STATE OF ALASKA
DEPARTMENT OF LABOR
LABOR RELATIONS AGENCY

ALASKA PUBLIC EMPLOYEES ASSOCIATION,	)
Complainant,	)
vs.	)Case No. ULP 89-003
KETCHIKAN GATEWAY BOROUGH,	)
Respondent.	)

DECISION AND ORDER 90-2

This case arises from unfair labor practice charges brought by the Alaska Public Employees Association ("APEA") against the Ketchikan Gateway Borough ("Borough") under the Public Employment Relations Act ("PERA"), AS 23.40.070-.260.

After investigation and conciliation, the Department of Labor, Labor Relations Agency ("Agency") determined that probable cause existed to support certain of the unfair labor practice charges and ordered a hearing. The hearing was held in Ketchikan on October 9-10, 1989, before Agency members Jim Sampson (Chairman), Thomas E. Stuart, Jr. and J.R. Carr. The hearing officer was Robert W. Landau, Esq. APEA was represented by Joan M. Wilkerson, Field Representative. The Borough was represented by Mitchell A. Seaver, Assistant Municipal Attorney. Each party presented evidence through witness testimony and documentary exhibits, and made its arguments both orally and in written posthearing briefs.

The Agency, having considered the evidence presented and the arguments of the parties, makes the following findings of fact, conclusions of law, and order in this matter.

FINDINGS OF FACT

1. APEA is the certified collective bargaining representative under PERA for employees of the Ketchikan Gateway Borough. APEA's bargaining unit is made up of 33 Borough employees in various job classes ranging from police officer to clerical staff.

2. In April 1986, APEA and the Borough entered into a collective bargaining agreement ("the agreement") covering all members of the bargaining unit. Article 25 of the agreement provided that the agreement would remain in effect through December 31, 1987, and thereafter from year to year, unless either party first gave timely notice of its desire to amend the agreement and subsequently gave notice of its desire to terminate the agreement.

3. In September 1987, pursuant to Article 25, APEA gave notice of its desire to enter into negotiations to amend the agreement. Negotiations between APEA and the Borough began in November 1987 and continued into 1988, with the parties exchanging proposals on a regular basis. At no time during the negotiations did either party give notice of its desire to terminate the agreement.

4. On May 25, 1988, the APEA negotiating team notified the Borough that it believed the parties had reached an impasse in their negotiations and requested that a federal mediator be called in. The parties met with the mediator for two days in July 1988, but no agreement was reached and an impasse was declared. The principal issues at the bargaining table involved wage increases, merit pay, the procedure for resolving job classification disputes, and the class status under AS 23.40.200 of three job classes: ferry toll collectors, airport secretary and animal control officers.

5. APEA and the Borough continued to exchange contract proposals in late 1988 and early 1989 but still no agreement was reached. A Borough proposal dated February 17, 1989, was presented to APEA's membership but was rejected. On May 2, 1989, the parties met once again to exchange new proposals but could not agree on wage rates, a job classification review system, and the class status of the three job classes identified above. After the unsuccessful May 2 session, APEA negotiators believed the negotiations were deadlocked and issued a press release indicating that the contract dispute would go to arbitration.

6. At its meeting on May 17, 1989, the Borough Assembly went into an executive session to discuss the contract negotiations. Later that evening the Assembly voted unanimously to direct the Borough Manager to implement the wage rates contained in the Borough's last offer of May 2, 1989. The Borough Manager implemented the proposed wage rates on May 18,

1989. APEA was not given any prior notice of the proposed wage rate implementation nor any opportunity to consult or negotiate regarding the proposed implementation.

7. The wage schedule implemented by the Borough on May 18, 1989, were contained in the Borough's last offer of May 2, 1989, with two significant differences. First, the implemented wage rates were made retroactive to May 1, 1989, whereas the Borough's May 2 proposal did not provide for any retroactive pay. Second, the Borough's implemented pay plan did not include the one-time lump sum payments which had been offered in the May 2 proposal. The implemented pay plan resulted in an actual pay increase for approximately 27 of the 33 bargaining unit members; the remaining 6 employees were already being paid in excess of their base rate of pay under the implemented plan.

