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ALASKA CORRECTIONAL OFFICERS ASSOCIATION,

Complainant,

vs.

STATE OF ALASKA,

Respondent.

CASE NO. 09-1556-ULP

**DECISION AND ORDER NO. 291**

The Alaska Labor Relations Agency Board deliberated on July 22, 2010, on the State of Alaska's (State) "Motion to Dismiss" an unfair labor practice complaint filed by the Alaska Correctional Officers Association (ACOA). The record for this motion closed on July 22, 2010, when the Board completed its deliberations.

**Digest:** The State's motion to dismiss is granted. The issues contained in the unfair labor practice filed by the Alaska Correctional Officers Association are now moot. The only remedy ACOA requested was an order requiring the State to reimburse bargaining unit members for medical costs that ACOA contended were required to be paid under the parties' expired collective bargaining agreement. The State asserted that it is in the process of, or has completed this reimbursement. ACOA does not dispute the State's assertion. Therefore, there is no remedy that this Agency could order, and no live case or controversy in dispute. The issues for decision are therefore moot. Moreover, there are no public interest exceptions to the mootness doctrine, based on the specific facts of this case.

**Appearances:** Brad Wilson, Business Manager for Complainant Alaska Correctional Officers Association (ACOA); Katherine Sheehan, Labor Relations Manager, for Respondent State of Alaska (State).

**Panel:** Gary P. Bader, Chair, and Members Tyler Andrews and Daniel Repasky.[1]

## DECISION

### Statement of the Case

ACOA filed a complaint alleging the State committed an unfair labor practice (ULP) under AS 23.40.110(a)(5) and (a)(1) by failing to increase the health insurance contribution in an amount "necessary to maintain comparable coverage under the current Select Benefits Default/Economy Plan," as required by Article 17.3 of the parties' collective bargaining agreement. This agreement expired on June 30, 2009. ACOA also contended that the State violated the status quo doctrine by making a unilateral change to a mandatory subject of bargaining. Hearing Officer Jean Ward investigated the complaint and found probable cause that the State committed a violation.

The State denied it committed a ULP, and it requested a hearing. Before a prehearing conference could be held to schedule a hearing, the State filed this "Motion to Dismiss" the unfair labor practice complaint, contending that the issues in dispute are now moot. ACOA opposes the motion. We grant the State's motion for the reasons stated below.

### ISSUES

1. Is the unfair labor practice complaint filed by ACOA moot?

2. If the unfair labor practice complaint is moot, is there an exception to the mootness doctrine that justifies moving the complaint forward to a hearing before the Board?

### FINDINGS OF FACT

1 Board Member Repasky has issued a dissenting opinion. His opinion follows the majority's decision.

The panel, by a preponderance of the evidence, finds the facts as follows:

1. ACOA represents correctional officers who are Class I state employees and who are prohibited from striking by AS 23.40.200(b).

2. ACOA and the State entered into negotiations for a new collective bargaining agreement to replace the three-year agreement that was due to expire on June 30, 2009. The parties eventually reached impasse, and pursuant to the requirements of AS 23.40.200(b), they agreed to and did attend interest arbitration.

3. On March 19, 2009, the arbitrator issued an award. The State submitted the terms of the award to the Alaska Legislature on March 31, 2009. However, the legislature adjourned the first session of the twenty-sixth legislature without deciding whether to appropriate the funds necessary to pay the first year of the new agreement, or whether to reject the request for appropriation of the funds.

4. Effective July 1, 2009, the State increased the cost, to bargaining unit employees, of medical benefits under the Select Benefits Default/Economy Plan by $43 per employee per month.

5. Upon learning of the increase, ACOA filed an unfair labor practice complaint on August 24, 2009. ACOA alleged that under Article 17.3 of the parties' collective bargaining agreement, the State was required by the "status quo" doctrine to pay this increased cost. ACOA contended that the State's failure to do so constituted a unilateral change to a mandatory subject of bargaining in violation of the status quo doctrine.

6. As a remedy, ACOA requested that the agency find that the State committed an unfair labor practice by failing to provide the "annual adjustment to its health coverage for bargaining unit members as called for by Article 17.3 of the CBA," and that the agency order the State "to provide that adjustment for all correctional officers, retroactive to July 1, 2009." (Statement of Complaint attached to Charge Against Employer, at 6).

