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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)

DECISION AND ORDER NO. 246

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. Reconsideration will be denied when a reconsideration petition makes essentially the same arguments that were made in the underlying case.

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

Panel: The panel consists of Chairman Alfred L. Tamagni, Sr., and members Raymond Smith and Robert Doyle.

DECISION ON RECONSIDERATION

Statement of the Case[1]

The Agency initially heard this matter on September 22 and 23, 1999, in Anchorage, Alaska. The board panel assigned to this matter subsequently issued Decision and Order No. 245 on November 17, 1999. *Alaska State Employees Association, AFSCME Local 52 AFL-CIO vs. State of Alaska, Department of Administration, Division of Personnel/EEO*, Decision and Order No. 245 (Nov. 17, 1999). On December 2, 1999, the Board decided to reconsider its decision on its own motion. The record for reconsideration closed on December 9, 1999.

The original Decision and Order No. 245 (D&O No. 245) addressed two charges ASEA filed. ASEA alleged 1) the State violated the Public Employment Relations Act (PERA) by surface bargaining; and 2) the State implemented a change to a mandatory subject of bargaining (increasing employees' health insurance premiums) without negotiating to impasse. The State argued, *inter alia*, that due to legislative action, it had no choice but to charge employees with the increased premiums, despite the fact the parties' agreement placed a premium cap on both parties' monthly contributions.

A hearing was held on September 22 and 23, 1999. The Agency issued Decision and Order 245 on November 17, 1999. In it, we denied and dismissed ASEA's surface bargaining complaint. Regarding the second charge, we concluded that the State committed an unfair labor practice by unilaterally implementing an increase to the medical insurance premiums (a mandatory subject of bargaining) of general government unit (GGU) employees, without negotiating to impasse. We ordered the State to "make the members of the general government unit whole, including repayment of premiums as appropriate." (Decision and Order No. 245, Order No. 2, at 16).

On November 19, 1999, we received a letter from Assistant Attorney General Jan Hart DeYoung indicating the State intended to request reconsideration of the decision. Attached to the letter was an Alaska Supreme Court case, *University of Alaska Classified Employees Association, APEA/AFT, AFL-CIO, v. University of Alaska,* Op. No. 5184 (September 24, 1999). This case was issued after the record closed for D&O No. 245.

On December 2, 1999, we deliberated on the letter and supreme court decision. We decided to reconsider D&O No. 245 on our own motion, pursuant to AS 44.62.540. Early in the afternoon of December 2, 1999, we sent the parties a letter, including a facsimile to the parties' counsel, stating: "[r]econsideration will be limited to the effect, if any, that *University of Alaska Classified Employees Association, APEA/AFT, AFL-CIO, v. University of Alaska,* Op. No. 5184 (September 24, 1999), may have on the decision. The panel decided it would not take any additional evidence or argument as part of this reconsideration. Therefore, a prehearing conference will be unnecessary." Later that same afternoon, the State submitted, by facsimile, a petition for reconsideration and accompanying memorandum.

Subsequently, we decided we needed to address some of the other arguments the State presented in the reconsideration memorandum, and also allow ASEA to respond. Therefore, on December 3, 1999, we gave ASEA until December 9, 1999, to respond.

DISCUSSION

The State asks us to "rethink" Decision and Order No. 245. We do not prefer to reconsider matters. In general, we do not believe reasonable people should often change a considered opinion within 30 days of its issuance on the basis of "rethinking" it. We have examined the State's petition in that light.

I. Should we modify Decision and Order No. 245 in light of *University of Alaska Classified Employees Association, APEA/AFT, AFL-CIO, v. University of Alaska*, Op. No. 5184 (September 24, 1999) (*UACEA*)? If so, should we grant the State's request for a stay?

We have reviewed *UACEA* and the parties' arguments. We decline the State's invitation to modify our decision or grant a stay, except to the extent noted below. A careful review of the State's reconsideration memorandum and arguments shows it is essentially rearguing the case it presented during the September 1999 hearing, and it is raising new arguments. Nonetheless, we will address it contentions.

