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EDUCATION SUPPORT STAFF ASSOCIATION, NEA-ALASKA, NEA,

Complainant,

v.

FAIRBANKS NORTH STAR BOROUGH SCHOOL DISTRICT,

Respondent.

CASE NO. 07-1506-ULP; CASE NO. 07-1507-CBA (Consolidated).

DECISION AND ORDER NO. 287

This matter was heard on June 18, 2008, in Fairbanks. Hearing Examiner Mark Torgerson presided, in accordance with 8 AAC 97.370.[1] The record closed on June 18, 2008.

Digest: The complaint by the Education Support Staff Association is granted. The Fairbanks North Star Borough School District committed an unfair labor practice when it unilaterally changed a mandatory subject of the parties' expired collective bargaining agreement prior to declaring impasse and without giving advance notice and opportunity to bargain the change. The District's unilateral declaration of impasse was invalid.

Appearances: Paul Grant, Attorney for Education Support Staff Association; Gayle Pierce, Director of Labor Relations, and Clarence Bolden, Executive Director of Human Resources, for Fairbanks North Star Borough School District.

Board Panel: Aaron T. Isaacs, Jr., Vice Chair; Matthew R. McSorley and Will Askren, Members.

[1] Hearing Examiner Torgerson was assigned by the Agency to hear the case alone and submit a proposed decision and order to the board panel, in accordance with the procedures outlined in 8 AAC 97.370 and 8 AAC 97.440.

DECISION

Statement of the Case

The Education Support Staff Association, NEA-Alaska, NEA (the Association) filed a complaint against the Fairbanks North Star Borough School District (the District), alleging that the District committed an unfair labor practice by making a unilateral change to the parties' expired collective bargaining agreement. The Association alleges that this unlawful change occurred when the District announced that it would not pay increments to employees whose anniversary date made them eligible for an increase from entry to base pay level under the 2003 – 2006 expired agreement.

The District denies the charge. It argues that by failing to dispute its declaration of impasse and by failing to request bargaining on the unilateral change, the Association waived the right to bargain over the unilateral change. Agency Hearing Officer Jean Ward issued a Notice of Finding of Probable Cause, and the case proceeded to hearing.

Issues

1. Did the District commit an unfair labor practice violation by unilaterally changing a term or condition of employment in the expired 2003 – 2006 collective bargaining agreement between the District and the Association, without providing adequate notice and opportunity to bargain, or without bargaining to impasse? Did the parties arrive at impasse at any time between July 1, 2006, and September 11, 2006, when they reached tentative agreement on a new contract that became effective September 18, 2006? If so, when did they reach impasse?

2. Did the Association waive the right to bargain over the District's unilateral change to the anniversary wage increment contained in the 2003 – 2006 collective bargaining agreement?

3. If the District committed an unfair labor practice violation, what is the remedy?

Findings of Fact

1. The Association[2] represents a bargaining unit of non-certificated employees of the District.

2. The District employs members of the Association's bargaining unit, some on nine-month contracts and others on twelve-month contracts.

[2] The parties also refer to the Association as ESSA.

3. The parties maintained a three-year collective bargaining agreement which was scheduled to expire on June 30, 2006.

4. On December 8, 2005, the Association notified the District of its intent to begin bargaining for a successor agreement to the 2003 – 2006 contract. The Association offered to meet on January 15, 2006. (Association Exhibit 1).

5. Six weeks later, on January 19, 2006, the District responded that it would be pleased to meet the Association's bargaining team on February 22, 2006. (Association Exhibit 2). The Association accepted the offer and agreed to meet on February 22. (Association Exhibit 3).

6. On February 22, 2006, the parties began bargaining for a new collective bargaining agreement for the 2006 – 2009 period. (Stipulation no. 1; Association Exhibits 1, 2, and 3).[3]

7. Negotiators for the parties reached a tentative agreement for a new collective bargaining agreement on May 9, 2006. (Stipulation no. 2; District Exhibit A).

8. The Association conducted a vote on whether to approve or reject the tentative agreement. Association members rejected the agreement by one vote on May 20, 2006. (Stipulation no. 3; Joint Exhibits I, II, III, and District Exhibit B; testimony of Buck George).

