

STATE OF ALASKA

LABOR RELATIONS AGENCY

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ALASKA PUBLIC EMPLOYEES
ASSOCIATION,

Petitioner,

vs.

ALASKA STATE EMPLOYEES
ASSOCIATION and PUBLIC
EMPLOYEES LOCAL 71,

Respondents.

PET 87-11 and 87-12

ORDER AND DECISION NO. 114

SUBJECT: VALIDATION OF FIRST-ROUND ELECTION RESULTS FOLLOWING
INVESTIGATION AND HEARING RESPECTING OBJECTIONS
RAISED BY PETITIONER

The State Labor Relations Agency (the "Agency") convened a special meeting on June 13, 14, and 15, in Anchorage to investigate, through a hearing, objections raised and filed by the Alaska Public Employees Association (APEA) concerning a representation election held and tallied on May 11, 12 and 16, 1988. At the hearing, Chairman C. R. "Steve" Hafling and members Ben Humphries and Marlene Johnson were present and so constituted a quorum. APEA presented its arguments and evidence through counsel William K. Jermain. Respondent Alaska State Employees Association (ASEA) presented evidence and arguments through counsel Don Clocksin. Respondent Public Employees Association, Local 71 (Local 71) presented evidence and arguments through counsel Kevin Dougherty. Testimony, documentary evidence, and the Agency's record of all proceedings on the petitions was submitted and considered. The Agency having considered the arguments, evidence, and the record, renders this decision in satisfaction of its investigatory obligations and upholds and validates the first-round election,

with further direction that a run-off election between ASEA and Local 71 be held.

FACTUAL AND GENERAL BACKGROUND

1. APEA is the certified and incumbent collective bargaining representative of the general government unit (sometimes "GGU") of public employees comprising some 7500 employees in State Government located at over 900 work stations throughout the State. APEA has been the only certified representative of this group since enactment of the Public Employment Relations Act. Since early 1987, APEA has been representing these employees without a written contract with the State, subject to various terms and conditions entered into between the State and APEA during the pendency of contract negotiations.

2. Local 71 is the certified collective bargaining representative of blue collar workers employed by the State of Alaska. On December 17, 1987, Local 71 filed a petition seeking to decertify APEA and calling for an election between APEA and itself respecting representation of GGU employees. ASEA, a newly created organization affiliated with the American Federation of State, County and Municipal Employees (AFSCME) filed a petition on December 22, 1987. Local 71's petition was denominated PET 87-11 and ASEA's was denominated PET 87-12.

3. In order to file an appropriate petition, ASEA and Local 71 needed to present showing-of-interest cards from over 30% of the eligible employees in the general government unit. Initial tallies indicated that insufficient valid showing-of-interest cards had been presented with each petition. As such each of ASEA and Local 71 sought and obtained additional showing-of-interest cards. On February 1, 1988, ASEA's showing-of-interest cards were validated by the Agency as representing over 30% of the eligible employees; two days later, Local 71's cards were similarly validated. Upon acceptance of the petitions, the Agency met with representatives of APEA, Local 71, and ASEA respecting posting of notices of the filing of a representation election petition and setting the date for a hearing to determine the propriety of an election pursuant to the Public Employment Relations Act. APEA, as automatic intervenor, sought a hearing.

4. Petitions were duly posted setting March 14, 1988, as the date for a hearing respecting the representation election. All Agency members were present at the hearing. At the hearing, APEA withdrew its opposition to the conduct of the representation election. The parties then met with the Agency in a non-adversarial setting on record to determine certain ground rules and preliminary matters regarding election

procedures. Procedures were prescribed whereby the State, as employer of the affected employees, would provide Excelsior lists and eligibility lists for the use of the unions and Agency, and provided for the day of election and counting procedures. The parties agreed to a mail ballot election with the vote tally on May 11, 1988. Dates respecting distribution of information and posting of notices were set by working back from May 11, in order to comply with the time requirements for notice and eligibility of voters.

5. Excelsior and eligibility lists were provided to the parties and APEA, ASEA and Local 71 commenced vigorous campaigning. Commencing April 12, 1988, the State mailroom mailed 7,689 ballot packets to all apparently eligible employees. Certain remedial measures were undertaken, and 5,986 ballots were received by the Agency as of 8:30 a.m., May 11, 1988. More ballot packets have come in since.

6. On May 11, 12, and 16, 1988, the Agency counted ballots that had been delivered by 8:30 a.m. on the morning of May 11, 1988. A substantial number of ballots were challenged. The final tally, after certain challenged ballots were counted and arguments respecting challenges heard, produced a result whereby ASEA received 1,565 votes, APEA received 1,551 votes, Local 71 received 1,554 votes, and the choice of "no representation" received 70 votes. Four valid ballots were left blank, and 1,242 ballots were not counted as a consequence of various challenges. The reconciled tally of votes counted and considered is set forth on Exhibit A attached to and incorporated into this order and decision.

7. As the union receiving the fewest number of votes, APEA filed objections to the election on May 23, 1988, a timely filing consistent with determinations by the Agency on May 16, 1988. Had APEA not filed timely objections, the Agency would have then validated the election results with a run-off election between the two highest vote-getters to follow.

8. Initially, the Agency proposed June 2 - 3, 1988, as a date to hear the objections. However, upon opposition by APEA to a shortened time frame, the Agency set hearings starting June 13, 1988 in Anchorage to consider objections. A pre-hearing conference was conducted between representatives of the unions and counsel for the Agency. The pre-hearing conference produced an Agency order setting a briefing schedule and the requirements for providing witness lists. Briefs and witness lists were exchanged. Certain pre-hearing discovery was undertaken including depositions of State Labor Relations officer Mike McMullen and Agency Administrative Assistant Gloria Kron.

A. OBJECTIONS RELATING TO ELECTION DATE/ELIGIBILITY DATE (APEA OBJECTION NO. 1).

1. APEA contends that the Agency never affirmatively set an "election date" as required under regulations, or alternatively if it did set the election date that date was most appropriately April 13, 1988 or before.

2. At the March 14, 1988 hearing, the Agency's counsel Robert M. Johnson stated that the date of the election would be the date the ballots were counted. The Agency concurred; there is no evidence that the Agency signified any disagreement with that statement. Subsequent actions including pre-hearing conferences and the full process of setting dates for purposes of posting notices of election and sending ballot materials to voters was premised on working backward from a May 11, 1988 election date. The Agency, as well as all parties including APEA, understood or should reasonably have understood that calculations respecting delivery of notices dated back from May 11. No analysis or discussion ever addressed a four-week cutoff date measured from any date other than May 11.

3. The notice of election provided information instructing eligible voters to cast ballots no later than 8:30 on the morning of May 11, 1988. The only fair implication from the notice of election is an election date on May 11, given the very title of the notice and given the last moment for receipt of ballots and commencement of counting of same. "Time and Place of Election" is followed by a designation of type of ballot, approximately when ballots would be mailed, and the return/counting date.

4. Excelsior lists and eligibility lists were initially prepared by the State respecting eligible GGU employees and delivered to APEA on approximately March 29, 1988 in Juneau and on approximately April 4, to ASEA and Local 71 in Anchorage. Each party signed a non-disclosure agreement. The Agency received its copies at the time Local 71 and ASEA received theirs. A second Excelsior list bringing current the names of hirees between the list generated at the beginning of April to April 13, 1988, the date four weeks prior to the May 11, 1988 election date was provided solely to the unions for the purpose of bringing current the list of eligible employees so that those eligible on the date "four weeks before the election date" pursuant to the Agency's regulations, could be ascertained and added to the previously provided lists.