First, we find a material distinction between the facts in *UACEA* and the facts in this case. In *UACEA*, the parties had negotiated new collective bargaining agreements (CBA) that contained salary increases for bargaining unit members, and the employer was seeking legislative approval of the monetary terms of the CBA, as required by AS 23.40.215(b). In this case, however, the CBA had expired, there was no new contract, and increases had not been submitted for legislative approval.

In UACEA, "two unions contested the nonpayment and late payment of salary increases due under the terms of their collective bargaining agreements with the University of Alaska." *UACEA* at 1. The Alaska Supreme Court stated: "Because Alaska law requires that the legislature appropriate the funds for these pay increases in order for the university to be obligated to pay them, and the legislature made no such appropriations, we affirm the superior court's order granting summary judgment to the University of Alaska and to the state." *Id.*

The two unions in *UACEA* had negotiated a new collective bargaining agreement with the employer, the University of Alaska. These agreements included salary increases for bargaining unit members. The University and the State of Alaska's executive branch requested that the legislature approve the monetary terms of the contracts, under AS 23.40.215. In both cases, the Alaska Legislature did not take action on the requests during the first legislative session

after the requests were made.

In August 1995, the unions filed suit in superior court "claiming that the university was obligated to pay the raises out of its personnel-services budget." *Id.* at 2. In November 1995, the University requested, by either legislation or "supplemental request," approval of some, but not all, the negotiated raises. *Id.* at 2. The legislature ultimately approved these latter requests. However, the unions sued for interest and the unfunded raise that the University had not presented to the legislature. The superior court granted summary judgment in the University's favor, and the unions appealed to the supreme court.

The supreme court affirmed the summary judgment ruling. The court applied AS 23.40.215(a), which provides that "[t]he monetary terms of any agreement entered into under [PERA] are subject to funding through legislative appropriation." The court stated:

> The plain language of this provision suggests that the monetary terms of ACCFT's CBAS do not become effective unless and until the legislature specifically funds them. The statute does not direct the legislature to take action on a request for funding; nor does it provide for funding by default in the event of legislative inaction. Rather, it simply hinges the effectiveness of the monetary terms of any public-sector CBA on legislative funding.

Id. at 3.

Citing to its prior decisions, the court also rejected the unions' argument that the University could pay for the salary increases by taking funds from other areas of its budget. "Were the State either free or required to reallocate its present appropriation and resources in this manner, the appropriation power of the legislature would be frustrated." *Id.* at 4, *citing to Public Safety Employees Association, Local 92 v. State*, 895 P.2d 980, 986 (Alaska 1995). Finally, the court concluded that the University need not pay the interest sought. It pointed out that in another prior decision, it ruled that "a legislative appropriation funding monetary terms in one year of a multi-year collective bargaining agreement does not oblige a public employer to pay according to those terms in subsequent years." *Id.* at 4, *citing to Public Employees' Local 71 v. State of Alaska*, 775 P.2d 1062, 1064 (Alaska 1989).

In *UACEA*, the parties had negotiated new collective bargaining agreements that contained salary increases for bargaining unit members, and the employer was seeking legislative approval of the monetary terms, as required by AS 23.40.215(b). The University was attempting to complete the bargaining process by obtaining legislative approval, as required by AS 23.40.215(b). However, the legislature took no action on the University's request; therefore, the salary increases were not approved initially. There is no indication that the legislature's nonapproval of the monetary terms of the CBAs in *UACEA* had any effect at all on the cost of monthly medical premiums to bargaining unit members represented by the two unions.