9. On May 31, 2006, Association President Irene Matheis informed the District that "[a]lthough a vote [to ratify the tentative agreement] was taken an unfortunate set of circumstances developed which caused the vote to be questioned and invalidated." (Association Exhibit 5; Joint Exhibit II). Matheis went on to inform the District that the Association was sending out another ballot, for a second vote, and the results would be available no later than July 7, 2006.

10. On June 29, 2006, Association President Pro-Tem Greg Rhines, who had replaced Matheis, notified Jennifer Schmidt, President of the District's Board of Education that on June 20, 2006, the Association's Executive Board had voted to uphold the May 20, 2006, vote that rejected the tentative agreement. Rhines added: "The Executive Board requests that bargaining resume as soon as possible." (Association Exhibit 6; Joint Exhibit III).

11. The parties did not reach agreement for a new collective bargaining agreement when the 2003 - 2006 agreement expired on June 30, 2006.

12. On July 11, 2006, the District issued a press release, "E.S.S.A. negotiations update." (District Exhibit B). In part, the District's release stated that, "[w]ith the rejection of the Tentative Agreement, ESSA employees will continue to be paid the hourly wage earned in 2005-2006. There will be no implementation of any other wage factors. Health insurance continues

[3] During the June 18, 2008, hearing, the parties submitted a document containing eight written stipulations.

and employees will continue with the current employee contribution to health insurance costs to be withdrawn from pay checks in September 2006. All other contract provisions will continue in keeping with the 2003 - 2006 agreement."

13. On July 20, 2006, approximately three weeks after the Association's request for bargaining, District Labor Relations Director Gayle Pierce notified Rhines that the District's bargaining team had considered the Association's request for a return to bargaining but took the position that the parties were at "'true impasse' because the Tentative Agreement represents . . . our last best offer and was achieved in the mediation process." Pierce further stated that the District bargaining team "stipulates that an impasse . . . exists." (Association Exhibit 7; Joint Exhibit IV). Pierce requested that the Association meet with the District to agree on the selection of an arbitrator or on a process to select an arbitrator.

14. On July 24, 2006, Association President Rhines responded that the Association would meet with the District on July 27 or 28. (Association Exhibit 8; Joint Exhibit V).

15. The same day that Rhines responded to Pierce (July 24, 2006), the District's Superintendent, Dr. Ann Shortt, sent a memorandum to hiring supervisors, with a copy sent to the district's management team, human resources, and to the Association. Shortt noted that the 2003 - 2006 collective bargaining agreement between the District and the Association had expired, and there was no successor agreement because the Association's members had rejected the tentative agreement. Shortt wrote:

> The 2003-2006 agreement will continue, however **wages will remain at the 2005-2006 hourly rates. There will be no changes based on anniversary dates or experience factor increments.**
>
> **New hires will begin at the 2005-2006 Entry Wage for the relevant job classification.** When recruiting new hires for classified positions please understand that classified employees hired after June 30, 2006 will be placed at the Entry wage of the 2005-2006 school year salary schedule in the expired agreement. The provision that employee's pay increases on the employee's one year anniversary date is not applicable. Movement beyond the 2005-2006 Entry rate will depend on the outcome of the negotiations process.

(Association Exhibit 9; Joint Exhibit VI) (Punctuation and bolding in original).

16. Article 14 of the parties' expired 2003 – 2006 collective bargaining agreement contains salary and related information, including salary schedules for bargaining unit positions and the pay grade (from 1 through 6) assigned to each specific position. Payment for increases in each of the three years included in the collective bargaining agreement would be made at one of three levels: entry, base, or max level. Generally, employees started at the entry level hourly wage in the salary schedule. Under Article 14.1, employees would then "move to base rate on the anniversary of their date of hire." (Joint Exhibit IX, at 28 – 34). Moving to the base rate results

in an increase in hourly wage. Article 14.1 also provides for payment of experience increments to "eligible employees," with specific percentage increments payable in each of the three years of the agreement. (*Id*. at 28). The Article defines "eligible employees" as "those who have been employed by the District for more than one (1) year and are not at the maximum salary amount for their grade." (*Id*.).