5. APEA asserted that it did not know until the morning of May 11, 1988 that May 11, 1988 was the election date for purposes of vote tabulation. APEA therefore retained a continuing challenge to new hirees after April 1, 1988 and with

respect to the decision to exclude employees terminated after April 1, 1988. The "new hires" and "terminated" voter ballots were segregated from otherwise unchallenged ballots and subsequently counted. The new hirees group yielded 16 votes for ASEA, 13 votes for Local 71, and 3 votes for APEA. The terminated employees group comprised 30 ballots which were not counted.

B. OBJECTIONS RELATING TO DEFECTIVE BALLOT NAMES
(APEA OBJECTION NO. 2).

1. The Agency considered the requests of the various unions for ballot designations. The Agency concluded that APEA'S request to be labeled "incumbent" and its request to identify ASEA as an "AFSCME affiliate" were issues relating primarily to campaigning and propaganda, and did nothing to preserve certainty among voters. As such the ballot when printed, contained four choices as follows:

ALASKA PUBLIC EMPLOYEES ASSOCIATION
(APEA)

ALASKA STATE EMPLOYEES ASSOCIATION
(ASEA)

PUBLIC EMPLOYEES, LOCAL 71, AFL-CIO
(LOCAL 71)

NO REPRESENTATIVE

The names were randomly rotated in the printing process.

2. APEA submitted that the entity that became APEA was known as the Alaska State Employees Association. Checks from APEA's Glenn - Rich Chapter apparently continue to bear the identification as Alaska State Employees Association, and APEA submitted such a recently cancelled check as evidence thereof.

3. Substantial election propaganda was disseminated by all parties in this election. APEA material was sent to all eligible voters known to APEA informing them that ASEA was an AFSCME affiliate. In some propaganda submitted by APEA, the ASEA affiliation with AFSCME was not mentioned.

4. No credible testimony by affidavit or otherwise was submitted which demonstrated a confusion in the eyes of voters that ASEA was APEA or visa versa.

C. OBJECTIONS RELATING TO BALLOT DISTRIBUTION, SECURITY AND VOTER CONFUSION (APEA OBJECTION NOS. 3, 5, 6, AND 10).

1. All parties agreed at the March 14, 1988 hearing to a mail ballot election in lieu of a combination of mail ballot and on-site elections or in lieu of solely on-site elections. The mail ballot election subscribed to by all parties served to avoid the logistics problems stemming from holding multiple election sites so that all 935 work places are fairly represented as well as to avoid the probable confusion arising from implementing dual voting procedures.

2. The Agency set forth proposals and discussions were subsequently held on March 14, 1988 with respect to the procedures for the mail ballot election. The Agency described its previous practice with mail ballot elections, to which the parties agreed. It was suggested that certified mail be utilized to verify voter receipt of mail ballot packages but, upon APEA opposition, all parties ultimately agreed that utilization of certified mail would be too burdensome and the mail delivery process too slow. All parties were provided drafts of language contained in, first, the notice of election posting material with affidavits and instructions to officials of the employer actually posting notices in the 935 work sites, and, second, ballots, instructions, and envelopes. The Agency described and intended that each mail ballot packet to be sent to a GGU employee at his or her home address would comprise the following:

- a. An outer envelope containing the whole packet addressed to the employee with a return address to the Agency;
- b. An inside postage pre-paid envelope which would be returned to the Agency by the voter; the envelope would be addressed to the Agency and would also carry lines for the voter's name, address, and identification;
- c. An inside small envelope marked "ballot";
- d. The actual ballot with the names of the four choices being randomly rotated; and
- e. An instruction sheet.

3. The process to be utilized and explained in the instructions (as well as in the notice of election proceedings) was that the eligible voter would mark the choice on the ballot, place the ballot inside the envelope marked "ballot",

seal the ballot envelope, place the ballot envelope inside the pre-paid envelope addressed to the Agency, and either mail the completed packet back to the Agency or personally hand carry and deliver it to the Agency. The instructions paralleled ones previously used in other Agency elections.

4. Due to the modest budget of the Agency and suggestions from the State, the Agency proposed to the parties that the Agency, unlike past smaller elections, would not itself prepare and mail the ballot packets to the voters. Rather the State printing office and mailroom in Juneau, a working area geared toward mass mailings, would be utilized. Union representatives were given an opportunity to be on-site at the time of mailing. The parties agreed to utilize the State for this purpose.

5. The text of the notice of election, the instructions to voters, and the ballots, as well as the general outlines of the envelopes and mailing materials were provided to the parties for their review. Some recommendations and changes were proposed, and some changes were made. The notices of election and attendant affidavits were mailed to the State, and the State commenced delivery through its personnel officers of the notices to work stations for GGU employees throughout the State. Posting was accomplished, and no objections were raised that posting was not properly performed. Affidavits were returned by State officials signifying that posting had been timely performed.

6. The printed materials for the ballot packages were delivered to the State. While in Juneau on business, Chairman Hafling and Assistant Kron met with the principal State contact for the printing process. At that time instructions were discussed and the placement of lines on the envelope to be returned to the Agency were made. The participants in the discussion agreed that a signature was redundant. The instructions printed by the State thus required a printed name, printed address, and social security number on the return envelope, but were silent respecting a signature.

7. When the envelopes and attendant materials were in fact prepared and mailed to eligible voters commencing approximately April 12 - 13, 1988, the reminder lines relating to name, address, and social security number were omitted erroneously from the pre-paid envelopes. Approximately two days after the mail ballot packets were sent to employees, Agency representatives were made aware of the missing lines, and a means of reminding employees that the instructions required information to be placed on the return envelope was discussed and agreed upon by the parties. Agency counsel Johnson contacted representatives of the unions and confirmed

the outlines of a remedial postcard to further remind employees regarding the placement of required information. That postcard was not sent out separately but its text was incorporated into the postcard described in the next paragraph.

8. By April 15, 1988, a number of employees had phoned in respecting sensitivities to disclosing the social security number on the return envelope. They were advised that a signature could be used in lieu of a social security number although a social security number would be helpful. Recognizing concerns voiced by employees, Chairman Hafling and counsel Johnson met with representatives of each of the unions on Saturday, April 16, 1988 to discuss alternatives. At least one representative from each union was present, with the APEA counsel John Gaguine participating by telephone conference from Juneau. It was considered whether or not the absence of reminder lines and the social security versus signature verification requirements posed such serious problems as to warrant reissuing ballot packets. The parties agreed that such a remedy was inappropriate, and that an appropriate remedy would be a mass mailing to all employees in the GGU of a postcard, the contents of which were specifically agreed upon by all parties. The postcard contained the following reminder:

LABOR RELATIONS AGENCY
- OFFICIAL NOTICE OF ALTERNATIVE VOTING PROCEDURE -

TO: GGU EMPLOYEES

You may SIGN the outer envelope in the GGU mail ballot election instead of providing a social security number.

In casting your secret mail ballot in the GGU election, DO NOT FORGET to print your name and address, and to SIGN your name on the outer envelope (the pre-paid postage envelope) which you will mail to the Labor Relations Agency. It is helpful, but optional, to place your social security number on that envelope. If your name, address, and either your SIGNATURE or your social security number are not on the envelope, your vote may be invalidated.

If you already voted and forgot to include your printed name and address and either your SIGNATURE or social security number, please contact the Labor Relations Agency for a new election packet.

Labor Relations Agency
P.O. Box 190701
Anchorage, AK 99519-0701
(907) 276-3564
(collect, if necessary)

[emphasis in original]. On April 19, 1988, the State printing office sent the remedial postcards containing the language described above to all GGU employees.

