BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:	)	
	)	OAH No. 13-0522-PER
ALEUTIAN REGION	)	
SCHOOL DISTRICT	)	
	)	

ADOPTION OF MODIFIED FINAL DECISION

I. Relevant Procedural History

The Aleutian Region School District is a participating employer in the Public Employee Retirement System. On June 1, 2012, ARSD wrote the PERS Administrator and asked that the Administrator 1) rule that ARSD's participation as an employer had been terminated and refund surplus funds to ARSD or, in the alternative, 2) rule that any surplus could be used as a credit towards future contributions owed to PERS by ARSD. The Administrator refused to issue a final decision on this request.[1] ARSD attempted to appeal the Administrator's ruling to the Office of Administrative Hearings, but the Administrator would not refer its appeal because he had not issued a final appealable decision.

ARSD appealed to the superior court. The court held that ARSD was entitled to an initial hearing pursuant to AS 39.35.006, and referred this matter to OAH for a "hearing on all factual and legal issues the OAH deems appropriate."[2] This matter was assigned to Deputy Chief Administrative Law Judge Christopher M. Kennedy. The parties agreed to conduct extensive discovery and file dispositive motions on the legal issues.

ALJ Kennedy issued a Proposed Decision on March 31, 2015. The Proposed Decision held:

1. ARSD retains the right to voluntarily and unilaterally terminate its participation in PERS;
2. The Administrator has the authority to credit any existing surplus in ARSD's employer contribution account as a prepayment of future employer contributions even if ARSD does not request termination;
3. If ARSD requests termination, any surplus would have to be calculated by conducting a termination study; and
4. If ARSD elects to withdraw, the Administrator does not have the legal authority to refund the surplus.

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1 Not issuing a ruling was essentially a denial of both requests.

2 Order in 3AN-12-09327CI dated April 2, 2013.

This matter was then remanded to the Administrator to consider whether to credit a surplus, if any, as a prepayment towards future contributions.

Pursuant to AS 44.64.060(e), ARSD filed a Proposal for Action.[3] Based on that Proposal for Action, and before the remand to the Administrator became effective, the ALJ remanded this matter to himself to receive briefing on the arguments raised in ARSD's proposal.[4] That briefing has now been completed.[5] ARSD's Proposal for Action raises four specific objections. The first two are related, and are discussed in section II A, below. The other two objections are discussed in sections II B and II C.

II. Discussion

A. Existence of a Separate Employer Asset Share Account

The Proposed Decision makes two legal conclusions about how the employer contribution account is calculated.[6] First, that the employer contribution account does not include any portion of the investment income and second, that it does not include any portion of the retirement reserve account.[7] ARSD's Proposal for Action takes issue with the first conclusion. ARSD disputes that PERS maintains a separate asset share account and asks that the reference to an employer asset share account in footnote 54 be deleted. It further asserts that the employer contribution account includes both employer contributions and its proportionate share of investment income.

PERS is obligated to maintain an adequate system of accounts for the management of the retirement system.[8] Prior to statutory changes in 2008, a separate account was maintained for each employer to track employer contributions. In addition, any investment income was deposited into each employer's asset share account.[9] These were identified as distinct accounts in former AS 39.35.615. Only the amount in the employer contribution account was, prior to 2008, available for refund.[10]

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3 The Administrator did not file a Proposal for Action.

4 *See* AS 44.64.060(e)(2). In most OAH hearings, an ALJ hears a matter and submits a proposed decision along with any proposal for action to the final decision maker, which is usually a board or commissioner. In this type of appeal, OAH is the final decision maker but the procedure for submitting proposals for action still applies. Thus, any proposal for action is considered by the ALJ who – like any final decision maker – has several options, one of which is to remand this matter for additional proceedings.

5 After the briefing was completed, this matter was reassigned to ALJ Jeffrey A. Friedman.

6 Where the Proposed Decision discusses "accounts" it is not referring to individual bank accounts, but to accounting entries used by PERS to keep track of contributions, distributions, and investment income.

7 Proposed Decision, page 17.

8 *See* 1975, 1980, and current versions of AS 39.35.100(a).

9 *See* 1975 and 1980 versions of AS 39.35.100(b)(3).

10 1980 version of AS 39.35.615(e).

Based on the deposition testimony and evidence in the record, it appears that the amount in the employer contribution account was transferred into the asset share account at the end of each fiscal year. Thus, it is unclear what amount, if any, would be available for a refund or credit now. However, the Proposed Decision only ruled that investment income was not available for a refund. The decision does not otherwise mandate how any credit or refund would be calculated.

AS 39.35.100(a) required the creation of an entire system of accounts to be used in administering the retirement system. The Administrator did in fact maintain an account related to each employer which included both an employer contribution account and an employer asset share account. No change is made to the Proposed Decision related to either of the first two issues raised by ARSD.

B. Payment for Employees of Other Employers

In its Summary Adjudication briefing, ARSD argued that the 2008 statutory changes made fundamental changes to its original Participation Agreement. Specifically, ARSD asserted that for the first time it was required to make contributions for the benefit of the employees of other participating employers. ARSD claimed that this change, along with other statutory changes, repudiated and breached ARSD's participation agreement with PERS.

OAH only has jurisdiction to address the appeal of the Administrator's decision that 1) ARSD could not terminate its participation and 2) could not receive a refund of, or credit for, any surplus. To the extent ARSD's complaint "is a simple contract case,"[11] OAH has no jurisdiction to resolve ARSD's claim.

The Proposed Decision states "ARSD has not shown that either the participation agreement, or applicable law, limited its contributions to the amount needed to fund its own employees' benefits."[12] It also states that the 2008 changes "did not convert ARSD's obligation for contributions from one limited to its own employees into one that included contributions for other employers' employees."[13]

The Proposed Decision is modified to include the following clarification:

> Any statement that may be viewed as a factual finding or legal conclusion that, prior to 2008, ARSD was for may have been required to make contributions on behalf of employees of other employers is intended to help explain how the conclusions were reached in this matter, and is not binding

[11] ARSD's Motion for Summary Judgment, page 34.
[12] Proposed Decision, page 11.
[13] Proposed Decision, page 18.

on the parties in subsequent proceedings regarding this appeal or future litigation. In addition, no ruling has been made as to whether there has been a breach of contract, repudiation, or breach of the covenant of good faith and fair dealing.

C. Termination Study

The final issue raised by ARSD is a request that the decision be modified to require a termination study. After consideration of ARSD's Proposal for Action, the Proposed Decision's conclusion is deleted and replaced with the following:

> ARSD's motion is granted in part, and the Administrator's cross-motion is denied. The Administrator has the discretion to determine that ARSD has already prepaid all or a portion of its share of any accrued actuarial liability to PERS, and, pursuant to AS 39.35.255(f), treat that payment as an offset to any future contributions that ARSD may be required to make. This matter is remanded to the Administrator (subject to any superior court order to the contrary) to determine whether a prepayment has been made, the amount of any prepayment, and any reasonable and appropriate charges for the costs to PERS attributed to accepting and accounting for the prepayment. The Administrator may consider all relevant factors including, but not limited to, litigation risks and the timeliness of ARSD's request. ARSD has the right to appeal the Administrator's determination or calculations as provided in AS 39.35.006.
>
> ARSD also retains the right to voluntarily and unilaterally terminate its participation in PERS. Its prior request to terminate was made three years ago. Therefore, if ARSD still wishes to terminate, it should submit a new request which includes an effective date for that termination. At that time, a termination study must be conducted in accordance with former AS 39.35.620. ARSD has the right to appeal any decision made by the Administrator based on that study as provided in AS 39.35.006.
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> To the extent the termination study shows there is a surplus after all employees have either received refunds or been vested in their benefits, the Administrator no longer has the legal authority to refund that surplus to ARSD. ARSD's only remedy, if any, lies in Superior Court. OAH does not retain jurisdiction over this dispute.