17. Shortt concluded her July 24, 2006, memorandum by stating: "Please reinforce the district's interest in settlement and the need to adhere to the appropriate legal impasse resolution process to reach a timely settlement. Above all please communicate that our classified employees are highly valued and appreciated as a critical component of the district workforce." (*Id*.)

18. Also on July 24, 2006, Shortt sent a memorandum to all classified staff, with a copy to the Association and to the District's management and human resources teams. In it, Shortt reiterated that the 2003-2006 agreement would continue, but the District would not change hourly wage rates over the 2005-2006 hourly rates, and there would be no changes based on anniversary dates or experience factor increments. (Association Exhibit 9, memorandum number 2; Joint Exhibit VI). Shortt added that the District would "follow state law . . . to continue the bargaining process. The next step is advisory arbitration which the district will vigorously pursue in order to reach an acceptable agreement as soon as possible."

19. The Association never specifically stipulated or agreed with the District that the parties were at impasse. Uniserv Director and Association team advisor Buck George testified that the Association did not believe the parties were at impasse at any time during the period from the date of Gayle Pierce's letter that declared impasse for the District, to September 11, 2006, the date the parties reached a second Tentative Agreement.

20. On or about July 27, 2006, the parties agreed to meet for advisory arbitration on September 11, 2006, with M. Zane Lumbley as arbitrator.

21. Sometime before the scheduled September 11 arbitration, the parties agreed to meet on September 8 and 9 to discuss and negotiate contract terms.

22. The parties met as scheduled, on September 8 and 9, 2006. They discussed and negotiated issues related to another tentative agreement. (District Exhibit C: Clarence Bolden notes from 9/8/06 meeting).

23. The parties reached another tentative agreement prior to the scheduled start of the September 11 advisory arbitration. (Joint Exhibit VIII).[4] However, the Association raised the

[4] Joint Exhibit VIII is a November 6, 2006, letter from Arbitrator Lumbley to Gayle Pierce. In the letter, he notes in two separate areas that the parties reached another tentative agreement before he arrived on September 11. There is no evidence to the contrary.

issue of the effective date of the agreement during the September 8 and 9 negotiations. Buck George testified that the issue of base rate anniversary pay for affected employees arose only after the issue of retroactivity was raised during September negotiations. The Association sought an effective date retroactive to July 1, 2006. This effective date would resolve the question of base rate anniversary pay. The District sought an effective date of September 18, 2006.

24. On September 11, 2006, the parties met with Arbitrator Lumbley, together and separately. The parties told Lumbley they had reached agreement. They added, however, that they had not resolved one remaining issue -- the effective date of the agreement, and the related issue of payment of wage increases for those affected by the District's decision to stop paying wage increments effective July 1, 2006, based on anniversary dates or experience factor increments. Because the parties were very close to agreement on all issues, Lumbley agreed to act as mediator on the remaining issue of retroactivity.

25. Arbitrator Lumbley met with the parties separately to discuss the effective date issue. The District told him the issue was a "deal breaker;" it would not agree to make the new agreement retroactive to July 1, 2006. After further discussing retroactivity with each side, Lumbley told the District that the Association informed him that the issue was "off the table."

26. Willie Anderson is a Uniserv Director for NEA-Alaska, from its Juneau office. He was asked by the Association to assist in preparation for participation in the parties' arbitration. During the Association's meeting with Lumbley, Lumbley told Association negotiators that the District would not budge on the effective date issue, and asked if there was anything the Association could do to save the tentative agreement. The Association decided it would drop its proposal to have an effective date of July 1, 2006, but it would pursue the issue of the base pay rate at a later date. According to Anderson, Lumbley agreed that the Association could pursue the base pay rate issue in the future.

27. The parties then reached a tentative agreement on September 11, 2006, and they asked Lumbley to review the agreement.

28. Arbitrator Lumbley sent the parties a letter, dated September 14, 2006, stating he had reviewed "in depth" the terms of the tentative agreement reached for the "proposed September 18, 2006, to June 30, 2009, collective bargaining agreement." (District Exhibit D). Lumbley informed the parties that he concluded that the agreement was "a fair and reasonable bargain for both parties as well as for the employees whom it is intended to benefit." (*Id.*) Lumbley recommended that the parties approve the agreement.

