

**ALASKA LABOR RELATIONS AGENCY  
3301 EAGLE STREET, SUITE 208  
P.O. BOX 107026  
ANCHORAGE, ALASKA 99510-7026  
(907) 269-4895  
Fax (907) 269-4898**

UNIVERSITY OF ALASKA )  
CLASSIFIED EMPLOYEES )  
ASSOCIATION, APEA/AFT, )  
 )  
Petitioner, )  
vs. )  
 )  
UNIVERSITY OF ALASKA, )  
 )  
Respondent. )  
 )  
\_\_\_\_\_ )  
CASE NO. 93-233-ULP )

**DECISION AND ORDER NO. 169**

This matter was heard on September 13 and 14, 1993, in Anchorage, Alaska, before the Alaska Labor Relations Board, members Stuart H. Bowdoin and Karen J. Mahurin, with hearing examiner Jan Hart DeYoung presiding. Member James W. Elliott did not participate. The record closed on September 14, 1993.

Appearances:

Joan M. Wilkerson, attorney, for petitioner University of Alaska Classified Employees Association, APEA/AFT;  
Thomas P. Owens, Jr., Owens & Turner, P.C., for respondent University of Alaska.

Digest:

Even before certification an employer must bargain with a newly elected bargaining representative any changes in terms and conditions of employment that have not been announced or implemented before the election or it risks committing an unfair labor practice.

**DECISION**

The University of Alaska Classified Employees Association (UACEA) first sought representation of a bargaining unit of University employees in January of 1992. While the question of representation was pending, the University discovered that it had underestimated its projected costs for providing health care benefits for University employees. The University's business council recommended a plan to meet the projected shortfall, including changes in benefits and employee cost sharing. The University notified employees of the need for changes and announced that employee task forces would participate in the decision making. Before any final decisions were announced, this Agency conducted a mail ballot election on the question of representation by UACEA. A majority of the eligible voters voted for representation by UACEA. After investigating an objection by the University, conducting a hearing on the objection, and counting additional ballots, which did not change the outcome of the election, the Agency certified the results of the election on May 3, 1993. The University's objection is now pending in superior court. In the meantime in April of 1993, the University announced health benefit changes and implemented those changes, without bargaining with UACEA, in two parts, on May 1, and July 1, 1993.

Maintaining that the University should have bargained changes, UACEA has filed this unfair labor practice charge. The

University's position is that the changes were decided before it had any obligation to bargain with UACEA and therefore bargaining was not required. The University further argues in the alternative that, if the Agency were to find that UACEA had a right to bargain the health benefit changes, UACEA waived the right by failing to demand it.

We find that, because the benefit changes were not announced or implemented until after the obligation to bargain arose, the University was required to bargain over them with UACEA for those members of the UACEA bargaining unit. We also find that UACEA did not waive its right to bargain.

### Findings of Fact

1. The University of Alaska is a state funded institution of higher education with campuses throughout the state. Its major campuses are in Fairbanks, Anchorage, and Juneau. It employs approximately 3500 people.
2. The University of Alaska Classified Employees Association (UACEA) is a labor organization comprised of certain University of Alaska employees and is affiliated with the Alaska Public Employees Association/American Federation of Teachers.
3. On January 21, 1992, UACEA filed a petition with the Alaska Labor Relations Agency seeking to represent certain classified employees of the University of Alaska. The parties disputed the composition of the bargaining unit, and this Agency conducted a hearing on the dispute June 16 through 18, 1992.
4. In the late spring or summer of 1992, employee health benefits became an issue at the University. At this time University health benefits were funded completely by the staff benefit rate charged the departments and, for federally funded programs, against federal grants. The University discovered that health care costs had been underestimated and those costs were projected to exceed the recovery from staff benefit rate payments. Jim Lynch, University comptroller, alerted the Department of the Navy, which is responsible for negotiating the staff benefit rate charged federal grants, to possible changes in the staff benefit rate. The University also began to think of other means to meet the shortfall, including cost sharing with employees. The first week of September, 1992, Lynch and Patty Kastelic, director of human resources, met with the chancellors to outline the problem. Id. On September 9, 1992, the University chancellors council, which consists of the University's president, chancellors, vice presidents, vice chancellors, the comptroller, and the human resources director, charged the University business council with studying the shortfall and recommending a solution. P. Kastelic, Director, Statewide Human Resources, memo. to Chancellors Council (Sept. 25, 1992), Exh. Q.
5. In a report written by Patty Kastelic and dated September 25, 1992, the business council made several recommendations, including use of workers' compensation claim reserves, increases in the staff benefit rate charged the departments and federal grants, program changes, cost sharing through employee payments, and adoption of a flexible benefits program. Exh. Q, at 3-5.
6. The health program changes were not specified in the report:

#### **Implement targeted benefit program changes.**

There are several targeted benefit program changes, most of which would affect only a few university employees, which the benefits consultants believe would save money for the university. These include establishment of preferred provider arrangements for mental health and chemical dependency, increasing the university payment to 90 percent for use of generic drugs, reducing emergency room payment by the university to 80 percent, and other similar steps affecting small numbers of university employees. We recommend statewide human resources, working with consultants, develop a package of these changes for communication to employees in October and November for implementation January 1, 1993.

Exh. Q, at 3. Changes in life insurance were also targeted. Id.

7. The plan also proposed to require some form of payment from employees. More specifically, the report recommended that employees be charged for dependents' coverage. The method or amount of the charge was left open. Exh. Q, at 4.

8. Communicating the plan to employees was an integral part of the recommendation. Exh. Q, at 5.
9. The chancellors council did approve the business council's recommended plan and assigned an effective date of January 1, 1993. Kastelic testified that the decision on health benefits was a chancellors' level decision because the University board of regents does not manage with this level of specificity, although the board was kept advised of the issue.
10. The plan included appointment of a benefits task force to meet and make recommendations to be used in the formulation of a final decision.
11. Within days of the approval of the plan, Kastelic was meeting with governance groups, task forces on each campus, and forums open to all University employees.
12. Carol Ann Hoshiko, University of Alaska, Anchorage assembly president, described the governance structure of the University. The general assembly is comprised of faculty, staff, and student representatives from the different campuses. The next level contains the statewide assembly, UAF assembly, UAS assembly and UAA assembly. The UAA assembly in Anchorage is made up of representatives of the classified council, the APT council, the faculty senate and the union of students. Each of these units has a constitution and by-laws and receives its authority from the general assembly, which also has a constitution and by-laws. Ultimate authority rests with the board of regents.
13. The UAA assembly's function is to review policies and procedures and make recommendations to the general assembly, and through the chain to the chancellor, president and board of regents. The local assembly also looks at salary issues, working conditions, and matters of business of the institution.<sup>1</sup>
14. On September 30, 1992, Hoshiko met with Patty Kastelic and Mr. Davis, the representative of the University's health care consultant, Mercer and Associates, about the health care crisis. Kastelic requested assistance from the UAA assembly in setting up a local task force with a representative sample of employees. Hoshiko understood that the Assembly was being asked to assist with finding solutions to the shortfall. Hoshiko did appoint the members of the Anchorage benefits task force and did serve as an ex officio member. She wrote the memorandum appointing task force members and scheduling two meetings. C. Hoshiko, memo. to benefits task force (Oct. 19, 1992), Exh. L.
15. News of the anticipated gap between health benefit expenses and staff benefit charges and the need for employee contributions was transmitted to staff by letter from President Komisar, mailed to each employee. President Komisar advised of significant increases in the cost of providing health benefits to University employees, stating in part,

We have not yet found a way to handle this additional financial burden. Some of it will be covered by reductions in University programs. To enable us to do this we are reducing all program expenditures by 1% effective November 1 and using the dollars generated to increase the University's health care contributions. Unfortunately, this will not be enough to cover the shortfall. Additional resources must be found through some system of cost sharing.

The University of Alaska is committed to maintaining a first-rate health benefits program. To discover how to achieve that end in a fiscally sound way will require your thinking and your help.

Ms. Patty Kastelic, Executive Director of Human Resources, has already met with the General Assembly to outline the issues. Over the next few weeks she will be meeting with governance groups throughout the University to provide additional information on health costs and benefits, and to engage in discussions on alternatives to meet our present dilemma.

Ms. Patty Kastelic and Mr. Brian Rogers, Vice President for Finance will be using the guidance received from faculty, staff and the administration to recommend to me and the Board of Regents a reasoned solution to the University's health insurance issues. You will be hearing more from them.

- J. Komisar, letter to colleagues (Oct. 7, 1992), Exh. 13. The implication is that, at this time, the University was soliciting ideas towards a decision on how to cope with health benefit cost increases.