9. Through substantial advertising efforts, each of the unions reminded voters of their rights described in the postcard and ballot instructions.

10. After the State printing office mailed ballot packets it sent all extra ones to the Agency's office, the offices of Administrative Assistant Kron. The Agency printed or rubber-stamped reminder lines on the return envelopes relating to printed name, printed address, signature, social security number ("optional"). In addition paragraph 4 of the instructions previously used was changed in order to clarify that a signature was an appropriate verification device in lieu of a social security number, but that utilization of the social security numbers was helpful but optional.

11. Ballot packets were received from GGU employees by the Agency. During the first week 50% of all ballot packets were received and 67% of all ballot packets totally unmarked on the outside return envelope were received. The receipts were pursuant to the schedule set forth on Exhibit A. The pattern further indicated that while the bulk was received during the first week, the numbers of unmarked ballot packets declined proportionally the succeeding day.

12. The Agency's office directly sent out 576 ballots requested by telephone calls from persons purporting to be employees. On the assumption that sufficient checks existed to preclude of ineligible voters, the Agency's agents did not inquire as to specific eligibility of the caller other than to ascertain that the caller was at least representing him or herself to be the person requesting a ballot packets. APEA expert Dr. Art Bukowski testified that statistically not all of the 576 requests would comprise duplicate ballots, but that according to his calculations some 380 of the 907 unmarked envelopes reflected votes by voters who failed to comply with the written instructions to provide information and who did not request a second ballot to remedy their error. In addition to the 576 ballot packets sent out (each with return address lines and verification lines and with revised instructions), the Agency directly sent 158 ballots respecting new hires. Each of

these ballot packets also contained the return address lines and revised instructions.

13. With respect to updating the initial Excelsior list provided to all parties on or about April 1, 1988, the State provided "bring down" lists containing the new hires between April 1 and April 13, 1988 to all unions. In addition, the State provided additional information at the request of the Agency which information was provided in tabular form to all parties on May 11, 1988:

- a. A list of persons who had been terminated from State employment from April 1 forward.
- b. A list of some 200 part-time employees who had been inadvertently included on the initial list provided on April 1 and subsequently on April 13.

In addition, the State investigated whether Airport Security Officers and Court System Officers, two groups of employees who had been severed from APEA through decertification or unit clarification by the Agency in 1987 and 1988, had inadvertently been included on prior Excelsior lists. The State determined that none of these employees were on previous lists and that since only those employees who were on those lists had received ballots, ASO's and CSO's had not received ballots. Nevertheless, a number of ASO's and CSO's received ballot packets but did not vote.

14. APEA presented affidavits that purported to show confusion on the part of prospective voters relating to voting instructions. Only a few of the affidavits related to clarity of the instructions, and those affidavits were not particularly on point and in many respects not even helpful. APEA presented no live testimony respecting a lack of comprehensibility in the instructions other than speculation and semantics. ASEA argued (without specifically producing evidence) that the clarity of the initial instructions and second instructions were well within the so called "Flesch test" adopted by the Alaska State Legislature as a guideline for drafting regulations. GGU members, particularly most of those members who provided affidavits which can be construed to have contended the instructions were confusing, have a higher than average level of education and many have college degrees.

D. OBJECTIONS RELATING TO DUPLICATE BALLOTS.
APEA OBJECTION NO. 4).

1. As previously indicated the Agency invited persons through the postcard mailing of April 19, 1988 to

request second ballots if they thought they had omitted required information on the return envelope. Some 576 persons (not counting new hires) requested ballots. Of this group all or most comprised otherwise eligible persons.

2. Of the 576 requests for new ballots, it is unknown how many were second requests remedying an unmarked packet included among the 907 unmarked packets which were never counted or opened.

3. Of ballots that would have otherwise have been valid (but for eligibility determinations respecting the individual voter) 47 duplicate sets were received by the Agency. The Agency date-stamped all ballots received, and utilized the date stamp rather than the post marks (inasmuch as on pre-paid postage envelopes sometimes the post office does not apply post marks), and counted the later received ballot only.

4. Of the 47 sets of duplicates received 46 single ballots were accepted and counted. One set of duplicates was rejected in its entirety because of the ineligibility of the voter.

5. The Agency in previous elections consistently maintained a practice of counting the later received ballot primarily because virtually all Agency elections had been mail ballot elections.

E. OBJECTIONS RELATING TO DENIAL OF RIGHT TO VOTE BY
STELLA POWERS (APEA OBJECTION NO. 8)

1. APEA's notice of election indicated that individuals could personally deliver their own ballot at the Agency's offices prior to 8:30 a.m. on May 11, 1988. The Agency's offices are in a business suite owned and operated by Kron Associates and located at 1113 West Fireweed Lane, Suite 200, Anchorage, Alaska.

2. The suite of offices operated by Kron Associates is on the second floor of a seven story building with access via an open stairway and a security door. The security door is operated by utilizing a telephone and door buzzer system. At each of the entrances, a sign listing the Labor Relations Agency under the general heading of Kron Associates appears and each sign provides that office hours are from 9:00 to 5:00.

3. An employee of Kron Associates and agent of the Agency, Joanne Hitchcock, was at the offices from 8:00 a.m. onwards on May 11, 1988 and no voter came to the office to vote. The stairway entry was open, and boxes of ballots and

election material were being loaded into the truck by other Agency personnel.

4. Stella Powers, an eligible GGU employee, testified that she arrived at the location of the Kron Associates building sometime prior to 8:30 a.m. on May 11, 1988. She apparently did not notice the stairway entrance but attempted entry through the security door. She did not try the security system telephone, assuming incorrectly that the telephone was a pay phone of some sort. She testified that she was put-off by the notation that Kron Associates office was open only from 9:00 to 5:00.

5. On balance, the testimony suggested that by missing the open door and failing to even utilize the security system telephone, Ms. Powers simply did not take such practical and reasonable steps as would be appropriate under the circumstances to seek entry to the Kron Associates suite.

F. OBJECTIONS RELATING TO NEW HIRES ELIGIBILITY
(APEA OBJECTION NO. 9)

1. At the Agency's request, the State provided to all parties a list of employees hired between April 1 and April 13, 1988. Neither the Agency nor apparently any of the unions took any additional independent level of inquiry with respect to the validity or accuracy of the new hires list.

2. Each of the new hires on the list were mailed a ballot packet from the Agency's office, which ballot packets would have contained a return envelope with appropriate name and verification lines on it and the revised instructions relating to voting. The Agency mailed 158 ballot packets to individuals on the new hire list and 32 were received and counted by the Agency.

3. The State's representations that these employees had been hired and commenced work was not questioned, and as a factual matter it was unknown and no evidence was presented to dispute that any of the 32 newly-hired employees whose ballots were counted had actually commenced performing their job duties within their classification. APEA's inference that these voters included Seward Correctional Officers (see part J below) suggests however, that certainly some had started. The eligibility list provided the Agency indicated a start up date for each employee, and the testimony of Mike McMullen does not suggest that the start up date was anything other than an actual start up.

G. OBJECTIONS RELATING TO LAY-OFF (APEA OBJECTION NO. 11)

1. On approximately April 1, 1988, when the State provided Excelsior lists to union representatives and Excelsior plus eligibility lists to the Agency, the lists comprised three parts. The first part related to an "all other" category comprising the bulk of GGU employees. The second part comprised the "seasonal" employees. A third part was provided by the State and comprised an information only list of "lay-off" employees or persons whose status was not certain and was different from the "all others" or "seasonal" groups.

