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INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1547,
Complainant,

vs.

KODIAK ISLAND BOROUGH,
Respondent.

CASE NO. 95-372-ULP

DECISION AND ORDER NO. 190

This matter was heard on May 9 and 10, 1995, before a panel of the Alaska Labor Relations Board, with vice chair Stuart H. Bowdoin, present in Anchorage, and board members Karen J. Mahurin and James W. Elliott, participating on the basis of a review of the record. Hearing examiner Jan Hart DeYoung presided. The record closed on May 10, 1995.

Appearances:

William F. Morse, Associate General Counsel, for complainant International Brotherhood of Electrical Workers, Local Union 1547; and Robert M. Johnson, Wohlforth, Argetsinger, Johnson & Brecht, P.C., for respondent Kodiak Island Borough.

Digest:

The employer violated the duty to bargain in good faith in AS 23.40.110(a)(5) by insisting on negotiating a permissive term, by changing the terms and conditions of employment outside of the bilateral bargaining process, and by refusing to present a collective bargaining agreement for approval as required in the parties' ground rules.

DECISION

It has been six years since the Electrical Workers first sought recognition as the bargaining representative of a unit of Kodiak Island Borough employees and the parties are not yet working under a collective bargaining agreement. The process of determining the initial jurisdiction of this Agency under the Public Employment Relations Act and of determining questions of decertification and unit composition has been exhaustive. It has obviously strained the parties' relationship.

This case revealed a mutual lack of trust. The facts disclosed misunderstandings between these parties on even insignificant issues. The more important misunderstandings involve whether the parties reached a complete tentative collective bargaining agreement. The Electrical Workers believe the parties reached a tentative agreement and concluded their negotiations. They openly took steps to obtain bargaining unit ratification, including posting notice of the ratification vote and holding the ratification election in a Borough facility. The Borough, on the other hand, believes the parties agreed to delay finalizing their agreement until after action by this Agency on eligibility to vote in a decertification election. Anticipating approval of the agreement, the Assembly adopted new personnel rules that in

effect established the terms of the tentative agreement for all Borough employees in advance of its approval. The Assembly's action in adopting and implementing these personnel rules prompted this unfair labor practice charge by the Electrical Workers.

On viewing the parties' conduct as a whole, we believe that the Electrical Workers and the Borough did in fact reach a tentative agreement in their negotiations. The Borough's conduct reveals an apparent misunderstanding of the bilateral bargaining process. By implementing personnel rules outside of the bargaining process that were the same in essentials as the terms of the tentative agreement, the Borough established itself as the sole source of the terms and conditions of employment. Unilateral action is so inherently destructive of the bargaining process and of the relationship between the bargaining representative and the employees on whose behalf it bargains that it is a per se unfair labor practice. To prove a per se unfair labor practice a party with the burden of proof does not need to establish motive. The fact that the conduct occurred is enough to show a violation.

We believe remedying this unfair labor practice requires recognition of the collective bargaining agreement for the balance of the contract term. Assembly approval of the agreement in effect occurred when the Assembly, whose members participated in negotiations, adopted the personnel rules. Remedying the unfair labor practice also requires a period of time before this Agency can be assured of the necessary laboratory conditions to conduct the decertification election that is pending and which was blocked by this unfair labor practice charge.

We recognize that legitimate issues over the past several years have separated the Borough and the Electrical Workers. However, it is time for the parties to put those issues behind them and to look forward to working together to fulfill their mandated obligations under AS 23.40.070--23.40.260.

At a hearing before a panel of the Alaska Labor Relations Board on May 9 and 10, 1995, the parties presented testimony and other evidence. The record closed on May 10, 1995.

Findings of Fact

1. The International Brotherhood of Electrical Workers Local Union 1547 (Electrical Workers), is the certified bargaining representative of a general government unit of Kodiak Island Borough employees.

2. The Electrical Workers' effort to represent a unit of Borough workers began approximately in 1989 when an Electrical Workers' organizer met with a group of Borough general government employees. The group did not include the mental health center employees and the Electrical Workers' representation petition did not seek to represent them. Millard v. International Bhd. of Elec. Workers, Local Union 1547, Decision & Order No. 183, at ¶ 2 (Dec. 21, 1994).

3. The Kodiak Island Borough objected to the representation petition on two grounds, arguing that a 1980 resolution exempted it from the Public Employment Relations Act and that, even if PERA were to apply, the unit inappropriately excluded the mental health employees.

4. This Agency's predecessor, the Department of Labor, Labor Relations Agency (DOLLRA),[1] found the ordinance ineffective to exempt the Borough from PERA but found a larger unit a more appropriate unit than the unit the Electrical Workers initially sought to represent. International Bhd. of Elec. Workers, Local Union 1547 v. Kodiak Island Borough, DOLLRA No. 90-5 (May 4, 1990). The DOLLRA conducted the election and certified the Electrical Workers as the bargaining representative of the general unit of Borough employees it had defined.

5. The Borough appealed the decision on the issue of coverage under PERA. Pending the Borough's appeal on the effectiveness of its resolution to reject PERA, the Borough and the Electrical Workers agreed to suspend bargaining. They further agreed that the one year election bar in AS 23.40.100(c) would run after the appeal was finally decided. Thus, for three years while the representation issue was pending before the superior and supreme courts, the Electrical Workers did not actively represent Borough employees.

6. On June 4, 1993, the Alaska Supreme Court affirmed the decision that the Borough's resolution was ineffective to reject PERA. Kodiak Island Borough v. State of Alaska, 853 P.2d 1111 (Alaska 1993).

7. After the Supreme Court issued its decision, the Electrical Workers made a demand to bargain. Millard v. International Bhd. of Elec. Workers, Local Union 1547, Decision & Order No. 183, at ¶ 5.

8. On August 2, 1993, the Borough sought clarification of the composition of the bargaining unit. Kodiak Island Borough v. International Bhd. of Elec. Workers, Local Union 1547, case no. 94-241-UC (filed Aug. 2, 1993). The Borough stated it filed the petition to correct errors in the initial unit determination and to address new positions that had been created. Millard v. International Bhd. of Elec. Workers, Local Union 1547, Decision & Order No. 183, at ¶ 6. On the basis of 8 AAC 97.060(e), the Agency dismissed the petition. Id.

9. The parties began negotiating in August of 1993. Barbara "B.J." Jewel was the business representative from the Electrical Workers involved in negotiations and its chief spokesperson. Members of the unit participated on the negotiations team. The main spokesperson for the Borough was Walter Sapp, the city manager of the City of Kodiak, who worked under contract for the Borough. The Borough's chief executive officer is the mayor. Jerome Selby has served as mayor for about 11 years, including all of the time the Electrical Workers have been active in the Borough. Id., at ¶ 27. Included in his duties as chief executive officer are the duties of personnel officer for the Borough. Mayor Selby and various members of the Kodiak Island Borough Assembly also participated with Sapp as members of the negotiating team. Assembly members Mary Monroe, Little John Burt, Gordon Gould, and Jack McFarland participated at various negotiating sessions. Also present for the Borough were Rachael Miller, who took notes, and the finance officer.

10. The parties began negotiations by agreeing to ground rules. They agreed that, once the parties tentatively agreed to a term in the collective bargaining agreement, a party could not reopen it unless the other party agreed:

> Agreement on individual items shall be signed off by the parties as TA'd and "off the table" unless the parties mutually agree to reopen a specific item.

Ground Rule No. 10 (Aug. 30, 1993), Exh. 1; Millard v. International Bhd. of Elec. Workers, Local Union 1547, Decision & Order No. 183, at ¶ 12.

11. The parties also agreed in the ground rules that tentatively agreed terms would be effective only after the complete agreement was effective:

> The Agreement reached shall be tentative until final ratification by the bargaining unit employees and approval by the International Office of the International Brotherhood of Electrical Workers and by a majority of the Kodiak Island Borough Assembly. When full Agreement has been reached, the Borough's negotiating team agrees to recommend approval to the Borough Assembly.

Ground Rule No. 12 (Aug. 30, 1993), Exh. 1; Millard v. International Bhd. of Elec. Workers, Local Union 1547, Decision & Order No. 183, at ¶ 13.

12. At each of the negotiating sessions the participants signed a sign-in sheet. Exh. 18. The parties also agreed to meet weekly on Wednesday evenings to negotiate.

13. The initial bargaining proposal made by the Borough was a draft of changes proposed to personnel rules, which had been prepared in 1988-1989.[2]

14. The issue of the composition of the unit was raised in bargaining. The Borough's representative, Sapp, indicated an interest in negotiating the composition of the unit. The Borough sought to exclude several positions, including some of the employees in the mental health department and some others outside that department. Id., at ¶ 7.

15. The mental health employees, particularly the clinicians, communicated to the Electrical Workers' representative that they did not want to be in the bargaining unit. After obtaining statements from the clinicians and after the Borough expressed interest in excluding certain employees from the unit, the Electrical Workers raised in negotiations the issue of excluding the mental health clinicians. Id., at ¶ 8.

16. On March 25, 1994, the Electrical Workers and the Borough tentatively agreed to amend the bargaining unit to exclude from the unit a number of positions:

> Excluded from the unit are elected officials, the Borough attorney, Borough Clerk, Deputy Clerk, Records Coordinator, Engineering & Facilities Director, Environmental Engineer, Construction Inspector/Arch., Construction Inspector/Eng., Community Development Director, Personnel Assistant, Administrative Assistant to the Mayor, Assessor, Finance Director, Data Processing Manager, Mental Health Center (MHC) Director, MHC Assistant Director, MHC Clinicians, MHC Staff Assistant, MHC Rehabilitation Director and Fire Chief.

Exh. 2; Millard v. International Bhd. of Elec. Workers, Local Union 1547, Decision & Order No. 183, at ¶ 8. Employees who were excluded from the bargaining unit were asked not to participate further in the negotiations. Id.

17. On April 5, 1994, Kelli L. Veech filed a petition to decertify the Electrical Workers as the bargaining representative of the entire unit. Id., at ¶ 15. The petition was supported by the required showing of interest from members of the unit. Id., at ¶ 16.