16. John Bhend, an APEA/AFT professional who made site visits to the University, was aware of the letter from President Komisar. Bhend testified that he heard rumors that there would be cuts to benefits but he had no real facts.

17. Employees were advised of the problem in a second way. Within days of the chancellors council's approval of the plan, Kastelic had drafted the October edition of Forum, which went to all employees with their paycheck.

18. The October Forum advised of the need for change in the health benefits program and of the business council's proposal:

Rogers and Kastelic explained that one proposal from the campus business officers includes

an immediate increase of 1 percent in the staff benefit rate charged to departments, effective October 1, 1992, with another 1 percent supplemental increase, effective July 1, 1993;

adoption of premium costsharing for employees with dependents, effective January 1, 1993;

implementation of other minor health benefit program changes, effective January 1, 1993;

modification of the current life insurance package;

intensified communication with faculty and staff to increase awareness of the necessity to reduce health care expenditures

Kastelic will be meeting with employee groups to review this and other proposals.

UA Forum (Oct. 1992), Exh. M, at 1. The method of cost sharing for dependent coverage was left open, with several methods discussed. Id. at 2.

19. UA Forum further advised that University employees would participate in the decision-making:

UA's efforts to adjust its health benefits in order to contain burgeoning costs concern all permanent employees at the University, and I want to reassure everyone that we will be actively involving our employees in the process of decision-making as we consider changes to the current program.

....

Together we will decide on a method for cost-sharing which minimizes the impact, especially for our employees who have lower earnings and several dependents. Together we will decide how it is to be done and when it should be implemented. I will be actively seeking your advice because I am acutely aware that this change will have an adverse impact on all of us. Finding a way to pay for this sudden increase in the cost of our health care will require all our best efforts.

Exh. M, at 2.

20. Kastelic testified that communication was important for employees to be aware of the magnitude of the problem and to better appreciate the plan. Although decisions had been made, employees might be able to suggest other innovative ways to address the shortfall and to decide the fairest method for cost sharing. The University needed the task forces to look at different mechanisms that could be used to address the shortfall and their different impacts on employees.

21. In sum, in the fall of 1992, the University had adopted a plan to correct a health benefits shortfall. Aspects of the plan included changing benefits and imposing some form of cost sharing on employees. The University also solicited ideas from the employees, not only to communicate or market the changes but to allow employees a say in those changes directly affecting them. While the University had decided to change benefits, it had not yet determined the changes themselves.

22. The chair of the Anchorage task force was Carol Lund. There were other task forces from Juneau, Fairbanks, and statewide administration. Lund, who is not a member of the UACEA unit, stated there were two audio conferences with the other task forces, in the fall of 1992 and in January of 1993. Lund stated the Anchorage task force believed it would be participating in the decision making and believed its recommendations would be taken seriously.

23. The Anchorage task force met regularly, twice a week for two to two and one half hours between mid-October, 1992, through December, 1992, and began meeting again in January of 1993. After mid-March, the task force met once each week.

24. In a follow-up edition of Forum, provided, in November, the University advised of the task forces' progress on the health care issue:

Human Resources Executive Director Patty Kastelic has met with individual ad hoc benefits committees established by the campuses, and will meet with all of them via teleconference in mid-November.

"This will be an ongoing process," Kastelic said after the first round of meetings. "In order to make good decisions we need to understand the issues."

UA Follow-up (Nov. 1992), Exh. N. However, there appeared to be uncertainty on the implementation date:

[Patty Kastelic] said it has yet to be determined whether a January 1, 1993, implementation date is realistic from an employee viewpoint.

Id. The implementation date changed because of employees' resistance to changes and because the "picture started looking a little bit brighter." Although a health benefits shortfall remained, the magnitude of the problem was not as great as first expected.

25. On November 18, 1992, the Agency issued Decision and Order No. 148, which found a unit of University trades, maintenance and custodial workers appropriate, and the Agency ordered an election to determine whether these workers wanted UACEA to represent them for purposes of collective bargaining.

26. On November 19, 1992, the Anchorage (UAA) benefits task force met with President Komisar and expressed concern about making recommendations in time for the projected implementation date of January 1, 1993. Lund recalls Komisar saying that he would consider the possibility of delaying a decision until March or April, but he did not make a definite commitment.

27. In December of 1992, the UAA benefits task force requested "an external audit of the health care program and compensation" and continued employee involvement on the health benefits program. C. Lund, letter to M. Kelly, Chair, Human Resources Committee (Jan. 14, 1993), Exh. 15.

