[Labor Relations Agency Stationery]

BEFORE THE ALASKA STATE LABOR RELATIONS AGENCY

ALASKA PUBLIC EMPLOYEES ASSOCIATION,	)
Complainant,	)
vs.	)
STEPHEN C. COWPER, in his capacity as Governor, JOHN ANDREWS in his capacity as Commissioner of the Department of Administration, the DIVISION OF LABOR RELATIONS, and the STATE OF ALASKA,	)
Respondents.	)

ULPC Nos. 88-14 and 88-16

ORDER AND DECISION NO. 115

SUBJECT: UNFAIR LABOR PRACTICE CHARGES RELATING TO EMPLOYER CONDUCT SURROUNDING REPRESENTATION ELECTION; TIMELINESS OF FILING CHARGES

The State Labor Relations Agency (the "Agency") convened hearings on September 6 and, as adjourned, September 26 through 29, 1988 in Juneau, Alaska, to consider the unfair labor practice charges brought by the Alaska Public Employees Association ("APEA") against the State of Alaska and certain of its officials and agencies with respect to actions allegedly taken by the State during the period surrounding a representation election. Chairman C. R. "Steve" Hafling and members Marlene Johnson and Mike Andrews were present at the hearing on September 26 - 29 and so constituted a quorum. APEA was repre-sented by William K. Jermain and James A. Gasper. The State was represented by Assistant Attorney General Kathleen Strasbaugh.

Limited intervenor Alaska State Employees Association ("ASEA") was represented by John Sullivan. Limited intervenor Public Employees, Local 71 ("Local 71") did not appear at the September 26 - 29 hearings. The parties filed post-hearing briefs. The Agency, having considered the arguments, the evidence and testimony of the parties, and deeming itself sufficiently advised, renders the following Order and Decision dismissing the unfair labor practice charges filed by APEA except as noted.

PROCEDURAL AND FACTUAL BACKGROUND

1. APEA represented since 1973 the general government unit (GGU) of State employees comprising approximately 7,000 employees. APEA also represents the 700-800 person supervisory unit of state employees. Its status as GGU collective bargaining representative was challenged in decertification petitions filed in 1987 by ASEA and Local 71. A representation election was conducted on May 11, 1988, and that election provided four choices: APEA, ASEA, Local 71, and the choice of "no representation". The final tally, after certain challenged ballots were counted and arguments respecting challenges heard, demonstrated that ASEA received 1,565 votes, Local 71 received 1,554, APEA received 1,551, and the choice of "no representation" received 70. As such, APEA and the choice of "no representation" were eliminated and the two highest vote-getters, ASEA and Local 71, were permitted to participate in a run-off election.

2. Objections were filed to the May 11, 1988 election by APEA, and in Order and Decision No. 114, the Agency denied the objections raised. The Agency also dismissed APEA's two concurrent unfair labor practice charges, ULPC-12 and ULPC-13. ULPC-13 was filed against the State respecting allegedly improper production of eligibility lists.

3. The run-off election between ASEA and APEA was scheduled for September 20, 1988. Prior to that election taking place and prior to ballots being distributed or notices being posted, APEA filed two lawsuits relating to the initial election which had eliminated APEA from contention. In APEA v. Labor Relations Agency, 3AN-88-6942, APEA filed a petition for review concurrently seeking a stay of further election proceedings. A day before argument was held on those issues, APEA filed an appeal of Order and Decision No. 114 in APEA v. Labor Relations Agency, 3AN-88-7415. The two cases were assigned to Judge Fuld. On July 29, 1988, Judge Fuld denied the request for stay, denied the petition for review, and commented that the appeal was the appropriate judicial mechanism. He indicated that he would deny a stay during the pendency of the appeal unless further evidence was brought forward. APEA filed a motion for reconsideration

attempting to introduce new evidence, but Judge Fuld denied through silence the motion for reconsideration. On the day before the September 20, 1988 vote tally on the run-off election, APEA filed an injunctive action in APEA v. Labor Relations Agency et al, 3AN-88-9032, seeking among other things a temporary restraining order against conducting the election or certifying the results. On September 20, 1988 Judge Shortell denied that motion by order finding that "Plaintiff has not shown irreparable harm, adequate protection, or its own probable success on the merits."

4. On August 5, 1988, APEA filed ULPC 88-14 containing five counts. The Agency noticed the action pursuant to the Administrative Procedures Act, and a prehearing conference was conducted among counsel. ASEA and Local 71 moved to intervene. Informal investigation revealed no likelihood of resolution of the issues. A hearing was set on September 6 and 7, 1988 in Juneau for purposes of promptly resolving these issues. Several days before this hearing, APEA filed ULPC 88-16 containing some twelve counts charging the State with unlawful practices. In each of ULPC 88-14 and 88-16, APEA sought the reversal of the representation election held on May 11, 1988. At the hearing on ULPC 88-14 in Juneau, counsel for APEA indicated that recent depositions in a separate lawsuit between APEA and ASEA raised facts which expanded the scope of the charges brought under 88-14 and 88-16. Upon agreement of the parties, the Agency ordered APEA to consolidate the two unfair labor practice charges and meet with the State respecting appropriate discovery and other processes in anticipation of the hearing set for September 26 - 29, 1988.