18. On May 4, 1994, the Electrical Workers requested a hearing, objecting to the petition on the basis that it included positions that were no longer included in the unit. Id., at ¶ 18.

19. Subsequently, a second petition to decertify the Electrical Workers was filed. On July 18, 1994, Sandra Collins-Jackson filed a petition to sever a group of employees from the bargaining unit and decertify the Electrical Workers as its bargaining representative.

20. The Borough, the Electrical Workers, and Kelli L. Veech could not agree over the composition of the bargaining unit eligible to vote at the decertification election. The controversy was between the unit as negotiated in the pending agreement or as certified by the DOLLRA in 1990.

21. The composition of the unit is important because it could affect the outcome of the election.

22. This Agency, after a hearing on September 12 and 13, 1994, issued its decision finding the appropriate unit to be the wall-to-wall unit found appropriate in the DOLLRA's earlier decision. The Agency released its decision on December 21, 1994. Id.

23. While the election issues were pending, the Electrical Workers and the Borough continued negotiating toward a collective bargaining agreement.

24. The issue of the composition of the unit resurfaced in negotiating sessions while the dispute on the unit was pending before the Agency. Electrical Workers' business representative Robert K. Larsen had taken over responsibilities for the unit from Jewel in the spring of 1994. Id., at ¶ 11.

25. Larsen learned that community support program (CSP) employees at the Borough did not support representation by the Electrical Workers and were seeking to be excluded from the bargaining unit. Larsen made a commitment to those workers to seek their exclusion in negotiations. Toward that end, Larsen on July 13, 1994, in a negotiating session with the Borough, stated his interest in reopening the agreement on the bargaining unit's composition to address the exclusion of the CSP workers. Borough bargaining notes (July 13, 1994), Exh. 5. Larsen perceived from the discussion at the bargaining table that the Borough had no problem with excluding these workers but that it wanted the proposal in writing. Selby, on the other hand, stated that the Borough's position at this meeting was that it would not discuss modification of the unit until the Electrical Workers presented a written proposal. The Borough's bargaining notes from this meeting state that the Borough did not "have a problem with adding CSP to the list of items being discussed." Id., at 2. The notes confirm that the parties did engage in some discussion of the subject at the July 13 meeting: After caucus, the IBEW representative inquires, "Did you discuss the CSP request to be out of the union?" Id. The KIB responded, "Yes--but do you have a list of the positions or copies of the request to be exempted by CSP?" Id. The notes then show that the parties proceeded to address other subjects, "on-call time, bereavement leave, and sick leave." Id.

26. The Electrical Workers prepared a draft proposal on the subject of excluding the CSP employees and presented it at the next negotiating session on August 17, 1994. Exh. 3. The proposal is a typewritten document with several handwritten changes made by Larsen. Id. The typed draft had named "clerical workers" in the list of employees to be excluded but Larsen stated the Electrical Workers' bargaining team did not want to exclude them. Larsen had made the handwritten corrections to the proposal he presented. Larsen explained his corrections and the Electrical Workers' proposal. Apparently not all of the copies of the proposal distributed to the Borough bargaining team had Larsen's handwritten corrections on them.

27. Selby remembers that in caucus the Borough representatives were confused by the two versions of the proposal. Selby stated the proposal was not clear, because the printed matter referred to "Mental Health Center" employees who already had been modified out of the unit, even though the handwritten changes substituted "Community Support Program" employees. Id. This confusion existed apparently despite the efforts of Larsen to explain the changes and his intent. Selby then states that at this meeting Larsen agreed to bring a clean version of the proposal to the next meeting. Selby states this proposal brought the unit designation back on the table and the parties negotiated on the subject. He says that the parties were not in agreement on the matter but that the matter was still under discussion.

28. Larsen remembers this session somewhat differently. Larsen did raise the issue of the exclusion of the CSP workers. Larsen remembers that the Borough changed its position and was "flat not willing to do it." Larsen also remembers that the discussion became heated because he had thought the parties had committed to excluding the CSP workers and now the Borough was unwilling to sign the proposal. He states that the Borough's position was that, if the Borough had not TA'd a matter or put it in writing, the Borough had not agreed to it. He states that, while the discussion was heated, the parties did not negotiate on the substance of the proposal to exclude the CSP workers from the unit.

29. Another point of contention during the meeting on August 17 involves a list of bargaining topics. Larsen states that, at the beginning of the August meeting, the Borough presented a list of the proposals remaining for discussion, and the list did not include the issue of the exclusion of the CSP workers. Borough bargaining notes (Aug. 17, 1994), Exh. 6; Exh. 12 (list). It was generally the practice of the parties in negotiations to work off a list of bargaining topics in sequence, starting at the top of the list and working to the bottom. Larsen believes that the final list, which served as the agenda for the remaining negotiations, appears in Exhibit 12. As the parties TA'd a particular subject, Larsen states he marked it off this list. Exh. 12. However, Selby concluded from the items listed that this particular list was given to the Electrical Workers in late June or July. Selby states that probably 20 lists were prepared over the course of negotiations. Whether the Borough provided a list on August 17 or whether Exhibit 12 is that list is not clear. Taking the evidence as a whole, we cannot infer from the absence of the subject unit composition on Exhibit 12 any information on whether or not the parties agreed to further negotiate on that subject.

30. At the following session on August 31, Larsen brought up the issue of unit composition again. He brought a new draft proposal to remove the Community Support Program workers from the bargaining unit, which corrected the errors in the August 17 draft. The difference from the previous proposal was the removal of the reference to the clerical workers and the substitution of the words "Community Support Program" for "Mental Health Center." Compare Exh. 3 with Exh. 4. He presented the clean draft to the Borough at the session on August 31. Larsen states he was told the Borough would not discuss the removal of CSP workers from the unit.

31. Selby's recollection of the August 31 meeting, on the other hand, was that the parties negotiated further on August 31 on the issue of the unit's composition but failed to reach agreement. Selby states that the Borough expressed willingness to continue the discussion but was concerned about the September 1994 hearing before this Agency about who could vote at the election and the confusion between the two issues of the composition of the unit as negotiated and for purposes of the election. Selby stated that the Borough stated that it would be willing to take the issue up after the Board's ruling and, more importantly, that the Electrical Workers concurred. The Borough's position is that the parties had mutually agreed to reopen the negotiations on the unit but had not agreed to any specific changes. The recollection of the Borough's chief spokesperson Sapp was that the Borough stated it would not act further on unit issues until after the Agency's hearing in this case. Sapp stated a concern about confusing the workers because of the pending unit dispute before this Agency.

32. The Borough's notes show the Borough's response as "We gave you a response last time we met on this issue.

There's a lot of confusion right now among employees as to this issue." Exh. 7, at 2. The notes continue,

> IBEW - This doesn't confuse the process at all. These people have asked to out of unit, there's no reason for them to in the unit - nothing is being served by keeping these people in. You're only benefit to this is that they might vote no for union.
>
> KIB - We discussed this last time and told you our thoughts on this.
>
> IBEW - Does that mean there is no more discussion on this? Do you expect that we bring a new proposal to each mtg and keep backing down? Is that what you're going to do on all the proposals? Is this your last and final offer?
>
> KIB - We're not able to reach agreement on that right now.
>
> IBEW - Is that your last and final offer on this item?
>
> KIB - We're not going to agree to that until the hearing is passed.
>
> IBEW - I need to know what items we are at impasse on -- are we at impasse on this item?
>
> KIB - [Selby speaking] No.
>
> IBEW - Why don't you pick one to talk about.

Exh. 7, at 2-3 (marked pages 5-6 on the exhibit).

33. Selby states that the Electrical Workers agreed at this meeting to delay discussion of any modifications to the unit. However, no evidence corroborates the statement that the Electrical Workers actually agreed to delay the issue. Certainly Borough representatives' refusal to address a subject is not the same as an agreement to discuss it later. Nor is a unilateral announcement that a subject will be addressed later a bilateral agreement to discuss it later even absent any protest. Selby and the Borough bargaining team may have wanted to address unit composition at a later date but there is no evidence that the Electrical Workers concurred or consented in any way.

34. The Borough and Electrical Workers next met in negotiations on September 21. The parties did not address the subject of the removal of the CSP workers from the unit on this date. Larsen approached Selby at this session when they were alone to express his dissatisfaction with the progress of negotiations to date and suggest that the parties put their differences behind them and make an effort to reach an agreement. Larsen stated that he had never endured negotiations of this kind. He complained about the manner in which the Borough conducted negotiations. He complained about the Borough's insistence of following a list and not departing from the order of that list and their refusal to TA items if they were on Electrical Workers' paper. He complained about the absence of any give and take and the unwillingness of the Borough to meet any of his needs.

35. The parties next met in bargaining on October 5, 1994. Larsen believed the tone of the negotiations changed at this session. Each of the parties made some movement in the bargaining and they began rapidly going through the last few items on the list: sick leave, annual leave, leave without pay, dismissal notice, good standing with the union, off duty/call out pay, pay differential, and impasse procedure. Borough bargaining notes, Exh. 8; Electrical Workers notes (Oct. 5, 1994), Exh. 10.

36. The subject of the CSP workers came up again in the context of a term addressing on-call time, which affected the community support program workers. The Borough suggested tentatively agreeing to a term with the understanding that it would be null and void if CSP workers were removed from the unit. Exh. 8, at 3; Exh. D, at 3. The parties finally TA'd the term deleting the specific reference to CSP. Id., at 4. The Electrical Workers' notes indicate that Larsen was reluctant to address on-call and shift differential until the CSP issue was addressed:

> Have been arguing for CSP to be out, reluctant to sign without clarification from DOL on who's in, who's out.

Exh. 10, at 2. Then the parties agreed to remove the references to CSP and the Borough and signed and tentatively agreed to the term for on-call time. Id., at 3; see also Exh. 10, at 2.[3]

37. The Borough named the items remaining for discussion as "compensation, longevity pay, term of agreement, and Appendix A [the pay schedule]." Borough bargaining notes (Oct. 5, 1994), Exh. 8, at 7; Exh. D, at 7. The Borough's notes indicated, "if you'll accept 2.0% 1-1-95 we'll buy the whole thing." Id., at 9.