28. After seeing a public notice of a board of regents meeting that included health benefits on the agenda, Lund wrote a letter to regent Kelly on behalf of the UAA benefits task force that "strongly" urged the delay of any health care program decisions until after additional information became available. C. Lund, letter to M. Kelly, Chair, Human Resources Committee (Jan. 14, 1993), Exh. 15.

29. The deadline for the task force to respond to the request for recommendations was extended to February 12, 1993.

30. On February 11, 1993, the Anchorage benefits task force made its preliminary report to the UAA University assembly. It did not recommend any benefits cuts, questioning the reliability of budget projections and seeking additional information. It did recommend implementing the UA employee benefits utilization and wellness plan and continuation of the MAU-centered task forces. UAA benefits task force, Preliminary Report (Feb. 11, 1993), Exh. 16.

31. Between January 29, 1993, and February 16, 1993, the Agency conducted an election by mail ballot among the members of the trades, maintenance, and custodial unit. Ballots were tallied on February 18, 1993. The results were 93

votes for representation by UACEA and 90 votes for no representation.

32. The board of regents met the third week of February, on or around February 24, and some health care options were presented. Afterwards on March 2, 1993, Kastelic met with the Anchorage benefits task force. Kastelic stated that changes in the health care program were imminent but decisions were yet to be made on point of service payments and dependents' coverage and she asked for input. Kastelic further stated that the chancellors council would be meeting with President Komisar, where the final decisions would be made.

33. The meeting on March 2, 1993, with Kastelic following the board of regents meeting was the first time Lund could recall being told that decisions had been made on health benefits. She described the changes as including changes to emergency room, prescription drug, and mental health coverage and a cap on life insurance.

34. Hoshiko and Lund met with vice chancellor and provost Bev Beeton to express the Anchorage task force's concerns about a point of service charge and a dependents' charge, just before the chancellors council meeting in early March or the latter part of February.

35. On February 23, 1993, the University filed challenges to the election. After an investigation and hearing on the challenges, the Agency issued a decision ordering that four additional ballots be counted. UA Classified Employees Ass'n v. University of Alaska, Decision & Order No. 160 (April 21, 1993).

36. Beginning in February and ending in March, 1993, Mike Humphrey, the statewide director of human resources after January of 1993, wrote the employee handbook, which included the health benefit changes. The Handbook (April 15, 1993), Exh. A.

37. On April 7, 1993, John Bhend by letter advised Patty Kastelic of UACEA's awareness of pending changes in the health care benefits program "through various non-official sources" and sought to "remind" her of a "legal obligation to notify all employees affected prior to any change being implemented." J. Bhend, AFT Project Representative, letter to P. Kastelic (April 7, 1993), Exh. 12. The letter did not demand bargaining. Neither Bhend nor Bruce Ludwig, APEA Business Manager, believed that UACEA had the right to demand bargaining before certification.

38. The tally of additional ballots was conducted on April 27, 1993, and the final results were 95 votes for representation by UACEA and 92 votes for no representation. The Agency certified UACEA the bargaining representative for the trades, maintenance and custodial unit on May 3, 1993. Certificate of Election (May 3, 1993), Exh. 6.

39. In April of 1993, the University provided staff with a newsletter advising of changes being made in the health benefits plan and advising that additional changes were expected but not finally decided. It states, in part:

The ad hoc benefit task forces appointed by the campus assemblies have been studying alternatives and recently made their recommendations regarding changes to our benefit plans. The decision regarding which changes will be implemented was made by the president and the chancellors, who considered the recommendations of the ad hoc committees.

Final decisions regarding the amount of the dependent charge and/or a point-of-service charge for health care coverage have not yet been made. Once these decisions are finalized, the University does not plan to make any more benefit changes from July 1, 1993, to July 1, 1994. During this time, the cost effectiveness of the current changes will be closely monitored. The decision to make any additional changes after that time will depend on the actual plan costs over the next year.

The changes announced had effective dates of May 1 and July 1, UA Benefits, Issue 1/April 1993, Exh. 17, at 1. The newsletter further states,

At this time, final decisions regarding the amount of the dependent charge and/or a point-of-service charge for health care coverage have not been made. You will be notified of these changes as soon as they have been finalized. [Id.]