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III. Conclusion

After consideration of the Proposal for Action, the Administrator's response, and ARSD's reply brief, the Decision on Summary Adjudication has been modified as set out above. The Decision on Summary Adjudication as modified is hereby adopted as a final administrative decision.

Dated this 15th day of October, 2015.

Signed
Jeffrey A. Friedman
Administrative Law Judge

This Adoption order, together with the original Decision on Summary Adjudication, is a final decision. Judicial review of the final decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

[This document has been modified to conform to the technical standards for publication.]

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:	)	
	)	
ALEUTIAN REGION	)	
SCHOOL DISTRICT	)	
	)	OAH No. 13-0522-PER

[*PARTIALLY ADOPTED PROPOSED*] DECISION ON SUMMARY ADJUDICATION

I. Introduction

The Public Employees Retirement System (PERS) credited the Aleutian Region School District (ARSD) with a surplus of $2,782,777 in the district's account as of June 30, 2006. By legislation effective July 1, 2008 PERS was converted to a cost-sharing system, and all employers' accounts were consolidated. In 2012 ARSD asked that the administrator refund the surplus to the district, or use it as a credit against the district's future liability for contributions to the system.[14] The administrator declined to issue a decision regarding the request,[15] and ARSD filed an appeal to the superior court.[16] The court referred the matter to the Office of Administrative Hearings (OAH) "for a hearing on all factual and legal issues the OAH deems appropriate."[17]

After the matter was referred to OAH, the parties filed cross motions for summary adjudication. ARSD's motion argues that: (1) the failure to refund or grant a credit for the surplus is a breach of contract, in that it is contrary to the terms of the district's participation agreement with PERS;[18] (2) ARSD is entitled to terminate its participation in PERS and to receive the surplus pursuant to the participation agreement and former AS 39.35.615(e);[19] and (3) the surplus should be deemed a prepayment of future contributions under AS 39.35.255(f).[20] PERS opposed the motion and in addition filed a cross motion seeking a ruling that: (1) to the extent ARSD has asserted a claim for relief based on a breach of contract, its claim is barred by AS 09.10.053 (the statute of limitations governing actions based on a contract)[21] or by waiver;[22]

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14 R. 5-7.

15 R. 8.

16 The superior court appeal was filed after the administrator declined to refer the district's administrative appeal to the Office of Administrative Hearings. *See* R.2-4, 10.

17 Aleutian Region School District v. State, Department of Administration, Division of Retirement and Benefits, No. 3AN 12-09327 CI (Order Re: Motion for Trial De Novo, April 3, 2013).

18 ARSD Motion at 34-47.

19 ARSD Motion at 47-49.

20 ARSD Motion at 50-54.

21 PERS Response at 30-34.

and (2) the administrator lacks authority to either refund the surplus or use it to provide a credit against future contributions.[23]

ARSD's claims for damages and restitution based on breach of contract are not appropriate for resolution in this forum. The administrator has established that under current law he lacks authority to refund any surplus to ARSD. However, ARSD has established that under current law the administrator has authority to credit an amount equal to ARSD's surplus in its employer contribution account (if any, calculated pursuant to former AS 39.35.620(g)), as a prepayment of contributions under AS 39.35.255(f).

For these reasons, ARSD's motion is granted in part, the administrator's cross-motion is denied, and this matter is remanded to the administrator (subject to any superior court order to the contrary) to consider whether, in his discretion, to credit a surplus, if any, in ARSD's employer contribution account as a prepayment of contributions, taking into account any factors relevant to such an action, including but not limited to litigation risks and the timeliness of ARSD's request. The Office of Administrative Hearings does not retain jurisdiction in this matter, and the administrator's decision on remand may be appealed as provided in AS 39.35.006.

II. Facts

The Public Employees Retirement System was established effective January 1, 1961.[24] The system's purpose is to encourage qualified personnel to enter and remain in the public service by providing for the payment of retirement, disability, and death benefits to public employees.[25] Political subdivisions of the state can become participants in PERS upon approval by the administrator.[26]

The Aleutian Region School District became a participant in PERS effective July 1, 1976.[27] Upon the district's entry into PERS, ARSD and PERS executed a participation agreement. The agreement included these provisions:

> [ARSD] agrees for its part as follows:
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> …

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22 PERS Response at 34.

23 PERS Response at 2 ("Finally, ARSD's claim must fail because the Administrator has no authority to do what ARSD requested it to do.").

24 AS 39.35.010(b) (2004).

25 AS 39.35.010(a) (2004).

26 AS 39.35.550 (1993).

27 *See* R. 250.

> (5) [ARSD] agrees to make contributions each year which are sufficient to meet the normal cost attributable to inclusion of its employees including actuarial and administrative costs and to amortize the past service cost for its employers…. The contributions shall be computed according to the relevant provisions of the statutes and the amount determined by the actuary.
> …
> (9) [ARSD] agrees that this agreement shall not be terminated by it except by written notice…submitted to the director at least 90 days before the date on which [ARSD] wishes to terminate. Upon termination, distribution of employee and employer's contributions will be made in accordance with the relevant statutory provisions, including AS 39.35.620-650 and the required actuarial valuations.
> …
> The State agrees for its part as follows:
> …
> (2) The contributions received by the State from [ARSD] will be added to and become part of the Retirement System funds.
> …
> The parties mutually agree as follows:
> (1) Any reference in this agreement to any statutory provisions or to any regulations shall include any amendments, additions, or deletions, both express and implied which may be affected.
> (2) This agreement shall continue in effect until…
> (a) [ARSD] unilaterally terminates the agreement…
> (b) The parties mutually agree to terminate the agreement. [or]
> (c) The State unilaterally terminate[s] the agreement…because of statutory direction or authorization, whereupon written notice will be given.[28]

At the time ARSD joined PERS, there was no reference in AS 39.35 to the voluntary, unilateral termination (by an employer) of participation in PERS. AS 39.35.620 provided for the involuntary termination of participation for failure to make required contributions, and AS 39.35.620(g) provided that after such termination and deductions for refunds to employees and funding for employee benefits, "the remaining funds in the employer contribution account shall be refunded to the employer…." In addition, AS 39.35.650 stated:

> In no event may an employer receive an amount from the pension fund, except that, upon termination of participation, the employer shall receive the amount which remains after the satisfaction of all liabilities of the system to the employees of the employer arising out of variations between actual requirements and expected actuarial requirements.[29]

In 1980, the legislature enacted AS 39.35.615, which provided that a participating employer could request to amend a participation agreement so as to terminate coverage of a group of employees and, in AS 39.35.615(e), provided for a refund to the employer of any excess

28 R. 250-255.
29 §44 i, ch. 143 SLA 1960 (Ex. 2, p. 18).

funds in the employer's contribution account attributable to those employees.[30] In conjunction with the enactment of AS 39.35.615, the legislature amended AS 39.35.650 to read:

