existing practices and its first written counterproposal was not submitted until 3 1/2 months after it had been requested."

9Although ASEA did not file an unfair labor practice charge on failure to provide information, we want to emphasize that the State is obligated to provide health cost information to ASEA in a timely manner so ASEA can evaluate health benefits costs. As we stated in D&O 158 at 18:

> The obligation to bargain in good faith includes the duty to disclose relevant information about matters at issue in bargaining. NLRB v. Truitt Mfg. Co., 351 U.S. 149, 38 L.R.R.M.(BNA) 2042 (1956). Insurance cost information must be provided. NLRB v. Borden, Inc., 600 F.2d. 313, 101 L.R.R.M.(BNA) 2727, 2729 (1st Cir. 1979) (request for average cost per bargaining unit employee and other information related to insurance programs requested)("where the requested information is intrinsic to the core of the employer-employee relationship, and the employer refuses to provide requested information, the employer has the burden to prove either lack of relevance or to provide adequate reasons why he cannot, in good faith,

supply the information").