In the case before us, by contrast, no increases were submitted for legislative approval, a supplemental appropriation was not requested, and there was no new contract. The parties had negotiated a contract that expired on June 30, 1999, which contained no provisions to deal with possible increased health benefit costs in the event that a new agreement was not reached by the June 30, 1999, expiration date of the contract. The expired agreement caps both parties' contributions for health care costs. Although the State knew soon after bargaining started that health benefit costs were projected to increase, it did not even make its first formal offer on health benefits until May 10, 1999.[2]

In addition, the parties had not completed negotiations for a new contract when the legislature adjourned. The State did not submit a request to the legislature for approval of the projected increase in health benefit costs. The parties have not reached agreement on who should pay for the increased costs. Although the State had presumably submitted a budget to the legislature, there was no evidence that the budget contained the increased medical costs projected by the State. Therefore, the legislature did not have the opportunity to review the monetary terms of an agreement containing the health premium increases. The legislature cannot take action under AS 23.40.215 on a monetary term it has not had opportunity to review. Thus, the State's suggestion that the legislature somehow rejected the projected cost increases under AS 23.40.215 has no basis in fact.[3]

Accordingly, we find the facts in this case distinguish it from the facts cited by the supreme court in *UACEA*, and the other cases cited therein. According to our research, the court has not had an opportunity to rule on a case in which the public employer unilaterally decreased the value of a mandatory subject of bargaining without negotiating to impasse. Since we have found there are key factual distinctions between this case and *UACEA*, we will not modify Decision & Order No. 245 on that basis, and we will not grant a stay.

II. Is Agency Decision and Order No. 158 factually distinguishable from this case?

In its Reconsideration Memorandum, the State contends we overlooked "prior decisions and relevant authorities." For example, it argues that in *Alaska State Employees Association/AFSCME Local 52, AFL/CIO, vs. State of Alaska, Dept. of Administration, Division of Personnel/EEO,* Decision and Order No. 158 (1993) (D&O 158), we sanctioned its action in unilaterally increasing GGU members' insurance premiums.

The State overlooks an important difference between the contractual article addressing medical premium payments in D&O 158 and those in D&O 245. The State points out correctly that we concluded in D&O 158 that the employer is not required to pay medical premium costs beyond a cap provided in the parties' CBA. As we noted in D&O 245, that was the Agency's ruling in D&O 158. However, the State fails to mention a significant difference between the language of the parties' agreement in D&O 158 and the language of the agreement in D&O 245. As we pointed out, the agreement in D&O 158 *capped only the employer's premium contribution. In D&O 245, both parties' contributions are capped by the CBA.*[4] In our view, a cap on only *one* party's premium contribution (as in D&O 158) differs materially from an agreement containing a cap on *both* parties' premiums (as in D&O 158). We concluded in D&O 158 that the employer was not required to pay any increases because the contract capped its contribution. We further concluded that a cap nonetheless does not justify unilateral changes to the benefits provided. (D&O 158 at 17).[5]

By contrast, the agreement addressed in D&O 245 puts a limit or cap on *each* party's monthly medical benefit premiums. Further, it does not contain a contingency plan should the medical premiums exceed the total of the parties' contributions. The parties apparently either hoped premiums would not increase beyond the caps, that they would have a new contract, or left this term for future negotiation.[6]

Given the important difference between the contract in D&O 158 and the contract at issue in D&O 245, the question is who bears the responsibility to pay premium increases when the parties' collective bargaining agreement fails to provide for payment. Specifically, in this case, the State's projected premium increase, effective July 1, 1999, exceeds both the employer's and employees' premium caps as provided in the parties' 1996-99 collective bargaining agreement. The State says that in that event, employees must pay. However, the State provides no basis to support its argument that when a contract places a limit on both parties' premiums, the employees should pay any unnegotiated excess. Under the facts in this case, where the delay in negotiating health benefits was primarily attributable to the State, we do not believe employees should bear the costs.

III. To preserve industrial peace, how is the status quo maintained when the parties' agreement fails to provide for payment of medical premium increases?