8. On May 23, 1989, APEA filed the unfair labor practice charges in this case. APEA charged that the Borough had been bargaining in bad faith and that the Borough's unilateral implementation of its new wage rates was in violation of PERA. APEA additionally charged that the job classification review procedure proposed by the Borough did not end in binding arbitration and thus was also in violation of PERA. Finally, the Borough contended that the three disputed job classes (ferry toll collector, airport secretary and animal control officer) were in Class I under AS 23.40.200 and therefore entitled to binding interest arbitration along with other Class I employees.

9. The Borough denied APEA's charges in their entirety, contending that it was authorized to pay wage increases unilaterally under Article 24.2 of the agreement because APEA had contractually waived its right to bargain over wage increases and that, in any case, the Agency should defer to arbitration as to the meaning and effect of Article 24.2 of the agreement. As to the other charges, the Borough asserted that it had not engaged in bad faith bargaining; that the Agency lacked jurisdiction to make class determinations under AS 23.40.200 since no strike vote petition had been filed; and that it was not unlawful under PERA to propose a job classification review procedure which did not end in binding arbitration.

10. After preliminary investigation, the Agency determined that probable cause existed to support APEA's charges relating to the implementation of the Borough's pay plan, the proposed job classification review procedure, and the class status of the disputed job classes under AS 23.40.200. The Agency also determined that other bad faith bargaining charges were not supported by probable cause and dismissed those charges. Finally, the Agency denied the Borough's request to defer to arbitration on the contract waiver issue.

11. Article 24.2 of the agreement provides:

> Nothing contained herein shall prohibit the Employer, at its sole discretion, from paying wages and/or benefits in excess of those provided for herein.

At the hearing, former APEA negotiators Lee Powelson and Bruce Ludwig testified that this provision had been inserted into the

agreement at the Borough's request during the original contract negotiations in 1985. According to Powelson and Ludwig, the Borough's stated purpose in Article 24.2 was to allow the wages or benefits for a particular position to be raised in order to reward or retain an especially valuable employee or to make the position more attractive when recruiting new employees. Powelson and Ludwig further indicated that at no time during the 1985 negotiations did the Borough's negotiators indicate that Article 24.2 might be used to implement a general wage increase for all bargaining unit members or that it constituted a waiver of APEA's right to bargain over wages.

12. Mark Hutcheson, the Borough's chief negotiator during the 1985 negotiations, testified that the Borough proposed Article 24.2 to provide it with broad flexibility in granting wage or benefit increases to its employees regardless whether or not collective bargaining was taking place. Hutcheson further stated that the broad language of the provision made clear that it was not intended to be restricted to individual employees or positions but could be used to grant across-the-board increases. However, Hutcheson could not recall any specific examples of the use of Article 24.2 that may have been given at the bargaining table. Further, he did not recall indicating to APEA that Article 24.2 constituted a waiver of APEA's right to bargain over wages.

13. In its final proposal on May 2, 1989, the Borough included a job classification review procedure that culminated

not in arbitration but in a final decision by the Borough Manager. In its proposals prior to May 2, 1989, APEA had proposed a job classification review procedure that ended in binding arbitration. However, in its final proposal on May 2, 1989, APEA changed its position and agreed to final job classification decisions by the Borough Manager in lieu of arbitration. At the hearing, APEA witnesses explained that the last-minute change in position was for the sole purpose of trying to obtain agreement on wage increases by giving in to the Borough's proposal on job classification review.

14. There was considerable testimony at the hearing regarding the job functions and duties of the airport secretary and ferry toll collectors. The Borough's job descriptions for these two positions do not describe any duties relating to police, fire, prison or hospital functions. It was established, however, that both the airport secretary and the ferry toll collectors had occasionally been used to perform emergency dispatch duties to notify police, fire, hospital, ambulance services, and other transportation and medical providers as necessary during the course of an airport emergency. Further, these emergency duties were referenced in the airport's emergency plan certified by the FAA.