38. The discussion about the term of agreement involved a term of one-year or longer. The Borough wanted a one-year agreement and the Electrical Workers wanted a longer agreement. Eventually the Borough suggested an 18-month term from January 1, 1995--June 30, 1996. Exh. 8, at 9; Exh. D, at 9. The Electrical Workers' bargaining notes quote the Borough representative as appearing to anticipate ratification soon. Exh. 10, at 7.

39. During the bargaining session, the parties had made progress on a number of subjects. Larsen sensed that an agreement was possible at this point and, in a caucus with other members of the bargaining team, recommended a package proposal of the remaining terms, including reasons for termination, longevity pay, adding pay grade steps L and M to the pay scale, pay increases, the term of the agreement, and cash-in of annual leave. The proposed increase in compensation was 2.5 percent, to take effect on January 1, 1995, and an additional increase of 2.5 percent, to take effect on July 1, 1995. The Electrical Workers bargaining team returned from their caucus and presented the package proposal to the Borough team. The Borough team convened a caucus and returned in substantial agreement with the provisions of the package proposal except for a change in the July 1, 1995, compensation increase, which it changed from 2.5 to 2.0 percent. Both Larsen and Sapp signed the paper that the Electrical Workers had presented as its package proposal. Exh. 11.

40. Larsen believed at this point that the parties had an agreement. Larsen described the atmosphere in the negotiation room as a "party festive mood." All of the persons present were pleased and relieved. There was hand shaking all around. Larsen went to shake hands with Selby and had a conversation with him about whether Larsen should be present at the Assembly meeting for ratification. Larsen also spoke with Assembly member Little John Burt who expressed reservations about the pay increase but commented, "We're done." Larsen spoke to Sapp, "We're through this process, its been difficult, doesn't this feel good." Larsen remembers Sapp stating that Sapp would never negotiate another agreement. Larsen stated he fully believed the parties were finished. Marian Royall heard Sapp remark on his relief that it was all over and that he would have his Wednesdays back. Electrical Workers bargaining team member Lila Michaels also remembers the shaking of hands and this sense that the parties had completed negotiations. Michaels heard comments from participants such as, "Thank God its over." The atmosphere was very different from the other negotiating session she had attended in September. Marian Royall's recollections are similar. She heard statements of surprise that it was over. Electrical Workers' bargaining team member James Skog's remembered the happiness and relief after the signatures went on the proposal. He remembers that they were finished with negotiations and the Borough was going to type up a complete document for them to ratify or vote on.

41. Other witnesses remembered relief and celebration at the conclusion of the negotiations but attributed it to progress in the negotiations, rather than to the conclusion of negotiations. Sapp remembers some celebration over the progress of negotiations because each side had made gains. He remembers the handshaking and that it was "somewhat of a pleasant time." Assembly member Mary Monroe also remembers that the parties shook hands and were happy at accomplishing almost all of their goals.

42. The Electrical Workers notes state,

> Jerome--We'll have Rachael type up clean & mail to you w/in the week. Full document w/in 3-4 wks. Jerome--Requested the DOL to expedite their decision. We are done!!! Contract is negotiated!

Exh. 10, at 10. Royall, who had taken the notes, stated that it was her impression that the parties had negotiated the last items and were done. Royall's recollection was that Rachael would type and mail the new provisions for signing within

a week and that later, in two or three weeks, the Borough would send the complete document. Royall never distributed the notes from this meeting to members of the unit because she was expecting the complete package to be distributed soon.

43. Whether or not the parties' had reached a final agreement, the evidence shows that they expected to meet again after the Agency issued its ruling on the unit's composition. The Borough's notes state,

> TA'd package proposal We'll sign off this rough format now then Rachael will send the cleaned up copies to you within week for signature. Then we'll make a decision when to get together again and talk about who's in based on labor relations decision.

Borough bargaining notes, Exh. 8, at 10; Exh. D, at 10.

44. Larsen states he spoke about reopening the subject of the composition of the unit by stating the Electrical Workers would agree to reopen the term defining the scope of the unit under section 20.2 of the agreement. Section 20.2 provides,

> This Agreement may be amended at any time by mutual consent of the parties hereto. Such amendment shall be reduced to writing and state the effective date.

Exh. 13, at 43. None of the witnesses could corroborate Larsen's recollection that he raised the issue of section 20.2 of the agreement and Selby stated specifically that it was not discussed.

45. Selby's recollection that the parties agreed on this last day that they would complete negotiating the unit after the ruling from the Agency also is not corroborated. Selby states that he anticipated a decision from the Agency as early as November. He anticipated an additional negotiation session after the October 5 session to conclude discussions on the Electrical Workers' proposal to amend the unit designation and to check the document for internal consistencies. He stated that the parties were to set the date for that session immediately after getting the ruling from the Agency.

46. Sapp's recollection was that the parties would need to meet again. He identified the subject of this meeting as the effects of the Agency's unit composition determination but that the unit determination itself was an issue for resolution outside the negotiations. Sapp believed the parties would need to come back to the table after the Agency concluded the unit issue because other issues, such as on-call and overtime, might need modification depending upon who was in the unit. Sapp stated that he thought it was pretty clear to Larsen that the parties would need to await the Agency's decision before they could finalize the agreement.

47. It had been the practice of the Borough to retype the proposals agreed to for its database, and after October 5, 1994, it did send versions of the newly typed terms to Larsen for his signature. Larsen said that the Borough at the negotiations agreed to send the complete package in about two weeks. Selby remembers promising the document in three weeks but that it took longer to prepare than expected. The Borough did provide it on November 21, 1994. Larsen states that Selby apologized when the document was late, explaining the Borough had other commitments. He received a final assurance that he would have the document by November 21, and the Borough would provide the document directly to the employees.

48. That document, Exhibit 13, includes the entire agreement of the parties to that date, including the incorporation of approximately 140 provisions that had been tentatively agreed to. The draft includes the term addressing the composition of the unit that the parties tentatively made on March 25, 1994. Draft Agreement, § 1.1, Exh. 13, at 1. Also included in the tentative agreement is Article 17, Union Security. Exh. 13, at 1 & 37. The tentative agreement on union security provides:

> During the term of this Agreement, the Employer shall deduct from the wages of employees covered by this Agreement the membership dues or equivalent service charge for those employees who individually and voluntarily authorize such deductions in writing by signing an authorization for payroll deduction of Union dues. Deductions will be submitted by check to the IBEW L.U. 1547 each month with a list of individual

> names and amounts withheld. The Employer will not be held liable for deduction errors but will make proper adjustments with the IBEW L.U. 1547 for any errors as soon as possible. The Union agrees that the Employer assumes no responsibility in connection with deduction of monies except that of forwarding monies deducted as set forth in this Article. The Union shall indemnify the Employer and hold the Employer harmless from any and all claims against the Employer for the amounts deducted and withheld from earnings. [Id., at 37.]

49. During the time period the Borough and the Electrical Workers were negotiating, the Borough was working on changes to its personnel rules. Selby stated that the Borough had been prohibited from revising its personnel rules while awaiting a decision from the courts on the issue of the effectiveness of the Borough's attempt to opt out of the Public Employment Relations Act.[4] Selby indicated that the court directed the Borough in 1990 not to act. Selby was very clear on his recollection that the court had issued an order precluding any action on the personnel rules while the case was pending. He stated he received the information from counsel but did not recall whether he had seen it. After the Alaska Supreme Court's issuance of its decision in Kodiak Island Borough v. State of Alaska, 853 P.2d 1111 in 1993, Selby believed the Borough was no longer under a restraint against changing its personnel rules.

50. Selby described the Borough's procedure to adopt the personnel rules. He first is responsible to prepare a draft, which the Borough's personnel advisory board then reviews. Employees are advised of personnel advisory board meetings and able to participate at them. The advisory board then makes a recommendation to the Assembly. The Assembly takes the matter up as an ordinance. There is a first reading. At the second reading the public has the opportunity to participate at a hearing. The rules could then be adopted as law.

51. The Electrical Workers did not participate at the advisory board or the Assembly meetings on the rules, but were aware that changes in the rules were pending. A negotiating team member gave Larsen the minutes from an August 10, 1994, meeting of the personnel board, which showed that the rules being proposed were the same as the terms of the agreement being negotiated. Larsen raised these facts with the Borough in negotiations on August 31, and received assurances that the documents were completely separate. Borough bargaining notes (Oct. 5, 1994), Exh. 7, at 2.

52. The issue of the adoption of the personnel rules was presented to the Borough Assembly on August 18, 1994. Assembly Minutes, Exh. G, at 1. The Assembly conducted a public hearing and adopted the personnel rules on September 1, 1994. Assembly Minutes, Exh. G, at 3; Ordinance 94-18, Exh. H, at 2. The text of the personnel manual appears in Exhibit 22. Amendments to the personnel rules were proposed to make some technical corrections and conform the rules to changes negotiated with the Electrical Workers after the rules were first proposed in August. Those changes to the personnel rules appear in Ordinance 94-27 and were introduced on December 15, 1994, and adopted on January 5, 1995. Exh. K.

53. The substance of the personnel rules is very similar to the tentatively agreed terms of the IBEW/KIB contract under negotiation. A comparison of the tables of contents for the agreement and for the personnel rules shows the two documents to be very similar. Compare Exh. 13, at 1-4 with Exh. 22, at 1-4. Beginning with page 11 of the personnel rules, the rules closely track the agreement. Rules, Section 4.01 designation of employees mirrors article 3.1 of the agreement. Compare Exh. 13, at 3 with Exh. 22, at 11. The two agreements are identical with few exceptions. For example, the only difference in the 17 sections of chapter 4 of the rules and article four of the agreement addressing hiring and advancement, is that the rules include a section on interns not addressed in the agreement. Compare Exh. 13, at 4-8 with Exh. 22, at 11-16. Likewise article 5, separations, is identical to chapter 5 terminations. The only difference is that the rules expand the grounds for termination, and the agreement includes only the subheadings. Compare Exh. 13, at 9 & 10 with Exh. 22, at 17-20. Article 6 can be compared with chapter 6 of the rules. Hours of work in section 601 is section 6.1 in the agreement, ten hour work day in section 602 is 6.3 in the agreement, section 603, rest periods, in the rules is 6.6 in the agreement, section 604 staggered lunch period is section 6.7 of the agreement; section 606 overtime in the rules is section 6.2 of the agreement; section 607 overtime on holidays is addressed in 6.2 of the agreement. The agreement does not address section 605 exempt and non-exempt employees. The remaining chapters and articles are comparable.