The State asks us to rethink "what maintaining the status quo under this collective bargaining agreement means." (State's Reconsideration Memorandum at 2). We have reviewed our decision, the evidence, and the parties' arguments, and we see no need to modify D&O 245's factual findings on the status quo. We do note, though, that the State misunderstands our discussion of maintaining the status quo and legislative funding: "The agency's decision suggests that the maintenance of the status quo under labor law somehow overrides the legislature[']s express power to fund increased monetary terms, (No. 245 at 12), and that the legislature's resolutions should have no place in the parties' negotiations. no. 245 at 13." (Reconsideration memorandum at 8).

As we stated in D&O 245, the status quo must be maintained until the parties reach impasse. We must consider industrial peace in determining status quo. We emphasize that in this case, where the contract does not provide for payment of medical premium increases, the employer fails to foster "a non-coercive atmosphere that is conducive to serious negotiations" and fails to preserve the status quo when it unilaterally imposes an increase in monthly premiums without negotiating to impasse. *See* D&O 245 at 12, *citing to 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).

We found, under the facts of this case, that the status quo requires the State, as employer, to pay for any increases in health benefit premiums until the parties reach impasse. Decision and Order No. 245 at 12; Decision and Order No. 158 at 16, *citing to Intermountain Rural Electric*, 142 L.R.R.M. (BNA) at 2452. We believe this is what is required when the parties' agreement makes no provision, and there is no past practice. *See* 1 Patrick Hardin, *The Developing Labor Law*, 639-643 (1992). If the contract does not contain a provision outlining premium payment responsibilities, the employer should be required to pay amounts exceeding both parties' caps. The National Labor Relations Board generally requires employers to pay for contract cost increases until impasse. *See, e.g., Bituminous Roadways of Colorado*, 314 NLRB 1010, 147 L.R.R.M. (BNA) 1074, (1994) (employer's refusal to pay an increase in dental/vision coverage was a violation); *Circuit-Wise, Inc. and United Elec., Radio and Mach. Workers of America*, 306 NLRB 766, 140 L.R.R.M. (BNA) 1214 (1992) (employer committed unfair labor practice by unilaterally increasing employees' Blue Shield insurance costs without their consent and prior to impasse in negotiations); and *Arno Moccasin Co.*, 274 N.L.R.B 1515, 119 L.R.R.M. (BNA) 1206 (1985) (employer committed violation by unilaterally altering employees' health and life insurance coverage).

Nowhere in D&O 245 did we say that the legislature's monetary approval of contracts under AS 23.40.215 is affected by maintaining the status quo. In this regard, the State misreads D&O 245 when it contends we ruled that the legislature's resolutions should not play a role in bargaining. The legislature's role in approving or disapproving the terms of collective bargaining bargaining agreements is clearly stated in AS 23.40.215. As we explained in D&O 245, we did not give SCR 11 am the same weight we would give to a resolution applicable under AS 23.40.215, because SCR 11 am was not a resolution that applied to the facts of this specific case.

Specifically, AS 23.40.215 contemplates the Department of Administration submitting the monetary terms of an agreement to the legislature. Here, the legislature never had the opportunity to review an agreement containing the premium increases because it was never presented with it. At least we are not aware that the State ever submitted an agreement containing monetary terms that included the premium increases. AS 23.40.215. The legislature cannot approve or disapprove a monetary term that has never been presented to it. When the State realized health benefit costs were going to increase, it could have sought an increase from the legislature while it was still in session. This would have given the legislature an opportunity to act on the request.