29. The District issued a press release on September 15, 2006. (District exhibit E). In it, the District announced that the parties had reached agreement for a new contract and that each party would be considering ratification in the near future. The District also outlined the "new salary schedule" that would start September 18, 2006.

30. On September 27, 2006, a District employee who was also a bargaining unit member emailed Gayle Pierce and expressed concern that because of differences in the wage scale of the old expired contract and the new proposed contract, it would take much longer to earn under the new contract what she would have been entitled to earn under the expired contract. She wrote that the Association told her she was among those who would "fall through the cracks" and her alternative was to file a class action lawsuit, which she did not want to do.[5] Pierce responded that the "terms in the old contract are not automatically carried forward into a new contract. The wage provisions of the 2003-2006 contract did not carry forward. Both parties agreed upon a new wage schedule and agreed how continuing employees would transition to the new schedule . . . I am sorry the new wage does not meet your expectations, but it does reflect a bargain agreed to by both ESSA and the district." (District Exhibit G).

31. On September 29, 2006, Gayle Pierce wrote Audrey Daigger, the Association's bargaining spokesperson, that the District had become aware that the Association may file a grievance over "appropriate placement and consequent compensation for employees who had a one year anniversary fall between July 1 and September 18, 2006. . . ." (District Exhibit H). Pierce asserted that in the District's view, "this matter was settled by the terms of the tentative agreement as it was understood by the Board on September 11, 2006." Pierce went on to state that the District's negotiating team had been told by the arbitrator that the Association "had dropped this subject as an issue in dispute. Consequently the Board's team accepted an agreement had been reached encompassing this issue as well as other disputes addressed during the bargaining process." (*Id*.) Pierce concluded by stating that "[w]e do not have a Tentative Agreement." (*Id*.)

32. Daigger responded that the Association's bargaining team "stands by their position that the two parties have reached a Tentative Agreement." (District Exhibit I). Daigger added that the Association's bargaining team "agreed to the terms of the Tentative Agreement with the understanding that ESSA may advocate on behalf of any member that brings forth a concern. We dropped this issue from negotiations in order to bring what we feel is a fair and equitable Tentative Agreement to the majority of our members." (*Id*.). Daigger said the team intended to put the parties' agreement to a vote on September 30, 2006.

33. On September 30, 2006, the Association issued a press release announcing that bargaining unit members had "overwhelmingly" ratified the parties' tentative agreement. (District Exhibit J). Subsequently, the District's School Board also ratified the agreement.

34. On October 12, 2006, Gayle Pierce wrote Arbitrator M. Zane Lumbley and complained about his handling of the parties' September 11, 2006, mediation.

[5] This employee's anniversary date was November 5, so she would not be one of the 18 or 19 employees whose anniversary date fell between July 1, 2006 and September 17, 2006.

> Your work with the ESSA and the Board when the parties were in separate caucus rooms to deal with the issue of the employees whose anniversary dates occurred after July 1, but before September 18, 2006, was very disappointing. As the parties confirmed on Friday, September 29 in a telephone conference with you, each party was left with a distinctly different impression of how the issue was addressed when the parties agreed to settle. The Board believed this issue was resolved – "off the table" as you had told the Board's team, while the ESSA team had been left with the impression the issue could continue in dispute by using the grievance process.

(Joint Exhibit VII).

35. Lumbley responded on November 6, 2006:

> I do not know how that misunderstanding could have occurred unless one or both parties misapprehended the mediation process. Because you had reached the Tentative Agreement before I arrived, and because no one could predict with certainty if grievances over the issue of post-July 1 wage increases called for under the old contract either would be filed or would be successful if taken to arbitration, only two choices were presented to the parties once the issue was raised, namely to amend the language of the Tentative Agreement or to forge ahead with the agreed language and deal with the issue later if grievances were filed.
>
> . . . .
>
> As you note, I did tell the District the last-minute issue was taken "off the table" by the Association. However, that did not mean it would not rear its head at some future date if in fact one or more grievances should be filed. What it meant in the mediation context, and in view of the Tentative Agreement, was that the Union adopted my suggestion not to endanger the entire [agreement] by continuing to press for some new agreement, including the concomitant language required to codify such an accord, regarding the last-minute issue. I did not say to the District in conveying the Association's decision that the latter had agreed there would be no grievances or, if there were, that it would refuse to prosecute them.