54. The only significant differences between the rules and the agreement are the omission in the personnel rules of those terms appropriate only to a negotiated agreement, such as union security, term of the agreement, provisions to

renegotiate terms, and the like. In addition, the rules include several requirements in federal and state laws, such as the Americans with Disabilities Act, the Family Leave Act, and sexual harassment, among others.

55. Larsen went to Kodiak in the early part of November. While he was there he met with members of the bargaining unit who were concerned about the delay in ratifying the agreement and wanted to proceed. Larsen was concerned that the document from the Borough was later than expected. He therefore produced a draft of all of the tentatively agreed terms. He sent the document air freight with a cover letter announcing a meeting. He sent the document and letter to his shop steward at TTI who delivered it to Marian Royall. The letter, in memorandum format, explains the reason for the draft and that the Kodiak Island Borough will be producing a draft for distribution to the members. He also announces the meeting and vote on the agreement on December 1. Exh. 14. The announcement for posting in the work place states:

To: All Kodiak Island Borough

Employees Within the Bargaining Unit

SPECIAL INFORMATIONAL

MEETING AND VOTE

THURSDAY, DECEMBER 1, 1994

7:00 P.M.

KODIAK ISLAND BOROUGH

Conference Room

Exh. 15.

56. Marian Royall was responsible for posting the notice. Royall had been the Electrical Workers' note taker for much of the negotiations. Royall's practice had been to make copies of the notes and distribute them among the departments and to fax copies to CSP and out to the baler. This was the method used to inform the unit of the negotiations and their status.

57. Royall retrieved the packets at the airport and sought direction from the Electrical Workers on their distribution. Larsen instructed Royall to provide copies to the employees in the unit as tentatively agreed, specifically noting that CSP employees were in the unit and to be included. Royall confirms that copies were provided to all members of the unit as the unit was defined in the term the parties had tentatively agreed to on March 25. Copies were posted in the copy room and baler facility. She also posted a copy of the notice on the bulletin board in the copying room of the first floor of the Borough facility. She also sent a copy of the notice by telecopier to the baler facility, but states she was not as concerned about posting as she had been when posting her minutes of negotiations sessions in the past because each member was provided a personal copy of the notice. Exhs. 14 & 15. Royall got feedback on her distribution. People did call with questions about the election. Larsen believes all but one employee received the materials.

58. Larsen states he arranged for the Assembly conference room for the December 1, 1994, ratification vote personally with Mayor Selby. He does not remember that he actually stated his reason for requesting the room but believes Selby would have known. He states Selby forwarded his call to a person who actually reserved the room for him for December 1.

59. Selby denies any conversation with Larsen about the use of the Assembly facility. Selby states that he did not know that the Electrical Workers used the Assembly conference room on December 1 until after the fact.

60. The meeting did take place at the Borough's conference room with persons voting in person and by absentee ballot.

61. After the meeting, on December 7, 1994, Larsen telephoned Selby to advise that the workers had ratified the agreement. Larsen states Selby "started back pedalling." Selby said there was still a problem with the labor board's decision on who would vote in the election for decertification. Larsen tried to follow up with the mayor about the Assembly's ratification because he knew there was an Assembly meeting on December 15, 1994. Selby told him that, until the labor board issued its ruling, he was not going to take the matter to the Assembly. Larsen states that he was quite upset with this news because they had an agreement and he knew the wage increases were going to take effect. Mayor expressed concern that, if he took the contract to the Assembly, the Electrical Workers could then argue they had a contract in place that would bar the decertification election.[5] Larsen states that he offered to give Selby a letter stating that, if the members voted to decertify the Electrical Workers, the Electrical Workers would walk away. Selby told him to put it in writing. Larsen stated emphatically that Selby did not raise as an issue that the agreement was incomplete because the issue of the composition of the unit remained undecided.

62. Selby remembers this conversation differently. Selby had heard nothing about ratification by the unit until Larsen called him and told him about the ratification. Selby remembers that he immediately said, "How can you ratify the contract when we have not completed negotiations?" He remembers Larsen responding by saying as far as he was concerned they had completed them. Selby states that he said they had the unit issue to complete plus three technical issues that needed cleaning up. Selby says he said to Larsen that they needed to get together to complete the negotiations but that Larsen said he was not interested in doing that. Larsen inquired when Selby was going to be presenting the agreement to the Assembly and Selby said he replied by stating that he did not have a contract to present to the Assembly. Selby, however, agrees with Larsen that he talked with Larsen about the contract bar and its effect and that he inquired whether Larsen knew of the Agency's position on conducting an election under these circumstances. Selby stated that the Borough did not want to take action unwittingly that would interfere with employees' right to vote in that election.

63. Selby states that Larsen said during this conversation that he would not meet with the Borough to negotiate.

64. Both Selby and Larsen agree that Larsen said he would explore the possibility of eliminating the risk that concerned Selby. Both agree that Selby asked Larsen to address the contract bar question in writing so that he could consider the proposal and respond. Afterwards Larsen did discuss a letter that would waive a contract bar with his business manager and counsel. Larsen prepared a letter and sent it to Selby on December 9, 1994. Exh. 16.

65. Larsen did not hear a response from Selby to his December 9 letter. Larsen then telephoned Selby to find out the response to the December 9 letter. Selby would not discuss any details with him, but told him he had sent a letter response.

66. Selby's letter, dated December 15, 1994, states the position of the Borough that the parties had not reached agreement and would need to negotiate the issue of the composition of the unit after the Agency issued its decision:

> Thank you for your letter of December 9, 1994, regarding contract negotiations between the Kodiak Island Borough and IBEW. We have reviewed your proposal to enter a collective bargaining agreement contingent upon results of a decertification election held pursuant to unit determinations by the Labor Relations Agency. Regrettably, we cannot agree to the proposal you have submitted because of significant legal problems.
>
> The Public Employment Relations Act expressly bars an election if a collective bargaining agreement is in effect. AS 23.40.100 (e). The statute on its face compels action by the Labor Relations Agency and does not offer a discretionary option. AS 23.40.110(e) is distinct from the contract-bar rules as found in caselaw and interpretations arising from NLRB decisions. As such, we believe entry into the collective bargaining agreement which you propose would have the mandatory effect of preventing an election requested by employees of the Kodiak Island Borough. Entry into the collective bargaining agreement proposed by IBEW would be viewed by the petitioners in the decertification election process as very presumptuous; that is, based on an unfounded presumption by the Borough and IBEW that the employees do not wish to participate in the election to be held following the Agency's determination of the composition of the voting group.

> If the agency were to determine that all parties (presumably including the petitioners for the decertification election) could consent to an election notwithstanding the entry into the collective bargaining agreement and if all such parties then agreed to that consent election process, the Borough would certainly consider your proposal. However, we leave it to you to ascertain the Agency's view on whether such a process could in fact work and whether or not the collective bargaining agreement proposed by you, if signed and approved by the Borough's assembly, would by law bar an election from going forward.
>
> We are further perplexed by your assertion of a "ratified" collective bargaining agreement. As you well know, the Borough has engaged in numerous negotiation efforts with IBEW on a collective bargaining agreement, but we felt that we had clearly agreed to one final negotiation session after the Labor Relations Agency decision to finalize the definition of the unit membership. Specifically, the unit composition of the collective bargaining agreement has not yet been fully negotiated. The Borough and IBEW have been specifically leaving open to determination by the Labor Relations Agency whether or not a unit capable of voting on decertification was representative of the unit. We are concerned that IBEW has acted in a surprising if not bad faith manner in presumptively and unilaterally concluding the negotiations on the collective bargaining unit in its collective bargaining package which is the subject of your letter without reaching agreement with the Borough on that point. Because the Borough has repeatedly stated that the unit composition is to be determined after the Agency's ruling on the September 12-13, 1994 hearing, this key bargaining element remains unresolved.
>
> We hope the Labor Relations Agency will issue its ruling in short order and an election can be held allowing the Borough, its employees, and IBEW to proceed appropriately. Thank you for your attention, and if you have any questions, please contact me at 486-9300.

Exh. 17.

67. According to Selby, on December 7, 1994, Larsen refused to negotiate further on the agreement, stating he had a ratified agreement. Selby states that he said, we still have one final negotiation session to go, what about the CSP group and Larsen said it is just too bad about them. Selby states that he had the very clear impression that the Electrical Workers would not negotiate further on the unit issues. Selby states that he then asked whether Larsen wanted to remove the subject from the table but that he did not. The statement that Larsen declined to remove the issue of unit composition from bargaining is not credible. There is no reason why Larsen would impose a barrier to the finality of the agreement that all other evidence supports he pursued vigorously. Larsen's testimony, Selby's testimony, and Larsen's letter strongly support the fact that the Electrical Workers believed they had a final agreement and no items remained on the table. The actions of Larsen were consistent with his version that the parties reached final agreement. The actions of Selby, on the other hand, are not consistent with his version of events. In particular, his concerns about the election bar are not consistent with the position that the agreement is incomplete.

68. Walter Sapp stated that the Borough had not reached a position on the inclusion or exclusion of the CSP workers. The KIB representatives did discuss competing considerations on whether to include or exclude the community services personnel in caucus, but did not reach a decision on the issue. Sapp stated that one of the considerations was the impact on the decertification election and the feeling that those who initially cast a vote be able to vote in the upcoming election. Selby also stated that the Borough did not have a formal position on the question of the inclusion of the CSP workers.

69. Selby never specified to the Electrical Workers the subject areas of the three technical changes that he believed the parties needed to address.