5. The State objected to the timeliness of the unfair labor practice charges and further argued that insufficient time had been allowed to the State. ASEA and Local 71 each moved to intervene, and each were allowed to intervene, but limited to the issue of remedies respecting overturning the May 11, 1988 election. Their intervention was not permitted with respect to the substantive charges brought by APEA against the State.

6. On September 20-21, 1988, the Agency conducted the run-off election between ASEA and Local 71, and ASEA won that election by a vote of 3138 to 1897, with 213 ballots being either rejected or challenged. The hearing on the consolidated unfair labor practice charges commenced on September 26, 1988. During the course of these proceedings, the five-day period for filing objections to the run-off election passed without any objections having been received. Although APEA argued against the certification of the run-off election on grounds including, but not limited to, the pendency of the unfair labor practice

charges, the Agency certified the results of the run-off election on September 28, 1988 by written order. In that order ASEA was declared to be the certified collective bargaining representative of the general government unit of State employees.

7. APEA's consolidated complaint contains 15 counts. The State moved to dismiss these counts variously on the grounds of untimeliness, lack of definiteness, laches, and failure to carry the burden of proof. The State renewed its motion to dismiss at the close of APEA's case. The substantive aspects of the counts will be dealt with in findings of fact and conclusions of law below. However, during the course of the proceedings and in the face of objections and motions by the State, APEA agreed to dismiss Counts I(a), VI(c) and VI(d). The Agency determined at the close of APEA's case that no facts had been presented and therefore no grounds existed to proceed with Counts XII(a) (except as to allegations involving Gallant), XII(d) (except as to allegations involving Dawson and Kelley), XII(e), XII(h), XIV(c) and XIV(d). As no such those counts were deemed dismissed by the Agency, and indeed evidence on those counts was posed by way of offers of proof or was adduced during the State's case or during rebuttal.

FINDINGS OF FACT

A. ALLEGATIONS RELATING TO BARGAINING IN BAD FAITH. (APEA counts I, II, IV, V, VI, and VII)

1. APEA's collective bargaining agreement with the State respecting representation of GGU members expired on December 31, 1986, and was renewed for a six month period expiring on June 30, 1987. The State and APEA met on the general subject matter of renewed labor contracts in January 1987 when officials of the State's new administration met with representatives of all unions. Actual negotiations between the State and APEA started February 17, 1987. Larry Cotter was represented at that time to be the Chief Negotiator for the State, and Cotter indicated and announced the State's objective of a 15% cut in the costs of personal services. The ground rules were established between APEA and State at this time and a framework was set for further meetings.

2. The parties met again March 3-5, 1988 with numerous additional meetings through April, May and June of 1987. During this period of time various proposals were exchanged. The State's objective of a 15% cost decrease in personal services, though couched in the form of various reductions, did not substantially deviate. There were however various discussions respecting how the 15% cut could be achieved: i.e., through an

initial-year 10% cut and subsequent-year 5% cut, or through an increase in hours per week (37.5 to 40 hours), or through reductions in retirement and other benefit packages. The State was not inflexible with respect to the precise mechanism on how the 15% that would be achieved.

3. The State was not able to promptly generate cost data of the various components and wage packages. The State presented bits and pieces of its cost estimates on various elements, but did not give a full proposal with all data respecting the cost elements until May 6, 1987. Previous State proposals did not address key provisions, although APEA had submitted proposals to the State which articulated APEA's position on essentially all negotiable points.

4. The parties bargained hard, with each party engaging in the rhetoric and threats of economic action. APEA threatened strike action; the State threatened unilateral implementation in the event an agreement was not reached. APEA filed three unfair labor practice charges against the State respecting negotiating activities. In ULPC 87-2, APEA charged the State and Governor Cowper because Governor Cowper included in his revised budget package a reduction of personal service costs. The Agency conducted a hearing in May 1987 and issued Order and Decision No. 107 dismissing APEA's charges. ULPC 87-5, respecting dissemination of information by the State, was dismissed by the Agency in Order and Decision No. 108. APEA filed ULPC 87-6 alleging surface bargaining, bad faith bargaining for the purpose of unilateral implementation, refusal to bargain on the issue of classification, lack of authority on the part of the State's negotiators and various other allegations. This massive unfair labor practice charge was set for hearing before the Agency on July 22, 1987. However during the weekend prior to the convening of the hearing, negotiations between APEA and key State officials produced the outlines of a tentative agreement for both the GGU and the supervisory unit acceptable to State and APEA officials. Given the pendency of an agreement for both APEA bargaining units, APEA dismissed all but one count of ULPC 87-7 relating to whether or not the State could refuse to bargain respecting classification and implementation of a classification study. That count was dismissed by Order and Decision No. 110. The remaining issues were dropped by APEA without prejudice and not reinstituted. The terms of the tentative agreements were then fine tuned during the next ten days and readied for ratification.

5. The APEA membership rejected the GGU tentative agreement by 37 votes out of approximately 4,000 votes cast in September, 1987. The TA for supervisors readily passed. APEA management had presented to its members a comparative proposal of

the existing terms with the terms under the tentative agreement. Certain APEA members, particularly vocal leaders of the Juneau Chapter of GGU, opposed ratification.