(Joint Exhibit VIII, at 1-2).

36. On October 17, 2006, the Association filed a grievance contending the District violated the 2003 - 2006 collective bargaining agreement when it "denied movement from the entry rate to the base rate of the salary schedule for employees whose anniversary date fell between July 1 and September 17, 2006." (District Exhibit K, at 4). The grievance advanced to arbitration. In a February 27, 2008, Arbitration Award, Arbitrator Robert Landau concluded that the grievance was not arbitrable under the expired 2003 – 2006 agreement. Among other things, the arbitrator

reasoned that the grievance was based on facts arising after expiration of the 2003 – 2006 agreement, "namely the anniversary dates occurring between July 1 and September 17, 2006." (*Id*. at 10 – 11). The arbitrator also reasoned that, "under principles of contract interpretation, the right to salary advancement on an employee's first anniversary date did not, either explicitly or implicitly, survive the expiration of the old agreement." (*Id*. at 11). In a footnote, the arbitrator acknowledged that it was "beyond the arbitrator's authority and jurisdiction to decide whether the facts giving rise to this grievance might constitute an unfair labor practice under Alaska's Public Employment Relations Act, and the arbitrator expresses no opinion on this issue." (*Id*. at 11, n. 7).

37. On September 4, 2007, the Association filed a petition to enforce the parties' 2003 – 2006 collective bargaining agreement, alleging that the District violated AS 23.40.200(g)(2) and 8 AAC 97.280(c) by failing to implement terms and conditions which were bargained in good faith under the 2003 – 2006 agreement. Specifically, the Association alleged that the District's refusal to pay entry-to-base level pay for affected employees between July 1, 2006, and September 18, 2006, was a contract violation, and the Association requested enforcement of the contract for all affected employees.[6]

38. The Association filed an unfair labor practice charge on September 4, 2007, alleging that the District violated AS 23.40.110(a)(5) by failing to bargain in good faith when it notified the Association it would not pay wage increases due under a provision of Section 14.1 of the parties' 2003 – 2006 collective bargaining agreement, after expiration of that agreement. The Association asserted that the District failed to bargain in good faith when it altered the status quo by unilaterally changing a term of the 2003 – 2006 agreement, namely that the District refused to pay wage increments to employees whose anniversary date fell between the July 1, 2006, expiration of the agreement and the September 18, 2006, effective date of the new agreement.

39. Joint Exhibit X is the collective bargaining agreement reached between the parties for the 2006 – 2009 period. The effective date of the agreement is September 18, 2006. It expires on June 30, 2009. The agreement contains a Memorandum of Understanding (MOU) that addresses payment of wages during a "transitional" period. (Joint Exhibit X, at 43). This MOU does not specifically address any issues related to employees whose anniversary dates, from date of hire and pursuant to Article 14.1 of the expired agreement, fall between July 1 and September 18, 2006. The parties agree that 18 or 19 bargaining unit employees fall into this gap.

[6] During subsequent filings, prehearing conferences, and the hearing, the Association did not pursue the line of argument reflected in this petition. The Association's focus was on the unfair labor practice charge it filed, as described in Finding of Fact 38. In light of arbitrator Landau's February 8, 2008 Arbitration Award, and in light of the fact the Association did not pursue its petition-related arguments or dispute the Arbitration Award at the June 2008 hearing, its petition is dismissed.

ANALYSIS

1. Did the District commit an unfair labor practice violation by unilaterally changing a term or condition of employment in the expired 2003 – 2006 collective bargaining agreement between the District and the Association, without providing adequate notice and opportunity to bargain, or without bargaining to impasse? Did the parties arrive at impasse at any time between July 1, 2006, and September 11, 2006, when they reached tentative agreement on a new contract for the period September 18, 2006, to June 30, 2009? If so, when did they reach impasse?