> In no event may an employer receive an amount from the pension fund, except as provided under AS 39.35.615(e) and AS 39.35.620(g).[31]

As in effect at the time ARSD joined the system, PERS included a defined benefit retirement plan, under which all employees contributed a set percentage of their compensation and received a determinable amount ("defined benefit") based on their credited service and compensation. From the time ARSD joined PERS through June 30, 2008 an employer was required by AS 39.35.590 to make contributions "sufficient to meet the normal cost attributable to inclusion of its employees and to amortize the past service cost of its employees…" Throughout that time, the formula for computing employers' contributions was set out in AS 39.35.250. The formula included a percentage, redetermined annually,[32] of the employer's employees' total annual compensation[33] equal to the sum of two[34] components: (1) a uniform rate, applicable to all employers,[35] and (2) an employer-specific rate.[36]

From the time ARSD joined PERS through June 30, 2008, AS 39.35.100(b)(3) required PERS to maintain a separate account for each employer. Initially, AS 39.35.100(b)(3) provided:

> A separate account for each employer shall be maintained. The account shall be credited with the contributions of the employer…. This account shall be charged with the employer's actuarial charge for…benefits paid under this system to…the employee of the employer….[37]

This account was the employer's contribution account. In addition, also under AS 39.35.100(b)(3), PERS maintained one other account for each employer, an asset share account

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30 §44 ch. 13 SLA 1980 (Ex. 3, p. 7).

31 §46 ch. 13 SLA 1980 (Ex. 3, p. 8).

32 AS 39.35.260.

33 AS 39.35.270.

34 Until 1977, there was a third component, consisting of the rate necessary to offset the employer's pro rata share (based on number of employees) of PERS' administrative expenses. *See* AS 39.35.250(3) (1974), *repealed*, §24 ch 128 SLA 1977. AS 39.35.100(b)(3) was amended by the same legislation, to remove a provision excluding an employer's contributions made in payment of administrative expenses from the employer contribution account. *See* §18 ch 128 SLA 1977.

35 The specific methodology employed to determine this rate varied, as did the terminology attached to it. *See* AS 39.35.250 (1) (1974) (§10a ch 143 SLA 1960; am §13 ch. 1 SLA 1974) ("normal cost rate"); AS 39.35.250 (b) (1977) (§24 ch. 128 SLA 1977) ("consolidated employer rate"); AS 39.35.250(b) (2007) (§§65, 66, 120 ch. 20 SLA 2007) ("consolidated employer normal cost rate").

36 Again the specific methodology employed varied, as did the terminology. *See* AS 39.35.250(2) (1974) (§10a ch 143 SLA 1960; am. 13 ch. 1 SLA 1974) ("prior service rate"); AS 39.35.250 (c) (1977) (§24 ch. 128 SLA 1977) ("past service rate"); AS 39.35.250(c) (2007) (§§65, 66, 120 ch. 20 SLA 2007) ("past service rate").

37 AS 39.35.110(b)(3) (1975). As quoted above, the provision excluding contributions for administrative expenses, which was removed in 1977, has been omitted. *See supra*, note 21.

(consisting of the employer's share of the investment income of the fund).[38] PERS also maintained a retirement reserve account, consisting of the amounts transferred from employees' contributions and the employer's contribution account to fund employees' benefits.[39] PERS did not maintain a separate bank account for any of these funds. Rather, all employer contributions and all PERS investment income was commingled and PERS tracked the amounts attributable to each individual employer by maintaining separate financial accounts (bookkeeping entries) for each employer.[40]

From 1976 to 1988, ARSD made employer contributions totaling approximately $176,000 to PERS.[41] After 1988 and continuing through June 30, 2006 ARSD did not make any employer contributions to PERS. During those years, ARSD was not required to make any employer contributions, because its credited assets exceeded its accrued liability.[42]

In 2008, the legislature enacted SB 125, effective July 1, 2008, that "change[d] the defined benefit plan of the PERS…into an employer cost-sharing program…."[43] Under the cost-sharing program, employers' contributions to the defined benefit plan were set at uniform rate of 22% for all employers.[44] The employer-specific rate previously incorporated into the formula for determining employer contributions was repealed;[45] accounting for the defined benefit plan was integrated and the statutory requirement for PERS to maintain separate individual employer accounts was eliminated.[46] In addition, SB 125 repealed AS 39.35.615(e) and AS 39.35.620(g),

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38 *See id.* ("[T]he investment income of the pension fund shall be allocated to each employer asset share account….").

39 *See* AS 39.35.100(b)(1), (2). The amount transferred from the employer's contribution account was, it appears, the amount referred to in AS 39.35.100(b)(3) as "the employer's actuarial charge for…benefits paid under this system to…the employee of the employer."

40 *See* KG pp. 14-15; KL pp. 15-18. Individual accounts for members are defined by law in terms applicable to bookkeeping or financial accounting entities, rather than bank accounts. *See* AS 39.35.660(16) (employee contribution account), (17) (employee savings account). There is no statutory definition for any of the employers' accounts.

41 *See* R. 403.

42 R. 403. *See* KL p. 27. The reasons for the surplus in assets over liabilities are not clear in the record. The participation agreement states that current employers' past service is recognized "up to a maximum of 0 [zero] year(s)." R. 252. To the extent that participation agreement was construed to provide credit for prior service, it is noteworthy that at the time ARSD joined the system it had 30 PERS-covered employees, and it downsized to a half dozen or so by 1995. *See* R. 248, 370.

43 *See* Governor's Transmittal Letter to SB 125 (Senate Journal, March 16, 2007). *See* FCCSSB 125 (hereinafter, SB 125). SB 125 was introduced on March 16, 2007, passed the legislature on March 17, 2008, and was signed into law on April 9, 2008. Ch. 13 SLA 2008.

44 AS 39.35.255.

45 *See* §24 ch. 13 SLA 2008 (SB 125).

46 AS 39.35.100(a) ("The accounts and records [of the defined benefit plan] shall be integrated with the accounts, records, and procedures of the employers…"). *See* Governor's Transmittal Letter for SB 125 ("The bill

which had provided for refunds to an employer in the event of termination of coverage (§615(e)) or of participation (§620(g)).[47] In separate legislation, AS 39.35.650 (which, as will be recalled, had been amended in 1980 to reference those provisions)[48] was amended to read:

> An employer may not receive an amount from the plan, except as provided under AS 39.35.115(e) [providing for reversion of excess assets to employers upon termination of the plan in its entirety, subject to approval by the Internal Revenue Service].[49]

With these legislative changes, individual employers no longer had a statutory right to a refund upon termination of coverage for a group of their employees, or upon termination of their participation in the plan.[50]

In conjunction with the anticipated change to a cost-sharing plan and the elimination of separate accounting, the legislature in FY 2008 (July 1, 2007-June 30, 2008) appropriated funds to employers who would be adversely impacted by the transition.[51] First, in SB 53 (effective July 1, 2007) the legislature appropriated funds "for deposit into defined benefit plan accounts (AS 39.35.100) in [PERS]" as a one-time subsidy to employers whose contribution rate under the new program (22%) would be higher than their rate under the prior program.[52] ARSD did not receive any funds from this appropriation.[53] Second, in SB 256 (effective April 13, 2008), the legislature appropriated funds in the form of unrestricted grants to employers who in FY 2005-FY 2007 had made contributions in excess of their required contributions.[54] ARSD had not

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would repeal and reenact AS 39.35.100 to provide for one integrated system of accounting for all employers."); §1, CCCS SB 125 ("It is the intent of this act to…provide for one integrated system of accounting for all employers.").