70. On December 15, 1994, Selby proposed ordinance 94-27 to the Assembly to amend the Personnel Rules and Regulations. Exh. I, at 2. Selby represented the seven changes as minor modifications and clarification. Id., at 3.

71. At least one of the changes was to conform personnel rule 1108, concerning on-call time, to negotiated changes to section 6.4, on-call time, in the agreement made on October 5. The specific references to the community support program employees were removed in both provisions. Compare Exh. 20, at 4 (Ordinance No. 94-27) with Exh. 13, at

12.

72. With the exception of the union security clause, all of the financial terms agreed to between the Electrical Workers and the Borough were adopted as changes to the personnel rules.

73. The only notice to the Electrical Workers of the changes in the personnel rules and to the implementation of the pay raise was through publication of the announcements of Assembly hearing on the ordinances adopting the personnel rules changes and the budget adjustment. Whether employees were individually notified of the pay raise is not clear. No specific notice was provided to the Electrical Workers, although the Electrical Workers were aware that amendments to the personnel rules were pending. While the Borough did not provide direct notice to the Electrical Workers representatives, the negotiating team was aware that the Borough was working on changes to the personnel rules. For example, there are references to them in the Borough's October 5, 1994, bargaining notes. Exh. D, at 9.[6]

74. The Borough published on December 14, 1994, in the Kodiak Mirror, a daily newspaper published in Kodiak, a notice of public hearing on December 15, 1994. The agenda included two ordinances for introduction:

> Ordinance No. 94-10F Amending Ordinance No. 94-10 Fiscal Year 1995 Budget (Mid-Year Budget Adjustment).
>
> Ordinance No. 94-27 Amending the Personnel Rules and Regulations by Amending Certain Sections.

Exh. A, at 2.

75. On December 21, 1994, after the meeting, the Borough published an announcement of action taken on December 15, 1994. Included in the announcement was the following:

> **Advanced** Ordinance No. 94-10F Amending Ordinance No. 94-10 Fiscal Year 1995 Budget. (Mid-year Budget Adjustment) to public hearing on January 5, 1995.
>
> **Amended, Advanced** Ordinance No. 94-27 Amending the Personnel Rules and Regulations by Amending Certain Sections to public hearing on January 5, 1995.

Exh. B, at 2. See also Minutes (Dec. 15, 1994), Exh. I, at 1-4. The Assembly agenda for January 5, 1995, was published in the Kodiak Mirror on January 4, 1995, and it announced public hearing on the ordinances changing the personnel rules and adjusting the budget. Exh. C.

76. On January 5, 1995, the Borough implemented a wage increase in the amount of 2.5 percent for its employees, including the represented employees. The minutes for the public hearing state,

> Mayor Selby explained the mid-year budget adjustments of revenue and expenditures due to grants, interest earnings, and salary adjustments.
>
> In response to Assemblymember Stevens' inquiry about salaries, Mayor Selby explained that for a period of three to four years employees did not receive salary increases. He said current policy was to alternate between a 2.5 percent cola year and a bonus year.

Exh. I, at 5. Regarding the changes to the personnel rules, the minutes state,

> Personnel Adjustments-
>
> Mayor Selby said the seven minor changes were proposed as a result of recommendations by the Borough attorney, suggestions from administration and three items that were not negotiated.

Id., at 7. The changes to the on-call provision were made, according to Selby, on the recommendation of the borough

attorney. Id. The salary changes were also adopted at this meeting. The changes were a two percent increase effective January 1, 1995, and a 2.5 percent increase effective July 1, 1995. Id.

77. If the agreement had been ratified and implemented, section 17, the dues provision, would have become effective on January 1, 1995. The dues structure was payment of dues in the amount of 2.5 percent of wages. The Electrical Workers have not collected dues from the unit.

78. Selby described the relationship between the personnel rules that had been adopted and any collective bargaining agreement. Selby claims that, because the rules are adopted by ordinance for any agreement to be ratified, the ordinance language would have to be adopted first to allow the ratification of the contract because the law takes precedence over a contract. Selby further stated that the Assembly could not adopt a contract that was in violation of an ordinance. Selby intended the personnel rules to clear the way for the contract to be adopted in a timely fashion. The amendments in December were needed to correct three inconsistencies in the policy that needed to be corrected and several changes in negotiations that needed to be addressed. Selby was adamant that the Assembly could not adopt a contract that was "against the law" and could not ratify any agreement if there were any terms conflicting with the personnel rules, suggesting that Assembly members could go to jail for doing so.[7] The terms of the rules were therefore consistent with the terms of the agreement.

79. The Borough's notes for the August 31, 1994, meeting, on the other hand, support the conclusion that representations were made that the personnel rules would not apply to bargaining unit members:

> I have the minutes from August 10 mtg [this was a meeting of the personnel rules advisory committee] and wonder how the proposed personnel policies relate to the current contract?
>
> KIB - They are completely separate documents.
>
> IBEW - OK but some of the language is identical - how does it relate to contract - does it override?
>
> KIB - No. Emp will have contract, personnel policies will be for those not covered by contract.

Exh. 7, at 2.

80. Changes to the personnel rules proceeded on a parallel track with negotiations on the collective bargaining agreement with the Electrical Workers. Selby states that a draft of the personnel rules was actually the initial proposal the Borough made in its negotiations with the Electrical Workers. Because the final document at the conclusion of eighteen months of negotiations between the Electrical Workers and the Borough reflects almost to the word the same document as the personnel rules adopted in December, we infer that changes were made to the personnel rules as provisions were negotiated in bargaining with the Electrical Workers.

81. The issue of pay raises for Kodiak Island Borough employees is an important one in this case. Before 1988 the Borough adjusted employee compensation through adoption of a resolution. More recently, it has adjusted compensation by ordinance. The series of Borough actions resulting in increases to employees' compensation are reflected in a chart provided as an exhibit in the case. Exh. J. The chart shows the wage level of the employees on January 1, and July 1, of each year. The chart uses the year 1977 as a base line, or 100 percent. Each time employees' wages were increased the bar on the graph changes height commensurate with the percent of increase from the base line of the 1977 wages. The wages of the employees reflect increases in some years. In those years the increases are made either in July or in January. We can conclude that in some but not all years employees receive wage increases and in some but not all years they receive any increase in January and in other years in July and in even other years on both dates. We cannot conclude a predictable pattern of wage increases from this chart or the testimony of Selby. We note particularly a period of five years where no increases were received at all.

82. The Borough presented representative samples of ordinances or resolutions affecting employee salaries. The employees did receive a bonus of $900, which took effect on July 1, 1994. In July of 1993 there was a 2.5 percent in the pay scale increase appropriated while the parties were in negotiations. See Ordinance 93-10 (June 3, 1993) (1994 fiscal

year budget), Exh. F-2 (amount of increase not clear from face of ordinance). In July of 1992, the Borough paid a bonus per employee of $750.00. See Ordinance 92-10 (June 4, 1992), Exh. F-3. The Borough adjusted the salary scale midyear for employees in 1989 by $500. Ordinance No. 89-01-0 (Jan. 19, 1989), Exh. F-4. Employee pay was increased by resolution in earlier years. In 1979 the Borough adjusted the salary scale by increasing it by 13.5 percent, effective January 1, 1980. Resolution 79-68-R (Dec. 6, 1979), Exh. F-5.

83. A pattern of wage increases cannot be determined from the budget ordinances provided. The Borough 1995 fiscal year budget, which was adopted on June 2, 1994, addresses personnel services funds for various departments but whether it represents a pay increase cannot be determined. Exh. F-1. Budgets for fiscal years 1993 and 1994 also appear in the record. Exhs. F-2 & F-3.

84. The Borough did not advise the Electrical Workers that the pay raise negotiated for January 1, 1995, would take effect regardless of the effective date of the parties's agreement.

85. Selby answered no to the question whether he was aware of anything in PERA that would preclude him from unilateral actions when he had collective bargaining responsibilities.

86. The Borough adopted a bonus for employees on July 1, 1994, during negotiations for the agreement. Larsen described this action as creating some awkwardness during the negotiations and said that he thought he had an unfair labor practice charge there if he needed one. The Electrical Workers did not file a charge regarding this bonus.

87. This Agency proceeded to schedule the decertification election after the release of the decision on December 22, 1994. A preelection conference was conducted on January 13, 1995. At that conference, scheduled for the purpose of setting the dates and time of the election, the Electrical Workers provided verbal notice of its intent to file an unfair labor practice charge.

88. After the issuance of decision and order no. 183, the Agency issued documents to the parties setting forth the time frames for the election on the question of decertification, including setting an election date of February 24, 1995, for the election.

89. On January 25, 1995, the Electrical Workers filed its unfair labor practice charge resulting in this hearing. The Electrical Workers also filed a request that its unfair labor practice charge block the election scheduled for February 24, 1995. The question of blocking the election was briefed by all of the parties. The Borough and Dan Millard, who had been substituted for Kelli L. Veech, opposed postponing the election.

90. On February 2, 1995, the hearing examiner issued an order blocking the election.

91. The Agency conducted its investigation of the charges and on February 9, 1995, issued its notice of preliminary finding of probable cause and a notice of accusation under AS 23.40.110(a)(1),(2),(3), and (5).

92. On February 17, 1995, Selby requested in writing to negotiate on the unit and "a couple of technical corrections."

> In view of the fact that the Labor Relations Agency has ruled on the definition of who is authorized to vote in the decertification election, it would seem that per our final discussions at the last negotiation session, we should return to the negotiating table to complete negotiations with regard to the definition of the members of the bargaining unit. The IBEW proposal to remove the CSP unit is the primary remaining incomplete item for negotiating at this meeting. However, we do have a couple of technical corrections which we will provide to you as soon as we have a meeting date scheduled to complete the negotiations on this contract. Please advise me of your availability to meet and conclude these negotiations. I appreciate your timely response.

Exh. E.