40. The newsletter further advised that the May 1, 1993, changes would include changes in mental health and substance abuse benefits, in emergency room coverage, and for prescription drugs, and the July 1, 1993, changes would include a reduction in life insurance and implementation of the decision that remained to be made -- whether to require an employee contribution for dependents and a point of service charge. Id.

41. Kastelic stated that the recommendations of the task forces were taken seriously. As an example, she noted that a point of service method of cost sharing was considered because it had been recommended by the Fairbanks task force.

42. Final changes were announced in another newsletter, UA Benefits Final Health Care Plan Changes, provided employees with payroll. It states, in part:

Recently, you received a newsletter outlining changes to the health care program. Since that publication, the president and the chancellors have determined the last set of health care changes, to be implemented between July 1, 1993, and June 30, 1994. These changes include the following:

The maximum amount for a health care reimbursement account (RA) has been increased from \$2,500 to \$5,000 for this plan year (January 1, 1993, to December 31, 1993).

A point-of-service fee will *not* be implemented at this time.

A charge for dependent coverage will be implemented on July 1, 1993 . . . .

UA Benefits Final Health Care Plan Changes, Exh. 18, at 1.

43. On May 13, 1993, ten days after its certification as the exclusive representative of the trades, maintenance, and custodial unit, Bruce Ludwig, acting on behalf of UACEA, requested the name of the University's designated representative, information preliminary to negotiations, and that no changes be made to wages, hours, and other terms and conditions of employment until the employees had an opportunity to negotiate. He specifically identified a rumored change in insurance benefits. B. Ludwig, Business Manager for APEA, letter to J. Komisar (May 13, 1993), Exh. 23.

44. By letter dated June 3, 1993, Humphrey responded on behalf of the University, advising that the University would not recognize the UACEA until its superior court appeal of the election had concluded. M. Humphrey, Acting Director of Labor Relations, letter to B. Ludwig (June 3, 1993), Exh. 24. Humphrey did provide the information UACEA requested, but not as part of the duty to bargain.

45. Throughout the time at issue in this proceeding, certain teaching staff at the University were in a bargaining unit represented by a union, Alaska Community Colleges Federation of Teacher (ACCFT). After a request from ACCFT, Patty Kastelic refused to meet on "the availability of parties situation," which she defined as a request to formally sit down at the negotiating table. Kastelic stated that the reason for refusing to bargain was that ACCFT had an interim contract, which provided that ACCFT would have the same benefit package as all other University employees. In other words, the University took the position that it was not required to bargain with ACCFT. Kastelic did state that she "continuously interacted" with ACCFT president Ralph McGrath. She believed the University's obligation to be to notify ACCFT but not to negotiate a separate health plan with them.<sup>2</sup>

46. UACEA filed its unfair labor practice charge against the University on June 9, 1993, claiming violations under AS 23.40.110(a)(1), (2), (3), and (5).<sup>3</sup>

47. The University did later agree to bargain with UACEA wages and terms and conditions of employment, including health benefits, but would not negotiate the interim changes that it had already implemented.

48. On July 13, 1993, UACEA withdrew from its complaint those charges relating to a blanket refusal to negotiate and refusal to deduct dues.

49. The Agency investigated the charges and found probable cause to support the charge that health benefits were

changed without bargaining in violation of AS 23.40.110. The Agency issued a notice of accusation on July 13, 1993.

50. The University filed its notice of defense on July 27, 1993. The University admitted that "it changed health care benefits available to University employees who may be represented by charging party" and that "it did not bargain with the charging party concerning the changes in the health care benefits program." It also raised as defenses (1) that it was not required to bargain at the time the decision to change health care benefits program was made; (2) that UACEA had waived any right to bargain the changes; and (3) compelling economic circumstances justified the absence of bargaining.

51. The University amended its notice of defense on August 3, 1993, to remove its defense that compelling economic circumstances excused the obligation to bargain. Amended Notice of Defense (Aug. 2, 1993).

52. A hearing was conducted on September 13 and 14 where the parties presented testimony and other evidence. The record closed on September 14, 1993.

53. At the request of the University, the witnesses were sequestered. Each party was allowed a representative for purposes of assisting counsel.

### Conclusions of Law

1. The University of Alaska is a public employer under AS 23.40.250(7) and this Agency has jurisdiction under AS 23.40.110 to consider this complaint.

2. AS 23.40.110(a) provides,

A public employer or an agent of a public employer may not

....