15. Ken Linder, the airport manager, testified that he was not aware that the ferry toll collectors and the airport secretary had emergency dispatch responsibilities until he was notified by one of the Borough's attorneys. Because he did not

feel that their emergency duties were necessary, he took steps to delete such functions from the airport emergency plan. However, these changes did not become effective until September 1989, several months after APEA had first raised the issue. In addition, on October 9, 1989 -- the first day of the hearing --Linder ordered that the airport emergency control manual be removed from the ferry toll booth.[1]

16. There was also testimony about the duties of the animal control officers. These duties include removal of dead animals from roadways, collection of stray animals, investigation of animal bite cases, issuance of citations for failure to obtain required animal vaccinations and enforcement of quarantines. However, the animal control officer is not a certified police officer, carries no firearms, does not have arrest powers and does not issue criminal warrants. In the event of a law enforcement problem, the animal control officer is directed to seek the assistance of city police or state troopers. There was testimony to the effect that if the animal control officers were on strike for any length of time, the supervisor might have difficulty performing all their functions and there could be a resulting adverse impact on public health and safety from rabid

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We specifically discredit Mr. Linder's testimony that he had been planning to delete the emergency responsibilities of the airport secretary and the ferry toll collectors before this topic became an issue between APEA and the Borough. Furthermore, we give no weight to the Borough's efforts to change the job duties of these employees after this unfair labor practice proceeding was initiated. We also express no opinion as to whether such efforts may themselves constitute an unfair labor practice.

or diseased animals potentially transmitting disease to the human population.

CONCLUSIONS OF LAW

Jurisdiction and Deferral to Arbitration

1. The Agency has jurisdiction to hear and decide complaints of unfair labor practices described in AS 23.40.110 and is authorized to issue appropriate orders concerning such complaints pursuant to AS 23.40.140.

2. APEA is a certified employee "organization" and the Borough is a "public employer" within the meaning of PERA, and both APEA and the Borough are subject to the labor relations authority of the Alaska Department of Labor, AS 23.40.250.

3. The Agency also has jurisdiction in this case to determine the proper class status of disputed employees under AS 23.40.200. Such a determination is significant since there is a mixed bargaining unit and the parties disagree as to whether certain employees are within Class I for the purposes of interest arbitration. Under AS 23.40.200, only Class I employees are entitled to interest arbitration in the event contract negotiations reach an impasse. Since the determination of class status under AS 23.40.200 involves the application of that statutory provision to particular employees or classes of employees, it falls within the "special expertise" of the Agency to interpret and apply PERA to the specific facts presented.

4. Furthermore, with respect to the Borough that APEA has contractually waived its right to bargain over wage increases, the Agency declines to defer that issue to arbitration and asserts its jurisdiction to interpret the collective bargaining agreement in the context of this unfair labor practice proceeding. This approach is consistent with decisions of the federal courts and the National Labor Relations Board. See, e.g., NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967); NLRB v. Huttig Sash & Door Co., 377 F.2d 964 (8th Cir. 1967).

Contract Waiver

5. The collective bargaining agreement executed by APEA and the Borough in April 1986 is still in full force and effect. Under Article 25.1 of the agreement, the agreement remains in effect until either party serves notice of its desire to amend it and subsequently serves a notice of termination. Although APEA indicated its desire to amend the agreement, no notice of termination has been filed by either party.