2. In tallying the votes, the Agency did not use the lay-off list as eligibility to vote was determined from other lists. Lay-off list employees were not counted, and were denominated in the counting process as either being "lay-off" persons and therefore ineligible to vote or denominated in many instances as "no list" employees ineligible to vote. The "no list" determination was simply a reflection that the employee's name did not appear on one of the five lists utilized by the Agency.

3. At the March 14, 1988 meeting, each of the unions including APEA agreed that the lay-off employees were not eligible to vote. Lay-off employees typically comprise persons who were laid off due to reductions in force who have a reasonable expectation of being called back because they are high on the recall list. However such an employee has no certainty with respect to being recalled or that a particular job classification would be in place and available to them in the future. Moreover, the lay-off employee has no obligation to return. Further, lay-off employees were not accruing retirement benefits or vacation leave.

4. During the tallying process, APEA signified that it had no generalized objections to preclusion of the lay-off category. Rather, APEA asserted error in the non-inclusion of a couple of employees on lists 2, 3, or 4 (see below) because those employees were not on lay-off status. The individual merits of these employees were later considered, and the votes of some were counted based on proof offered.

H. OBJECTIONS RELATING TO COMMINGLING AND OBSERVERS (APEA OBJECTION NO. 12 AND AS ARGUED IN BRIEF).

1. The May 11 and 12, 1988, proceedings were held in the Susitna Room, a 20 x 40' (minimum) well-appointed conference room on concourse C of the International Airport. Approximately 40 people were there, and the press (with cameras) made occasional appearances. The meeting was open to the public.

Airport noises were an occasional nuisance. Large conference type tables were used to provide appropriate work space. All the Agency personnel wore printed name tags identifying themselves as election officials.

2. On and before May 11, 1988, the Agency delivered to union representatives proposed ground rules and general discussion points including an estimate of the number of counting tables and Agency representatives that would be available. The Agency had a total of nine persons participating in the tallying procedure. None of these were GGU members. The participants in the tallying process for the Agency were Chairman Hafling and Member Humphries (member Marlene Johnson was not present), Counsel Johnson, Administrative Assistant Kron, two employees in the confidential bargaining unit from the State Division of Personnel, a paralegal from Mr. Johnson's office, and one or two employees from Ms. Kron's office.

3. At the outset of the meeting on May 11, 1988, three general stages of the tallying process were described: (1) verification of voter eligibility; (2) unchallenged vote tallying; and (3) resolution of challenged ballots. With respect to the verification of eligibility the Agency indicated that five lists, 2 through 6, would be used: the "all other" employees list, "seasonal" employees list, new hires list, termination list, and part-timers list. Employees whose names appeared on lists 2, 3, and 4 could be counted, but if the employee appeared on lists 5 or 6 the employees vote would not be counted. The Excelsior lists previously provided to union representatives comprised lists 2, 3, and 4, and photocopies of lists 5 and 6 were provided to the participants on the morning of May 11.

(a) Verification process. An Agency representative read the name of a voter from the outer envelope and the name would be checked against the five previously described lists by Agency representatives and by two observers from each union at one of the counting stations. Because of the number of lists that had to be addressed, more than one Agency representative and more than one union representative participated in each. When a voter was verified, the unopened envelope was placed in an "unchallenged" box. If the voter's ballot packet was challenged by any union representative it was placed in a separate box categorized by the general subject matter of the challenge. APEA's continuing challenges related to all new hires, the terminated list, and the duplicate ballots. Other categories kept included the "no list" or "lay-off" lists and those outer envelopes which did not bear complete verification data. Ballot packets without identification were segregated prior to the verification process. Virtually all duplicate ballots had been previously segregated although one additional

set was discovered. During the verification process, the Agency utilized its eligibility lists which contained significantly more information than the Excelsior lists, particularly social security number and job classification title. This information frequently permitted the validation of a voter who for example had moved from the address which showed on the Excelsior list.

(b) Unchallenged Vote Tally. After the unchallenged votes had been segregated, the Agency opened each of the outer envelopes of those votes and extracted the sealed ballot envelope inside. The secret ballot envelopes were then mixed, unopened, so that there would be no identification of whose ballot related to which outer envelope. On a few occasions, some markings appeared on the ballot envelope, and after informal discussions, objections were generally withdrawn by all parties respecting markings on the inner envelope provided that when the envelope was opened, the ballot itself was maintained separately from the envelope. No parties objected to this procedure.

After the ballot envelopes had been extracted and mixed, the Agency proceeded at three work stations to slit open the ballot envelope, read the result of the ballot, and pass the ballot past at least three observers, one from each party at the counting table. Only Agency representatives actually handled the ballots. On a couple of occasions the ballot was misread but either an observer or an Agency agent corrected the error. Tally sheets were utilized by the Agency and identical duplicate tally sheets were used by each of the unions at each table. At each station, the procedure required that as one of the ballot choices reached 25 votes the process was stopped, the package of 25 votes for that particular choice was recounted and banded, and each of the Agency and duplicate union tallies verified as having reached the same numerical result. This process proceeded for approximately 12 hours on May 11 through May 12, until 4,610 unchallenged ballots had been opened and tallied. The unchallenged ballot tally was 1,513 for ASEA, 1,510 for Local 71, 1,515 for APEA, 69 for the "no representation" choice, and 3 were blank.

(c) Challenged Ballots. Because of the close result, challenged ballots obviously made a difference, and required analysis, review and decision. Each of the challenged ballots were reviewed by category, with the results tabulated separately provided that the group was not so small as to likely identify the voter. Challenged categories were as follows:

- (i) New Hires comprised employee names appearing on list 3. These were counted.

- (ii) Terminated comprised employee names appearing on list 2, 3, or 4 and also on list 5. These were not counted.
- (iii) Part-time comprised employee names appearing on list 2, 3, or 4 and also on list 6. These were not counted.
- (iv) Lay-off comprised employee names appearing on a lay-off list. These were not counted.
- (v) Not on any list comprised employee names not appearing on list 2, 3, 4, 5, or 6. Some may have been on lay-off lists or were known to be laid off employees. These were not counted.
- (vi) Duplicates comprised employee names appearing on two ballot packets. The later received ballot was counted, the earlier ones not counted and not opened. One duplicate set was rejected because the name was in the lay-off category.
- (vii) Signature or social security comprised ballots packets where the outer envelope (or when opened, the interior of the envelope) contained either a social security number or a signature, but not both. These were counted.
- (viii) Insufficient information comprised ballot packets where the outer envelope contained some information such as a printed name and address only or just an address and when the outer envelope was opened, no additional information was found. These packets contained neither a signature nor a social security number. These were not counted.
- (ix) Random challenges comprised miscellaneous claims made as to the employee's actual status, and where evidence was considered. These challenges related to the accuracy of the Excelsior lists. These were counted.
- (x) Social security verified comprised ballot packets containing only a social security number or just an address and a number. The State was contacted to check these numbers against a numerical-sequence list

and the numbers corresponded with names on lists 2, 3, or 4. These were counted on May 16.

- (xi) Unmarked outer envelopes comprised those ballot packets containing no information on the outer envelope and no evident clue that information was contained inside the envelope. These were not counted.
- (xii) No ballot comprised one ballot packet received without a ballot inside.

With respect to a signature on the outer envelope, Agency members reviewed the envelope to see whether what appeared to be signature did in fact appear. (In these instances a social security number was not present to provide the alternative verification source). In some instances clear printing only existed. In some instances it was not absolutely clear whether the printed name constituted script. Reasonable determinations were made in each of these respects, erring on the side of counting the ballot. Each of the union representatives at each of the three counting tables had an opportunity to object, and if any one party objected the ballot was set aside for further review and a determination was made by the Agency as to whether or not a signature did in fact exist.