7. Hearing Officer Jean Ward conducted an investigation and concluded that there was probable cause that the State committed an unfair labor practice. (Notice of Preliminary Finding of Probable Cause, December 8, 2009). In the Notice, Ward described the primary issue in the matter: "The primary issue is whether the State is required to continue paying an amount of money not exceeding that necessary to maintain comparable

coverage under the current Select Benefits Default/Economy Plan for the bargaining unit members ACOA represents after the parties' contract expired on June 30, 2009." (*Id*. at 4-5).

8. The cost of this plan increased by $43 per employee per month on July 1, 2009. When the Alaska Legislature did not appropriate funding to pay for this increase by July 1, 2009, the State began charging each employee in the bargaining unit for the $43 increase. However, the State subsequently agreed to reimburse employees. The State is now in the process of, or has already reimbursed bargaining employees for this monthly increase, retroactive to July 1, 2009. (State of Alaska's Motion to Dismiss, June 9, 2010, at 1).

## ANALYSIS

The State contends that the parties' dispute is now moot because the State has retroactively paid the $43 monthly increase to each affected bargaining unit member, this payment was the remedy ACOA requested, and "[i]t would be senseless to proceed to hearing on a matter that is clearly settled." (State's Motion to Dismiss at 1). The State adds that the public interest exception to the mootness doctrine does not apply here, and we should therefore dismiss the unfair labor practice complaint.

ACOA, on the other hand, urges us to deny the motion and proceed to hearing. While apparently conceding that the underlying dispute is moot, ACOA contends that we should find that the public interest exception to the mootness doctrine does in fact apply, and the case should be heard on the merits.

The first question is whether this dispute is moot. The Alaska Supreme Court has held that a claim is "'deemed moot if it has lost its character as a present, live controversy.'" *Ulmer v. Alaska Restaurant & Beverage Association (ARBA)*, 33 P.3d 773, 776 (Alaska 2001) (quoting *Gerstein v. Axtell*, 960 P.2d 599, 601 (Alaska 1998). Further, "[a] disputed claim is moot 'when its resolution would not result in any actual relief, even if the claiming party prevailed.'" *Alaska Railroad Corporation v. Native Village of Eklutna*, 142 P.3d 1192 (Alaska 2006).

We find that the underlying dispute in this case is moot. There is no present, live controversy that requires determination. This controversy ended (or will end) when the State paid bargaining unit members' medical costs retroactively, as requested by ACOA in its ULP complaint. Therefore, even if we heard this matter and even if ACOA prevailed, ACOA would not be entitled to any relief because the State has already funded (or is in the process of funding) the sole remedy ACOA sought in its unfair labor practice complaint.

The next question, then, is whether the public interest exception to the mootness doctrine applies. In *Kodiak Seafood Processors v. State,* 900 P.2d 1191, 1196 (Alaska 1995), the Alaska Supreme Court held that even when a matter is deemed moot, certain issues may still be addressed "if they fall under the public interest exception to the mootness doctrine." In analyzing the applicability of this exception, the court stated that three factors must be considered: "(1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine." *Id.* In weighing these factors, the court held that "[n]one of these factors is dispositive; each is an aspect of the question of whether the public interest dictates that a court review a moot issue. Ultimately the determination of whether to review a moot question is left to the discretion of the court." *Id.*

Concerning the first requirement, the Alaska Supreme Court has analyzed the term "capable of repetition" in terms of whether or not factual circumstances are "likely" to repeat in the future. "With regard to the first requirement, we have refused to apply the public interest exception to unusual factual circumstances that were unlikely to repeat themselves . . . ." *Fairbanks Fire Fighters Association v. City of Fairbanks*, 48 P.3d 1165, 1168 (Alaska 2001). ACOA contends that this event is likely to repeat in the future. We disagree with the contention that repetition of this event is likely to occur in the factual setting that unfolded here. Although this or a similar fact set could arise, to say that it is likely to repeat in the future is speculative. We therefore conclude that there is no basis to believe that the disputed issues are capable, that is, likely, of repetition.

