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INTERNATIONAL ORGANIZATION OF )  
MASTERS, MATES AND PILOTS, AFL-CIO, )  
 )  
Complainant, )  
 )  
vs. )  
 )  
STATE OF ALASKA, )  
 )  
Respondent. )  
 )

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CASE NO. 11-1610-ULP

**DECISION AND ORDER NO. 300**

The Board heard this unfair labor charge on December 19 and 20, 2012, in Juneau, Alaska. Hearing examiner Mark Torgerson presided. We considered the parties' arguments, including those presented in post-hearing briefs submitted on February 6, 2013. The record for this case closed on July 29, 2013, after the Board panel completed deliberations. This decision is based on the documentary record, evidence admitted, and testimony of the witnesses.

**Digest:** The unfair labor practice charge by the International Organization of Masters, Mates and Pilots is denied and dismissed based on the majority Board panel's decision that, based on the facts in this case, the unaccompanied vehicle travel aboard Alaska Marine Highway System vessels by bargaining members represented by the Masters, Mates and Pilots is not a mandatory subject of bargaining. Board Panel Member Repasky dissents.

**Appearances:** Rhonda Fenrich, West Coast Counsel, for Complainant International Organization of Masters, Mates and Pilots, AFL-CIO; Benthe Mertle-Posthumus, Labor Relations Analyst, for Respondent State of Alaska.

**Board Panel:** Gary P. Bader, Chair; Will Askren and Daniel Repasky, Members.

## **DECISION**

### **Statement of the Case**

On September 26, 2011, the International Organization of Masters, Mate and Pilots, AFL-CIO (MM&P) filed an unfair labor practice complaint against the State of Alaska (State) alleging the State violated AS 23.40.110(a)(5). The alleged violation of AS 23.40.110 pertains to the State's refusal to bargain its new policies concerning transporting unaccompanied vehicles on the Alaska Marine Highway System (AMHS). MM&P contends that because the policy directives were unilateral changes to the express and implied terms of the parties' collective bargaining agreement, made without negotiation, the State's actions constitute an unfair labor practice. The State responded timely, on November 4, 2011, that the new policy was not a change, but rather a clarification of an existing provision, and, thus, the State did not commit an unfair labor practice under AS 23.40.110.

Jean Ward, the agency's hearing officer, conducted an investigation and found probable cause that the State committed a violation under AS 23.40.110(a)(5) by refusing to bargain the policy implementations. (June 5, 2012, Notice of Preliminary Finding of Probable Cause). The Agency also issued and mailed a Notice of Accusation and Notice of Defense on June 5, 2012. The Agency received the Notice of Defense from the State on June 20, 2012.

### **Issues**

1. Is the ability of employees to transport unaccompanied vehicles "on pass" ("for free") a mandatory subject of bargaining? If so, did the State unilaterally change a mandatory subject of bargaining when it implemented the new policies and, thus, commit an unfair labor practice?
2. Does the State have any waiver defenses?

### **Findings of Fact**

1. The International Organization of Masters, Mates and Pilots (MM&P) is an affiliate of the American Federation of Labor and the Congress of Industrial Organizations. MM&P is the "duly recognized exclusive representative of the Licensed Deck Officers employed by the State [of Alaska]."
2. Employees represented by two other unions, the Inlandboatman's Union of the Pacific, Alaska Region, ILWU, and the Marine Engineers' Beneficial Association, also work on AMHS vessels.
3. MM&P and the State have a collective bargaining agreement for the period July 1, 2011, to June 30, 2014. The agreement for the period July 1, 2011, to June 30, 2014, as well as the previously negotiated contract, contains the following relevant provisions:

## **RULE 1: SCOPE**

1.02 . . . The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that this Agreement is the entire Agreement and includes all collective negotiations during its term. It is mutually understood that there is no desire on the part of the Union to dictate the business policies of the Employer, but when the Employer contemplates a change in policy affecting the welfare of the Deck Officer, proper and reasonable notice shall be given to the Union.