4. The categories of challenges produced overall results which squared with the close vote obtained in the unchallenged category. The only statistically significant aberration noted by APEA expert Dr. Bukowski was the new hires category in which APEA received significantly fewer votes than did ASEA or Local 71.

5. During the course of the proceedings on May 11 and 12, 1988, the work room occasionally grew noisy, but never so noisy as to preclude the Agency from continuing its tedious task. On some occasions quiet was requested, on other occasions Agency members reminded observers that no one could touch any of the ballot materials, and the Agency further reminded people present that they could not venture behind the counting tables. Emotions were high particularly as the realization grew that the vote was very close. Verbal confrontations between APEA representatives and representatives of other groups occurred on at least two occasions. At the close of the work session on May 11, 1988, the room was sealed with evidence tape and airport security was contacted to ensure that a continuing check was maintained on the room. No evidence of tampering was discerned.

6. All ballots were kept in the separate categories noted above and after ballots were removed from the outer envelopes, the outer envelopes were maintained in analogous separate banded packages. The Agency has not destroyed any materials from ballot packages received during the course of this election.

I. OBJECTIONS RELATING TO ERRONEOUS LISTS
(APEA OBJECTION NO. 13)

1. Prior to the election, only the State had direct access to information relating to eligibility of the 7,500 GGU employees state wide. The Agency had no independent source of information. APEA had a union dues check off list containing much of the same information relating to GGU employees as required and permitted under its collective bargaining agreement with the State. APEA received this informational list between the 5th and 15th of each month.

2. The deposition of Mike McMullen, of the Division of Labor Relations was taken prior to the hearing. Mike McMullen was the primary State official involved with preparing the Excelsior and eligibility lists requested by the Agency and distributed to the participants in this election. Mr. McMullen indicated in his deposition that a lag of two to six weeks existed between an employee action (such as new employment, transfer between units, or termination) and entry into the computers for Excelsior-type list generation. The computerized lists provided by the State in this matter were done in good faith and with the best of intentions.

3. Mr. McMullen recognized that an error did exist with respect to ascertaining whether terminations prior to April 1, 1988, had been picked up and reflected in the termination lists subsequently provided by the State. He determined that while the computer had been instructed to search for terminations after April 1, the computer had not been instructed to pick up terminations prior to April 1. APEA has contended that between 50 and 70 such employees were thus inadvertently and impermissibly included on the Excelsior list. A list of allegedly terminated employees was provided by APEA to the Agency after the election and the Agency was requested to determine which of those employees were determined to be eligible for purposes of casting ballots. The Agency determined that 15 employees on that list -- assuming that the list indeed constitutes a list of terminated employees -- were allowed to vote. Separate independent evidence of termination of these employees was not introduced at the hearing.

4. In the course of the election proceeding APEA never registered any challenges respecting the inclusiveness of

any individual employees allegedly terminated from GGU-covered employment prior to April 1, 1988.

5. In addition to its objections regarding inaccurate lists from the State, APEA filed unfair labor practice charge 88-13 on this issue as well.

J. OBJECTIONS RELATING TO ELECTIONEERING
(APEA OBJECTION NO. 14)

1. On April 27, 1988, ASEA invited GGU-covered correctional officers from the newly opened Seward Correctional Facility to a get-together at the Pioneer Inn in Seward. ASEA paid for drinks (including alcoholic beverages) and hors d'oeuvres. Correctional officers attended as did representatives from APEA. On other occasions ASEA passed out, hats, pens, and cups with ASEA logos.

2. At the get-together, ASEA and presumably APEA each campaigned for their respective positions. ASEA representatives recommended to the correctional officers that if they had not received election ballot packets that each should call and obtain one from the Agency. There is no evidence that correctional officers cast ballots or even had ballots on April 27.

3. There is no evidence that free food and drink, (or hats, pens, or cups) were provided as a specific inducement or consideration for a vote. There was however campaigning.

4. Evidence was presented that Local 71 and possibly APEA also provided drinks and food on other occasions to GGU employees in order to insure an opportunity in which to campaign on issue. No evidence was presented that those activities involved any exchange of food or drink for a vote.

5. The correctional officers at the Seward Facility comprised some of the new hires permitted to vote, and whose votes were challenged. The new hire votes went predominately for ASEA and Local 71 as distinct from APEA. It is not known how many correctional officers participating in the get-together at Seward voted.

6. In addition to its objection regarding the Seward Facility and with respect to Local 71 furnishing gratuitous meals and other items on other occasions, APEA filed unfair labor practice charge 88-12 on this issue as well.

K. OBJECTIONS RELATING TO REMOVAL OF LISTS
(APEA OBJECTION NO. 15)

1. While APEA filed an objection relating to this matter, no evidence was introduced, and it appears that APEA has abandoned this claim.

2. The Agency announced to participants in the election on May 11, 1988, that participants would not be allowed to check off names of persons who cast ballots on lists in order to maintain the confidentiality of whether or not people chose to vote. Subsequently during the proceeding the Agency agreed to permit literal checking off of names in order to facilitate the union observers' validation tasks given the number of validation lists being utilized. However with this change in procedure, all participants were advised that they would not be allowed to remove from the premises such marked up lists. No objection was raised to this procedure.

3. At the close of the proceeding on May 12, 1988, Local 71 brought to the Agency's attention that ASEA and APEA had removed lists. ASEA with apologies returned a list which bore check off marks the next day. It was unclear whether APEA's lists had been removed by APEA or any one else. However it appeared subsequently that an APEA list may in fact have been removed by an APEA representative inasmuch as a photocopy list bearing checks was utilized in the depositions of Mike McMullen. An APEA list has not been returned to the Agency.

4. In addition to its objections regarding list removal, APEA filed unfair labor practice charge 88-12 on this issue as well. ASEA moved to release the lists through a formal motion at the objections hearing.

CONCLUSIONS OF LAW

1. The Public Employment Relations Act (AS 23.40) grants the Agency authority and responsibility for administering decertification and representation elections. The Agency's obligations respecting elections are further prescribed in regulations, particularly those at 2 AAC 10.140-220.

2. The Agency comprises three private citizens appointed by the Governor to the State Personnel Board. The Agency is charged with conducting elections as well as reviewing any objections relating to the election. Here all three members of the Agency participated in the March 14, 1988, hearing and two members of the Agency participated in the actual vote tally on May 11, 12, and 16. All three members of

the Agency considered the objections filed by APEA pursuant to 2 AAC 10.180.

3. APEA's motion to recuse Hafling and Humphries asserts an inability of these members to vote dispassionately with respect to objections concerning the actual conduct of the election in which they had hands-on participation. However the actions taken on May 11, 12, and 16 did not constitute final determinations of the Agency any more than preliminary or evidentiary rulings and the like constitute a final administrative or judicial ruling. The objections constitute an on-going part of the election proceeding of which the tally also constituted a part. If Hafling and Humphries were to recuse themselves, the sole arbiter would be member Johnson who would alone not constitute a quorum of the Agency within the meaning of 2 AAC 10.410(f). The Agency denied the recusal motion by APEA, and its denial was appropriate and correct.

4. Setting aside the expression of voters through an election imposes a heavy burden of proof on the challenger. NLRB v. Belcor, Inc., 108 LRRM 2244, 2247 (9th Cir. 1981); NLRB v. Skelley Oil Co., 82 LRRM 2641, 2643 (8th Cir. 1973). Here the filing of objections to an election pursuant to 2 AAC 10.180 places the burden of proof upon the challenger APEA.