6. Following the September rejection of the GGU temporary agreement, negotiations between APEA and the State respecting GGU resumed, but were unsuccessful. Initially collective bargaining respecting Class 1 employees, who were subject to binding arbitration in lieu of any strike action, was scheduled, but then delayed at the request of APEA. Further, Class 1 binding arbitration was held in abeyance when APEA signified that it did not recognize that impasse was in fact in existence. At the same time litigation in Superior Court respecting the precise terms and nature of what terms and conditions could be imposed by the State in the event of impasse was temporarily resolved through a stipulation between APEA and the State, pending an appeal before the Alaska Supreme Court.

7. The bargaining team for the State involved various representatives primarily from the State Division of Labor Relations. The State officials necessarily had to report to their principals, and principals for the State included the Governor and the Commissioner of Administration. The evidence does not indicate that the State misrepresented the authority to approve components or to approve changes in bargaining position. State officials, on the occasion, talked with APEA personnel outside the scope of official bargaining session as when Bruce Cummings, Director of Division of Labor Relations spoke in July 1988 with Greg Scott concerning supervisory unit issues, and as when APEA representatives spoke with the Lieutenant Governor concerning bargaining positions in 1987. Larry Cotter was a chief negotiator for the State, but APEA was aware by spring 1987 that Larry Cotter had focused on Local 71 and the Confidential Employees Association (CEA) bargaining and thereafter was no longer involved with APEA bargaining. The evidence shows that various officials from both APEA and the State changed on the occasion due to conflicting needs and other duties.

8. The State requested that most bargaining sessions continue in Juneau but agreed to certain discussions in Anchorage. APEA-State negotiations were traditionally held in Juneau. Juneau is where state officials are located and is where the headquarters for APEA is located. Numerous meetings were conducted, and at the request of one party or the other some meetings were canceled due to conflicts in time.

9. Following the rejection of the GGU tentative agree-ment, the State insisted that, with respect to further negotia-tions, APEA give certain positive indicators through a Letter of

Agreement that it would indeed actively pursue the presentation of a contract to its membership. The State also sought to bar certain APEA court or Agency challenges. The State argued that it was concerned about any tentative agreement which might be "damned by faint praise" by APEA and therefore doomed to rejection. Further the State sought a 7-day ratification period but only in order to avoid a month lag in action. Moreover, the 7-day period sought by the State was, to the State, similar to short-fuze determinations with other unions in the past.

10. At issue in separate litigation is whether the State sought to impose a contract materially less favorable than the State's last offer (i.e., the tentative agreement), when it declared unilateral impasse on October 16, 1987 after exhausting mediation. The testimony was unclear on this point, although each party gained and lost on differing positions, such as respecting non-permanent employees and recall rights. Although some of the terms imposed are being litigated, APEA neither grieved nor filed an unfair labor practice charge upon implementation of these terms.

B. DIRECT DEALINGS (APEA counts I(i), VIII and IX)

1. At an uncertain time in June-August 1988, Larry Cotter met twice with GGU members Mike Murray, Dennis Gellhouse, Mike Hurst and Jag Yelletsety at Mike Murray's home in Juneau. Dennis Gellhouse initiated these conversations by contacting Larry Cotter and asking him if he would care to discuss possible means for breaking what appeared to be an impasse in negotiations between the State and APEA. Only Gellhouse and Cotter testified.

2. At the time Gellhouse contacted Cotter, he did not know or presume that Cotter was actively representing the State in any discussions with GGU. Cotter had been employed by the State as a negotiator since January 1987, but his contract with the State was winding down by August 1987 and as of April 1987 he had been working exclusively and full time on Local 71 and CEA matters and had not been involved whatsoever with APEA/GGU matters.

3. Cotter thought his meetings with Gellhouse and the others was a brainstorming session among people with a generalized interest in labor matters in Juneau. The conversations did not constitute negotiations. He made no representations that he was acting in an official capacity. The direct testimony did not indicate any criticism of APEA in the discussions. Cotter did not know that Gellhouse and the others had any interest whatsoever in breaking away from APEA. It was only later that Gellhouse and the others participated in

formation of ASEA and that arose predominantly after the rejection of the tentative agreement in September 1987.

4. Cotter did not transmit any information to the State from his discussions with Gellhouse, nor did he feel that there was anything in fact to transmit. Subsequently Bruce Ludwig, Chief Negotiator for APEA, became aware of the conversations and, according to Bill Ross, the ramifications if any of the meeting were discussed during the summer in a round table of principals of APEA. No information was shared, and no specific form of action through grievance or otherwise was considered. Bruce Ludwig asked Bruce Cummings about the meeting, but Bruce Cummings knew nothing of it and evidently disclaimed any participation by the State in such a meeting. APEA never grieved or filed an unfair labor practice charge respecting the meeting.

5. Anna von Reitz was an APEA member who opposed the tentative agreement. She met once or twice with Governor's Chief of Staff Pete Jeans but only as a lobbyist for APEA on various issues .

6. APEA representatives talked with the Lieutenant Governor during 1987 about the stalled State-APEA negotiations. The Lt. Governor was not on the bargaining team.

7. Each party to the negotiation lobbied legislators or sought legislative solutions to collective bargaining issues.

8. Both APEA and the State gave interviews to the press. No specific proof was presented to suggest that the State "questioned" APEA's ability to negotiate. However, both APEA and the State advanced rhetoric not atypical of collective bargaining process.

9. The Juneau Chapter of APEA/GGU opposed the general administration of APEA. Many of the principals of the Juneau Chapter were founding members of ASEA. No apparent linkage between the formation of ASEA and specific state action was shown.