## **RULE 32: PASS PRIVILEGES**

32.01 Deck Officers with two (2) years of company seniority as per Rule 26.01 will be issued annual passes upon request for the Deck Officer and spouse, subject to the following:

(A) The Deck Officer, dependents and personally-owned vehicle shall be authorized free transportation on a space-available basis only. . . .

(B) The Deck Officer's vehicle shall not travel on a pass while the Deck Officer is on duty unless the vehicle is accompanying the Deck Officer's dependent(s), or with specific approval of the Juneau Headquarters office.

## **RULE 32.07: PERSONALLY-OWNED VEHICLE**

(B) A vehicle and trailer may be transported on a trip pass subject to the following restrictions:

1. . . . The trailer must be towed by the vehicle listed on the employee's annual pass and shall not be allowed to be transported unaccompanied.

(MM&P Exh. 1).

4. The collective bargaining agreement neither expressly permits nor prohibits unaccompanied vehicle travel. The State attempted to narrow pass use privileges in each of the past three negotiation cycles, even bargaining to completely eliminate Rule 32. The State's attempts were unsuccessful. The 2011 agreement added a provision to Rule 32 that precluded extending pass use privileges to Deck Officers terminated from State employment for cause. (Collective Bargaining Agreement Rule 32.08).

5. In 2010, the State updated its "Traffic Manual" and renamed it the "AMHS Customer Service Policy and Procedure Manual" to "integrate new and updated procedures

relating to the day-to-day operations of the AMHS reservations, manifesting, ticketing *and* terminal functions.” (MM&P Exh. 3).

6. After the parties executed the 2011 agreement, the State issued Policy and Procedure (P&P) 7-1 and 7-2 to clarify existing policy. MM&P alleges that these policies disallowed the travel of unaccompanied vehicles on Annual and Trip Passes, unless the employee wanting to use the Pass was “scheduled to work on the vessel in CIP, Overhaul, or Layup.” (Policy and Procedure 7-1, 7-2).

7. Captain Ronald Bressette is the Representative for MM&P. He testified that he was never notified about the modifications to P&P 7-1 or 7-2 before the State implemented the policies. He also testified that MM&P decided not to file a grievance, but rather elected to file an unfair labor practice charge because the State unilaterally modified what MM&P believes to be a mandatory subject of bargaining.

8. After finding out about the new policies, Bressette contacted the AMHS General Manager, Captain John Falvey, to challenge their validity. Falvey responded, disagreeing with Bressette’s assertion that the policies violated the collective bargaining agreement, and welcomed a continued dialogue regarding the matter. Bressette did not follow-up with Falvey. (Testimony of Bressette).

9. At Bressette’s request, the State’s information technology contact, John Garrish, gave MM&P a list of unaccompanied vehicle shipments by MM&P bargaining unit members using an Annual Pass for the past 10 years. The list contained 582 instances of such shipments. (MM&P Exh. 8).<sup>1</sup> Depending on the distance an unaccompanied vehicle was shipped, employees enjoyed an economic benefit up to \$1913. (MM&P Exh. 8 at 15).

10. MM&P alleges that before the new policies were issued, employees could ship their vehicles “on pass” (“for free”) without actually travelling with the vehicles. Bressette testified regarding the process of obtaining a pass. Employees could apply each year, based on seniority, for an Annual Pass that allowed them and their dependents to ship their registered vehicles on the AMHS for free. Additionally, employees could get Trip Passes, which are one-time uses that also allow employees to ship their vehicles on the AMHS for free. Once the State issued policy 7-1, which corresponded with Annual Passes, and policy 7-2, which corresponded with Trip Passes, employees could no longer ship their vehicles unaccompanied.

11. Captain Scott Macauley, AMHS Vacation Relief Master and MM&P member, testified that he had never used the pass privilege himself, but had moved other employees’ vehicles while working.

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<sup>1</sup> There was considerable discussion and questioning about the accuracy of Exhibit 8. The State's hearing representative asserted that the State said "multiple times" that it did not know if the data it provided to MM&P in Exhibit 8 were accurate data. Captain Bressette indicated that he could not vouch for the accuracy of the data in exhibit, because he did not create the data in the exhibit. We find there is doubt as to the accuracy of the information provided by the State pursuant to MM&P's discovery request.