Regarding the second factor, we do not believe that application of the mootness doctrine may cause review of the issues to be repeatedly evaded. If these issues repeat in the future, we will review the dispute to determine whether the mootness doctrine is preventing review and whether the public interest dictates that a review should occur. However, even if this set of facts were to occur again, we do not believe that application of the mootness doctrine would cause review of these issues to be repeatedly circumvented. On the potential for circumvention, ACOA argues the following:

> If this case is dismissed, employers, including the State, will take as the message that unilateral action can never be sanctioned, because they will always have a "safe harbor": in the face of a ULP complaint, all that the employer would need to do would be to begin to reverse the unilateral action complained about and no tribunal could consider its violation of the statute or its bad faith.

("Opposition of the Complainant Union to the Employer's Motion to Dismiss," at 4).

By making this decision today, we are not sanctioning unilateral action that results in an unfair labor practice. We hope that the message that employers and labor organizations both take is that the public interest would not be served by this agency conducting a hearing in which no remedy could be accorded the prevailing party.

Finally, we must determine whether the issues presented are so important to the public interest that we would be justified in overriding the mootness doctrine. This dispute "raises a question of the power of government officials . . . ." *Fairbanks Fire Fighters Association, Local 1324 v. City of Fairbanks*, 48 P. 3d 1165, 1169 (Alaska 2002). In the appropriate case, analysis of the power of government officials over this aspect of the collective bargaining process may be so important as to override the mootness doctrine. We do not find that to be the case here. There is nothing to be gained from review of the merits in this case. *See, e.g., Ulmer v. Alaska Restaurant & Beverage Association (ARBA)*, 33 P.3d 773, 778 (Alaska 2001). Review of the merits here would add nothing to the remedy sought by ACOA, because the State has funded the monies ACOA requested in the remedy.[2] As there is no current controversy over payment of the increase in medical costs to employees in the bargaining unit, we believe an opinion on the issue would be "purely advisory." *See id.* at 779. Accordingly, we conclude that the public interest exception to the mootness doctrine does not apply in this case.

In *Marine Engineers Beneficial Association, District I, AFL-CIO v. State of Alaska*, (Decision and Order No. 275 (April 29, 2005)), we cited to a decision by our counterpart agency in Pennsylvania:

> We have often held that the successful completion of contract negotiations may make moot disputes over alleged misconduct during negotiations . . . . Continued litigation over past allegations of misconduct which have no present effects unwisely focuses the parties' attention on a divisive past rather than a cooperative future.

*Id*. at 7 (citation omitted). Though the end of the parties' negotiating process ended in arbitration and subsequent disputes, we believe it is important to move forward and work toward a cooperative future.

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2 If the State has not funded the remedy sought and has not reimbursed employees as it asserted it was in the process of doing, we retain jurisdiction to resolve any related disputes.

## CONCLUSIONS OF LAW

1. The Alaska Correctional Officers Association is an organization under AS 23.40.250(5), and the State of Alaska is a public employer under AS 23.40.250(7).

2. The parties' dispute is now moot. There is no live case or controversy. The public interest exception to the mootness doctrine does not apply in this case.

## ORDER

1. The State of Alaska's motion is granted. This unfair labor practice complaint is moot and is therefore dismissed.

2. The State of Alaska is ordered to post a notice of this decision and order at all work sites where members of the bargaining unit affected by the decision and order are employed or, alternatively, serve each employee affected personally. 8 AAC 97.460.

Dated: _____.

**ALASKA LABOR RELATIONS AGENCY**

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Gary P. Bader, Chair

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Tyler Andrews, Board Member

## Dissent of Board Member Daniel Repasky

I respectfully dissent from the majority's determination that the State of Alaska's motion should be granted. I would deny the motion and order the parties to proceed to hearing on the issues analyzed in the December 8, 2009 probable cause finding.

First, I would find that this dispute is not moot. Complainant Alaska Correctional Officers Association (ACOA) has raised several salient points, not only in its "Opposition to the Employer's Motion to Dismiss" brief, but also in supporting documents and briefs filed pursuant to the unfair labor practice (ULP). ACOA's points raise important issues relative to the ULP charge and the application of the "mootness doctrine" that are now unanswered.