IV. Is the Agency's decision internally inconsistent?

The State argues that our decision is internally inconsistent because we found that the parties' agreement did not require either party to pay an amount greater than the cap, but we also concluded that the State was liable to pay the premiums that exceeded the cap. We do not find that the decision is internally inconsistent. It is undisputed that the parties' expired contract caps both parties' contributions. However, the reality is that the monthly premiums have increased beyond the caps. Someone must pay for them. In our view, and in order to preserve industrial peace, the employer should pay for these increases until impasse.[7]

Our decision to require the employer to pay is consistent with federal labor law that requires the parties to bargain to impasse before an employer may unilaterally change a mandatory subject of bargaining. *See cases cited* at page 7 part III, above. *See also NLRB v. Katz*, 369 U.S. 763 (1962); *Massey-Ferguson, Inc. v. N.L.R.B.*, 78 L.R.R.M. (BNA) 2289 (7th Cir. 1971), enfg. 184 N.L.R.B. 640 (1970) (in the absence of consent or an impasse in negotiations, an employer may not make unilateral changes in existing wages and benefits while the parties are bargaining for a collective bargaining agreement.). Further, to allow the State, as employer, to change GGU members' premiums without bargaining to impasse would damage the collective bargaining process and create a playing field that is not level.[8] Public employers should be required to bargain to impasse before imposing changes in mandatory subjects of bargaining, just as public employees are required to be at impasse before they can strike. The Alaska Supreme Court has held, for example, that "Class III employees, all other employees, can also strike after an impasse in negotiations as long as a majority of the employees vote by secret ballot for a strike. AS 23.40.200(d). *Alaska Public Employees Ass'n v. State of Alaska*, 776 P.2d, at 1031 (June 30, 1989). In that same decision, the court stated that, "we believe that the

state may implement unilateral contract changes when negotiations reach an impasse." *Id.* at 1033.

If the employer is not required to pay the increased premium amount until it negotiates to impasse, the employer is placed at a distinct advantage in negotiations if negotiations do not conclude in a timely manner. Conversely, the labor organization is at a clear disadvantage. The parties here could have avoided their present predicament by starting bargaining sooner, being prepared with proposals on all mandatory subjects of bargaining when negotiations began, and requesting and providing relevant information in advance of the bargaining process. Perhaps then they would have reached agreement or impasse before the legislature adjourned, so their agreement could have been submitted for the legislature to act on under AS 23.40.215.

V. Should we modify our decision in light of the State's new assertion that we limited the State's complete presentation of its defense?

At page 15 of its "Corrected memorandum" supporting reconsideration, the State asserts, for the first time, that it did not have adequate time to present its defense. The State provides no credible argument or factual basis to support this assertion. We have reviewed the hearing tapes. During the hearing, the State's attorney initially expressed concern when we informed the parties we believed the hearing could be completed in a day-an-a-half or two days. But when he was assured he would have one day to present the State's defense, he agreed to proceed on that basis.

Near the end of the first day of testimony, and in a discussion of finishing the hearing in two days, ASEA's attorney informed the State's attorney ASEA had only one witness left to testify. The State's attorney then said: "Then we will finish." The State never objected to the length of the hearing until it filed its reconsideration petition, some two weeks after we issued Decision and Order No. 245. We find the State's objection untimely. Further, by failing to file an offer of proof or other objection at the hearing, it waived any right it may have to present additional evidence. Nevertheless, we have reviewed the record, the evidence, and the issues, and we conclude the State had sufficient time to present its defense. We therefore reject this assertion.

The State also argues "that the union was estopped from complaining about the state's conduct when it [sic] own conduct was dilatory and amounted to surface bargaining. *State's Notice of Defense* ¶2f (August 5, 1999). However, we find the State did not present sufficient evidence at the hearing to support this defense. It now attempts to resurrect a defense it never developed through the evidentiary process. We find the State abandoned this defense.

Even if the State did not abandon this defense, we deny the defense because the State failed to present credible evidence to support its allegation that ASEA's conduct was dilatory and amounted to surface bargaining. We have reviewed the evidence and testimony, and the State's prehearing brief, opening statement and closing argument. We find the State failed to develop this defense by providing supporting evidence and argument on this issue. Under the evidence presented in this case, we find ASEA's conduct was not dilatory and did not amount to surface bargaining. The State's defense is without merit and is therefore denied and dismissed.[9] We will modify our order in D&O 245 to reflect these findings and conclusions.