6. Under PERA, a public employer is required to bargain in good faith with a certified employee organization on matters of "wages, hours, and other terms and conditions of employment." AS 23.40.070. Nonetheless, it is well established in labor relations law that a party may agree to contractual language specifically waiving its right to bargain over a particular issue, such as wages. See generally Morris, The Developing Labor Law, 640-41 (2d ed. 1983) and 236-37 (2d ed. Second Supplement 1982-85). However, consistent with the

traditional common law view of waiver, the NLRB and the courts have construed the waiver doctrine strictly and have been reluctant to infer a waiver. Id. at 641, citing New York Mirror, 151 NLRB 834, 58 LRRM 1455 (1965). The Morris treatise further states:

In order for contract language to constitute a waiver of bargaining rights, it must be

> "clear and unequivocal." In assessing that question, the Board considers the bargaining history of the contract language and the parties' interpretation of the language. Where an employer relies on contract language as a purported waiver to establish its right to unilaterally change terms and conditions of employment not contained in the contract, the Board requires evidence that the matter in issue was "fully discussed and consciously explored during negotiations and the union must have consciously yielded or clearly and unmistakably waived its interest in the matter."

Morris, supra, at 286-37 (citations omitted).

7. In this case, after considering the language of Article 24.2 of the agreement, its bargaining history, the interpretations of the parties, and the overall context of collective bargaining negotiations between the parties, we conclude that APEA did not "clearly and unmistakably" waive its right to bargain over wages. APEA and the Borough actively exchanged proposals and bargained over wage increases for approximately 18 months before the Borough ever stated its position that Article 24.2 "waived" APEA's right to bargain over wage increases in the first place. There is no evidence that during the negotiations the Borough ever took the position that a general wage increase was not a proper subject of bargaining.

The Borough's waiver argument was raised only after negotiations had become deadlocked and it had unilaterally implemented across the-board wage increases, suggesting that the waiver argument was merely an after-the-fact attempt to justify its unilateral action.

8. Moreover, the parties are in strong disagreement about the scope and intent of Article 24.2. The Borough argues that the provision was intended to broadly allow across-the-board wage increases under any circumstances (e.g., during collective bargaining) while APEA contends that the provision was intended only to allow the wages or benefits for specific jobs to be increased in order to reward or retain an incumbent employee or to attract qualified applicants in the event of a vacancy, and that it was not intended to be a substitute for collective bargaining as to general wage increases. Significantly, there is no evidence of any past practice by the Borough to rely on Article 24.2 to support a unilateral general wage increase, nor did the Borough announce its reliance on Article 24.2 at the outset of negotiations in 1987. While Article 24.2 may well authorize the Borough to implement incentive or bonus pay increases for specific jobs, we conclude that the Borough has failed to carry its burden of proof to establish that APEA "clearly and unmistakably" waived its right to bargain over a general, across-the-board wage increase.

9. The Borough places great reliance on the holding in NLRB v. Honolulu Star-Bulletin, Inc., 372 F.2d 691 (9th Cir.

l967), where the court found no unfair labor practice in an employer's refusal to bargain over bonus pay based on a contract provision similar to Article 24.2. However, there are significant factual differences which limit the applicability of Honolulu Star-Bulletin to the present case. First, the employer in that case refused to bargain over bonus pay from the outset, relying on its contract provision; here the Borough actually negotiated over wage increases for an 18-month period. Second, the unfair labor practice charge alleged in that case involved the employer's refusal to bargain, whereas in the present case the Borough took the significant affirmative step of unilaterally implementing a general wage increase without notice to or consultation with APEA. Third, a bonus pay plan is not the same thing as a general wage increase; the former is more clearly contemplated by the language of the contract provision in Honolulu Star-Bulletin than the latter is by the language of Article 24.2. For these reasons, we conclude that the holding in Honolulu Star-Bulletin is inapplicable to the present case.