47 Sec. 24 ch. 13 SLA 2008 (§24 SB 125).

48 *See supra*, notes 16, 18.

49 *See* §58 ch. 20 SLA 2007. The legislature amended AS 39.35.115(e) in 2014, eliminating the provision for reversion of excess assets to employers, and instead providing that excess assets would be deposited in the general fund. *See* §3 ch. 52 SLA 2014. No conforming amendment was made to AS 39.35.650.

50 AS 39.35.650 (2008). *See* KL 42-45.

51 *See* §1, SB 125; R. 199.

52 *See* §55(f), HCS CSSB 53 (Fin) am H, ch. 30 SLA 2007) (hereinafter, SB 53). SB 53 was the capital appropriations bill for FY 2008 (July 1, 2007-June 30, 2008). *See* Governor's Transmittal Letter for SB 53 (Senate Journal, January 19, 2007); R. 199. The appropriation was a lump sum of $185,000,000, effective July 1, 2007. *See* §§55(e) (appropriation), 66 (effective date).

53 For employers whose FY 2008 board-approved rate was below 22%, the subsidy paid the employer's contribution down to a rate of 14.48%; employers were liable only for the first 14.48% of their 22% contribution. In FY 2008, ARSD's rate was 13.72%. R. 403. Accordingly, ARSD was ineligible for this particular subsidy.

54 *See* §32(a), HCS CSSB 256 (Fin) am H (2008), ch. 11 SLA 2008 (hereinafter, SB 256). SB 256 was the supplemental appropriations bill for FY 2008. *See* Senate Journal, January 30, 2008 (Governor's transmittal letter). Section 32 was not part of the SB 256 as introduced; it was added in the Senate Finance Committee. *See* CSSB 256 (Fin) (March 3, 2008). The legislature's intent was stated in the legislation and also in Section 1 of SB 125 and was included in the fiscal note for SB 125, where it was identified as a "Heroes" payment "to employers who previously made additional payments to pay down their share of the unfunded liability." R. 282. The appropriations legislation, SB 256, characterized the appropriation as "based on past employer contributions payments above the

made any such excess payments,[55] and thus it did not receive any of those funds.[56] Third, also in SB 256 (effective April 13, 2008), the legislature appropriated funds in the form of unrestricted grants to employers whose contribution in FY 2009 under the new cost sharing program would be greater than their contribution under the prior program, "to offset the implementation of a uniform contribution rate…at 22 percent" under the new cost sharing program.[57] This appropriation, which was contingent on enactment of SB 125,[58] included an unrestricted grant of $73,608 to ARSD.[59]

The uniform contribution rate of 22% for all employers under the new cost sharing plan beginning in FY 2009 was applied to the greater of the employer's current payroll or the employer's payroll in FY 2008.[60] Thus, an employer whose payroll diminished after FY 2008 was required to contribute 22% of its 2008 payroll, rather than its current payroll. On July 15, 2011 the Division of Retirement and Benefits notified ARSD that because its FY 2009 and FY 2010 payrolls were less than its FY 2008 payrolls, the district owed an additional $31,618.70 for its employer contribution for those two years.[61]

ARSD responded to the notice on July 20, objecting that the district (which is entirely state-funded) had not been provided an appropriation for the amount requested.[62] In a subsequent response on July 24, ARSD asked for information on the disposition of the

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required employer contribution rate." *Id.*, §32(a). SB 256 was passed by the legislature on March 18, 2008. The appropriation was effective April 13, 2008. *See* §§35-38, SB 256.

55 In FY 2005-FY 2007, ARSD made no cash contributions at all, because its accrued assets exceeded its liability for contributions. *See* R. 403.

56 Kathleen Lea, the division's deputy director, testified at her deposition that ARSD was included on the "Heroes" list. KL p. 38. However, the fiscal note for SB 125 shows that ARSD was to receive a "Hold Harmless" grant, and no "Heroes" funding. R. 283. The "Heroes" were employers who had an unfunded liability and made extra payments to reduce that liability. ARSD had no unfunded liability, and beginning in FY 2009 it made no cash contributions to PERS at all. *See* R. 403.

57 *See* §1, SB 125; R. 199; §32(a), SB 256. The appropriation was also included in the fiscal note for SB 125, where it was identified as a "Hold Harmless" payment, that is, "a one-time payment…to employers who currently pay employer contribution rates below the 22% level. R. 282.

58 §35(b), SB 256.

59 §32(d), SB 256. The payment, in ARSD's case, appears to have been intended to hold the district harmless for five years. *See* R. 283 ("Appx Coverage Provided by HH (yrs)"; "5" for ARSD).

60 AS 39.35.255(a).

61 R. 223-228.

62 R. 222. ARSD had been appropriated some funds intended to cover an anticipated shortfall, in 2008. The additional payment that PERS sought in 2011, presumably, constituted the amount due for FY 2009 and FY 2010 that was in excess of the amount anticipated to be due for those years at the time of the 2008 payment, which had been based on FY 2008 payrolls. *See supra*, notes 42-44.

$2,782,777 that ARSD termed as "excess contributions" that had been identified in a June 30, 2006 accounting performed for PERS by Buck Consultants.[63]

The division responded, in August, that assets and liabilities were no longer separately accounted for.[64] ARSD took the position that the $2,782,777 should be applied to the district's liability for contributions, or refunded to it.[65] The division disagreed, and, following a visit to the superior court,[66] this case ensued.

III. Discussion

For purposes of this discussion, it need not be determined whether ARSD had a surplus in its account, or the amount of the surplus if one existed.[67] At issue is not the existence or amount of a surplus, but the nature of ARSD's rights to such a surplus, should one exist. ARSD argues that notwithstanding the statutory changes since it joined PERS, and in particular SB 125, ARSD remains entitled to enforce the provision in the participation agreement under which it had the right to terminate participation and obtain a refund, and that it is entitled to damages for breach of contract (or equitable relief) if PERS will not honor ARSD's request to terminate and obtain a refund. Leaving aside its claim for damages or equitable relief, ARSD also asserts that the administrator has discretion, under current law, to provide a refund or a credit against future contributions and that in light of the language in the participation agreement he should do so.

Without ruling on the merits of ARSD's claim that it is entitled to damages or equitable relief (claims within the jurisdiction of the superior court), the parties' arguments regarding

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63 R .218.

64 R. 199.

65 R. 195.

66 *See supra*, notes 3-4.

67 Buck Consultants' accounting for purposes of determining ARSD's FY 2009 employer contribution shows a credit in favor of ARSD in the amount of $2,782,777 as of June 30, 2006. R. 103, 115. The credit is identified as the amount by which on that date ARSD's "adjusted assets" exceeded its "accrued liability."