12. Nancy Sutch is Deputy Director of Personnel within the Department of Administration. She was part of the State's bargaining team in the 2004, 2007, and 2011 collective bargaining agreement negotiations with MM&P. Sutch testified that one of the main reasons the State tried to eliminate Rule 32 each of the past three negotiation cycles was because other State employees did not realize a benefit for working in different departments and agencies in the same way AMHS employees did.

13. The State used AS 19.65.050-19.65.100, Legislative Findings, Purpose, and Intent, to justify implementing the policies. The intent of the statutes, in relevant part, is to "encourage prudent administration through cost management...[and] increase revenue from the operation of the system consistent with the public interest[.]" AS 19.65.050(c)(1) and (2).

14. Falvey testified that AMHS' desire to eliminate Rule 32 was based on "economic and command/control" principles. Captain Mike Neussl, Deputy Commissioner of the AMHS, testified and provided data to indicate that, over the past several years, revenues covered less of the AMHS' expenditures. (State Exh. B).

15. The testimony about whether Labor Relations approved the new policies was inconsistent. Falvey testified that, prior to implementation, the policies were not sent to either Labor Relations or MM&P for approval. In contrast, Captain Anthony Karvelas, AMHS Operations Manager, testified that Labor Relations approved issuing the policies.

16. MM&P filed an unfair labor practice charge on September 26, 2011, alleging that the State failed to bargain in good faith when it refused to negotiate the changes to pass use privileges. The State responded timely, on November 4, 2011, that the policies were not changes, but rather clarifications of an existing provision, and, thus, the State did not commit an unfair labor practice under AS 23.40.110.

## ANALYSIS

1. Is the ability of employees to transport unaccompanied vehicles "on pass" ("for free") a mandatory subject of bargaining? If so, did the State unilaterally change a mandatory subject of bargaining when it implemented the new policies and, thus, commit an unfair labor practice?

We first address the issue of whether unaccompanied vehicle travel, based on the facts in this case, is a mandatory subject of bargaining. The stated purpose of the Public Employment Relations Act (PERA) is to give public employees "the right to share in the decision-making process affecting wages and working conditions." AS 23.40.070. PERA requires "public employers to negotiate with and enter into written agreements with employee organizations on matters of wages, hours and other terms and conditions of employment." AS 23.40.070(2). However, AS 23.40.250(9) excludes from mandatory subjects of bargaining those "general policies describing the function and purposes of a public employer." Additionally, AS 23.40.250(9) defines "'terms and conditions of employment' [as] the hours of employment, the

compensation and fringe benefits, and the employer's personnel policies affecting the working conditions of the employees; but does not mean the general policies describing the function and purposes of a public employer."

When a public employer refuses to negotiate a mandatory subject of bargaining, it commits an unfair labor practice; "[a] public employer or an agent of a public employer may not refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in the appropriate unit...." AS 23.40.110(a)(5). Additionally, "[a] public employer or an agent of a public employer may not interfere with, restrain, or coerce an employee in the exercise of the employee's rights...." AS 23.40.110(a)(1). "Prior to impasse, and absent necessity, a compelling business justification, or contractual provisions to the contrary, the State violates AS 23.40.110(a)(5) and (a)(1) by implementing a unilateral change to a mandatory subject of bargaining...." *Alaska State Employees Association, AFSCME Local 52 AFL-CIO vs. State of Alaska, Department of Administration, Division of Personnel/EEO*, Decision and Order No. 246 at 1 (Dec. 16, 1999).

The Alaska Supreme Court provided a general balancing test for determining whether an issue of public education was negotiable in collective bargaining between a teacher's union and the local government under AS 14.20.550 – 6.10 (mediation and negotiation in public education employment). *Kenai Peninsula Borough School District v. Kenai Peninsula Education Association*, 572 P.2d 416 (Alaska 1977), (*Kenai I*). In *Kenai I*, the Supreme Court noted that "a matter is more susceptible to bargaining the more it deals with the economic interests of employees and the less it concerns professional goals and methods." (*Id.* at 422).