Unilateral Implementation of Wage Increases

10. Having decided that APEA did not contractually waive its right to bargain over wage increases, we must next examine whether the Borough's unilateral implementation of a general wage increase, in the context of these negotiations, constitutes an unfair labor practice under PERA. The leading Alaska case in this area is Alaska Public Employees Association v. State of Alaska, 776 P.2d 1030 (Alaska 1989). In that case

the Alaska Supreme Court adopted principles established in federal labor relations law, stating as follows:

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

776 P.2d at 1033. The court went on to hold that the employer was free to unilaterally implement previously-offered contract changes as to Class II employees after good-faith impasse and mediation and as to Class III employees after a good-faith impasse has been reached. Id. The question whether the parties negotiated to impasse in good faith must be determined on a case by-case basis. Id. Class I employees we re not addressed in the court's holding, although it noted that the lower court had ruled that unilateral implementation of contract terms could not take place as to Class I employees until the arbitration procedures in AS 23.40.200(b) had been exhausted or the parties had mutually agreed to forego arbitration. Id. at 1031 n.6. See also NLRB v. Katz, 369 U.S. 736 (1962).

11. Applying the foregoing principles to the instant case, we must first decide whether a good faith impasse existed on May 18, 1989, the date on which the Borough unilaterally implemented the wage increases. An impasse has been defined as "a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind

or the application of economic force.'" Id. at 1032, quoting Bonnano Linen Serv., Inc. v. NLRB, 454 U.S. 404, 412 (1982). After several months of stalled negotiations, APEA and the Borough met on May 2, 1989, to exchange contract proposals. Although several proposals were exchanged on that day, no agreement was reached and no further bargaining sessions were scheduled. From these circumstances we conclude that the negotiations were deadlocked and that an impasse existed. Moreover, since we have not found that the deadlock was obtained through bad faith bargaining, we further conclude that as of May 2, 1989, the parties were at a "good faith impasse."

12. After the May 2 deadlock in negotiations, it is undisputed that no mediation as specified in AS 23.40.200 took place with respect to any members of the bargaining unit. The mediation which occurred in July 1988 does not satisfy the mediation requirement since the impasse that was declared at that time was subsequently broken through a resumption of the negotiations.

13. The wage rates implemented by the Borough on May 18, 1989, had been previously offered to APEA and had been rejected by the membership. However, the implemented wage rates were made retroactive to May 1, 1989; such retroactive pay had not been previously offered by the Borough. Federal labor relations law makes clear that an employer may unilaterally impose changes in the terms of employment only if the changes were "reasonably comprehended" in the terms of its contract

offers to the union. See Southwest Forest Industries, Inc. v. NLRB, 841 F.2d 270, 273 (9th Cir. 1988); Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' and Food Employers' Pension Trust Fund, 827 F.2d 491, 496 (9th Cir. 1987). Unilateral changes not comprehended in pre-impasse proposals constitute a refusal to bargain under the National Labor Relations Act. Id.; Peerless Roofing Co. v. NLRB, 641 F.2d 734, 735 (9th Cir. 1981). Since the Borough had not offered retroactive pay in its pre-impasse proposals, we conclude that its unilateral implementation of retroactive pay was an unfair labor practice under PERA. See also Colorado-Ute Electric Association, Inc., 295 NLRB No. 67 (June 15, 1989) (employer's failure to bargain over timing and amount of unilateral merit increases was unfair labor practice).

14. We further conclude that the Borough's failure to give APEA any prior notice of its implementation of the new wage rates also constitutes an unfair labor practice under PERA. Federal labor relations cases have established that even where an employer has the right to unilaterally change the terms and conditions of employment, it may not do so lawfully without first giving the union adequate notice of the proposed implementation and an opportunity to bargain. See Southwest Forest Industries, Inc. v. NLRB, 841 F.2d 270 (9th Cir. 1988) (employer's three-day notice of its intent to unilaterally implement changes in job conditions after impasse was reached was unfair labor practice); M.A. Harrison Mfg. Co., 253 NLRB 675, 676 (1980), enf'd, 682 F.2d

580 (6th Cir. 1982) (three-day interval between announcement and institution of unilateral change was inadequate opportunity to bargain); cf City Hospital of E. Liverpool, Ohio, 234 NLRB 58, 59 (1978) (three weeks notice sufficient). See also APEA v. , State, 776 P.2d 1030, 1031 (Alaska 1989) (employer's unilateral implementation approved where one union given 2 months notice of implementation and another union given 10 days).