Under AS 39.35.100(b)(3), PERS was required to maintain a separate account for each employer, to be credited with the employer's contributions (less pro rata administrative expenses) and charged with the "employer's actuarial charge for…benefits paid." That was the "employer contribution account." In addition, the investment income of the fund was, until 1982, to be "allocated to each employer asset share account" in proportion to the employer's share of all fund assets, and beginning in 1982 to be "allocated to the retirement reserve account and to each employer asset share account" in proportion to the employer's share of all fund assets in those accounts. *See* AS 39.35.100(b)(3) (1977), am §43 ch. 137 SLA 1982 (HCS CSSB 121 (Fin) am H). The record includes PERS' accounting of ARSD's total assets as of June 30, 2006. *See* R. 14. There is no entry in that account identified as the "employer contribution account." ARSD's contributions for FY 2006 are shown in column g of the spreadsheet for "Total Assets by Employer" and column i of that spreadsheet appears to be ARSD's "employer asset share account", within the meaning of AS 39.35.100(b)(3) (1982). R. 14. Buck's accounting shows that, in addition to its share of other PERS assets, ARSD was credited with $2,113,203 as its share of the retirement reserve account on June 30, 2006. *See* R. 137.

ARSD's motion are explored more fully below, along with their arguments respecting the administrator's cross motion.

A. ARSD's Rights Under the Participation Agreement

"At its heart," ARSD says, "this matter is a simple contract case."[68] The linchpin of ARSD's argument is this provision in the participation agreement:

> [ARSD] agrees to make contributions each year which are sufficient to meet the normal cost attributable to inclusion of its employees including actuarial and administrative costs and to amortize the past service cost for its employers….[69]

According to ARSD, this language (which is identical to former AS 39.35.590) shows that the district agreed only to make those contributions that were necessary to cover benefits promised to its employees, and it argues that this limited obligation was "the essence of the parties[']bargain."[70] As ARSD sees it, to convert ARSD's obligation for contributions from one limited to the amount "sufficient" to fund benefits to be paid to its own employees, with concomitant undertakings to maintain a separate account for ARSD's contributions and to refund any surplus upon termination, into an obligation to make contributions to fund benefits paid to employees of other employers, without separate accounting and the right to terminate and obtain a refund upon termination, would so fundamentally alter the participation agreement as to make it an illusory contract, repudiate the participation agreement, and violate the covenant of good faith and fair dealing.[71] The appropriate remedy (in contract terms) for these alleged transgressions, ARSD says, is restitution,[72] specific performance (termination of the participation agreement pursuant to its terms)[73] or reformation (providing a credit for prepayment).[74]

1. ARSD's Initial Obligation For Contributions

ARSD characterizes its obligation to make contributions to PERS at the time it joined system as limited to the amount sufficient to fund its own employees' benefits, relying on the language in the participation agreement quoted above. But as PERS points out, ARSD's quote from the participation agreement omits the additional statement (found in the same provision of the participation agreement, but absent in AS 39.35.590) that "contributions shall be computed

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68 ARSD Brief at 34.
69 ARSD Brief at 38, *quoting* Participation Agreement at pp. 3-4, ¶5 (R. 252-253).
70 ARSD Motion at 38.
71 ARSD Motion at 40-43.
72 ARSD Motion at 35, 44-47.
73 ARSD Motion at 47-49.
74 ARSD Motion at 50-54. *See* AS 39.35.255(f).

according to the relevant…statutes…."[75] This additional language, according to PERS, means ARSD's contribution must be computed in accordance with law, even if that amount exceeds the amount required to meet the cost of its own employees' benefits.[76] In PERS' view, the participation agreement establishes a floor, but not a ceiling.

ARSD argues that to read the participation agreement as PERS does would be "absurd" and that limiting contributions to the amount needed to fund the employer's own employees was the fundamental essence of the bargain struck.[77] But, notwithstanding ARSD's protestations, the participation agreement expressly states that contributions will be computed as provided by law. At the time ARSD joined the system, an employer's contributions were computed under AS 39.35.590 and AS 39.35.250. AS 39.35.590 required contributions to be made in an amount sufficient to meet the "normal cost"[78] attributable to an employer's employees and to amortize the past service cost for its employees. The contribution rate needed to provide this amount was computed in accordance with AS 39.35.250. Under AS 39.35.250, an employer's contribution rate was a combination of a uniform rate applicable to all employers (the "normal cost rate", echoing the reference to "normal cost" in the participation agreement and in AS 39.35.590), plus an employer-specific rate (the "prior service rate"). As ARSD acknowledges, the uniform rate was intended to cover benefits earned by all employees after their respective employers had joined PERS,[79] and the employer-specific rate was intended to amortize the employer's obligation for benefits earned by its own employees prior to the employer's entry into the system (the employer's "unfunded obligation").[80] The employer-specific component was needed, according to ARSD, because employers entering PERS had the option to provide credit in the PERS system for periods worked by its own employees prior to the employer's entry into PERS, thus creating an unfunded obligation for the PERS system as a whole.[81]

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75 PERS Response at 18.

76 PERS Response at 18.

77 ARSD Opp. at 7.

78 The term "normal cost" was not defined in statute until 2008, at which time it was defined, for purposes of AS 39.35.255, as "the cost of providing the benefits expected to be credited, with respect to service, to all active members of the plan during the year beginning after the last evaluation date." AS 39.35.255(h).

79 *See* ARSD Motion at 6; *supra*, note 22.

80 *See* ARSD Motion at 6; *supra*, note 23.

81 *See* ARSD Motion at 6; R. 252. As in effect at the time ARSD entered the system, the formula called for determining the present value of all future benefits of the employer's employees, and subtracting from that amount the current value of the employees' and employer's past and future contributions and the employer's share of PERS assets: the difference was deemed the unfunded obligation for prior service. *See* AS 39.35.250(2) (1974). As amended in 1977, the formula simply called for amortization of the unfunded obligations, without specifying the formula by which the unfunded obligation was to be determined. *See* AS 39.35.250(c) (1977).

Under AS 39.35.250, the uniform rate was a cost-sharing rate, under which all employers paid the same rate regardless the existence of a surplus or shortfall in the particular employer's accounts for its own employees' benefits earned after entry into the system. In that regard, the uniform rate was no different when ARSD joined the system than it is today: it has always been a cost-sharing rate. The only difference is that the uniform rate is now fixed at 22% under AS 39.35.255, whereas formerly, under AS 39.35.250, it varied from year to year (and, over time, proved insufficient to meet the total amount of obligations outstanding) and employers paid an additional amount to fund their own employees' benefits attributable to service prior to the employer's entry into PERS.[82]

Because the participation agreement expressly called for ARSD to make contributions computed in accordance with the relevant statutes, and the relevant statutes as in effect at the time ARSD joined PERS (AS 39.35.590 and AS 39.35.250) called for contributions that were in part based on the outstanding obligations of all employers rather than only the employer's own employees, ARSD has not shown that either the participation agreement, or applicable law, limited its contributions to the amount needed to fund its own employees' benefits. ARSD was always subject to the risk that the amount required to fund its proportional share of all employees' benefits would exceed the amount required to fund its own employees' benefits.