C. RESTRICTED ACCESS (APEA Count IX(g))

1. APEA as well as ASEA and Local 71 requested opportunities to utilize lunch rooms and other gathering areas on State facilities for the purposes of organizational efforts. Requests were filed by the unions with the State and the State generally accommodated these requested. No evidence was presented suggesting that one union was preferred over the other with respect to access.

2. On occasions due to objections from employees who sought to use their lunch rooms for lunch purposes rather than for organizational purposes or because of conflicts in utilization of meetings, the State either rescinded or declined to permit APEA the use of rooms or facilities. The only specific instance regarding the circumstance to use of a common room at the Department of Environmental Conservation.

D. BULLETIN BOARD ACCESS AND REMOVAL OF POSTINGS FROM BULLETIN BOARDS (APEA counts X and XI)

1. Pursuant to the APEA-State collective bargaining agreements, APEA had certain bulletin boards for its exclusive use. These bulletin boards were located, among other places, in the foyer of the State Office Building in Juneau. In addition to these bulletin boards, other bulletin boards were used by the general public subject, at least in the Juneau State Office Building, to Department of Education control. These generally unrestricted bulletin boards were utilized for State notices as well as such public notices as used-car sales, rentals, and want ads.

2. Prior to the organizational efforts undertaken by ASEA and Local 71, APEA's bulletin board had not been used for organizational purposes. At the time the ASEA and Local 71 organizational efforts started, the State sent written directives to the executive director of the APEA setting state policy respecting posting. APEA's witnesses did not recall receiving these letters, although the State represented that such letters (introduced into evidence) had been sent.

3. Under the proposition that the State had to maintain neutrality, the State asserted that organizational information could not be posted on APEA's bulletin boards because to do so would give APEA a leg up on ASEA and Local 71 whose access to bulletin boards was restricted to the general public ones. State officials on the occasion apparently removed organizational materials from APEA's bulletin board. In addition State officials evidently removed offensive materials or materials not related to APEA from APEA's bulletin boards.

4. Materials posted by ASEA, Local 71 and APEA all disappeared from various sites without proof that rival unions (or any other parties) were specifically removing such materials.

5. In Spring 1988, Lynn Cox, an employee of APEA, observed a person later identified to him to be Commissioner of Administration John Andrews removing material from an APEA

bulletin board. At that time Lynn Cox was posting organizational materials. He was not aware however what materials Commissioner Andrews was removing. Commissioner Andrews stated to him that there should be "a policy" regarding posting of materials on such boards inferring thereby that Commissioner Andrews did not know of that policy set forth in the October 1987 mailings.

6. APEA never grieved or filed any other objections with the State respecting removal of materials or any policies regarding posting on APEA bulletin boards.

E. DISCRIMINATORY TREATMENT OF LEAVE TIME (APEA Counts IX(f) and XII)

1. APEA-GGU members may take leave without pay (LWOP) or take business leave paid from a contractually created business-leave bank. The APEA - State Contract provides that the Director of the Division of Labor Relations approves business leave; an employee's supervisor approves LWOP. However, over time the Director has not generally approved business leave such that APEA argued that a waiver respecting the interpretation of that provision exists.

2. APEA claims that the State discriminated against APEA by granting leave without pay to John Gallant, an ASEA organizer, while denying Pete Kelley and Tom Dawson, APEA organizers, paid business leave in June 1988. All three are employed by the Department of Corrections. Dawson and Kelley work directly with prisoners, and in May 1988, were involved with the transfer of prisoners from federal institutions back to their institution in Anchorage. Kelley and Dawson had been granted extensive business leave in 1988 prior to the May representation election as had a number of other APEA members. Kelley and Dawson sought an extension of business leave after the May, 1988 representation election. The request was denied by the Director of the Division of Labor Relations based upon statements from Kelley and Dawson's supervisors in the Department of Corrections that their services were needed at that time and the Department of Corrections could not find alternative help.

3. It is generally easier for the Department of Corrections to hire an employee for a known, long period of time rather than for unpredictable short periods of time. Shorter absences produces overtime hours by co-workers comprising an expensive and demoralizing substitute.

4. John Gallant, a supervisor, sought LWOP, leave not requiring the Director of the Division of Labor Relations' approval, because among other things LWOP does not require

deductions from a leave bank and is not a contractual issue. John Gallant's absence was on a long-term, more-predictable basis allowing the Department of Corrections to fill his position.

5. No evidence was admitted respecting leave issues concerning personnel other than Kelley, Dawson, and Gallant.

6. Various other ASEA organizers obtained LWOP status, and the determinations of their eligibility for LWOP rested with their supervisors.

F. INTERFERENCE WITH APEA FEES (APEA Counts XII(f) and (g) and XIV)

1. The State deducts agency fees, including initiation fees, from a State employee's paychecks provided that the State employee signs an authorization for the State to do so. This authorization is on a form developed by APEA to satisfy the requirements for deductions and it is up to APEA to obtain the authorizations.

2. In the summer of 1987, APEA began requiring an initiation fee from new employees employed after a certain date. The existing authorization form prior to that time did not provide for the deduction of initiation fees. The State informed APEA that the authorization form needed to be changed. Moreover authorization needed to be obtained from those existing employees whose employment date fell within the time period for those liable to pay the newly initiated initiation fee.