15. Even if the Borough had given APEA adequate prior notice of its proposed implementation and an opportunity to bargain over retroactive pay to May 1, its unilateral implementation would still constitute an unfair labor practice as to Class I and Class II members of the bargaining unit. Under AS 23.40.200(b), Class I employees are entitled to mediation and interest arbitration in the event contract negotiations become deadlocked, neither of which occurred prior to the Borough's implementation. Similarly, under AS 23.40.200(c), Class II employees are entitled to mediation before an employer can unilaterally implement contract changes. See APEA v. State, supra, 776 P.2d at 1033.

Job Classification Review System

16. APEA charges that the Borough's proposal of a job classification review system which does not culminate in binding arbitration constitutes bad faith bargaining and is an unfair labor practice under PERA. An examination of the contract proposals exchanged by the parties reveals that during most of the negotiations, APEA proposed that disputes concerning the

proper placement of individual employees within the existing classification scheme should be submitted first to the Borough Manager for resolution and then, if there was continuing disagreement, to binding arbitration under the grievance and arbitration provisions of the contract. In response, the Borough proposed that all job classification disputes be resolved by a final decision of the Borough Manager without resort to arbitration. On May 2, 1989 -- the final day on which the parties exchanged proposals -- APEA changed its position on job classification disputes and essentially adopted the Borough's proposed procedure. The Borough argues that job classification issues generally are within the management rights of a public employer under PERA and are excluded from the definition of "terms and conditions of employment" in AS 23.40.250(8) and therefore are not mandatory subjects of bargaining.

17. Under AS 23.40.250(8), "terms and conditions of employment" means

> 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 functions and purposes of a public employer.

We believe that the assignment of an individual employee to the proper job classification within the public employer's existing job classification scheme is so closely connected with the economic well-being of the individual employee that it falls within the meaning of "terms and conditions of employment" under AS 23.40.250(8) and therefore constitutes a mandatory subject of

bargaining. An individual employee's job classification has a direct impact on the wages of the employee and could also affect the employee's benefits or other working conditions. We do not think that job classification disputes concerning individual employees involve the "general policies describing the functions and purposes of a public employer" which are exempt from collective bargaining under AS 23.40.250(8). Cf. Kenai Peninsula Borough School District v. Kenai Peninsula Education Ass'n, 572 P.2d 416 (Alaska 1977) (matters of "educational policy" are not mandatory subjects of bargaining for public school teachers under AS 14.20 but matters affecting the "economic interests" of employees must be negotiated).

18. The Borough relies on Order and Decision No. 110 of the Alaska Labor Relations Agency (ALRA), a separate body from this agency, for the proposition that job classification issues are outside the scope of mandatory collective bargaining under PERA. Alaska Public Employees Association v. State of Alaska, State of Alaska Labor Relations Agency Order and Decision No. 110 (August 26, 1987), aff'd, Superior Court Case No. 3AN-87-9539 (August 18, 1989), appeal pending, Supreme Court Case No. S-3582 (filed September 22, 1989). In that case, however, the ALRA appears to have been addressing general classification disputes "where the State's classification of a job, by description, by assignment of functions, and assignment of a pay range, is challenged by APEA." Order and Decision No. 110, supra, at 2 (Finding of Fact No. 4). In contrast, the instant case involves

job classification disputes where an individual employee believes that he or she has been improperly classified under the Borough's existing job classification scheme. APEA has not contested the Borough's establishment of a job classification system by description, by assignment of functions, or by assignment of a pay range. Accordingly, it does not appear to us that the classification issue decided in APEA v. State is the same as that before us in this case and therefore we conclude that the ruling and rationale of the ALRA in its Order and Decision No. 110 are inapplicable to the present situation. However, to the extent that the ruling in Order and Decision No. 110 was intended to apply to disputes involving the proper job classification of specific employees, we do not consider ourselves bound by that decision and we reaffirm our conclusion above that classification disputes involving individual employees are not exempted from mandatory subjects of bargaining under PERA.