93. A hearing was scheduled for May 9 and 10, 1995, at which the parties presented testimony and other evidence.

94. The record closed on May 10, 1995.

95. A significant issue is whether the Electrical Workers and the Borough agreed under its ground rules to reopen and renegotiate the question of the composition of the unit. We find the Electrical Workers and the Borough agreed on March 25, 1994, to the composition of the unit, which changed the unit that the Department had found appropriate in its 1990 decision. By the Electrical Workers and Borough's bargaining ground rules, this tentative agreement could be reopened only upon mutual agreement by the parties. Also under the ground rules each term would be effective only when the complete agreement became effective. We find that the Electrical Workers sought at least on three different occasions to reopen negotiations on the subject of the composition of the bargaining unit. We find the Borough did not agree to reopen discussions. We do find the Borough indicating that discussion should be delayed but we do not find a bilateral agreement to delay discussion on the unit. The question of unit composition was close to the hearing date before the Agency at the time the Electrical Workers sought to reopen the issue. We understand the notes, the testimony, and the absence of any written response by the Borough on this issue to mean it declined to reopen and discuss the issue when proposed by the Electrical Workers.

96. Another significant dispute is whether the Electrical Workers and the Borough completed negotiations of the agreement on October 5, 1994. We conclude that they did. The Electrical Workers and the Borough negotiated every term of the agreement. On October 5, 1994, the parties discussed a possible need to address unit composition after this Agency issued its decision. This discussion, however, does not preclude a final agreement, because unless the parties agreed to reopen a term, under the parties ground rules, it was final.

97. The Electrical Workers and the Borough's actions are entirely consistent with a final agreement. We note the relief and good will in the room at the conclusion of the October 5 session. Electrical Workers representative Larsen plainly believed that he had a final agreement and ratification was appropriate. He addressed tactics for obtaining Borough approval with the Mayor. He took steps to arrange a room for a ratification vote election. Notices were provided to employees in the unit defined in the tentative agreement. Copies of the tentatively agreed terms were provided to unit members for review and ratification. The election was posted publicly. All of these actions are consistent with the adoption of a final agreement between the parties.

98. In contrast, the Borough's actions throughout a critical period are inconsistent with its position that the parties did not reach agreement. The Borough did not take a position on the issue of the inclusion of the CSP employees in the unit. The Borough did not have a contract goal precluding a complete agreement. Sapp's actions on October 5 were consistent with ending his role in the negotiations. The Borough did prepare a complete draft of the tentative agreement, including the term addressing the composition of the unit. Selby's discussion of strategy for Assembly approval with Larsen is consistent with finality. The timing of the adoption of the personnel rules, which track the terms of the agreement, also supports the finality of the agreement. Selby and Larsen's discussion of the contract bar is particularly persuasive of a final agreement. The question whether the agreement would interfere with a decertification election under the contract bar would only be an issue if the parties had reached a final agreement. If there were a barrier to a final agreement, such as a disputed key term, contract bar would not be an issue.

99. We believe the statements that the agreement is not final are inconsistent with the actions of the Borough's representatives and are not credible, and we do not believe them.

Preliminary Matter

1. The Blocking Charge. The hearing officer blocked the election in this case upon a request by the Electrical Workers. The Alaska Supreme Court has adopted the NLRB policy to block an election unless the NLRB determines the practice would not affect the election. Alaska Public Employees Ass'n v. Municipality of Anchorage, 555 P.2d 552, 555 (Alaska 1976). Blocking the election pending the decision on the unfair labor practice in this case was appropriate. The evidence does not support a conclusion that the practices would not affect the outcome of the election. See discussion below.

Conclusions of Law

1. Kodiak Island Borough is a public employer under AS 23.40.250(7) subject to the Public Employment Relations Act,

Kodiak Island Borough v. State of Alaska, 853 P.2d 1111 (Alaska 1993), and the Alaska Labor Relations Agency has jurisdiction under AS 23.40.110 to consider this case.

2. Complainant has the burden to prove each element of its case by a preponderance of the evidence. 8 AAC 97.350(f).

3. The charges referred for hearing in this case are of violations of AS 23.40.110(a)(1),(2),(3), and (5).

4. In determining charges under AS 23.40.110, the Agency gives weight to cases decided by the National Labor Relations Board and the federal courts. 8 AAC 97.450(b).

I. AS 23.40.110(a)(5): Refusal to bargain in good faith

5. Subsection (a)(5) prohibits employers from refusing to "bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit."

A. Insisting to impasse on a permissive term.

6. This Agency and its predecessor have held that a general wall-to-wall unit in the Borough is as large as is reasonable and avoids unnecessary fragmenting and found a wall-to-wall unit was appropriate in this case. Millard v. International Bhd. of Elec. Workers, Local Union 1547, Decision & Order No. 183 (Dec. 21, 1994); International Bhd. of Elec. Workers, Local Union 1547 v. Kodiak Island Borough, DOLLRA No. 90-5 (May 4, 1990), affirmed on other grounds Kodiak Island Borough v. State of Alaska, 853 P.2d 1111 (Alaska 1993).

7. The composition of the unit continues to be a controversy in this third case between the Electrical Workers and the Borough.

8. The parties tentatively agreed on March 25, 1994, to change the unit's composition. Under their ground rules, however, the parties could agree to reopen an issue after tentative agreement. Finding of fact ¶ 10. We found in our decision in Millard v. International Bhd. of Elec. Workers, Local Union 1547, Decision & Order No. 183, that, because the unit changes remained tentative, they were not effective. At issue is whether the parties mutually agreed to reopen a tentatively agreed term. The Borough attaches great significance to the efforts of the Electrical Workers to reopen the term defining the unit. Every time the Electrical Workers raised the issue of reopening discussion on unit composition, however, the Borough erected a barrier to discussion. When one barrier was overcome, another appeared in its place. First the proposal needed to be in writing. Once the proposal was presented in writing, the Borough was confused by the handwritten changes. Once the Electrical Workers presented a clean draft of the proposal, the Borough could not address it because the subject was pending before the Agency. Conflicting communications can themselves be an unfair labor practice. See Totem Ass'n of Educational Support Personnel, Decision & Order No. 150 (Dec. 3, 1992). The parties never engaged in any discussion on the merits of the proposal at all. Why the Borough wanted or needed to address the unit definition after the Agency issued its decision was not disclosed. The Borough never developed a position on whether to include the CSP employees in the unit. The justification for bargaining proposals is a factor used to determine the totality of the circumstances in assessing good faith under the duty to bargain. K-B Resources Ltd., 294 NLRB No. 82, 131 L.R.R.M. (BNA) 1561 (1989); 1 Patrick Hardin, supra 594. The absence of a reason or even a position for reopening the unit definition is one factor that would support finding that the Borough was acting in bad faith.

9. But the parties' motives are not really material. The parties agreed to modify the unit in March of 1994, which they were free to do in negotiations. As Hardin states, "Even when the [NLRB] has defined a unit, the parties are free to agree on a negotiated unit different from the certified or recognized unit." 1 Patrick Hardin, The Developing Labor Law 931 (3d. ed. 1992). Under the ground rules, that term would be effective when the agreement became effective, unless the parties agreed to modify it. The Borough's position is that the parties agreed to reopen the issue but to delay negotiations until after this Agency ruled. However, the facts do not support any agreement or mutuality. The facts show that the Borough did not want to talk about the issue until the Agency ruled and that the Electrical Workers sought to negotiate the issue on three occasions, and failed. The facts do not support any agreement or mutuality between the parties at all on this issue.

10. The effect of the Borough's refusal to discuss the proposals to reopen the agreed term on the composition of the unit on August 17 and 31 was that the composition of the unit remained as tentatively agreed between the parties on March 25.

11. Even if the parties had agreed at one point to reopen the subject of the composition of the unit, that agreement was nullified by the unequivocal statement that Selby understood Larsen to make on December 7, 1994, that the Electrical Workers had a ratified agreement and that Larsen did not intend to discuss the composition of the unit.

12. The parties are required to discuss only mandatory subjects of bargaining. 1 Patrick Hardin, The Developing Labor Law 604, 864 & 930-931 (3d. ed. 1992). See also Yukon Flats School District v. State of Alaska, Labor Relations Agency, Decision on Appeal, case no. 3AN-92-3603 Civ. (Super. Ct. Feb. 5, 1993), adopting by reference Yukon Flats School District v. Yukon Flats Education Ass'n, proposed decision & order, case no. 91-005-ULP, at 5 (Oct. 30, 1991). Insisting on a permissive term to impasse violates this prohibition against refusing to bargain in good faith. A corollary of the absence of the duty to bargain about a subject is that a party may not insist on a permissive subject to impasse. See e.g., NLRB v. Borg Warner Corp., 356 U.S. 342, 42 L.R.R.M. (BNA) 2034 (1958).

13. Unit composition is a permissive subject of bargaining. Douds v. Longshoremen's Ass'n, 241 F.2d 278, 39 L.R.R.M. (BNA) 2388 (2d Cir. 1957). Because composition of the unit is a permissive term, a party may not insist to impasse on negotiating composition of the unit. Boise Cascade Corp. v. NLRB, 860 F.2d 471, 129 L.R.R.M. (BNA) 2744 (D.C. Cir. 1988).

14. Under even the Borough's version of the status of negotiations, the parties had one term remaining to discuss -- unit composition. This case illustrates the importance of not allowing a question on the composition of the unit to hang up bargaining. The parties cannot meaningfully negotiate unless they know the scope of the unit. Douds v. Longshoremen, 241 F.2d 278, 39 L.R.R.M. (BNA) 2388 (2d Cir. 1957). The terms negotiated may depend on the positions covered in the unit. In this case on the last day of bargaining -- October 5 -- the parties had difficulty addressing shift work and on-call because of questions about whether the CSP workers were in the unit. As one court has stated,

> [T]he existence of a defined unit is a prerequisite to bargaining over terms and conditions of employment, for parties cannot bargain unless they know which employees a union represents.

Boise Cascade Corp. v. NLRB, 860 F.2d 471, 129 L.R.R.M. (BNA) 2744, 2746 (D.C. Cir. 1988) (addressing why an employer may not unilaterally change the scope of the unit). Delaying determination of the unit until after the terms of an agreement are negotiated complicates negotiations, interferes with stable bargaining relationships, and potentially undermines the labor organization's relationship with the members it represents.

