BEFORE THE STATE OF ALASKA

LABOR RELATIONS BOARD

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| In the Matter of: | ) |
| | ) |
| The University of Alaska and | ) |
| the Associated Faculty- | ) |
| University of Alaska | ) |
| _____ | ) |

Case No. ULPC 80-2

ORDER AND DECISION NO. 70

In December, 1980, a petition was filed by the Associated Faculty of the University of Alaska, represented by NEA, to organize the faculty within the University. The petition met the prerequisites of A.S. 23.40.100. Extensive hearings were held in Fairbanks, Anchorage and Juneau. Over 1500 pages of transcribed testimony has been received to date. The lengthy hearings were necessitated by two affirmative defenses asserted by the University. The first being that the recent U.S. Supreme Court case of NLRB v. Yeshiva University, 444 U.S. 672 (1980) was applicable to the State of Alaska; the second affirmative defense was that there was no community of interest between the three University campuses located at Anchorage, Fairbanks and Juneau. Only the first affirmative defense is decided by this Order and

Decision. However, the Agency does take judicial notice of our prior Order and Decision Number 25. In Order and Decision Number 25 the Agency denied a proposed unit of all employees of the University of Alaska at the Anchorage campus having academic rank and who are employed fifty percent or more, or full time to teach, do research and perform public service for academic support. The Agency followed the principle that the units should be exhaustive of State-wide classification. (See Order and Decision Number 25, dated July 26, 1976).

The bifurcation of the briefing schedule was requested by counsel for NEA. The University of Alaska acquiesced in the request for a bifurcated briefing, and attempts were made by the Agency to have the parties stipulate to a statement of the issues. Such attempts failed as the parties could not agree on how the factual and legal questions should be approached and applied to the law of the State of Alaska (A.S. 23.40.070 et seq.) Therefore the Agency compromised by allowing the parties to argue their respective provisions as they related to Yeshiva. The threshold issue of Yeshiva is whether "managerial" employees, however the term may be defined, are excluded from the coverage of the Alaska Act.

In Yeshiva supra, the U.S. Supreme Court ruled that the faculty at Yeshiva University were managerial employees, as a matter of law. Therefore they were denied the right to have collective bargaining representatives under the NLRM.

NEA argued that:

1. That Alaska has no managerial exclusion.

2. That Yeshiva involves the exclusion the managerial employees under the NLRM, and the facts and circumstances in that law are inapplicable to Alaskan Law.

3. That the University concedes the proposed unit is homogeneous and a managerial unit.

4. That none of the faculty are appointed officials and excluded from PERA. [See 23.40.250(5), in particular.]

The University argued:

1. That the Labor Relations Agency has followed a "no mix", or inherent conflict of interest document in the past. That the faculty now regulates themselves, and are therefore the dominant influence in collective bargaining and they cannot bargain with themselves.

2. That the University of Alaska has the "bubble up"

process of administration. The faculty effectively now determine their teaching methodology; grading policies; admissions, retention and graduation policies; curriculum; faculty hiring; promotion and tenure; sabbatical; budget; research projects; and teaching load. Those functions are conducted through the Faculty Senate and the Statewide Assembly which has legislative authority to determine same within the University. The legislative authority is of course subject to the veto of the Board of Regents or the University President.

3. The University argued it is a conflict of interest to have a bargaining unit when the faculty already are acting as management, and controlling the administration of the University.

The Agency recognizes that the University's system is a collegial one, and unique. The Agency is not going to evaluate the present system and determine whether it is a good system or a poor one. Because of the uniqueness of the collegial system we recognize there is a mix of functions.

During closing arguments on the Yeshiva issue, several

interesting concessions were granted by both parties. NEA conceded that the faculty at times acted as management. (See Tr. pp. 18 and 30.) The University conceded that the group as a whole was a homogeneous one. (See Tr. P. 72.) The duties of the faculty at large could not be totally separated from the Division Directors at the University. The two often rotate positions and collegially make decisions. The concessions were interesting because they appear to allow the Agency to determine as a matter of law whether PERA allows a managerial exclusion. If there is no managerial exclusion, and the unit is homogeneous, all members within the unit should logically be allowed the right to vote on representation for a bargaining unit.

In analyzing the situation the Agency relies on the PERA statute, prior Alaska Supreme Court decisions, and our prior Orders and Decisions.

PERA does separate employees into different classifications. Presently, there is no mixture of supervisory and non-supervisory personnel; confidential employees have a separate unit. PERA recognizes the right of public employees

to organize for the purpose of collective bargaining, A.S.23.40.070 (1). An employee is defined as:

> Any employee of a public employer, whether or not in a classified service of a public employer, except elected or appointed official or teachers that are non certified employees of the school district. A.S. 23.40.250 (5).