The general rule is that an employer is prohibited from unilaterally changing terms of a contract that are mandatory subjects of bargaining without first bargaining to impasse. The Association argues that the parties were not at impasse at any time during the period leading up to and including the meeting with Arbitrator Lumbley on September 11, 2006. The Association contends that under the agency's regulations, "true impasse" does not occur until the parties have exhausted the advisory arbitration procedures outlined in 8 AAC 97.280. The Association further contends that the District committed an unfair labor practice violation by failing to maintain the status quo when the District made a unilateral change to a mandatory term of the parties' expired collective bargaining agreement without bargaining to impasse.

The District argues that it appropriately made a unilateral change after the parties reached impasse, and the Association took no action to dispute impasse. Further, the District argues that in any event, the Association waived any right it had to bargain the change to the expired collective bargaining agreement when the Association failed to request bargaining after the District declared impasse.

AS 23.40.070(2) requires "public employers to negotiate with and enter into written agreements with employee organizations on matters of wages, hours, and other terms and conditions of employment[.]" The subjects of bargaining listed in section 070(2) are mandatory subjects of bargaining. *International Organization of Masters, Mates and Pilots v. State of Alaska,* Decision and Order No. 271 (December 28, 2004), *citing Alaska State Employees Association/AFSCME Local 52, AFL/CIO v. State of Alaska,* Decision and Order No. 158, at 15 (May 14, 1993), *aff'd. Alaska State Employees Association v. State of Alaska,* 3 AN-93-05800 CI (June 14, 1994). *See also TruServ Corp. v. N.L.R.B.*, 254 F.3d 1105, 1113 (2001). In this case, the provision in Article 14 of the parties' expired collective bargaining agreement dealing with movement from entry to base level pay on an employee's anniversary date affects unit members' wages and is therefore a mandatory subject of bargaining.

Under AS 23.40.110(a)(5), an employer commits an unfair labor practice by refusing to negotiate on these mandatory subjects: "A public employer or an agent of a public employer may not refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative." Moreover, "[c]onduct that violates AS 23.40.110(a)(5) can also interfere with rights protected under AS 23.40.110(a)(1). *See generally I Patrick Hardin, supra,* at 75 (discussing derivative section 8(a)(1) violations)." *Alaska Community*

Colleges' Federation of Teachers, Local 2402, AFT, AFL-CIO v. University of Alaska, Decision and Order No. 191 at 8 (Sept. 26, 1995) *aff'd* 3 AN-95-9083 CI (Alaska Super. Ct. September 26, 1995).

The parties' 2003 - 2006 collective bargaining agreement expired on June 30, 2006. After an agreement expires, the parties are nevertheless required to maintain the dynamic status quo until they reach a new agreement or until they reach valid impasse. *Mid-Kuskokwim Education Ass'n v. Kuspuk School District*, Decision and Order No. 156, at 7 (March 8, 1993). This requirement is implicit in AS 23.40.110(a)(5). *See*, *Mo-Kan Teamsters Pen. Fund v. Botsford Ready Mix Co.*, 605 Fed. Supp. 1441, 1446 (1985) (*Mo-Kan*), *citing N.L.R.B. v. Katz*, 369 U.S. 736, 743-44, 82 S.Ct. 1107, 1111-12, 8 L.Ed. 2d 230 (1962).[7] *Mo-Kan* concluded that National Labor Relations Act (NLRA) section 8(a)(5), 29 U.S.C. section 158(a)(5) implicitly requires maintenance of the status quo. This section of the NLRA is similar to section 110(a)(5) of the Public Employment Relations Act (PERA). The Agency adopts the above analysis from *Mo-Kan* as applicable to section 110(a)(5).