15. Even under the Borough's version of the facts, it refused to conclude negotiations until this permissive subject was addressed even after hearing unequivocally from the Electrical Workers that it would not discuss the subject. By insisting on negotiation of a permissive subject after clearly understanding that the Electrical Workers had no intention of bargaining further on the issue, the Borough committed a text book unfair labor practice under AS 23.40.110(a)(5).

B. Unilateral changes during bargaining.

16. A unilateral change in a term of employment during bargaining can also violate the duty to bargain in good faith. The Alaska Supreme Court has stated:

> An employer that implements unilateral changes in the conditions of employment during contract negotiations without consulting the union violated the duty to bargain collectively. When an impasse occurs, after the breakdown of good faith negotiations, the employer is free to unilaterally implement terms of employment, provided the changes were offered to the union during the bargaining process.

Alaska Public Employees Ass'n v. Department of Administration, 776 P.2d 1030, 1033 (Alaska 1989) (citations

omitted). See also NLRB v. Katz, 369 U.S. 736, 50 L.R.R.M. (BNA) 2177 (1962), University of Alaska, Classified Employees Ass'n, APEA/AFT v. University of Alaska, Decision & Order No. 169 (Dec. 28, 1993).

17. In most cases determining whether a party has violated the duty to bargain in good faith requires an examination of the totality of the circumstances for evidence of subjective bad faith. However, certain conduct has been determined bad faith regardless of any evidence of subjective good or bad faith. A classic example of a violation of the duty to bargain in good faith is the duty to refrain from unilateral changes of mandatory bargaining terms without first bargaining to impasse. 1 Patrick Hardin, supra 596.

18. The reason unilateral increases in wages generally are prohibited during bargaining is that the action undercuts the role and effectiveness of the union as the exclusive bargaining representative for the employees. As one commentator has stated,

> The Second Circuit has noted that a "wage increase [during bargaining] is by far the most important 'unilateral act'." That court considered such an action a deliberate attempt by the employer to deal directly with its employees and to convince them that benefits come solely from the employer.

Id., at 640-641, quoting NLRB v. Fitzgerald Mills Corp., 313 F.2d 260, 267, 52 L.R.R.M. (BNA) 2174 (2d Cir. 1963).

19. Making such a change during negotiations is a per se refusal to bargain and can constitute a violation of section 8(a)(5) of the National Labor Relations Act despite the absence of any evidence of actual bad faith. NLRB v. Katz, 369 U.S. 736, 50 L.R.R.M. (BNA) 2177 (1962); 1 Patrick Hardin, supra, at 592.

20. The Borough argues that its adoption of the personnel rules, including the pay increase, is not a unilateral change as proscribed in Katz. Under the Borough's version of the facts, the parties were in bargaining but had not concluded their agreement. Under the Electrical Workers' version of the facts, the parties had concluded negotiating a tentative agreement, which was pending final approval by the Assembly. Under either version, before the parties had a final agreement, the Borough adopted new personnel rules covering the same terms in the agreement, including, most importantly, a pay raise.

21. The Borough argues that key elements required in Katz are missing. First, the parties in Katz had not negotiated. In contrast in this case the Borough had negotiated these terms with the Electrical Workers and the Electrical Workers had agreed to them. However, the fact that the parties negotiated before the Borough implemented the changes does not override the fact that the benefits were granted independently of the negotiations. By acting outside of the bargaining process, the Borough sent a message that it is the sole source of these benefits. This act weakens the role of the bargaining representative. The action further harms the relationship between the representative and the unit members because the members can obtain the benefits of the negotiations without the cost of dues because the union security clause is dependent upon the effectiveness of the agreement. While the Borough's acts in this case differ somewhat from the facts in Katz, they have the same harmful impact on collective bargaining.

22. The Borough argues that a second key factor distinguishing the case from Katz is the absence in its actions adopting the pay raise and personnel rules of any discrimination between groups of employees. The third distinguishing fact the Borough raises is really a restatement of the second -- that the action of the Assembly did not pit groups of employees against each other. The Borough argues that the discrimination in Katz was a key element to the employer's unfair labor practice in that case. We disagree. The existence or absence of discrimination is not the conduct with which Katz is most concerned. The key to Katz is the effect of the employer's conduct on bargaining. The message sent by the Borough's action in this case is that there are no differences or advantages to collective representation. All employees will be treated the same regardless. The employee is dependent on management for any wage increases or other changes in terms of employment. This action is destructive of the bargaining relationship despite the absence of discrimination between unit and nonunit members. See NLRB v. Zelrich Co., 344 F.2d 1011, 59 L.R.R.M. (BNA) 2225, 2227 (5th Cir. 1965).

23. The Borough argues that the facts that the Electrical Workers and employees had notice of the personnel rules revisions and that they failed to raise an objection with the Borough should be taken into account. This is a waiver

argument. In some cases inaction or, more specifically, a failure to demand to bargain after notice of an employer's intent to make a unilateral change, can operate to waive the right to bargain. Inlandboatmen's Union of the Pacific v. State of Alaska, Decision & Order No. 141, at 17 (Aug. 7, 1992). But in this case, the parties had bargained to agreement on these issues. The Borough did not notify the Electrical Workers that the personnel rules changes would apply to the Electrical Workers' bargaining unit members. The Electrical Workers' representative had asked in bargaining about the pending rules changes and received reassurances that the matters were separate. The Electrical Workers filed reasonably promptly after notice of the Borough's unilateral action. These facts do not support a finding of waiver.

24. Although the per se standard applied here does not require an examination of the Borough's motives, we believe a comment on the Borough's justification for its unilateral action could discourage future unfair labor practices. The mayor has explained the Borough's unilateral action, at least in part, as a necessary step in the Borough's approval of an agreement between the parties. Finding of fact ¶ 78. Other government entities subject to collective bargaining have addressed the relationship between collective bargaining agreements and personnel rules by adopting a provision in the rules stating that the rules apply "except as provided in any collective bargaining agreement." However, Mayor Selby made a point of testifying that the personnel rules needed to conform to the collective bargaining agreement and that the agreement, if it concluded, could not be approved without a preceding change to the personnel rules by ordinance. The Borough did not cite any law to support this claim and we are not aware of any such requirement. See AS 27.25.040 & 29.25.070. Moreover, requiring that the collective bargaining agreement conform to the personnel rules, which apply to unit and nonunit members, would be in derogation of the union's status as exclusive representative of a unit of Borough employees. Requiring the terms of the agreement to be preadopted as personnel rules outside of the bargaining process, which apply to unit and nonunit members alike, disrupts the bilateral bargaining process and undercuts the union's role in negotiating for its members. Moreover, the suggestion that Assembly members could go to jail if they approved a contract inconsistent with the personnel rules was surprising. Certainly the state's personnel rules, 2 AAC 07.005--2 AAC 07.999, authorized in AS 39.25.140, do not interfere with the negotiation and agreement of collective bargaining agreements between the state and the various state bargaining representatives. The state personnel board is not required to amend the specific terms of the personnel rules every time a new agreement is reached. The problem is not with the adoption of personnel rules but with their application here to change terms and conditions of employment for unit members outside of the bargaining process.

25. The Borough's unilateral changes in mandatory terms and conditions of employment violated its duty to bargain in good faith under AS 23.40.110(a)(5).

C. Refusal to ratify the agreement.

26. Another act that the National Labor Relations Board has identified as a per se violation is a refusal to execute a written contract. 1 Patrick Hardin, supra, at 602-603. Section 8(d) of the National Labor Relations Act requires execution of any agreement reached and refusal to do so is a per se refusal to bargain. A party may not condition execution of the contract upon approval or ratification by the other party under the National Labor Relations Act unless specified in the parties' ground rules.

27. The parties each expressly reserved in the ground rules the right to approve the contract. The Borough reserved the right of approval by a majority of the Borough Assembly. Generally public entities subject to PERA do require some form of approval. See AS 23.40.215 (state monetary terms, by resolution); Alaska Community Colleges' Federation of Teachers, Local No. 2404 v. University of Alaska, 619 P.2d 1299, 115 L.R.R.M. (BNA)2338, 2340 (Alaska 1983); Alaska Public Employees Ass'n v. City of Nome, Decision & Order No. 176 (May 24, 1994) (City Council by resolution). The Borough similarly appears to require separate authorization for appropriations to fund pay increases. When the power of approval is reserved, we have found that the obligation to bargain in good faith in AS 23.40.110(a)(5) requires public employers to present an agreement for ratification or approval to the governing body that has the authority to approve or ratify it. See Alaska Public Employees Ass'n v. City of Nome, Decision & Order No. 176. The Borough's cases are distinguishable because they rely on the absence of a final agreement. See NLRB v. International Credit Service, 651 F.2d 1172, 108 L.R.R.M. (BNA) 2506 (1981); Consolidation Coal Co. v. NLRB, 669 F.2d 482, 109 L.R.R.M. (BNA) 2452 (1982).

28. Whether the parties reached agreement is a question of fact to be decided by the board. Garment Workers Local 512 v. NLRB, 795 F.2d 705, 122 L.R.R.M. (BNA) 3113, 3118 (9th Cir. 1986). We have found an agreement in this case. Finding of fact nos. 97-99. Failing to refer the agreement to the Assembly for approval as required in the ground rules is a violation of AS 23.40.110(a)(5).

29. However, we do not order the Borough to present the tentative agreement for ratification because we believe that, by participating in the negotiations and by adopting the essential terms agreed to as personnel rules, the Assembly has in effect approved the agreement.

II. AS 23.40.110(a)(1): Interference with Protected Rights.

30. By violating AS 23.40.110(a)(5), as set forth above, the Kodiak Island Borough has also interfered with rights protected under AS 23.40.110(a)(1) and violated that section as well. See generally 1 Patrick Hardin, supra 75 (discussing derivative section 8(a)(1) violations). In addition to these "derivative violations", the Borough has independently violated subsection (a)(1), which prohibits employers from engaging in conduct that interferes with the exercise of protected rights. Conferral of a benefit during an election campaign can violate section 8 (a)(1) of the National Labor Relations Act. Id., at 116. Here, a decertification election is pending that could be influenced by the conferral of a benefit. However, because the Electrical Workers are currently the certified bargaining representative of the employees, we address the Borough's conduct under the obligation to bargain in good faith, above.