The Public Employment Relations Act (PERA) was established to protect its interest when it required binding arbitration and prohibited strikes by Class 1 employees. An important question of law, as to a public employer's ability to impose a mandatory subject of bargaining upon Class 1 employees while it awaits actions from the Legislature, is being questioned in this case and it should proceed to hearing for proper consideration.

I believe the question before the Board in this case was as follows: "Did the State commit a ULP by improperly imposing upon the ACOA and its members a mandatory term or condition of employment? If so, what remedy?"

In this case, the State admits it imposed this term on the ACOA but argues (among other things) that because it has retroactively remedied (or is in the process of doing so) the unilateral imposition of a mandatory term, the issue before us is moot and the Board majority agrees. This does not provide guidance to either the State or to representatives of Class 1 public employees by answering the question, "Was such action an unfair labor practice?"

The Board majority does not believe it is required to determine whether or not the ULP occurred because the financial aspect of the requested remedy in the ACOA's ULP case was fulfilled and therefore the case is moot. I do not agree.

Questions which I believe require adjudication which for now will remain unanswered:

1) Did the State violate the Act by requiring each ACOA member/employee pay $43.00 a month to maintain said benefit?

and

2) Under PERA, can a public employer pick and choose which aspects of an agreement it chooses to apply for Class 1 employees who have been through arbitration and are awaiting legislative funding? If so, what relief from such unilateral action are Class 1 employees entitled to?

By dismissing the case as moot, the Board majority has failed to explore the implication of an argument that is of great public interest to all Class 1 employees and their employers. I would submit that this has the potential to have a substantial impact on Class 1 employees throughout the State and therefore is of public interest. I do agree with the majority that this issue is of public interest as it relates to the power of public officials. However, I believe the question of the power of public officials as displayed here overrides the mootness doctrine and requires a hearing.

ACOA Class 1 employees are prohibited by law from striking. The parties bargained to impasse and then proceeded to the legislated resolution of that impasse, binding arbitration. The arbitrator issued an award in sufficient time for the Legislature to act upon prior to the expiration date of the agreement. The precedent agreement required the State to maintain the healthcare benefits at the status quo without establishing a cost feature therein.

In *Mid-Kuskokwim Education Association vs. Kuspuk School District,* Decision and Order No. 156 (03/08/1993) as part of the Conclusion of Law at point 3, the Board panel at that time found that …

> *As part of the duty to bargain under AS 23.40.110, parties negotiating the successor to an expired agreement are under an obligation to maintain the status quo until they reach impasse and satisfy any conditions to exercising the economic weapons of unilateral action or strike under AS 23.40.200. An employer's unilateral changes to a term of the expired agreement during negotiations can violate its duty to bargain in good faith under AS 23.40.110(a)(5).* (Italics added).

I further believe the remedy of the alleged unfair labor practice charge in this case is not simply the repayment of the funds held out of each ACOA member's paychecks. It is also the remedial authority of the Board to impose upon a violator conditions of admission to cure the violation (if held to be true) and to restore the balance in negotiations for Class 1 employees.

Moreover, PERA (AS 23.40.140) gives the Board authority to determine if a party has engaged in an unfair labor practice and if so, to issue an "order or decision requiring the person to cease and desist from the prohibited practice and to take affirmative action which will carry out the provisions of AS 23.40.070 – 23.40.260." Agency staff found that there was probable cause that a ULP violation occurred. I believe a finding of probable cause here implies that a live controversy still exists. It is therefore incumbent on the Board to proceed to hearing and make the determination whether the State committed an unfair labor practice in this case.

Accordingly, I respectfully dissent from my colleagues and would send this case to hearing.

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Daniel Repasky, Board Member

APPEAL PROCEDURES

This order is the final decision of this Agency. Judicial review may be obtained by filing an appeal under Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of mailing or distribution of this decision.

This is to certify that on the 14th day of October, 2010, a true and correct copy of the foregoing was mailed, postage prepaid to
Brad Wilson, ACOA
Katherine Sheehan, State of Alaska

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Signature