5. The results of this election are numerically very close with but three votes being the difference allowing Local 71 to appear in a run-off election and APEA being ineligible to appear. The closeness of the vote is logically a factor to consider in determining the correctness of an election. In NLRB v. Gooch Packing Co., 457 F.2d 361, 362 (5th Cir. 1972). However, a numerical test is not the test to determine election validity, and the closeness of the election becomes a factor only insofar as it relates to the insubstantiality or substantially of an error or event which impacts the fairness and legitimacy of the election. Lemco Construction Co., 124 LRRM 1329 (NLRB 1987); see also the analysis in Finkelstein and Robbins, "Mathematical Probability in Election Challenges", 73 Col. Law Rev. 241 et seq. (1973) ("... the number of irregular votes required to generate even a small probability of reversal rises very rapidly with the winner's plurality, probably much more rapidly than most statistically uneducated persons would suppose" at 246). The proof must establish initially that there were errors, flaws, or irregularities in the voting process before the substantiality of errors, flaws or irregularities has to be considered. The test in Alaska is that an election is to be overturned only upon a showing of election misconduct or specific scienter. Misconduct is a significant deviation from statutorily or constitutionally prescribed norm which introduces a significant bias in an election. Hammond v. Hickel, 588 P.2d 256, 258 (Alaska 1978), Boucher v. Bomhoff

495 P.2d 77 (Alaska 1972). Good faith may even preclude a finding of malconduct. Hammond v Hickel, supra; In re Contest of election of Vetsch, 71 NW.2d 652 (Minn. 1955).

6. The statistical analysis of election results in this particular matter, including assertions by APEA's expert witness, suggests that the only adverse impact to APEA was the counting of new hires. With respect to other deviations, including the 907 unmarked ballots, Dr. Bukowski concluded that, more probably than not, the same equal distribution of votes would have occurred. The new hires ballot packets were all sent from the Agency's office and were only in envelopes with lines for name, address, and social security number/-signature included on the return envelope. These packets would thus not have fallen within the unmarked category and therefore would not have changed the result among unmarked ballots. In the absence of finding fraud or corruption in the election, the Alaska Supreme has noted that statistical norms will carry through. Hammond v. Hickel, 588 P.2d at 260. No fraud, corruption, or improper scienter has been demonstrated in this matter, and the only fraud or corruption which has even been suggested in this process is a generalized assertion of bias by the State in its printing/distribution role. Evidence clearly did not support a finding of fraud, corruption or scienter in the State's participation in the list preparation and mail ballot preparation process.

7. The procedures used by the Agency were not those prescribed in the NLRB Case Handling Manual. The long-standing Agency procedures utilized were explained to the parties, and at no point was a suggestion raised that the Agency should utilize exclusively NLRB procedures with respect to the mail ballot GGU representation election. The Alaska Supreme Court in Hammond v. Hickel imputed a waiver of claims by inconsistent acts and a failure to utilize opportunities to object in timely fashion. 588 P.2d at 264-65. In any event, it has been held that "election procedures are not meant to be inflexible and details of conducting specific elections are felt to be the expertise of the Board and need not be formally incorporated in board rules and regulations." Walter A. Kelley, 24 SLRB No. 220, 49 LRRM 1427 (1961).

8. Agency Regulation 2 AAC 10.440(b) provides that:

Relevant decisions of the National Labor Relations Board and Federal courts will be given great weight in determinations made under this chapter and AS 23.40.

There is no obligation on the part of the Agency to blindly incorporate NLRB precedent, and in fact no specific requirement

that NLRB procedures, such as those contained in the NLRB Case Handling Manual, as distinct from decisions, are to be adopted. This is not however to say that the NLRB Case Handling Manual is inappropriate or does not have good suggestions. Moreover as will be discussed below, Agency decision-making particularly with respect to determinations on challenged ballots is not particularly inconsistent with NLRB procedures or decisions.

NLRB decisions (or procedures) have a long history, but in the private sector. The Public Employment Relations Act is public sector labor law requiring the Agency to make determinations in the context of public employment as well as within the factual context of a mail ballot election conducted throughout the largest state.

9. A significant issue throughout these proceedings is the waiver or estoppel of arguments made by APEA in its objections. Waiver and estoppel arguments arise in two contexts:

First, by specific agreement to and knowing participation in certain procedures, APEA assisted in the development of procedures which arguably produced and justified the following circumstances:

- (a) May 11, 1988 as the election date (part A below);
- (b) The utilization of non NLRB ballot and notice procedures in the mail ballot election (part C below);
- (c) The determination not to count 907 unmarked and 129 partially marked ballots (parts C and H below);
- (d) The counting of 158 new hire employees (part F below);
- (e) The determination not to count lay-off list employees (part G below);
- (f) The tallying procedures utilized on May 11, 12, and 16, 1988 (part H below).

Second, estoppel and waiver arises in a context of precluding APEA's objection as to certain points which it should have raised in the form of timely challenges. The Agency's regulations provide a mechanism whereby challenged ballots are set aside from unchallenged ones and resolved only if the election result is close. 2 AAC 10.170. Logically this

means that challenges must be raised in time to segregate challenged ballots from otherwise unchallenged ones. Objections, by distinction, go to the manner in which an election was conducted or to conduct affecting the results of the election -- these must be raised within five days after the tally of ballots has been furnished pursuant to 2 AAC 10.180. NLRB v. Tower Co. 325 U.S. 324 (1946); NLRB Case Handling Manual sec. 11360. Certain of APEA's objections are new challenges and are therefore untimely.

10. Legal analysis of each of the major points raised by APEA set forth in the same sequence as discussed in the findings of fact above.

A. OBJECTIONS RELATING TO ELECTION DATE/ELIGIBILITY DATE.

1. The "date of an election" is referenced in 2 AAC 10.140 and 150. The date of election is relevant with respect to notice to the employee in order determine the timeliness of submitting a ballot and with respect to a point from which eligibility for voters can be determined.

2. In this case, the posted (and mutually agreed upon "notice of election") provided a specific time and place of election in the notice. Further, the Agency, through agents and by actions directly, and with the acquiescence and certainly non-objection of APEA, measured backward from May 11, 1988, the four week period for eligibility of voters. Statements by the State and Mike McMullen, as well as participation by APEA in the March 14, 1988 proceeding and knowledge by APEA of a second Excelsior list which identified employees falling outside the four-week eligibility exclusion period (that is, April 13 to May 11) establishes a sufficiently definitive election. APEA lobbied for the votes of Seward Correctional Officers, even though they were new hires; at no point did APEA complain that its campaign strategy had been compromised.

3. All employees knew pursuant to the notice of election and ballot instructions that their ballots needed to be delivered in person by 8:30 a.m. on May 11, 1988. There is a leap in logic to presume that the election occurred on any date other than that date on which ballots needed to have been filed.

B. OBJECTIONS RELATING TO DEFECTIVE BALLOT NAMES

1. NLRB decisional law does not compel an affiliation designation such as AFSCME following ASEA's name, to be identified on the ballot unless the affiliation is indeed a portion of the legal name of the petitioner. Yale

University, Case No. 39-RC-408 (1983). Where, on the other, hand it is necessary to differentiate between two unions each with the same local number, the affiliation addition is appropriate.

2. The Agency's regulations provide that in a certification petition, a petitioning union must designate its affiliation. 2 AAC 10.020(a)(4). The union must also designate a substantial amount of additional information. However the contents of the petition do not translate into the necessary contents of a ballot designation for the same collective bargaining representative. Compare 2 AAC 10.165(b).

3. That APEA sought to have its own name denominated as "incumbent" and sought to have ASEA designated as an affiliate of a larger national union are each potentially compelling campaign points. However names placed on the ballot are intended to avoid confusion and not to serve as a propaganda vehicle.