The State also contends in its reconsideration memorandum that ASEA waived its right to bargain over the implementation of the increased premiums by failing to "offer any alternatives[]" to the State's notice that it would, barring agreement, "start deducting the cost of the premium increase effective July 13, 1999." (Reconsideration memorandum at 18). Citing to *N.L.R.B. v. Pinkston-Hollar Const. Services, Inc.*, 954 F.2d 306 (5th Cir. 1992), 139 L.R.R.M. (BNA) 2686 (1992), the State argues that "the basic [sic] principle is that if an employer meets the requirement of notice, and there is an opportunity for bargaining which the union disregards or avoids, the employer may implement, even where there is no impasse." (Reconsideration memorandum at 16). We find this is another argument that was not developed adequately during the hearing. Nonetheless, we will address it.

The State asserts that in *Pinkston-Hollar*, the employer was entitled "to implement a new insurance plan because the union failed to respond in a timely fashion to the employer's notice and offers to bargain about the change." (Reconsideration memorandum at 16.) (citation omitted). We find *Pinkston-Hollar* factually distinct from the case before us.[10] Here, we find ASEA did not delay in bargaining or fail to respond timely prior to implementation. In fact, from the time the State notified ASEA it would implement the premium increases to the actual implementation of the

increases in July 1999, there was limited time to bargain. Moreover, there was no evidence ASEA delayed the bargaining process or did not participate in bargaining prior to this implementation. On the contrary, it actively participated and was attempting to get the State's agreement to allow it to establish its own trust. In short, we find the union did not fail to bargain or waive its right to bargain prior to implementation of the increase in health premium. The State's new argument in this regard is rejected.

VI. Should we place a deadline on negotiation of the health benefits issue?

While the parties may both share some responsibility for the current lack of agreement on health care benefits, the bulk of the responsibility lies with the State.[11] The undisputed testimony shows that ASEA had a health care proposal ready when bargaining began, but the State did not. Although ASEA chose to withhold its proposal until the State presented its proposal, the fact remains that it at least came to the table prepared to present a proposal on health care, an important mandatory subject of bargaining.

It is hardly a surprise that the parties are required to discuss mandatory subjects of bargaining during negotiations. The parties have known since they agreed upon their last contract, effective July 1, 1996, that the contract would expire on June 30, 1999. The parties also knew that health care costs could rise unexpectedly, as occurred during their last contract, requiring a larger premium. With this in mind, the parties should have known that rising health care costs would be an important issue in bargaining, and that advance preparation was vital to timely conclude discussions on the subject. Yet, the State failed to present a formal proposal for ASEA's consideration until May 10, 1999, four months into negotiations, and approximately one week before the end of the legislative session. Consequently, by the end of the legislative session, the State had no new contract to present to the legislature under AS 23.40.215, and it apparently failed to even present a proposal to the legislature on payment of the increased premiums.

By its arguments, the State suggests that it should only be required to bargain on a mandatory subject of bargaining -- a health care premium increase -- until the end of the fiscal year, which in this case coincided with the expiration of the parties' agreement. It contends it should then have authority to impose the premium increase without negotiating to impasse, as is usually required, despite the premium cap the parties' agreement places on GGU members. We believe there is too much at stake in the collective bargaining process to sanction such an action. If the State had presented a health care proposal at the onset of negotiations, and if the parties had started negotiations early and used their time efficiently, an agreement or impasse could have been reached by July 1, 1999.[12] Then the State might not be in the position it is now.

We fully understand the significant, unanticipated expense our Order in D&O No. 245 places on the State, as employer of the GGU members, and as the party required to pay under that Order. We further believe that the parties have had ample time and opportunity to bargain the issue of health benefits. Therefore, we will order that if the parties have not reached agreement by Friday, December 31, 1999, the parties are at impasse on the subject of health care benefits.

ORDER

1. The State of Alaska's petition that we modify Decision and Order No. 245 is denied and dismissed, except as modified below.