19. Further, we conclude that disputes regarding the placement of individual employees within the Borough's existing job classification scheme are subject to mandatory grievance and arbitration procedures as set forth in AS 23.40.210. That provision requires, in pertinent part, that all public sector collective bargaining agreements under PERA "shall include a grievance procedure which shall have binding arbitration as its final step." In Hemmen v. State, Dept. of Public Safety, 710, P.2d 1001 (1985), the Alaska Supreme Court held that a dispute involving the involuntary transfer of an employee was subject to

binding grievance arbitration as required by AS 23.40.210, even though the State and the employee's union had provided in their collective bargaining agreement that involuntary transfers would be excluded from binding arbitration. Id. at 1003. Similarly, we believe that the public policy underlying AS 23.40.210 requires that disputes concerning the proper job classification of individual employees must be resolved through grievance procedures with arbitration as the final step, even where the parties propose otherwise in their negotiations or collective bargaining agreement. In the present case, we believe that the Borough Manager's "final" decision as to individual job classification disputes is the functional equivalent of Step II of the grievance procedure described in Article 18 of the current agreement. Under the rationale of Hemmen, therefore, we believe it would be a violation of AS 23.40.210 not to provide for binding arbitration as the final step of the dispute resolution 'process.

20. During the negotiations, however, APEA gave no notice that it believed the Borough's proposal regarding job classification disputes was in violation of PERA and, more importantly, it ultimately adopted the Borough's proposal in its own final offer on May 2, 1999. In addition, we recognize that the question of whether individual job classification disputes must be submitted to binding arbitration under PERA is still an unsettled matter of law. Under these circumstances, we believe that equitable principles should apply to bar APEA from

complaining about the Borough's job classification review proposal which did not include binding arbitration as the final step. Accordingly, we conclude that APEA's unfair labor practice charge on this issue should be denied and dismissed.

Classification of Employees Under AS 23.40.200

21. APEA and the Borough disagree about whether the airport secretary, ferry toll collectors and animal control officers fall within Class I under AS 23.40.200 for purposes of interest arbitration. Under that provision only Class I employees are entitled to arbitration in the event contract negotiations become deadlocked and mediation has been exhausted. As noted earlier, because there is a reasonable probability that the negotiations as to Class I employees may be referred to binding interest arbitration, we have exercised our ancillary jurisdiction to consider this issue as part of this unfair labor practice proceeding.

22. AS 23.40.200(a) divides public employees into three classes according to their services:

(l) those services which may not be given up for even the shortest period of time;

(2) those services which may be interrupted for a limited period but not for an indefinite period of time; and

(3) those services in which work stoppages may be sustained for extended periods without serious effects on the public.

Class I employees include police and fire protection employees, jail, prison and other correctional institution employees, and

hospital employees. AS 23.40.200(b). Class II employees include public utility, snow removal, sanitation and public school and other educational institution employees. AS 23.40.200(c). Class III employees include all other public employees not contained in either Class I or II. AS 23.40.200(d).

23. Although the airport secretary and ferry toll collectors have performed occasional emergency dispatch duties, the evidence established that their role has been strictly auxiliary and they have not been directly involved in police or fire protection on a full-time basis. Under these circumstances, we believe these two positions are most appropriately placed within Class II as long as they involve only occasional auxiliary emergency dispatch duties.

24. Similarly, we conclude from the evidence that the duties of the animal control officers do not directly involve police protection and therefore do not come within Class I. However, because of the public health impact that could potentially result from a lengthy strike by animal control officers, we believe their services are analogous to those of public utility or sanitation employees and that they are most appropriately placed within Class II.

Remedies

25. AS 23.40.140 provides that if the labor relations agency finds that an employer has engaged in an unfair labor practice, the agency shall issue an order requiring the employer

to cease and desist from the prohibited practice and to take affirmative action which will carry out the provisions of PERA.