3. The State's finance section had problems with stacks of forms in identifying new employees liable for the deductions. As a consequence State employees liable for the initiation fee were faced with having to authorize the deductions at the same time as the organizational drives by ASEA and Local 71. APEA evidently was criticized by new employees facing the initiation deduction.

G. SUPERVISORY UNIT INTERFERENCE (APEA Count XIII)

1. Bruce Cummings met with Greg Scott, an APEA bargaining representative for APEA's supervisory unit in July, 1988. Bruce Cummings made a remark implying, according to Scott, that the supervisory unit should rescind its contractual relationships with APEA and "get in on the action," presumably referring to ASEA's or Local 71's efforts to displace APEA. Cummings recalled the comment as facetious. Scott recalled the comment as serious but made no further mention of it. In any event, no adverse reaction was discerned thereafter in the course of that conversation.

2. The supervisory unit agreement ratified in October 1987 contained a wage reopener July 1988 with an expiration of December 31, 1989. The State backed off wage reopener discussions given the pendency of the instant unfair labor practice charges.

H. STATE'S ALLEGED ERRORS IN PROVIDING ELIGIBILITY LISTS (APEA Count XV)

1. As required by statute and regulation, the State employer provided eligibility lists to the Labor Relations Agency. As Excelsior lists, alphabetical lists of eligible employees (with addresses) were provided to APEA as well as ASEA and Local 71 with respect to organizational efforts prior to the representation election conducted May 11, 1988.

2. APEA receives information from a variety of sources from the State regarding employees in the State GGU. Testimony indicated that APEA receives dues check information and information directly from the State showing changes in membership. It receives personnel action forms weekly with information updated to that time within the limits of the State's ability to process and deliver evidence of personnel actions from throughout the State. Prior to May 11, 1988, the APEA would have received personnel action updates or about April 21 give or take two weeks. APEA's new membership secretary indicated that APEA's own bookkeeping regarding personnel actions was sloppy and that indeed she could not even find the personnel actions which had been delivered by the State to APEA prior to her taking that position approximately three months ago.

3. APEA alleged errors in the eligibility lists used in the May 11, 1988 election. As such APEA filed objections to the election based in part upon those claims of error. In addition, APEA filed ULPC 88-13 against the State. APEA took the deposition of Mike McMullen, the State official of the Division of Labor Relations who oversaw preparation of the lists. McMullen admitted that certain errors appeared in the eligibility lists, but those errors were made in good faith and were based upon inadequate data available for computer runs. The Agency rejected APEA's objection on this issue as a basis for overturning the representation election and on the basis of evidence presented at the objections hearing declined to accept the unfair labor practice charge unless new evidence was presented.

4. No new evidence was presented at this hearing to im-pute negligence or bad faith on the part of the State in preparing and

delivering the eligibility lists to the Agency or APEA, nor was evidence presented that errors in the list were material to APEA.

Conclusions of Law

1. The Agency has jurisdiction to hear and consider complaints regarding unfair labor practice charges described in AS 23.40.110, and is authorized and charged with responsibility to make appropriate orders concerning such complaints pursuant to AS 23.40.140. National Labor Relations Board precedent, where applicable, is to be given deference by the Agency pursuant to AAC 10.440(b).

2. AS 23.40.110(a) provides in pertinent part:

> A public employer or agency of a public employer may not:
>
> (l) interfere, restrain or coerce an employee in the exercise of the employee's rights guaranteed in AS 23.40.080...
>
> (5) refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

3. APEA bears the burden of proving by evidence admissible within the bounds of the Administrati ve Procedures Act each of its claims. 2 AAC 10.430; AS 44.62.460(e).

4. Five general categories of legal issues are before the Agency in this unfair labor practice charge:

(a) Timeliness and waiver of the claims filed;
(b) Res judicata on some of the issues presented;
(c) Legal substance of the claims filed;
(d) Animus; and
(e) Remedy.

A. TIMELINESS AND WAIVER OF CLAIMS BROUGHT

1. To the extent that unfair labor practice charges seek to overturn the representation election held on May 11, 1988, the objections must be timely received. This is so because elec-tions inherently require finality. 10 AAC 10.180 amplified the finality aspect by requiring that objections to an election be

filed within five calendar days after an election has been conducted. Charges which bear on an election must be brought promptly especially where as here replacement of the bargaining representative is sought not by the employer but by the workers. Templeton v. Dixie Color Printing Co., 444 F.2d 1064 (5th Cir. 1971); Surratt v. NLRB, 463 F.2d 378 (5th Cir. 1972).

2. All of the material facts which APEA asserts as having occurred prior to the May 11, 1988 election were known or should have been known by APEA prior to the election. APEA could have raised challenges at the March 14, 1988 hearing determining the propriety of the representation election. Similarly APEA could have raised many of its allegations during the period between notice of the election and conduct of the election, or prior to distribution of the ballots respecting the May 11, 1988 election. A claim against an employer or against one of the other unions as to unfair labor practice charges could have, if filed then, produced a "blocking charge" sufficient to set-off the May 11, 1988 election. NLRB Proc. Manual Sec. 11730 and cases cited; APEA v. Municipality of Anchorage, 555 P.2d 262 (Alaska 1978). A filing of a blocking charge is an accepted tactic based upon the principle that an election should be not held if allegations are made known to the administering agency sufficient to convince the administering agency that the laboratory conditions necessary for conducting an election have been tainted by the employer. NLRB Proc. Manual, supra. Here APEA evidently presumed that it would prevail in the May 11, 1988 election and therefore did not attempt to pursue a blocking charge to delay conduct of that election. Similarly it failed to raise many of the points during the five day objections period.