(5) refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

3. Decisions of the National Labor Relations Board and federal courts are given great weight by this Agency in determining what constitutes an unfair labor practice. 8 AAC 97.240(b) & .450.

4. The duty to bargain in good faith prohibits a unilateral change in a term or condition of employment by an employer unless the employer has negotiated to impasse. Alaska Community Colleges Federation of Teachers, Local No. 2404 v. University of Alaska, 669 P.2d 1299, 1303-1304 & n. 4 (Alaska 1983)(unilateral imposition of new work rules after the expiration of the contract but before impasse was an unfair labor practice).

5. "Terms and conditions of employment" include health benefits and health benefits are therefore a mandatory subject of bargaining. AS 23.40.070(2); AS 23.40.250 (1) & (9); 1978 Op. Att'y Gen. 3 (J66-444-78, Jan. 23, 1978).

6. An employer's duty to bargain collectively with a bargaining representative attaches at the date of the election of the representatives, rather than at the date of certification. In In re Mike O'Connor Chevrolet-Buick-GMC, 209 N.L.R.B. No. 90, 85 L.R.R.M.(BNA) 1419, 1424-1425 (1974), the NLRB states:

The Board has long held that, absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. And where the final determination on the objections results in the certification of a representative, the Board has held the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes. Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued. To hold otherwise would allow an employer to box the



union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending. Accordingly, since we have already determined in this case that the Union should be certified, we find, contrary to the Administrative Law Judge, that Respondent was not free to make changes in terms and conditions of employment during the pendency of post-election objections and challenges without first consulting with the Union.

Cited with approval in NLRB v. Sandpiper Convalescent Center, 824 F.2d 318, 320, 126 L.R.R.M.(BNA) 2204, 2206 (4th Cir. 1987)(citations omitted) (states the purpose of this rule is to "prevent employers from postponing their bargaining obligation through dilatory tactics and spurious objections" and to provide representation elections with a "presumption of validity and that the choice of unit employees should be promptly effectuated"). See also Timsco Inc. v. NLRB, 819 F.2d 1173, 1180, 125 L.R.R.M.(BNA) 2636, 2641-2642 (D.C. Cir. 1987).

7. The fact that an employer has decided to make a change in the terms and conditions of employment before the obligation to bargain attaches does not insulate the decision from bargaining. NLRB v. Exchange Parts Co., 339 F.2d 829, 58 L.R.R.M.(BNA) 2097 petition for rehearing denied, 341 F.2d 584, 58 L.R.R.M.(BNA) 2456 (5th Cir. 1965) (violation regardless whether decision to make reduction was made before or after union certification).

8. In determining whether there is a duty to bargain, the key date is not the date the decision is made but rather the date notice of the decision is provided. NLRB v. Sandpiper Convalescent Center, 824 F.2d 318, 126 L.R.R.M.(BNA) 2204; Timsco Inc. v. NLRB, 819 F.2d 1173, 125 L.R.R.M.(BNA) 2636; In re Mike O'Connor Chevrolet-Buick-GMC, 209 N.L.R.B. No. 90, 85 L.R.R.M.(BNA) at 1424-1425.

9. The original implementation date for changes in the health benefits was January 1, 1993, before UACEA could demand to bargain. The decision making process continued until at least February 11, 1993, when the task forces made their final reports to the chancellors council. See finding of fact paragraph 30, supra. Most of the changes appear to have been finally decided between that time and the board of regents meeting the third week of February. The first announcement to an employee of these changes in the record was made informally by Patty Kastelic to the Anchorage benefits task force on March 2, 1993. Finding of fact paragraph 32. The last changes, involving cost sharing, were made after the March 2, 1993, meeting. Formal written announcement to the employees occurred in the two April newsletters mailed with payroll. Finding of fact paragraph 42. The key date for purposes of determining whether there was a duty to bargain was the date of the first notice of the changes, that is, the date the first April newsletter was provided, apparently some time in April. Finding of fact paragraph 39. The final changes were announced in the second April newsletter. Both April dates and even the March 2 date followed the date the election results were first known on February 18, 1993.