2. Maintenance of a Separate Account

At the time ARSD entered the system, and continuing through June 30, 2008, AS 39.35.100(b)(3) required that PERS maintain a separate account for ARSD. However, as PERS points out, the participation agreement does not include any language creating a right to a

[82] It is not clear that it is accurate to characterize the employer specific rate as intended to fund an employer's liability for its own employees' service prior to entry into PERS, beginning May 3, 2007, when AS 39.35.250 was last amended. As amended, the formula called for combining the "consolidated employer normal cost rate" and the "past service rate." §§65, 66, 120 ch. 20 SLA 2007. Those rates were no longer set based on the date of the employer's entry into PERS, but rather based on an annual valuation. *Id.* The consolidated employer normal cost rate was defined as "the percentage of compensation of all active employees in the system which, when combined with all employee contributions to the plan, is sufficient to provide the benefits earned during the year beginning after the last evaluation date." *Id.* The past service rate was defined as the percentage of compensation of all employees in the system necessary to provide the annual amount required to amortize the unfunded obligations of the employer for benefits earned by the employer's members in the plan as of the date of the last actuarial valuation"). *Id.* Under the 2007 amendment, it appears more accurate to characterize the employer's "unfunded obligation" (a term that was previously used to describe an employer's obligation for its own employees' prior service) as its total shortfall for benefits owed to its employees, regardless of when the shortfall accrued, and regardless of the cause (*i.e.*, including actuarial errors or investment shortfalls).

separate account.[83] In fact, PERS adds, the participation agreement specifically provided that employer contributions would be added to and become part of the PERS funds.[84]

ARSD has not asserted that PERS was required to segregate ARSD's funds, or any income from those funds, in a separate bank account.[85] Rather, ARSD simply relies on the existence of the statutory right to a separate accounting to buttress its argument that limiting its contributions to the amount necessary to fund its own employees' benefits was a fundamental aspect of the original agreement.[86] As explained above, however, the participation agreement did not limit ARSD's contributions, and the existence of a statutory right to separate accounting does not change that fact.

But whether the participation agreement limited ARSD's contributions or required PERS to maintain a separate account is beside the point. What ARSD is saying is that it had the right under the participation agreement to terminate its participation and to obtain a refund, and that is what it wants to do. The existence of a statutory requirement to maintain a separate account would obviously facilitate determining the amount of the refund due in the event an employer who had a contractual right to terminate chose to do so. But for purposes of deciding whether under current law the administrator must, may or should permit ARSD to terminate its participation in PERS and obtain a refund of the surplus, or in the alternative credit the surplus against ARSD's future contributions, the issue to be decided is not whether PERS was required to maintain a separate account for ARSD after June 30, 2008, but rather what rights did ARSD have in a surplus (if one existed) prior to July 1, 2008 and could ARSD still enforce those rights after June 30, 2008. Whether PERS was required to maintain a system of separate accounting is immaterial.

3. ARDS's Initial Right to Terminate and Obtain a Refund

PERS denies that any provision in the participation agreement, express or implied, gave ARSD a right to recoup any funds from PERS, other than by termination.[87] But termination and a refund is precisely the remedy that ARSD has asked for. The right to voluntarily terminate and thereupon to receive a payment of surplus funds was included in the participation agreement, and

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83 *See* PERS Response at 22-23.

84 PERS Response at 17.

85 As ARSD noted, "The precise form that the accounts took for administrative purposes is not relevant to the legal argument." ARSD Opp. at 10, note 16.

86 *See* ARSD Motion at 8-9, 20-21; ARSD Opp. at 5.

87 PERS Response at 19.

viewed favorably to ARSD the contractual right to voluntarily terminate and to obtain a refund of surplus funds would be considered a fundamental part of the bargain. PERS' objection to refunding ARSD's alleged surplus is not that ARSD did not initially have a contractual right to terminate and obtain a refund, or that the right was not central to the participation agreement. Indeed, PERS has not argued that ARSD's contractual right to terminate its participation in PERS has been extinguished. Rather, PERS' objection, and the basis for its cross motion, is that ARSD's contractual right to obtain a refund after termination was subject to statutory changes, and the right to a refund was extinguished by SB 125 effective July 1, 2008.[88] ARSD's response is that (1) SB 125 is so contrary to the original agreement as to be unenforceable, for purposes of a breach of contract claim; and (2) even if ARSD no longer has a contractual right to obtain a refund after termination, under current law the administrator has authority to credit the surplus as a prepayment of contributions under AS 39.35.255(f), and to continue ARSD's participation in PERS.

B. Incorporation of Statutory Changes

ARSD acknowledges that the participation agreement incorporates changes in applicable law, and it does not deny that under current law ARSD lacks the right to obtain a refund.[89] ARSD's position is that the participation agreement cannot be read to incorporate all changes in applicable law, because that would make the participation agreement an illusory contract.[90] At the least, ARSD argues, the participation agreement cannot be read to incorporate changes in the law that effectively repudiate a fundamental provision in the agreement, as that would be contrary to good faith and fair dealing.[91] Because the participation agreement cannot be read to incorporate changes in statute as far-reaching as those that occurred, ARSD argues, PERS' refusal to permit ARSD to terminate and obtain a refund is a breach of the participation agreement.

ARSD's argument on these points and PERS' response to it are set forth in more detail below.

88 *See* PERS Response at 20-22.
89 *See* ARSD Opp. at 10, 15-16.
90 ARSD Opp. at 4-7, 11-17.
91 ARSD Opp. at 17-18.

1. Illusory Contract

An illusory contract is one in which by it terms makes performance by at least one of the parties entirely optional.[92] ARSD's position, citing federal cases,[93] is that to read the participation agreement as subject to changes in applicable law, without restriction, would be tantamount to creating an illusory contract.[94] If it is an illusory contract, ARSD argues, then ARSD is entitled to damages or other relief based on quasi-contract or promissory estoppel.[95]

The cases cited by ARSD are all distinguishable, PERS asserts.[96] According to PERS, those cases demonstrate that a government contract is not illusory when, like the participation agreement at issue in this case, it expressly incorporates changes only to specified statutes or regulations.[97]

2. Repudiation

Repudiation of a contract (anticipatory breach) occurs when a contracting party unequivocally disavows the intent to perform, or performs a voluntary act that renders that party unable to perform.[98]

ARSD argues that if all of the statutory changes can be incorporated into the participation agreement without rendering that agreement an illusory contract, then PERS' refusal to permit ARSD to terminate its participation in PERS and obtain a refund constitutes a repudiation of the participation agreement.[99] Repudiation of the participation agreement is a breach of contract,[100] for which the appropriate remedy is restitution.[101]

PERS does not directly respond to ARSD's assertion that it has repudiated the participation agreement. However, it is apparent that to the extent the participation agreement

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92 Askinuk Corp. v. Lower Yukon School District, 214 P.3d 259, 267 (Alaska 2009).

93 ARSD Opp. at 11-17, *citing* Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U. S. 604 (2000) (hereinafter, Mobil Oil), Marathon Oil Co. v. United States, 177 F.3d 1331 (Fed. Cir. 1999), *rev'd on other grounds sub nom.* Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U. S. 604 (2000) (hereinafter, Marathon Oil), United States v. Winstar Corp., 518 U.S. 839 (1996) (hereinafter, Winstar); CCA Associates v. United States, 91 Fed. Cl. 580 (Fed. Cl. 2010) (hereinafter, CCA Associates), Franconia Associates v. United States, 61 Fed. Cl. 718 (Fed. Cl. 2004) (hereinafter, Franconia II; ARSD Opp. at 26-28, *citing* Franconia Associates v. United States, 536 U. S. 129 (2002) (hereinafter, Franconia I).

94 ARSD Opp. at 11-17.

95 ARSD Motion at 41, note 79.

96 *See* PERS Reply at 6-8.