C. OBJECTIONS RELATING TO BALLOT DISTRIBUTION, SECURITY, AND VOTER CONFUSION.

1. It is paramount that an election be administered so as to give the electorate the fairest opportunity of selecting candidates. General Shoe Corp., 21 LRRM 1337 (1948). Here ballot procedures and counting procedures were utilized to promote a filing of mail ballots by eligible employees, with sufficient security steps designed to preclude ineligible voters.

2. The instructions provided to employees as originally drafted and subsequently amended in order to address the reluctance to provide social security numbers were sufficiently and legally explicit. The language utilized was vetted with the affected unions, and no objections were raised as to the content and form of the ballot packets. Moreover, telephone conversations between representatives of all unions, particularly including APEA, on April 14 and 15 and then a conference with representatives of all unions on April 16, 1988, yielded a plan whereby the electorate was reminded to enclose required information, was reminded to provide either a signature or a social security number, and was reminded that if there was any doubt in the voter's mind that he or she had cast an improper ballot that a second ballot could be obtained from the Agency. Sufficient evidence has been entered to suggest that all employees had the opportunity to in fact request and cast a second ballot and satisfy their concerns regarding disclosure of a social security number.

3. The union representatives including APEA agreed that the alternative of simply sending out new ballots to all employees was not favored. Given that election procedures even

under the NLRB are not static and are subject to flexibility given the circumstances (see for example Case Handling Manual respecting different procedures and duplicate ballots at section 11336.4), the procedures utilized by the Agency and acquiesced to by APEA are not inappropriate. Moreover the Agency's initial materials were not in error or subsequent remedies were not in error.

4. On the first set of instructions and ballots provided to all employees, a social security number was required. Social security numbers have previously been required by showing-of-interest cards by unions in this particular election, and the request for social security numbers had not been objected to by any unions, including APEA. However recognizing the sensitivity of certain persons to disclosure of social security numbers and the federal restriction on compelling the use of a social security number in order to obtain a right, the Agency quickly revised its balloting procedures to invite alternatives to social security numbers and to remind voters to in fact place identification information on the return envelope as it had already requested in the instructions. The omission of lines to place name, address, and identification information on the pre-paid envelope returning to the Agency was a printing error, but the instructions specifically required that information and it is not unreasonable to presume that voters would read instructions on matters of importance to them. The lines themselves served only as a reminder to voters, and did not constitute an independent requirement.

5. The final tabulation showed that 907 ballots had been cast without any exterior markings but that 576 ballots (in addition to new hire employees who were independently sent ballot packets) were cast presumably remedying previously shortcomings on ballots provided. The result does not show any other than that some people did not read instructions. Errors are attendant in any voting procedure, and indeed presumably underlay the general disfavor by the NLRB toward mail ballot elections. However no evidence had been adduced that people refused to supply requested information, but only that they did not read instructions. The instructions were sufficiently plain on their face, and the lines on the outer envelope constituted a helpful reminder but were not in of themselves legally compelled. In any event the opportunity existed for sending new ballot packets to all employees, but this alternative was opposed by the union representatives including APEA.

6. APEA argues that the Agency erred because it failed to check each individual signature and that in any event any mark contained on the outer envelope constitutes a signature. The Agency did not have at hand signature examples of

employees, but drew an appropriate conclusion that a mail ballot indeed came from a person it purported to come from when it came with an apparent signature and social security number. APEA failed to challenge the validity of any signature and therefore the eligibility of a voter at that point in time. Thus APEA's contention that signatures were not available was a challenge and is not an appropriate post-election objection. 2 AAC 10.140.

That the Agency ascertained that certain marks did not appear to be signatures constitutes a subjective, good faith determination not refuted by evidence presented by APEA. A signature is meant to be "nothing more than a means of affirming the identity of the signator and of authenticating the document which the signature is affixed". Fischer v. Stout 741 P.2d 217, 225 (Alaska 1987). Thus if an apparent signature existed, the authenticity of the ballot packet -- was not in doubt. However, if the Agency concluded that a signature did not exist, APEA had the burden to challenge and rebut with proof that determination. APEA not only did not object in a timely fashion, but indeed specifically opposed the counting of ballots containing a printed name but no signature or social security number. Its reversal of that position in these objections now is inappropriate.

D. OBJECTIONS RELATING TO DUPLICATE BALLOTS

1. The Agency precedent in counting the second ballot arguably but not necessarily conflicts with NLRB precedent contained in Case Handling Manual sec. 11336.4. The NLRB provides that in those instances where a second ballot is mailed to a person under circumstances due to for example the failure to sign the first ballot, the second ballot will indeed be counted. Id.

2. Not only is there a logic to the second ballot in a mail election being counted -- i.e., the election date is on May 11 such that the parties are free to choose their candidates up to the moment of the election -- but circumstances in this election justify counting the second ballot. Here, employees were invited to request a second ballot under circumstances such as when they may not have recalled whether they properly filled out an initial ballot sent to the Agency. If in those circumstances where they had properly filled out the first ballot, the second ballot received constitutes the more contemporaneous expression of their views and logically could be counted.

3. The Agency has preserved the outer envelopes of not only the second ballots received (and counted) but has tabulated independently the results of the duplicate ballots.

There has been no commingling whatsoever of the duplicate ballots with any other category of ballots received. Further, the uncounted duplicate ballot packets have been retained.

E. OBJECTIONS RELATING TO DENIAL OF RIGHT TO VOTE BY STELLA POWERS.

1. Persons casting ballots are expected to act in a reasonable fashion. The Agency properly determined that the preponderance of the evidence did not demonstrate that Stella Powers, with all due respect, acted as a reasonable person seeking to undertake an important act -- the casting of the ballot.

2. The preponderance of the evidence did not demonstrate that the Agency's office was closed and unavailable for the casting of a ballot by Stella Powers.

3. Even if Stella Powers was prevented from casting a ballot, her single vote would not change the result of the election. There is no proof to suggest that other persons were turned away from the office. Indeed some 37 other persons cast ballots in person at the Agency's office on other days.

F. OBJECTIONS RELATING TO "NEW HIRES" ELIGIBILITY

1. The regulations of the Agency provide that persons are eligible to vote who have been on the State's roster four weeks prior to the date of election and on the date of the election. 2 AAC 10.150(1) ["all employees found by the Labor Relations Agency and who are listed on the employment roll of the public employer ..."] (emphasis added)]. As such if May 11, 1988 were the date of the election, all persons on the State's roster as of April 13 and again on May 11 were eligible to vote.

2. The burden of proof with respect to challenging the inclusion of employees rests with the union. NLRB Case Handling Manual. The employers list is presumed to be accurate and no basis was presented by APEA to suggest on May 11, 1988, that the lists used were not properly reflective of whether or not the new hires were in fact on the job. NLRB v. Triangle Express, Inc., 111 LRRM 2227, 2229 (10th Cir. 1982).

3. APEA argued with respect to several individuals but did not argue generically that the Agency's list was inappropriate. Since APEA itself had a dues check-off list, it had a source of information to form the basis for challenges to the appropriateness of certain individual employees. No evidence was submitted to suggest that new employees were

anything other than at work on the new hire date, and indeed the deposition of Mike McMullen states the contrary.

G. OBJECTIONS RELATING TO LAY-OFF

1. 2 AAC 10.320(b)(2) provides that an "employee" [therefore eligible to vote] means "... a person employed by a public employer who is entitled to receive retirement and vacation benefits from the public employer." Lay-off employees do not receive retirement and vacation benefits and are therefore severable from the "all others" group of GGU employees "seasonal" group of GGU employees who were in any event stipulated by the parties to be eligible.