In a later case, the Supreme Court applied this balancing test to a different issue: a dispute over classification and pay plans. *Alaska Public Employees Association v. State*, 831 P.2d 1245 (Alaska 1992). The Court noted, "[w]e now adapt the *Kenai I* balancing test.... between mandatory and permissive subjects of bargaining in cases such as this one, where the government employer's constitutional, statutory, or public policy prerogatives significantly overlap the public employees' collective bargaining prerogatives." (*Id.* at 1251). The Court further decided that "a matter is more susceptible to categorization as a mandatory subject of bargaining the more it deals with the economic interests of employees and the less it concerns the employer's general policies." (*Id.* at 1251). Finally, the Court concluded that the "contrast between the state's strong, specific, express mandate to act and the employees' more diffuse, general, limited entitlement to bargain is important in our balance of the competing interests[.]" (*Id.* at 1252).

MM&P alleges that prior to the State issuing policies 7-1 and 7-2, MM&P's bargaining unit members received an economic benefit up to \$1913 per shipment by shipping their vehicles unaccompanied on AMHS vessels. (MM&P Exh. 8 at 15). MM&P contends that, now that the policies have taken that privilege away, the bargaining unit members no longer enjoy the corresponding economic benefit.

But, as evinced by the Supreme Court, the analysis does not stop there. *Alaska Public Employees Association*, 831 P.2d 1245 (Alaska 1992). Only invoking a balancing test between the employees' collective bargaining prerogatives and the public employer's policy prerogatives

yields the proper result. (*Id.* at 1251). Falvey testified regarding the command and control issues that arise when an unaccompanied vehicle traveling “on pass” needs to be removed from the vessel for a paying customer. Removing the vehicle requires valuable time, money, and resources, making a policy that helps run the vessel more efficiently well within the purview of AMHS and the State. The new policies fall within this category. Because AMHS and the State have a strong interest in developing policies that allow AMHS to competently and proficiently manage the complex travel system, we find those interests outweigh the economic interests of the employees based on the facts of this case. Therefore, under *Kenai I*, we conclude that the shipping of unaccompanied vehicles is a permissive, and not a mandatory subject of bargaining.

Neussl’s testimony regarding decreased revenue relative to costs also elucidates the importance of, as a matter of policy, allowing AMHS to make decisions affecting operations that the Legislature eludes to in AS 23.40.250(9). “[T]erms and conditions of employment’ ...does not mean the general policies describing the function and purposes of a public employer.” The primary “function” of AMHS is to transport people and their vehicles to various destinations, meaning decisions, such as the one in this case, regarding the process by which that happens should fall within the discretion of management. Therefore, this unaccompanied vehicle issue is not a mandatory subject of bargaining under PERA.

MM&P relies on evidence presented at the hearing that indicates AMHS and the State knew that union members were shipping vehicles unaccompanied on pass, and, therefore, the State did not have the right to unilaterally alter the privilege. (MM&P Exhs. 7, 8, and 9) John Garrish, an information technology specialist at AMHS, and Bressette compiled the data comprising the exhibits after Bressette requested information from Garrish pertaining to MM&P’s bargaining unit members’ pass use.

MM&P argues that the past practice of shipping vehicles unaccompanied occurred for decades, it was a value to employees, and it was thus a mandatory subject of bargaining that could not be changed without bargaining the issue. MM&P contends that, “the twenty-plus year open and notorious uses of the passes to transport unaccompanied vehicles is sufficient to establish a past practice which can only be changed after notice and bargaining.” (MM&P December 4, 2012, Hearing Brief at 8).

“An employer’s practices, even if not required by a collective-bargaining agreement, which are regular and long-standing, rather than random or intermittent, become terms and conditions of unit employee’s employment, which cannot be altered without offering their collective-bargaining representative notice and an opportunity to bargain over the proposed change.” *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). The past practice “must occur with such regularity and frequency that employees could reasonably expect the “practice” to continue or reoccur on a regular and consistent basis. (*Id.*). Further, the practice must be “ripened into an established and recognized custom between the parties.” *Bonnell/Tredegar Industries, Inc. v. National Labor Relations Board*, 46 F.3d 339, 344 (1995).