97 *See id.*

98 *See* Anchorage Chrysler Center, Inc. v. Daimlerchrysler Motor Corporation, 221 P.3d 977, 986 (Alaska 2009); K & K Recycling, Inc. v. Alaska Gold Company, 80 P.3d 702, 715 (Alaska 2003). Both cases rely on RESTATEMENT OF CONTRACTS 2D, §250 (1981).

99 ARSD Motion at 34-35, 43-44.

100 *Id.*

101 ARSD Motion at 44-47.

incorporated future changes in the law, applying current law is not a repudiation of the participation agreement. ARSD's argument respecting repudiation, in effect, is that the participation agreement's incorporation of future changes should be read as limited to changes that are consistent with the essential terms of the agreement and the law in effect at the time ARSD joined PERS.

3. Good Faith

ARSD argues that the "the State's actions [that is, enactment of statutes that, in its view, are fundamentally inconsistent with the participation agreement as initially in effect] violate the covenant of good faith and fair dealing."[102] The statutory changes, ARSD says, deprive ARSD of the benefit of its bargain, and are simply not fair.[103]

PERS responds that to the extent the administrator interprets the participation agreement in accordance with its express terms, he has acted in accordance with the covenant of good faith and fair dealing.[104] In any case, PERS asserts, there is no evidence that the administrator acted in bad faith.[105]

C. Effect of Statutory Changes on ARSD's Rights When it Joined PERS

As may be seen from the foregoing summary, in substance ARSD's position is that the government's ability to incorporate statutory changes into a contract without creating liability for damages incurred by the other party as a result of those changes is limited in two ways: first, the contract must specify the statutes in question (or it is illusory), and second, the changes to those statutes must not deprive the other party of the benefit of its bargain (which would be a repudiation or violation of the covenant of good faith). In this case, accordingly, to be entitled to summary adjudication ARSD must establish either that the participation agreement did not by its terms incorporate the specific statutory changes that ARSD objects to, or, if it did, that those changes in effect deprived ARSD of the substantial benefit of its bargain. The following sections consider those underlying issues: what statutory changes does ARSD object to, did the participation agreement incorporate them, and do they deprive ARSD of the benefit of its bargain?

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102 ARSD Opp. at 17-18.
103 ARSD Opp. at 17-18.
104 PERS Response at 27, *citing* Chijide v. Manilaq Assoc., 972 P. 2d 167, 172-173 (Alaska 1999).
105 *Id.*, at 28.

1. 1980: Enactment of AS 39.35.615; Amendment of AS 39.35.650

In 1980, the legislature enacted AS 39.35.615, which provided that a participating employer could request to amend a participation agreement to terminate coverage of a group of employees and, in AS 39.35.615(e), provided for a refund to the employer of any excess funds in the employer's contribution account attributable to those employees, after the same deductions, limited to those employees, that would be made in the event of involuntary termination under §620(g).[106] AS 39.35.615 did not alter or eliminate ARSD's right under the participation agreement to unilaterally terminate its participation in PERS; rather, it created an additional right, not present in the participation agreement, to request to amend a participation agreement to withdraw coverage as to specified groups of employees.[107]

The same legislation amended AS 39.35.650. Prior to the 1980 amendment, AS 39.35.650 had provided that:

> In no event may an employer receive an amount from the pension fund, except that, upon termination of participation, the employer shall receive the amount which remains after the satisfaction of all liabilities of the system to the employees of the employer arising out of variations between actual requirements and expected actuarial requirements.[108]

As amended in 1980, AS 39.35.650 read:

> In no event may an employer receive an amount from the pension fund, except as provided under AS 39.35.615(e) and AS 39.35.620(g).[109]

The participation agreement provides that upon voluntary, unilateral termination by ARSD, "distribution of…employer's contributions will be made in accordance with the relevant statutory provisions, including AS 39.35.620-650 and the required actuarial valuation." Prior to the 1980 amendment to AS 39.35.650, this provision (read in conjunction with AS 39.35.650) created a right, in the event of a voluntary termination, to payment of that portion of the employer contribution account that "remain[ed] after the satisfaction of all liabilities of the system to the employees of the employer arising out of variations between actual requirements

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106 §44 ch. 13 SLA 1980 (Ex. 3, p. 7).

107 Note that under AS 39.35.615, a participating employer could request to amend a participation agreement so as to terminate coverage as to specified groups. AS 39.35.615 did not, by its terms, provide for termination of participation in PERS. An employer could request amend the participation agreement so as to terminate coverage as to all its covered employees, which would be tantamount to terminating participation in PERS. It could not do so unilaterally, however. Because PERS was a party to the participation agreement, the participation agreement could not be unilaterally amended by ARSD.

108 §44 i, ch. 143 SLA 1960 (Ex. 2, p. 18).

109 §46 ch. 13 SLA 1980 (Ex. 3, p. 8).

and expected actuarial requirements." After the 1980 amendment to AS 39.35.650, this same provision in the participation agreement (read in conjunction with AS 39.35.650) created a right, in the event of voluntary, unilateral termination, to payment of that portion of the employer's contribution account that remained after transfer into the retirement reserve account of the amount actuarially determined to be necessary to fully fund the employer's employees' benefits,[110] that is, the same as the payment that would be made in the event of termination of coverage under AS 39.35.615(e), or involuntary termination under AS 39.35.620(g).

It does not appear that there is any substantial difference between the payment to an employer who voluntarily, unilaterally withdrew prior to the 1980 amendment and after. The participation agreement specifies that the payment is a distribution of the employer's contributions, which, in conjunction with the relevant statutes, clearly means the payment will come out of the employer's contribution account and will not include any portion of the investment income of the fund which (at the time ARSD joined PERS) was entirely allocated to the employer's asset share account and was not a part of the employer's contribution account. Similarly, it would not include any portion of the retirement reserve account, since that account was, by definition, reserved to fund the terminating employer's employees' benefits. And it would not include, under the pre-amendment version of AS 39.35.650, any residual additional amount "arising out of variations between actual requirements and expected actuarial requirements."

Both before and after the 1980 amendment to AS 39.35.650, the precise amount to be paid to an employer upon voluntary, unilateral termination could be determined only after deducting all amounts necessary to fund the employer's employees' benefits. ARSD has not claimed that the methodology for calculating the payment in effect after the 1980 amendment was inconsistent or incompatible with the method in effect when it joined the system. Indeed, the relief it has requested is to obtain a payment calculated pursuant to AS 39.35.615(e), rather than a payment calculated according to AS 39.35.650 as it was in effect when ARSD joined PERS. In short, ARSD has not asserted that the 1980 statutory changes were not incorporated into the participation agreement, or that they deprived ARSD of the benefit of its bargain.

[110] *See* AS 39.35.615(d), -.620(f)

2. 1982: Amendment of AS 39.35.100

In 1982 the legislature amended AS 39.35.100(b)(3). As amended, the investment income of the fund was no longer entirely allocated to employers' asset share accounts; instead, a portion was allocated to the retirement reserve account, as follows:

> [T]he investment income of the pension fund shall be allocated to the retirement reserve account and to each employer asset share account according to the ratio that the average of the assets in the account…bears to the total of the average balance of the retirement reserve account and all employer accounts.[111]

The 1982 amendment had no effect on the manner in which funds were credited to and charged against the employer contribution account. Rather, it had the effect of reducing each employer's asset share account by whatever amount was credited to the retiree reserve account.

ARSD has not asserted, nor has it shown, that this statutory change was not incorporated into the participation agreement, or that it deprived ARSD of the benefit of its bargain.