3. The facts do not support a legal conclusion that information was simply unavailable in a timely fashion to raise issues prior to the election or to the objections hearing. Similarly no grievances were filed respecting alleged breaches of contractual rights such as denial of access, inappropriate policies respecting certain designated bulletin boards, denial of business leave or LWOP, or deduction of initiation fees. Events occurring after the election did not evidence a pattern of pre-election animus thereby rendering those post-election events relevant to the determination of whether the May 11, 1988 election should be set aside.

4. While the Public Employment Relations Act does not contain a statute of limitations for the filing of unfair labor practice charges (the NLRB operates with a 6-month limitation), the nature of the relief sought respecting the prior election bars APEA's claim under equitable theories including estoppel and laches. If APEA's actions were unreasonable and inexcusable and

if undue prejudice to the Agency results from the delay, a defense of laches may be asserted. Moore v. State, 553 P.2d 8, 15 (Alaska 1976). APEA unreasonably delayed exercise of reasonable diligence in bringing an action, and further waived its rights to do so through a failure to exhaust the grievance procedures or otherwise. Wolff v. Arctic Bowl Inc., 560 P.2d 758, 767 (Alaska 1977); Citizens of South Kenai Peninsula v. Kenai Peninsula Borouqh, 527 P.2d 447, 457 (Alaska 1974)

5. Many of the allegations raised by APEA could have been addressed as grievances pursuant to the APEA-State collective bargaining agreement. The Collyer/Spielberg doctrine and the doctrine of exhaustion of remedies appropriately provide that an agency such as the NLRB or this Agency should defer, if possible, to the contracted-for grievance procedures because that process may well remedy wrongs of the type asserted here. Access rights, bulletin board use, and business leave denials clearly involve interpretation of the APEA-State agreement in a manner conducive to the grievance and arbitration procedures. In any event, APEA's failure to grieve precluded an opportunity to remedy alleged wrongs.

6. Allegations underlying APEA's counts I and V were known or should have been known to APEA many months before filing this action. Nothing precluded APEA, fully represented by counsel throughout the negotiations and in all unfair labor practice proceedings, from renewing its surface bargaining complaints or other matters contained in ULPC 87-6 after its membership failed to ratify its tentative agreement or during the preliminary stages of the representation election proceeding.

7. Counts II, III, IV, V, VI, VIII, IX and XIV could have been raised at the time of the occurrence in the form of grievances or ULPC's or after the rejection of the tentative agreement, but in any case well before the election occurred. No evidence has shown that the allegations in these counts were not known before the election and testimony indicates that all of the incidents complained of were known shortly after they occurred. The fact that APEA only subsequently drew the conclusion that these matters were of more importance than they perhaps initially thought is not controlling.

8. Counts VII, X and XI as well as most of count XII could have been raised prior to the election. Count XIII is irrelevant with respect to rerunning the election because it occurred after the election and involved a bargaining unit other than GGU. Count X concerning post-election business leave respecting Messrs Dawson and Kelley is also irrelevant, because it relates to allegations arising after the election.

B. RES JUDICATA AND PRIOR LITIGATION

1. Count XV relating to State error in preparing eligibility lists was addressed at some length in the objections proceedings held by the Agency on June 13-15, 1988. APEA took depositions in preparation for that proceeding. No new evidence favorable to APEA was presented in this matter. While ULPC 88-13 was previously dismissed by the Agency as not setting forth a sufficient cause of action, the Agency indicated that the presentation of further evidence would permit the reopening of that case. However new evidence favorable to APEA was not presented in these proceedings and no basis exists for reinstituting ULPC 88-13 or reversing prior determinations.

2. The doctrine of res judicata (a prior ruling precluding subsequent relitigation of the same matter) applies to administrative actions as well as court cases. Jeffries v. Glacier State Telephone Company, 604 P.2d 4, 8 (Alaska 1979).

3. If and to the extent that APEA has restated its claim to inject a negligence issue should not and does not give APEA grounds for a redetermination of the same facts. DeNardo v. State, 740 P.2d 453, 456 (Alaska 1979). No evidence proving negligence was even introduced.

C. CONCLUSIONS OF LAW RESPECTING THE SUBSTANCE OF THE ALLEGATIONS

1. The Public Employment Relations Act does not require parties to reach agreement on matters being negotiated. Collective bargaining is defined in AS 23.40.250(1) as:

> ... the performance of the mutual obligation of the public employer or employer's designated representatives and the representative of the employees to meet at reasonable times, including meetings in advance of the budget making process and negotiate in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or negotiation of a question arising under an agreement and the executing of a written contract incorporating an agreement reached if represented by either party, but these obligations do not compel either party to agree to a proposal or require the making of a concession...

Thus collective bargaining is to be undertaken in good faith, but neither the State nor APEA is compelled to agree to the terms and conditions by the other party, provided that discussions have been engaged in with good faith in an attempt to amicably resolve the differences. See also Order and Decision No. 113 (1988)

2. The evidence indicates the mutual use of economic dynamics and collective bargaining. The exercise of economic dynamics by the State does not rise to the level of coercion under the facts presented here. Refusal by the State to agree to certain issues, withdrawal of previous issues following negotiation, and failure to reach overall agreement does not constitute coercion provided under AS 23.40.110. The fact that a tentative agreement was reached (albeit rejected by APEA's membership) is convincing evidence that bargaining was in good faith.