MM&P claims that the practice of shipping vehicles unaccompanied was “open and notorious.” We disagree. In contrast to MM&P’s assertion that the State knew employees used passes to ship their vehicles, Falvey testified that AMHS did not know “factually” that it was

occurring. Further, there is insufficient evidence that the State knew about, or had agreed to allow the shipment of unaccompanied vehicles. Without state agreement, we cannot conclude that the shipment of unaccompanied vehicles was an established, recognized custom between the parties.

Moreover, we have already concluded that the unaccompanied vehicle issue is a permissive subject of bargaining. In order to trigger an unfair labor practice violation based on a unilateral change, the subject of bargaining must be mandatory. A permissive subject of bargaining need not be bargained, even if it was bargained in the past. "A history of bargaining a permissive term does not obligate an employer to future bargaining on the term. A subject is not transformed into a mandatory subject by bargaining." *Alaska State Employees Association/AFSCME Local 52, AFL-CIO vs. State of Alaska*, Decision and Order No. 170, at 7 (Jan. 26, 1994).

Second, as we have stated, we find under the facts of this case that although there was evidence of some history of unaccompanied vehicle travel, there was no "established and recognized custom between the parties." *Bonnell/Tredegear Industries, Inc. v. National Labor Relations Board*, 46 F.3d at 344.

Accordingly, based on the facts presented in this case, we conclude that MM&P failed to prove all the elements of its claim by a preponderance of the evidence.

2. Does the State have any waiver defenses?

Because we find the transportation of unaccompanied vehicles in this case is not a mandatory subject of bargaining, there was no requirement to bargain the policy with MM&P, and the unilateral implementation of the unaccompanied vehicle policy did not violate PERA. We need not address any waiver defenses the State may have because we have not found a violation of AS 23.40.110(a)(5).

### **CONCLUSIONS OF LAW**

1. The International Organization of Masters, Mates and Pilots is an organization under AS 23.40.250(5). The State's Alaska Marine Highway System is a public employer under AS 23.40.250(7).

2. This agency has jurisdiction to determine whether a violation was committed under AS 23.40.110.

3. Shipping unaccompanied vehicles under the facts in this case is not a mandatory subject of bargaining. Therefore, the State did not violate AS 23.40.110(a)(5) by failing to bargain in good faith before issuing 7-1 and 7-2.

4. As complainant, MM&P has the burden to prove each element of its claim by a preponderance of the evidence. 8 AAC 97.340 and 350(f).

5. MM&P failed to prove each of the elements of its claim by a preponderance of the evidence.

6. Because we have determined that transportation of unaccompanied vehicles in this case is not a mandatory subject of bargaining, the waiver issue is not addressed in this decision and order.

## ORDER

1. The unfair labor practice complaint by the International Organization of Masters, Mates and Pilots, AFL-CIO, is denied and dismissed.

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

ALASKA LABOR RELATIONS AGENCY

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Gary P. Bader, Chair

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Will Askren, Board Member

### Dissent of Board Member Daniel Repasky

I respectfully dissent from the majority's decision. I believe that the unaccompanied vehicle issue is a mandatory subject of bargaining that the State unilaterally changed in violation of AS 23.40.110(a)(5). Therefore, the State also violated AS 23.40.110(a)(1) by interfering with, restraining, or coercing an employee in the exercise of the employee's rights guaranteed in AS 23.40.080.<sup>2</sup> In order to promote harmonious and cooperative relations between government and its employees, the Alaska State Legislature requires that public employers negotiate with and enter into written agreements with employee organizations on "matters of wages, hours, and other terms and conditions of employment." AS 23.40.070(2).

While "wages" and "hours" are self-explanatory, the realm of "other terms and conditions of employment" requires greater interpretation. Prior to the State revising policies 7-1 and 7-2,<sup>3</sup> AMHS employees represented by MM&P could ship their vehicles unaccompanied at any given time free of charge on a space-available basis, meaning employees could ship their vehicles if there was adequate room on the vessel. Without employee status, that privilege did not exist.