26. Relevant federal labor relations decisions indicate that when an employer commits an unfair labor practice by unilaterally altering conditions of employment, the NLRB typically orders a restoration of the status quo ante running from the date of the violation until such time in the future as the parties negotiate in good faith to a new agreement or an impasse. Southwest Forest Industries, supra, 841 F.2d at 274, citing NLRB v. Cauthorne, 691 F.2d 1023, 1025 (D.C. Cir. 1982); see also Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).

27. Applying these principles to the instant case, we believe it would effectuate the purposes and policies of PERA to order APEA and the Borough to resume their negotiations in good faith until either a new agreement is reached or the parties become deadlocked and mediation is exhausted.

28. We further believe it is appropriate to order the Borough to cease and desist from unilaterally implementing any contract changes affecting the "terms and conditions of employment" of Class II or Class III employees unless and until the requirements set forth in APEA v. State, 776 P.2d 1030 (Alaska 1989), have been satisfied and APEA has been given adequate notice and opportunity to bargain regarding all elements of the proposed implementation. Additionally, with respect to Class I employees, it is appropriate to order the parties to

submit to binding interest arbitration in the event negotiations become deadlocked and mediation is exhausted.

29. Finally, to fully restore the parties to the status quo ante, we reserve the right to order the Borough, at APEA's request, to cancel the wage increases unlawfully granted to employees through the respondent's unilateral action. See Colorado-Ute Electric Association, 295 NLRB No. 67 (June 15, 1989). Nothing in our order, however, should be construed as requiring or allowing the Borough to cancel any wage increases without a request from APEA and an order from this Agency. Id.; see also Taft Broadcasting Co., 264 NLRB 185 n.6 (1982).

ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency hereby orders as follows:

1. APEA and the Borough, if they have not already done so, shall immediately resume contract negotiations in good faith, until either a new agreement is reached or the negotiations become deadlocked and mediation has been exhausted.

2. The Borough shall cease and desist from unilaterally implementing any contract changes affecting the "terms and conditions of employment" of Class I employees. In the event the negotiations become deadlocked and mediation has been exhausted, the parties shall submit Class I employees to binding arbitration as provided in AS 23.40.200.

3. The Borough shall cease and desist from unilate- rally implementing any contract changes affecting the "terms and

conditions of employment" of Class II employees until the parties have reached a good faith impasse and mediation has been exhausted.

4. The Borough shall cease and desist from unilaterally implementing any contract changes affecting the "terms and conditions of employment" of Class III employees until the parties have reached a good faith impasse.

5. Additionally, the Borough is prohibited from unilaterally implementing any contract changes affecting the "terms and conditions of employment" of Class II or Class III employees without first giving APEA adequate notice and an opportunity to bargain regarding all elements of the proposed implementation.

6. At the request of APEA and upon further order from this agency, the Borough shall cancel the wage increases implemented on May 18, 1989. However, without such request or further order, the Borough may not cancel the implemented wage increases.

7. APEA's unfair labor practice charge concerning the job classification review system is denied and dismissed.

8. The Agency reserves continuing jurisdiction to consider any further alleged violations of PERA.

DATED this 22nd day of February, l990.

DEPARTMENT OF LABOR,
LABOR RELATIONS AGENCY

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Jim Sampson, Chairman

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Thomas E. Stuart, Jr., Member

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J.R. Carr, Member

[Seal Affixed and Signatures on File]

APPEAL PROCEDURES

An Agency order may be appealed through proceedings in Superior Court brought by a party in interest against the Agency and all other parties to the proceedings before the Agency, as provided by the Rules of Appellate Procedure of the State of Alaska.

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

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of the Decision and Order in the matter of Alaska Public Employees Association, Complainant, and the Ketchikan Gateway Borough, Respondent, Case Number ULP F89-003, dated and filed in the office of the Labor Relations Agency in Anchorage, Alaska, this 27th day of February, 1990.

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CLERK

[Signature on File]