3. Existence of impasse presumably allows the State to implement last terms and conditions. Alaska Comm. College Fed. of Teachers v. Univ. of Alaska, 669 P.2d 1299, 1303-05 (Alaska 1983). This issue is now apparently on appeal before the Alaska Supreme Court in litigation between APEA and the State. Binding arbitration for Class 1 employees is contingent upon impasse having been reached. AS 23.40.200(b). The State did not evidence an unlawful refusal to enter into binding arbitration for Class 1 employees given an apparent reluctance by APEA to agree on impasse. In any event, delays in conducting binding arbitration for Class 1 employees was a product of APEA's own request for delay.

4. The facts do not demonstrate that the State was hiding behind a lack of authority in negotiations. Clearly negotiators have to report to principals, and the State has clear right and responsibility to maintain statutory lines of authority. The State's designated spokes-persons did indeed authorize and tentatively agree to numerous articles of a tentative agreement and to other provisions, and the fact that contacts on the occasion needed to be made with principals does not constitute an unfair labor practice. There was no pattern of employing consultation with principals as a mere tactic. Moreover the fact that a tentative agreement was reached is an indicator that communication between the State's negotiator and their principals was adequate. Coastside Scavenger Co., 1118 LRRM 1439, 1440 (1985).

5. The instances of allegedly wrongful direct communication do not rise to the level of unfair labor practices inasmuch as no negotiation occurred and no evidence was

presented demonstrating a pattern of going outside the scope of negotiations. Both parties engaged in similar contact with officials not on the bargaining team. Moreover, the Cotter incident, though known to APEA, was evidently not considered to be important or serious enough to take seriously. NLRB v. Schroeder, 726 F.2d 967 (3rd Cir. 1984).

6. The State did not coerce or interfere with APEA by requiring bargaining in Juneau or with respect to direct communications or press statements. The alleged remarks deemed coercive by APEA where at worse isolated incidents not sufficient to support a finding of anti-APEA animus, let alone coercion. Southern Maryland Hospital v. NLRB. 801 F.2d 661, 671 (4th Cir. 1981). An employer is certainly entitled to express its viewpoint. Wal-lite Div. of U.S. Gypsum v. NLRB. 484 F.2d 108, 110-12 (8th Cir. 1973).

7. Agency regulation 2 AAC 10.210 permits the employer to regulate organizational activities:

> A labor or employee organization may organize public employees only during the employees' lunchtime, other official free time or before or after official working hours. A labor or employee organization shall notify a public employer that it is on the public employer's premises before conducting organizing activities. A labor or employee organization which fulfills the foregoing requirements shall not be denied the right to conduct organizational activity by the public employer.

This regulation is consistent with AS 23.40.070 which provides among other things that, "The legislature declares that it is a public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government." Evidence was not presented implying discriminatory denial of access to APEA or any other particular union nor evidence demonstrating animus.

8. APEA's access to bulletin boards must take into account 2 AAC 10.210 as noted in the preceding paragraph. Access to general bulletin boards are subject to reasonable control by the employer, and no person including the union has an inherent right to the employer's bulletin boards. Roadwav Express. Inc. v. NLRB. 831 F.2d 128S. 1290 (6th Cir. 1987); NLRB v. Southwire Co., 801 F.2d 1252, 1256 (llth Cir. 1986). However

precedent prohibits the employer from assenting to employee access to a bulletin board and discriminatorily refusing to allow the posting of union notices or messages. Id. Once the State allowed non-work related announcements on bulletin boards, the employer could not thereafter have valid managerial reasons to exclude union notices. Id. Here however evidence was not introduced demonstrating that the State (as opposed to other unknown persons) was involved in removal of or restrictions on APEA notices from public bulletin boards other than limitations and directions to utilize only bulletin boards.

9. APEA designated bulletin boards are a contractual item pursuant to the APEA-State collective bargaining agreement, which provides that "Past practice with regard to bulletin board shall continue" (Article 9, Section 10). APEA organizational efforts had not existed in the past; thus no "past practice" could directly be described respecting organizational activities. However the State's restriction on the use by APEA of APEA bulletin boards so as to prohibit organizational literature is apparently based on a motive to be neutral and not on specific anti-APEA animus. Nor did the restrictions evidence a pattern of behavior given the State's written policies expressed to APEA in October 1987. Nevertheless, restricting APEA use of such bulletin boards for organizational purposes is questionable given cases such as Honeywell. Inc., 262 NLRB 1402 (1982) and Perry Education Association. v Perry Local Educators Assoc., 460 US 37 (1983). These cases recognize that even though APEA might well have had a "leg up" on other unions by its ability to utilize APEA designated bulletin boards, such contractually vested rights are inherent in the strength of an incumbent. The evidence in this matter however showed that while the State set forth a policy respecting organizational information as distinct from day to day APEA administrative matters, neither the Commissioner of Administration nor other State personnel were specifically observed removing organizational materials. Further, APEA knew of the State policy, and never grieved the interpretation of Article 9, Section 10 advanced by the State.