MM&P introduced evidence at the hearing that indicated employees enjoyed an economic

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<sup>2</sup> "[C]onduct that violates AS 23.40.110(a)(5) can also interfere with rights protected under AS 23.40.110(a)(1)." *Alaska State Employees Association, AFSCME Local 52 AFL-CIO vs. State of Alaska, Department of Administration, Division of Personnel/EEO*, Decision and Order No. 245, at 10 (Nov. 17, 1999).

<sup>3</sup> P&P 7-1 and 7-2 were revised effective June 15, 2011 to disallow unaccompanied vehicle transportation, except if the employee is scheduled to work on a vessel in CIP, Overhaul, or Layup.

benefit reaching as high as \$1913, depending on the length of the trip. (MM&P Exh. 8 at 15). This is not an insignificant amount of money, and there were multiple instances of four-digit fares waived by the privilege in the same exhibit. In that regard, the privilege constitutes a “term” of employment, and constitutes a form of compensation for the job. Now, without the benefit, employees must pay to ship their vehicles unaccompanied, or in the alternative, make other plans altogether so that traveling is as economical as possible. This change to the “terms and conditions of employment” happened unilaterally, constituting an unfair labor practice.

When a paying customer wants to ship her vehicle unaccompanied, she pays a surcharge of not more than \$50 to do so (in addition to the fare). (State of Alaska’s Response to Unfair Labor Practice Charge, Exh. 1 at 11, Nov. 4, 2011). The surcharge, or some form of it, would have been a perfect item to bargain: something upon which the parties could have reached common ground. But, instead, the State chose to unilaterally eliminate the unaccompanied vehicle privilege by implementing policies 7-1 and 7-2, and at the same time, remove an economic benefit previously reaped by MM&P bargaining unit members. The fact that the State “clarified ” an existing provision in policies 7-1 and 7-2 to eliminate a practice that had been occurring hundreds of times shows that the State knew unaccompanied vehicles were being shipped. Otherwise, there would have not been a need to “clarify” the policy.

Moreover, Nancy Sutch’s testimony indicated that at negotiations of the last three collective bargaining agreements, 2004, 2007, and 2011, respectively, the State attempted to completely remove Rule 32 (which governs pass privileges) from the agreement. Both sides admit that Rule 32 is silent on unaccompanied vehicle travel, except where it prohibits the unaccompanied travel of trailers in Rule 32.07(D)(1).<sup>4</sup> But having bargained unsuccessfully to remove Rule 32, it is impermissible to allow the State to drastically alter Rule 32 in its favor without bargaining for that change.

Under *Kenai I*, the Board must conduct a balancing-of-the-factors test to determine if the employees’ collective bargaining prerogatives outweigh the employer’s policy prerogatives. *Alaska Public Employees Association v. State*, 831 P.2d 1245 (Alaska 1992). In the instant case, the majority opinion mistakenly diminishes the economic benefit enjoyed by the employees regarding the unaccompanied vehicle transportation privilege. Many employees have been using this privilege for a long time, making it a term or condition of employment. To unilaterally take it away does not “promote harmonious and cooperative relations between government and its employees” as required by the Alaska State Legislature. Therefore, I believe the economic benefit enjoyed by the employees outweighs the policy prerogatives, and, thus, constitutes a mandatory subject of bargaining that could not be unilaterally changed by the State without bargaining to impasse.

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Daniel Repasky, Board Member

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<sup>4</sup> Rule 32.07(D)(1) states, in relevant part, that “[t]he trailer....shall not be allowed to be transported unaccompanied.”

**APPEAL PROCEDURES**

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

**CERTIFICATION**

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of *International Organization of Masters, Mates and Pilots, AFL-CIO v. State of Alaska*, Case No. 11-1610-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 6th day of August, 2013.

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Margie Yadlosky  
Human Resource Consultant I

This is to certify that on the 6th day of July, 2013, a true and correct copy of the foregoing was mailed, postage prepaid to:

Rhonda Fenrich, MM&P  
Benthe Mertle-Posthumus, State

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Signature