2. The State of Alaska's petition for a stay is denied and dismissed.

3. In light of the significant expense to the State of Alaska anticipated by this order, it is further ordered that, if the parties have not reached agreement by Friday, December 31, 1999, the parties are at impasse on the subject of health care benefits.

4. In this case, the State's defense that ASEA's conduct was dilatory and amounted to surface bargaining is without merit, and is denied and dismissed.

5. The State's assertion that it did not have adequate time to present its defense is without merit, and is denied and dismissed.

6. The State's assertion that ASEA waived its right to bargain the increase in health benefit premiums is denied and dismissed.

ALASKA LABOR RELATIONS AGENCY

Alfred L. Tamagni, Sr., Chairman

Robert Doyle, Board Member

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 Decision and Order No. 246, 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-ULP (consolidated), dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 16th day of December, 1999.

Margie Yadlosky

Personal Specialist I

This is to certify that on the 16th day of December 1999, a true and correct copy of the foregoing was mailed, postage prepaid to

Margaret A. McCann, ASEA

Kathleen Strasbaugh, State of Alaska

Signature

1For a full history of the case, including findings of fact and conclusions of law, please refer to Decision and Order No. 245.

2It then withdrew that offer at the very next bargaining session.

3In its Reconsideration Memorandum at 7, n.2, the State admits it did not submit a new agreement for legislative approval during the 1999 legislative session. It states it attempted to obtain funding for the health premium increases. However, there is no evidence it ever submitted an agreement containing the increased health benefit premium under AS 23.40.215. Commissioner Robert Poe's informal attempts to solicit legislative support, as noted in D&O 245 at 6, finding of fact number 20, were informal and not part of a new agreement between the parties. It appears Commissioner Poe was attempting to gain approval for the proposal to have the parties share the increased premium costs.

4*See* Decision and Order No. 245 at 12, n.7.

5As in D&O 158, we believe that the parties should have the freedom to negotiate financial responsibility for payment of medical insurance costs.

6Either way, it was not ideal planning by the parties. By failing to provide for this contingency, the parties left themselves open for time-consuming litigation of the issue.

7There was credible evidence at hearing (the testimony of Ed Burgan) that the premium increases could be paid from the reserve for a period of at

least six months after July 1, 1999. Regardless, the employer must find a source of payment, whether the source is the reserves, a supplemental appropriation from the legislature, or elsewhere.

8See discussion on this point in Decision and Order No. 245 at 13.

9The State filed a separate charge concerning ASEA's conduct in negotiations, but this charge was filed only five days before the hearing in these cases. Thus, there was inadequate time to investigate the charge and possibly consolidate that case for hearing with these cases. We want to be clear that we are not deciding the issue in the charge the State filed against ASEA. Our finding here is based only on the evidence presented in this case.

10The First Circuit Court of Appeals found *Pinkston-Hollar* "inconsistent" with that court's approach. *See Visiting Nurse Services of Western Massachusetts, Inc. v. NLRB*, 177 F.3d 52, 161 L.R.R.M. (BNA) 2326 (1st Cir. 1999). *Cf. NLRB v. Triple A Fire Protection, Inc.*, 136 F.3d 727, 157 L.R.R.M. (BNA) 2577 (11th Cir. 1998) (the court stopped short of recognizing the *Pinkston-Hollar* rule).

11We believe the State's four-month delay in presenting a health care proposal and furnishing ASEA the information it requested about health care costs hindered the parties' ability to reach an agreement on health care that could have been submitted to the legislature for approval or disapproval.

12The parties' agreement allows them to begin bargaining on December 1, 1998. However, they did not begin until January 11, 1999. This gave the parties approximately four months to negotiate the entire agreement and submit it for legislative approval, before the end of the legislative session. Further, AS 23.40.215 gives the legislature 60 days to review the agreement and advise the parties whether it approves the monetary terms, or not.