10. The State did not discriminate between APEA and other unions respecting the grant of extraordinary leaves from State jobs. The criteria behind granting business leave are different than those respecting leave without pay. Business leave, by APEA-State contractual agreement, is subject to the approval of the Director of the Division of Labor Relations, while leave without pay is a decision left solely in the hands of an employees supervisor. The denial of business leave (after the May 11, 1988 election) to Messrs. Kelley and Dawson was based upon recommendations from their supervisor and was not

discriminatorily applied. APEA organizer Gallant's leave without pay was approved by his supervisor. Further, the State's interpretation of how business leave could be granted was a grievable issue not pursued by APEA.

11. The State did not act in a discriminatory fashion or demonstrate anti-APEA animus with respect to the requirement that APEA amend its authorization forms for initiation fee deductions and assist in the identification of those employees subject to that deduction. The State is not responsible for those deductions, and no evidence was advanced to show that the State acted with an anti-union motive in processing the paperwork to provide for these deductions. The fact that the initiation-fee deductions became publicized at approximately the time that ASEA and Local 71 commenced organizational activities was a risk which APEA had to face regardless of State participation in that process.

12. The State's failure ['failure' handwritten] to generate an absolutely perfect eligibility list for the May 11, 1988 election does not constitute an unfair labor practice. APEA was not only possessed of additional information, but held the burden of proof with respect to challenging the inclusion of employees. NLRB Case Handling Manual; NLRB v. Trianale Express Inc., 111 LRRM 2227, 2229 (lOth Cir. 1982). APEA was not denied the opportunity to raise challenges as to exclusion or inclusion of employees on the list, and the challenges by APEA were addressed at the objections hearing. No evidence was presented indicating anti-APEA animus or even negligence with respect to preparation of the list.

D. ANTI-APEA ANIMUS

1. APEA has alleged that anti-union animus underlay all of the State actions alleged to have occurred by APEA. The cumulative effect of these actions, according to APEA, demonstrates anti-APEA animus.

2. APEA has failed to present adequate evidence to support its claims of anti-union animus through admitted evidence. A mere "pyramiding" of inferences is not the sort of substantial evidence necessary to support a finding that anti-union animus has occurred. NLRB v. National Paper Co., 216 F.2d 859, 862-63 (5th Cir. 1954).

3. A demonstration of anti-union motive or retaliatory motive on the part of the employer is rebuttable by proof of other reasons for employer action. Alaska Commuting College Federation Teacher's Assn. v. University of Alaska, 669

P.2d 1299, 1308-09 (Alaska 1983). APEA has not overcome the justifications for the various actions taken by the State and entered into evidence by the State in this matter.

E. REMEDY

1. Setting aside the expression of voters in an election places a heavy burden of proof on the challenger NLRB v. Belcore Inc., 108 LRRM 2244, 2247 (9th Cir. 1981); NLRB v. Skelley Oil Co., 82 LRRM 2641, 2643 (8th Cir. 1973); Order and Decision No. 114 (1988). Clearly the short-fuse for filing objections to an election prescribed in 2 AAC 10.180 amplifies the burden of proof upon a challenger to an election. Finality in elections is an important concept, and "sound and important public policies" favor prompt challenges. McAlpine v. Univ. of Alaska,_____ P.2d _____, Op. No. 3382 (Alaska 1988), Slip. Op. at pp. 11-12 and 23 (on initiatives).

2. Elections are to be ideally conducted in "laboratory conditions." General Shoe Corp.. 21 LRRM 1337 (1948); Midland National Life Insurance Co., 110 LRRM 1489, 1492-95 (1982). However the test, given particularly the level of importance of finalized elections, is that the proof must establish material deviations or that the actions are both wrong and contributed materially to changes in the election. Hammond v. Hickel, 588 P.2d 256, 258 (Alaska 1978).

3. AS 23.40.140 provides that the Agency, if finding a person has engaged in a prohibited practice "may issue and serve on the person an order and 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." The Agency must pursuant to that provision, in finding an unfair labor practice charge, fashion a remedy appropriate to suit the circumstances.

ORDER AND DECISION

Based on the foregoing findings of facts and conclusions of law, the Agency unanimously orders and decides that:

1. Governor Cowper, Commissioner Andrews, and the State Division of Labor Relations did not engage in unfair labor practices within the meaning of AS 23.40.110(a) as alleged by APEA in consolidated ULPC's 88-14 and 88-16. The State's actions respecting bargaining and conduct relating to and surrounding the representation election conducted on May 11, 1988 do not evidence bad faith or a motive to chill, obstruct,

or negate ongoing negotiations or to coerce or otherwise deprive APEA of its rights under the Public Employment Relations Act.

2. The unfair labor practice charges filed by APEA are dismissed.

3. The Agency is troubled with the contractual references in the APEA State collective bargaining agreement on APEA designated bulletin boards. It is unclear whether the State, given unclear contractual language, may limit the use *of* APEA designated bulletin boards for organizational purposes. Even *if* such use is inappropriate, the Agency determines that there is no basis for overturning the May 1988 election as a consequence thereof. However, the Agency recommends that in the future, any collective bargaining agreement between the State and a collective bargaining entity specify whether or not such dedicated bulletin boards can be used for organizational purposes and pursuant to what terms and conditions.

4. This written decision sets forth the rationale for the decision reached by the Agency in this matter following the hearing on September 26 - 29, 1988.

DATED this 20 day of October, 1988.

STATE OF ALASKA LABOR RELATIONS AGENCY

BY _____
C. R. "Steve" Hafling
Chairman

[Signature on File]