3. 2008: Repeal of AS 39.35.250, .615(e), & .620(g); Enactment of AS 39.35.255 & .625; Amendment of AS 39.35.100 and AS 39.35.650

The 1980 and 1982 statutory changes did not affect ARSD's right, under the participation agreement, to terminate participation unilaterally in PERS and obtain a refund, although they may have affected the manner in which that refund was calculated. ARSD's focus is on the statutory changes effected in 2008 by SB 125.

a. Contribution Rate

SB 125 changed the method by which an employer's contribution was calculated, by repealing AS 39.35.250 and enacting AS 39.35.255. As previously explained, these changes did not convert ARSD's obligation for contributions from one limited to its own employees into one that included contributions for other employers' employees. To the contrary, the change simply eliminated the employer-specific rate that covered the employer's liability for benefits accrued by its own employees prior to joining PERS, and substituted a fixed rate for a previously-variable rate with respect to the uniform rate that covered the employer's share of PERS' liability for benefits to be paid to all employees.

Viewing the evidence favorably to ARSD, PERS has shown that the change in the formula used to calculate an employer's contributions was incorporated into the participation agreement, and that the change did not deprive ARSD of the benefit of its bargain.

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111 §§42, 43 ch. 137 SLA 1982.

b. Voluntary Termination of Participation

Neither ARSD nor PERS argues that SB 125 eliminated ARSD's express right under the participation agreement to terminate its participation in PERS.[112]

c. Right to A Payment Upon Voluntary Termination

SB 125 repealed AS 39.35.615(e) and AS 39.35.620(g), the two subsections that, prior to enactment of SB 125, had provided for payment to the employer of any surplus in an employer's contribution account upon mutual agreement to terminate coverage of a group (§615), or involuntary termination of participation in PERS (§620). At the same time, SB 125 amended AS 39.35.650, which had previously referenced AS 39.35.615(e) and AS 39.35.620(g), to instead reference AS 39.35.115(e), which provided a methodology for calculating payments to employers upon termination of PERS in its entirety, and it added AS 39.35.625, which provides that upon termination of coverage of a group (AS 39.35.615) or involuntary termination of participation in PERS (AS 39.35.620), an employer must continue to make payments into the plan "until the past service liability of the plan is extinguished."

With the elimination of reference to AS 39.35.620(g) in AS 39.35.650, and enactment of AS 39.35.625, there is no longer any provision in law for payment of any amount of money to an employer who voluntarily terminates participation in PERS. Here, we come to the crux of ARSD's objection, which is that SB 125 eliminated its ability to obtain a payment of any surplus in its account upon voluntary termination. Viewing the evidence favorably to ARSD, PERS has not shown that this change is consistent with the participation agreement, or that it did not deprive ARSD of a fundamental benefit of its bargain. However, absent undisputed evidence that ARSD's employer contribution account would have had a positive balance on July 1, 2008 after termination and funding all vested benefits due to its employees, ARSD has not shown that this change resulted in any harm to it.

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[112] Termination of the right to withdraw would not, in itself, have amounted to an unconstitutional taking of property under federal law. *See generally*, Bowen v. Public Employees Opposed To Social Security Entrapment, 477 U.S. 41 (1986) (legislation terminating states' right to withdraw from participation in the Social Security system, even if notice of withdrawal had already been provided, did not constitute a "taking" within the meaning of the Fifth Amendment).

D. A Surplus In the Employer's Contribution Account May Be Credited As A Prepayment of Contributions

ARSD argues that nothing in SB 125 prevents the administrator from treating a surplus as a prepayment of its accrued actuarial liability, consistent with AS 39.35.255(f).[113] This statute provides:

> All or a portion of the employer's share of any accrued actuarial liability to the plan may be prepaid in a lump sum. … If a lump sum payment is made, the payment shall be accounted for separately in accordance with regulations adopted by the commissioner. The regulations must provide for crediting to each lump sum payment account all earnings and losses received from investment of that payment. The lump sum payment shall be used solely to offset contributions under this section required of the employer that made the payment or on whose behalf the payment was made, taking into account earnings and losses from its investment. …

ARSD notes that nothing in SB 125 prohibits the continued maintenance of a separate employer's account for limited purposes as may be appropriate, and, indeed, as expressly required for purposes of AS 39.35.255(f).[114]

PERS responds that AS 39.35.255(f) was enacted as part of legislation intended to create a pension obligation bond system, not as a vehicle for crediting surplus funds in an employer's account under the former system to its liability for contributions under the new system.[115] In any event, to the extent such discretion exists, to permit ARSD to obtain a surplus would jeopardize the tax exempt status of the plan, the administrator argues.[116]

As to the first point, that AS 39.35.255(f) was enacted to facilitate a pension obligation bond system does not mean that it cannot be used as ARSD suggests. As to the second point, it is immaterial, because ARSD is proposing a credit against its contributions, rather than a payment to it. In short, nothing in PERS' opposition negates ARSD's contention that under current state law, the administrator has discretion to credit a surplus in ARSD's employer contribution account against its contributions if it remains a participant, just as the administrator could do, under AS 39.35.625(b), if ARSD were to elect to terminate its participation.[117]

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113 ARSD Motion at 34, 50-54; ARSD Opp. at 18-22.
114 ARSD Motion at 21; ARSD Opp. at 19.
115 PERS Response at 28-29; PERS Reply at 8-9.
116 PERS Response at 29-30.
117 *See also* AS 39.35.620(k) (terminated employer current on payments due under AS 39.35.625 may rejoin PERS).

Under AS 39.35.255(f), the administrator has discretion to grant ARSD the substantial benefit of the bargain struck when it entered the system, by crediting a surplus in its employer contribution account upon termination, calculated as provided in former AS 39.35.620(g), as a prepayment of contributions should ARSD elect, following completion of a termination study, to continue as a participant in PERS. Of course, the existence and amount of any such surplus is as yet undetermined. There has been no showing that the bookkeeping entry that was characterized by ARSD as "excess contributions" was the amount in ARSD's employer contribution account, much less that ARSD would have been entitled to payment in that amount if ARSD had elected to terminate its participation in PERS. In any event, it will be necessary to recalculate the amounts in question based on the effective date of ARSD's proposed termination.

IV. Conclusion

ARSD retains the right to voluntarily and unilaterally terminate its participation in PERS. Under AS 39.35.255(f), the administrator has authority to credit a surplus in ARSD's employer contribution account that would remain after the effective date of a the proposed termination (determined pursuant to a termination study conducted in accordance with former AS 39.35.620(g)), as a prepayment of contributions owed under AS 39.35.255, should ARSD elect to continue participation rather than to withdraw.

The administrator no longer has statutory authority to refund contributions to ARSD. If ARSD proceeds with withdrawal, its sole remedy, if any, lies in Superior Court, presumably in an action for damages.

ARSD's motion is granted in part, the administrator's cross-motion is denied, and this matter is remanded to the administrator (subject to any superior court order to the contrary) to consider whether, in his discretion, to credit a surplus, if any, in ARSD's employer contribution account as a prepayment of contributions, taking into account any factors relevant to such an action, including but not limited to litigation risks and the timeliness of ARSD's request. The Office of Administrative Hearings does not retain jurisdiction in this matter, and the administrator's decision on remand may be appealed as provided in AS 39.35.006.

DATED: March 31, 2015.

Signed
Christopher Kennedy
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]