The faculty at the University campus is not directly referred to in the Act, as an employee; however, the 1978 Amendments to PERA indirectly recognized the faculty in two sections.

A.S. 23.40.212 authorizes the Board of Regents to grant the Department of Administration authority to negotiate with an employee organization for a collective bargaining agreement.

A.S. 23.40.245 states in part:

> When a bargaining unit includes members of the faculty or other employees of a public institution of post-secondary education, the public employer and their representatives of the bargaining unit shall permit student representations of that institution to....

It is clear to the Agency that the State Legislature intended the faculty at the University of Alaska to be allowed to form an association and have a collective bargaining

unit, if approved by secret ballot. The legislature has not given the Agency any direction to provide for a managerial exemption by statutory language. It appears, therefore, that the Legislature intended the faculty at the University of Alaska to be within PERA. The Legislative intent can be discovered from the 1978 amendments. An unambiguous statute should be enforced if it reads without judicial modification or construction. Hafling v. Inland Boatmen's Union of the Pacific, 585 P.2d 870 (Alaska 1978). If the legislature intended to exempt faculty from bargaining, they could have easily included an express exemption in its definition of employees. The legislature did not do so, and therefore this Agency takes jurisdiction over the dispute.

The Kenai Peninsula Borough School District v. Kenai Peninsula Borough School District Association, 590 P.2d 437 (Alaska 1979), is indirectly applicable. In the Kenai case, the essence of the School District's asserted interest was that it needed to exercise prospective control of the vigor which its non certified employees were represented at the bargaining table. The University's position in the instant

case is that the faculty are already in a posture similar to being at the bargaining table, and in fact running the University. The Supreme Court held in Kenai Peninsula supra, in part, "It can no longer be disputed that the right to affiliate with a union of one's choice is the right of the public employees as well as the private employee." The Supreme Court recognized that same freedom for employees covered by the Alaska Public Employee Relations Act. State v. Petersberg, 548 P.2d 263 (Alaska 1975).

Therefore the legislative history and the Alaska Supreme Court Decisions lead us to a conclusion opposite from that asserted by the University.

Furthermore, the issue of managerial exclusion has been discussed by Agency Order and Decision Number 12 and 13. In Order and Decision Number 12, the Agency stated:

> The Labor Relations Agency's position was that there is no grounds under the Alaska Public Employee Relation Act to exclude "managerial" positions per se, since the APERA, unlike the National Labor Management Relations Act, does not exclude supervisor employees from the definition of "employee", whereas the NLRB extended the supervisory exclusion of National Labor Management Relations Act to managerial employees.

However, the Labor Relations Agency stated its recognition of the possibility of conflicts of interest rising out of the inclusion of certain classifications with other classifications in the same bargaining unit, particularly as such conflicts of interest might pertain to formulation implementation of collective bargaining policy, which might lead to the conclusion that collective bargaining units as originally authorized might not be appropriate.

In Order and Decision 13 we restated the policy set forth in Order and Decision Number 12.

The Decisions by this Agency in Order and Decision Number 12, have been in existence for more than seven years. The legislature has not changed the definition of employee, nor given the Agency any other direction which supports the University's position. In fact the legislative changes indicate that the legislature is looking forward to the day when attempts are made to organize the faculty at the University of Alaska.

Therefore, based on the record, and the law, we make the following Findings of Fact:

## FINDINGS OF FACT

1. That the faculty (the faculty is limited as

defined by NEA's petition) of the University of Alaska has a substantial collegial voice in operating the University and making its policies.

2. That the faculty is a homogeneous unit of individuals with a community of interest.

And we conclude as a Matter of Law:

1. That Yeshiva does not apply to the U of A.

2. That if the faculty were to be considered managers under PERA they would be entitled to a managers unit or similarly designated unit.

3. That there is no conflict of interest among the faculty that precludes the formation of a bargaining unit,

and;

O R D E R

That the University's affirmative defense based on Yeshiva be dismissed with each party to bear its costs and attorney fees.

Further hearings on the question of the proper bargaining unit and specific individuals to be included or excluded from that unit and any other matters will be held

December 4, 1981.

The parties are ordered to confer no later than November 23, 1981 and set forth the remaining issues and need for discovery or further hearings. The issues will be reduced to writing no later than November 27, 1981 and mailed to each member of the Agency.

A hearing will be held on the remaining issues December 4, 1981 at Anchorage. The parties will be notified of the time and place by a Notice of Hearing.

DATED this 16th day of November, 1981

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C. R. "Steve" Hafling, Chairman

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Morgan Reed, Member

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Ronald M. Henry, Member

[Signatures of Hafling and Reed on File]