III. AS 23.40.110(a)(2): Domination or interference with formation or administration of a union.

31. AS 23.40.110(a)(2) is very similar to section 8(a)(2) of the National Labor Relations Act. The purpose of section 8(a)(2), as stated by Patrick Hardin, "was to eradicate company unionism, a practice whereby employers would establish and control in-house labor organizations in order to prevent organization by autonomous unions." 1 Patrick Hardin, supra 289. The subsection also prohibits conduct short of domination, such as participation in union activities by low level supervisors. Id. The facts in this case do not raise an issue under AS 23.40.110(a)(2).

IV. AS 23.40.110(a)(3): Discrimination to encourage or discourage union membership.

32. The facts in this case do not support a conclusion that the Borough discriminated between members and nonmembers of the Electrical Workers or between members and nonmembers of the bargaining unit, and the Electrical Workers did not develop this argument in their brief or at the hearing. We therefore do not address it.

V. Remedy

33. Devising a remedy for the unfair labor practices in this case is complicated by the petition to decertify the Electrical Workers that has been pending since April 5, 1994. Dan Millard v. International Bhd. of Elec. Workers, case no. 94-299-RD. The election in that case was blocked pending the outcome of the charges in this case.

34. Generally if an unfair labor practice charge has blocked an election and the NLRB has determined that the employer committed the unfair labor practice, the NLRB continues to block the election until the employer has fully complied with the NLRB's remedial order. Alaska Public Employees Ass'n v. Municipality of Anchorage, 555 P.2d 552, 554 & n.13 (Alaska 1976), citing with approval the NLRB Field Manual, sec. 11730 (rev. ed. June 1971).

35. Since we have found the Borough violated AS 23.40.110 (a)(1) and (5), under Alaska Public Employees Ass'n v. Municipality of Anchorage, 555 P.2d 552, it would be appropriate to continue to block the election until the Borough can comply with the remedial order in this decision. This outcome is appropriate because we have found the Borough's acts interfered with the union's status as exclusive bargaining representative and with its relationship to its members. This conduct interferes with the laboratory conditions required for an election.

36. The Agency's remedial authority appears in AS 23.40.140, which provides (emphasis added):

> ORDERS AND DECISIONS. If the labor relations agency finds that a person named in the written

> complaint or accusation has engaged in a prohibited practice, the labor relations agency shall issue and serve on the person an order or decision requiring the person to cease and desist from the prohibited practice and to take affirmative action which will carry out the provisions of AS 23.40.070 - 23.40.260. If the labor relations agency finds that a person named in the complaint or accusation has not engaged or is not engaging in a prohibited practice, the labor relations agency shall state its findings of fact and issue an order dismissing the complaint or accusation.

The authority is similar to Congress's authority to the NLRB in section 10(c) of the National Labor Relations Act to order violators to "cease and desist" the unfair labor practice and "to take such affirmative action." See 29 U.S.C.A. § 160(c), which the courts have construed broadly. NLRB v. Food Store Employees Local 347 (Heck's Inc.), 417 U.S. 1, 86 L.R.R.M. (BNA) 2209 (1974); see generally 1 Patrick Hardin, supra 1833. The NLRB has broad authority to award a remedy that makes the complainant whole. NLRB v. Strong, 393 U.S. 357, 359, 70 L.R.R.M. (BNA) 2100, 2101 (1969).

37. The Electrical Workers ask the Agency to find that the tentative collective bargaining agreement is in effect. In support of its request it argues that the participation of Assembly members on the Borough bargaining team and the Assembly's adoption of the personnel rules, which contain the key terms of the collective bargaining agreement, operate as a de facto ratification of the collective bargaining agreement.

38. This Agency does not have authority to compel concessions or require agreement. Porter Co. v. NLRB, 397 U.S. 99, 73 L.R.R.M. (BNA) 2561 (1970); K-B Resources, Ltd., 294 NLRB No. 82, 131 L.R.R.M. (BNA) 1477, 1478 (1989).

39. In this case, however, the parties have reached agreement. By requiring recognition of that agreement, the Agency would not be compelling agreement but requiring the parties to give effect to an agreement already made. This case is similar to one in which a party refuses to execute an agreement. In such cases the NLRB orders execution of the agreement. NLRB v. Strong, 393 U.S. 357, 70 L.R.R.M. (BNA) 2100; Tex Tan Welhausen Co. v. NLRB, 434 F.2d 405, 75 L.R.R.M. (BNA) 2554, rehearing denied 76 L.R.R.M. (BNA) 2624 (5th Cir. 1970). The Borough in this case has failed to execute or implement an agreement it freely made and ordering it to do so is justified and within the authority of the Agency. See Alaska Community Colleges' Fed'n of Teachers, Local No. 2404 v. University of Alaska, 669 P.2d 1299, 1302 (Alaska 1983). A complete agreement was made and in effect ratified when the Assembly adopted the personnel rules changes with almost all of the essential terms of the agreement.

40. We therefore find that the agreement is effective during its stated term.

41. The NLRB will require an employer to reimburse a union for lost dues during the time the employer refused to execute an agreement if the agreement includes a dues checkoff provision. Chicago Tribune Co., 303 NLRB No. 106, 139 L.R.R.M. (BNA) 1024, 1025 (1993); Georgia Kraft Co., 288 NLRB No. 9, 130 L.R.R.M. (BNA) 1343 (1988).

42. The agreement in this case contains a dues checkoff provision. We therefore find that the Borough should reimburse the Electrical Workers for dues lost due to its refusal to execute and enforce the agreement.

43. Anticipating questions about the composition of the unit, we note that eligibility to vote at the decertification election will depend on the effect of any agreement defining the composition of the unit. If an election is held during the term of an agreement governing the unit composition, the agreement will govern eligibility. Absent any agreement, the Agency's determination of the appropriate unit in decision and order no. 183 will control the issue of eligibility to vote.

44. The Electrical Workers ask this Agency to excuse dues collection for a period equal to the period between the application of the personnel rules and the effective date of this decision. Issues of dues assessment and collection, however, are internal union matters. Unless such issues as agency fee disputes under AS 23.40.110(b) or religious exemption under AS 23.40.225 are implicated, this Agency does not address dues collection.

ORDER

1. The Kodiak Island Borough's actions (a) in implementing changes in terms and conditions in bargaining before

executing the collective bargaining agreement with the International Brotherhood of Electrical Workers Local 1547, (b) in insisting on negotiation of the permissive subject of scope of the unit, and (c) in refusing to submit the agreement to the Borough Assembly for approval under the ground rules are unfair labor practices under As 23.40.110(a)(5) and the Kodiak Island Borough is ordered to **cease and desist** action prohibited under AS 23.401.110 and to take the following affirmative steps:

(a) execute the collective bargaining agreement; and

(b) reimburse the International Brotherhood of Electrical Workers Local 1547 for dues for members of the unit as defined in section 1.2 of the agreement from January 1, 1995, to the effective date of this agreement;

2. Because we find that the unfair labor practices in this case undermined the position of the Electrical Workers with the bargaining unit members making an election under laboratory conditions unlikely, we find that the election in case no. 94-299-RD is blocked during the Borough's compliance with this remedial order, i.e., the term of the collective bargaining agreement, until June 30, 1996.

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

ALASKA LABOR RELATIONS AGENCY

Stuart H. Bowdoin, Jr., Vice Chair

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 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 the Decision and Order in the matter of International Brotherhood of Electrical Workers Local Union 1547 v. Kodiak Island Borough, CASE NO. 95-372-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 21st day of July, 1995.

Victoria D. Scates

Administrative Clerk III

This is to certify that on the 21st day of July, 1995, a true and correct copy of the foregoing was mailed, postage prepaid to

William F. Morse, IBEW

Robert M. Johnson, KIB

Dan Millard, KIB Employee

Signature

1This Agency was the result of the consolidation of the Department of Labor, Labor Relations Agency, which administered PERA for municipalities, the State Labor Relations Agency, which administered PERA for the State, and the Railroad Labor Relations Agency, which administered the railroad labor laws for the Alaska Railroad Corporation. Executive Order No. 77 (eff. July 1, 1990).

2These changes had been prepared earlier but not pursued because Selby perceived legal barriers to changing personnel rules during the litigation on the Borough's resolution to reject PERA. See Kodiak Island Borough v. State of Alaska, 853 P.2d 1111 (Alaska 1993). However, the Borough did not specify any particular law or order, and this Agency is not aware of any legal prohibitions against amending the personnel rules in this case.

3The different handwriting in the Electrical Workers' notes can be explained by the fact that they were taken by two note takers. The first was Kim. She left midway through the negotiations and Marian Royall took over.

4Selby attributed the ineffectiveness of the Borough's resolution to opt out of the Public Employment Relations Act to the absence of a Borough alternative to PERA, which he believes was required by a law change in 1984. The only legislative changes to the Public Employment Relations Act in 1984 involved legislative approval of monetary terms. AS 23.40.215 & 23.40.250, am. Chapter 10, §§ 1,2 SLA 1984. The Court's decision in Kodiak Island Borough v. State of Alaska, 853 P.2d 1111 concerned the timing of the Borough's resolution and the existence of organizational activity in the Borough shortly before the Borough's action.

5See AS 23.40.100(e), which bars an election in a bargaining unit in which there is a valid agreement except during a 90-day period preceding the expiration date. Whether this statute would bar an election under a petition filed before the bargaining agreement was concluded is apparently the question concerning Selby.

6We continue to be concerned about the absence of direct communication about terms and conditions of employment with the employees' bargaining representative and urge management to provide actual notice to the representative whenever possible. See University of Alaska Classified Employees Ass'n v. University of Alaska, Decision & Order No. 185 at 12 & n. 2 (April 13, 1995).

7But generally state law preempts conflicting municipal ordinances.