10. At no time did the University provide any notification of any future or any pending changes to UACEA. Usually an employer commits an unfair labor practice by failing to notify the bargaining representative before unilaterally changing terms and conditions of employment. Bastion-Blessing, Division of Golconda Corp. v. NLRB, 474 F.2d 49, 82 L.R.R.M.(BNA) 2689 (6th Cir. 1973). There are circumstances, however, where direct notice to employees can serve as adequate notice to a bargaining representative. The University argues that its notices to employees was adequate notice to UACEA. Resp. Brief, p. 21, citing W.W. Grainger, Inc. v. NLRB, 129 L.R.R.M. (BNA) 2718, 2722 (7th Cir. 1988); NLRB v. Island Typographers, 705 F.2d 44, 113 L.R.R.M. (BNA) 2207, 2210 (2d Cir. 12/23/931983); by supplemental briefing, YHA, Inc. v. NLRB, 2 F.3d 1681, 143 L.R.R.M. (BNA) 3057 (6th Cir. 1993).

11. The University in this case notified employees that health benefits changes were pending -- directly through written notices and indirectly through the task forces. The October 1992 newsletters alerted employees that changes would be forthcoming and of the process the University would follow to make the changes. The clear message was that University would involve the employees in the decision making through the task forces but ultimately the final decision would be made at the regents or chancellor level.

12. While the notices were not provided to UACEA, UACEA apparently became aware of the information contained in them because it asked, first, by letter dated April 7, 1993, that employees be notified of the changes and, second, by letter dated May 13, 1993, that changes not be made in the terms and conditions of employment, specifically referring to changes in insurance benefits.

13. The University responded to the second request by advising that it would not be negotiating with UACEA until its superior court appeal of the election results concluded, although subsequently the University did change its position and negotiate on subjects other than the implemented health benefit changes.
14. The University implemented a unilateral change in the terms and conditions of employment of UACEA unit members at a time when it was under a duty to bargain in good faith with UACEA.
15. The University has argued by way of defense that, if UACEA had a right to bargain, UACEA waived that right. Failure to request bargaining despite knowledge of a unilateral change can be a waiver of the right to bargain. Inlandboatmen's Union of the Pacific v. State, Decision & Order No. 141 (Aug. 7, 1992); NLRB v. Spun-Jee Corp., 385 F.2d 379, 383-387, 66 L.R.R.M.(BNA) 2485, 2488-2489 (2d Cir. 1967), amended on rehearing 67 L.R.R.M.(BNA) 2308 (2d Cir. 1967); Justesen's Food Stores, Inc., 160 N.L.R.B. 687, 63 L.R.R.M.(BNA) 1027 (1966).<sup>4</sup>
16. Application of waiver under the circumstances of this case, however, would be unjust. First, the employer should not be permitted to bypass the bargaining representative and then claim waiver when a demand to bargain is not made.
17. Second, it can be inferred from the University's responses to UACEA when it made demands and from the University's refusal to bargain with another union, ACCFT, when it asked to bargain, that a demand to bargain, if made after election and before certification, would have been futile. All evidence supports the University's reluctance to negotiate the changes to health benefits. See finding of fact paragraphs 43 - 45, supra.
18. Third, unlike the cases finding a waiver, this is not a case where the union ignored its responsibilities or sat on its rights. UACEA was engaged with the University in disputes over the unit and election challenges. Ten days after certification, it made its demands to negotiate and for no changes to health benefits. The University's response was that it considered the decision to be made and nonnegotiable, although the request preceded the July 1 implementation date. The record does not support the argument that the union was dilatory or ignored its responsibilities. The facts in the cases cited by the University demonstrate the contrast. In Vandalia Air Freight Inc., 297 N.L.R.B. No. 164, 133 L.R.R.M.(BNA) 1257 (Mar. 22 1990), for example, the employer requested suggestions from the union president and the union failed to respond. In W.W. Grainger, Inc. v. NLRB, 860 F.2d 244, 129 L.R.R.M.(BNA) 2718, the union indicated that it was not interested in discussions. In NLRB v. Island Typographers, 705 F.2d 44, 113 L.R.R.M.(BNA) 2207, 2210, the union was provided with repeated notices, it was aware of the company's acquisition of equipment, and it was aware of notices posted on the employer's premises and yet it failed to demand to bargain. In Justesen's Food Stores, 160 N.L.R.B. 687, 63 L.R.R.M.(BNA) 1027 the union was advised of a decision to automate when employees were laid off but failed to grieve the layoff and then waited six months to demand bargaining. The facts of these cases, in which the unions failed to act or delayed action in the face of an employer's notice of imminent change, contrast markedly with the facts of this case, in which the union is engaged in a protracted petition for representation, does not receive direct notice of action, and does promptly request bargaining after certification.
19. The NLRB refuses to find inaction to be a waiver of the right to bargain where notice of a change is contemporaneous with the change or where a demand to bargain would be futile. NLRB v. National Car Rental System, Inc., 672 F.2d 1182, 109 L.R.R.M.(BNA) 2832, 2837 (3d Cir. 1982) enforcing as modif'd, 252 N.L.R.B. 159, 105 L.R.R.M. (BNA) 1263 (1980); Michigan Ladder Co., 286 N.L.R.B. 21, 127 L.R.R.M.(BNA) 1092 (1987); Intersystems Design & Technology Corp., 278 N.L.R.B. 759, 121 L.R.R.M.(BNA) 1229 (1986).
20. Providing the notification of the health benefit changes only to the employees sometime in April and not directly to UACEA before the implementation date of May 1 did not provide UACEA with an adequate opportunity to demand bargaining before changes were implemented on May 1, 1993. The union's demand did precede by approximately six weeks implementation of the cost sharing changes, and the University refused to bargain even those changes that had not yet been made. All evidence supports the conclusion that earlier or additional requests to bargain health benefit changes would have been futile.
21. UACEA did not waive its right to bargain changes in the health benefit plan.
22. The University's unilateral implementation of health benefits changes for employees who are members of the trades,