2. APEA specifically agreed that lay-off employees would not be eligible as a group to vote. APEA did however contend that certain persons who were described as being laid-off persons were factually eligible to vote and should have been on the list. APEA was permitted to submit proof with respect to the individual eligibility of those persons, and that proof determined whether or not they were eligible. NLRB v. Tower Co., supra; NLRB Case Handling Manual sec. 11338. As such the challenges to eligibility by APEA was addressed and resolved, and those challenges do not translate into the basis for an objection as to the lay-off lists generally.

H. OBJECTIONS RELATING TO COMMINGLING AND OBSERVERS

1. 2 AAC 10.170 provides that challenged ballots will be disregarded and not constitute a basis for objection if they are not numerically determinative of the election. As such, unchallenged ballots were tallied first and challenged ballots were then set out separately and considered by group separately. Categories of challenged ballots were not commingled with unchallenged ballots or with other categories.

2. Procedures relating to the conduct of the election are not "writ in stone," but need only be reasonable and designed to insure accurate counting pursuant to Agency "requirements" and "finding." 2 AAC 10.150. The factual circumstances underlying the tallying of voting on May 11, 12, and 16, do not demonstrate a level of disruption or interference with the tallying process. No credible evidence was adduced which suggested that APEA was hampered in its ability to challenge or not challenge ballots, or that the Agency itself was precluded from accurately counting and resolving challenges before it. The deference afforded the administering agent or election supervisor under even NLRB precedent is substantial.

3. APEA and other union representatives were permitted to participate in the formulation of the specific on-site procedures and timing to be used. APEA did not object to the actual logistics of counting and tallying the votes even though it had an opportunity to do so.

4. Each of the challenge categories produced appropriate and correct determinations as a matter of law by the Agency consistent with the requirements that the employee be identified as an eligible employee under 2 AAC 10.150 and the definition of employee in 2 AAC 120.220 (b)(1).

I. OBJECTIONS RELATING TO INELIGIBLE VOTERS

1. Eligible employees not only have to be those found to be eligible to vote but those who are "listed on the employment roll of the public employer" as provided in 2 AAC 10.150 (1). Thus even though there may be a time lag between a person's commencement on the job and appearance on an employer's roll, that fact always exists. Under-inclusive or over-inclusive lists, unless produced corruptly or fraudulently, are not reasons for setting aside elections. The lists are not intended to be an exclusive method of informing persons of a right to vote. NLRB v. Triangle, supra.

2. There has been no proof of anti-union animus or bad faith on the part of the State in providing the Excelsior or eligibility lists, nor is there any basis to suggest that the lists themselves were fatally unreliable or particularly were prepared with an eye toward being unreliable. The lists were as accurate as possible.

3. APEA itself had union check-off lists with which to compare lists provided by the State on April 1 and then later on about April 15. APEA's obligation to challenge the eligibility of voters was required to be made at the time of the election tally pursuant to 2 AAC 10.150. APEA did challenge whether or not certain persons should have been included, but its post election challenges as to eligibility are inappropriate under even NLRB standards.

J. OBJECTIONS RELATING TO ELECTIONEERING.

1. Free food and drink as part of a campaigning process are not per se violations under NLRB decisions. Peerless Plywood Co., 107 NLRB 127 (1953); Ohmit Manufacturing Co., 34 LRRM 1610 (1955).

2. Only if there has been a showing that free food and drink or other consideration is specifically provided in exchange for the casting of a ballot is there a violation. The

evidence in this situation shows no direct correlation, but only that the incident involving ASEA at the Pioneer Inn or that the instances involving free food or drink by Local 71 were anything other than permissible campaigning. These circumstances did not demonstrate the "atmosphere of fear and confusion" precluding a fair election. James Lees & Sons Co., 47 LRRM 1285 (1961). Nor were those facts analogous to outrageous circumstances such as noted in NLRB v. Labor Services, Inc., 721 F.2d 13 (1st Cir. 1983).

J. OBJECTIONS RELATING TO REMOVAL OF LIST

1. This objection seems to have been dropped by APEA.

2. Even if APEA objects, the removal of the lists is not relevant to the outcome of this particular election and is moot as to APEA. Moreover APEA itself has apparently conceded to the charge that it removed a list, and therefore its claim is inappropriate for that reason as well.

CONCLUSION

Based upon the foregoing findings of fact and conclusions of law, the Agency unanimously orders and decides:

1. The results of the representation election held and tallied on May 11, 12, and 16, 1988 are ratified and affirmed, and ASEA and Local 71 shall participate in a run-off election as soon as is practicable;

2. APEA's objections to the election are dismissed;

3. This order and decision sets forth in writing the rationale for the decision rendered orally in Anchorage, Alaska, by the Agency on June 15, 1988.

DATED this 21 day of June, 1988.

STATE LABOR RELATIONS AGENCY

By C. R. "Steve" Hafling
C. R. "Steve" Hafling
Chairman

Ex A - (Cron
b410)

ALASKA LABOR RELATIONS AGENCY
ANCHORAGE, ALASKA

PETITIONS 87-11 and 87-12

June 9, 1988
Statistical Data Compiled for Deposition.
GGU Election

Summary of ballots received.
Summary of ballots counted.

<u>DATE RECEIVED</u>	<u>MARKED BALLOTS</u>	<u>UNMARKED BALLOTS</u>	<u>TOTAL BALLOTS</u>
4/18/88	786	224	1,010
4/19/88	583	161	744
4/20/88	388	100	488
4/21/88	464	120	584
4/22/88	279	83	362
4/25/88	242	34	276
4/26/88	274	48	322
4/27/88	138	12	150
4/28/88	196	18	214
4/29/88	87	9	96
5/02/88	387	24	411
5/03/88	36	2	38
5/04/88	171	13	184
5/05/88	149	7	156
5/06/88	238	14	252
5/09/88	316	23	339
5/10/88	72	3	75
5/11/88	<u>270</u>	<u>15</u>	<u>285</u>
FINAL TOTAL	<u>5,076*</u>	<u>910</u>	<u>5,986</u>

*Total includes 161 ballots without social security number or signature.

*Thirty-six (36) ballots were hand delivered to ALRA Anchorage office.

Memo: Sixty-eight (68) ballots were returned by post office, indicating that they were undeliverable.

Memo: Ballots mailed out from ALRA Anchorage office was 576.

TALLY OF VOTES FOR VARIOUS UNIONS

	<u>Local 71</u>	<u>APEA</u>	<u>ASEA</u>	<u>No Representative</u>
Initial Ballots	1,510	1,515	1,515	69
Random Challenges	3	3	2	
No S.S. Signature	7	11	12	1
Duplicates	15	14	17	
New Hires	13	3	16	
SS # Verified w/ Div. of Personnel	<u>6</u>	<u>5</u>	<u>5</u>	<u>—</u>
Total 5/16/88	<u>1,554</u>	<u>1,551</u>	<u>1,565</u>	<u>70</u>

Page Two - Petitions 87-11 and 87-12
GGU Election Statistics

Blanks

Initial Ballots 3
No S.S. Signature 1
Total 5/12/88 4

TALLY OF THOSE BALLOTS NOT COUNTED

Unmarked outer envelopes	907
No signature or ss # on outside - envelopes opened and no identification was inside envelope	129
Uncounted duplicates	46
No ballot enclosed in envelope	1
Part time employees	67
Terminated 4/1/88 to election date	30
Duplicate - layoff	2
Layoff	1
Layoff - not on list	2
Not on any lists	<u>57</u>
TOTAL BALLOTS NOT COUNTED	<u><u>1,242</u></u>

4
1242