maintenance, and custodial bargaining unit violated AS 23.40.110(a)(5).

23. The appropriate remedy when an employer acts unilaterally to change terms and conditions of employment in violation of its obligation to bargain in good faith under AS 23.40.110(a)(5) is to restore the status quo and make the employees whole for any loss of benefits. See Inlandboatmen's Union of the Pacific v. State, Decision & Order No. 149 (Dec. 3, 1992).

### ORDER

1. The University has an obligation to bargain with the University of Alaska Classified Employees Association over changes in health benefits for members of the trade, maintenance and custodial unit and changing those benefits without bargaining violated AS 23.40.110(a)(5);
2. The University must make the members of the trades, maintenance and custodial unit whole, including the restoration of benefits as appropriate; and
3. The University must bargain to agreement or impasse before changing health benefits for trades, maintenance, and custodial unit employees.

### ALASKA LABOR RELATIONS AGENCY

Stuart H. Bowdoin, Jr., Board Member

### NOT PARTICIPATING

James W. Elliott, Board Member

Karen J. Mahurin, Board Member

### APPEAL PROCEDURES

An Agency decision and order may be appealed through proceedings in superior court brought by a party in interest against the Agency and all other parties to the proceedings before the Agency, as provided in the Alaska Rules of Appellate Procedure and the Administrative Procedures Act.

The decision and order becomes effective when filed in the office of the Agency, and unless proceedings to appeal it are instituted, it becomes final on the 31st day after it is filed.

### CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of Decision and Order No. 169 in the matter of University of Alaska Classified Employees Association, APEA/AFT vs. University of Alaska, case no. 93-233-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 28th day of December, 1993.

Victoria D. J. Scates

Clerk IV

This is to certify that on the 28th day of December, 1993, a true and correct copy of the foregoing was mailed, postage prepaid, to

JOAN M. WILKERSON, Business Agent, APEA/AFT(AFL-CIO)

THOMAS P. OWENS, JR., Attorney

## Signature

1We note that the National Labor Relations Board recently addressed the relationship between employee committees and bargaining representatives in *Electromation, Inc.*, 309 N.L.R.B. No. 163, 142 L.R.R.M.(BNA)1001 (1992), but we do not address the issue because it was not raised.

2This Agency has no opinion on the record in this case whether there was or was not a duty to bargain with ACCFT.

3At the hearing UACEA limited its briefing and argument to the charge under AS 23.40.110(a)(5), and did not address subsections (a) (1), (2), and (3).

4The University also cites *Gibbs & Cox, Inc.*, 292 N.L.R.B. No. 78, 131 L.R.R.M.(BNA) 1425 (1989), in support of its waiver argument. *Gibbs & Cox, Inc.*, had provided the union with two-weeks notice before it changed health benefits from the union's apparently illegal plan to the employer's plan. The employer had provided notice of the change to the union and many months previously had provided the union a copy of its medical plan. A two-week period can, depending on the circumstances, provide a meaningful opportunity to bargain. However, the University and UACEA's conduct differed significantly from that of the parties in this case. See discussion in conclusions of law paragraphs 16, 17 and 18, *infra*.