Maintaining the status quo generally requires parties to honor the terms and conditions of their expired agreement that are mandatory subjects of bargaining. Failing to maintain the status quo for mandatory terms carries consequences. With few exceptions, it is a violation of the duty to bargain in good faith and a per se unfair labor practice to unilaterally change the terms that are a mandatory subject of bargaining, after contract expiration, without first reaching a final agreement or bargaining to a valid impasse. *Alaska Vocational Technical Education Center Teachers' Ass'n, NEA-Alaska v. State of Alaska*, Decision and Order No. 274, at 6 (April 13, 2005); *International Brotherhood of Electrical Workers v. City of Seldovia*, Decision and Order No. 208, at 11 (September 23, 1996); *Mid-Kuskokwim Education Ass'n v. Kuspuk School District*, Decision and Order No. 156, at 7 (March 8, 1993); *TruServ Corp v. N.L.R.B.*, 254 F.3d. 1105, 1113-1114 (2001) (citations omitted). Further, "[t]he net effect of an invalid impasse is that all subsequent unilateral changes made by the employer are illegal." *Rivera-Vega v. ConAgra, Inc.*, 876 F.Supp 1350, 1367 (D.Puerto Rico 1995), citing *Litton Financial Printing v. NLRB*, 501 U.S. 190, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991); *NLRB v. Katz*, 369 U.S. 736, 741 – 748, 82 S.Ct. 1107, 1111-1114, 8 L.Ed.2d 230 (1962).[8]

The District contends the parties were at impasse when it notified the Association that it would no longer pay the anniversary entry-to-base increments. The Association argues that the parties never reached true impasse prior to reaching agreement on a new contract.

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[7] The Association suggested in closing argument that the District's cases were invalid because they were "old" cases. The Agency applies principles from cases regardless of age, provided the case is relevant and has not been subsequently overruled.

[8] "Relevant decisions of the National Labor Relations Board will be given great weight in determining what constitutes an unfair labor practice under AS 23.40.110 and AS 42.40.760." 8 AAC 97.240(b). *See also* 8 AAC 97.450(b): "Relevant decisions of the National Labor Relations Board and federal courts will be given great weight in the decisions and orders made under this chapter and AS 23.40.070 – 23.40.260 . . . ."

Whether the parties reached impasse is a case-specific, factually driven determination, because "[t]here is no fixed definition of an impasse or deadlock which can be applied mechanically to all factual situations." *TruServ Corp. v. N.L.R.B.*, 254 F.3d 1105, 1114; 167 L.R.R.M. (BNA) 2036 (D.C. Cir. 2001) (quoting *Dallas Gen. Drivers, Warehousemen and Helpers, Local 745 v. N.L.R.B*, 355 F.2d 842, 845 (D.C. Cir. 1966). The Agency has previously stated: "A finding of impasse requires a determination that meaningful progress is not likely to be made on mandatory subjects of bargaining." *Alaska State Employees Ass'n v. State of Alaska*, Decision and Order No. 178, at 13 (1994), *quoting Alaska State Employees Ass'n v. State of Alaska*, SLRA Order and Decision No. 124 (Sept. 14, 1989). To determine whether meaningful progress is likely to be made on mandatory subjects of bargaining, the Agency considers factors named in the principal NLRB case addressing impasse, *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 64 L.R.R.M. (BNA) 1386 (1967), *petition for review denied sub nom* (*Taft)*. *Taft* provides:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Id. at 478, 64 L.R.R.M. (BNA) at 1388; *Alaska State Employees Ass'n v. State of Alaska*, Decision and Order No. 178, at 13 (June 15, 1994); I John E. Higgins, Jr., *The Developing Labor Law* 989-990 (5th ed. 2006). "The Board may also consider additional factors, for the existence of an impasse is very much a question of fact." *Id.*

Federal cases have held that impasse in negotiations "occurs where the parties after good-faith negotiations, have exhausted all prospects of concluding an agreement." *Public Service Co. of Oklahoma v. N.L.R.B.*, 318 F.3d 1173, 1180 (10th Cir. 2003), citing *Borden, Inc. v. N.L.R.B.*, 19 F.3d 502, 512 (10th Cir. 1994); *see also, Taft*, 163 N.L.R.B. 475, 478. Put another way, impasse exists if there "is no realistic possibility that continuation of discussion at that time would have been fruitful." *Cotter & Co.*, 331 N.L.R.B. 787, 164 L.R.R.M. (BNA) 1307, (2000). Finally, to find impasse, it must be shown that the parties "have reached 'that point of time in negotiations when [they] are warranted in assuming that further bargaining would be futile.'" *Wycoff Steel, Inc.*, 303 N.L.R.B. 517, 523 (1991) (quoting *Patrick & Co.*, 248 N.L.R.B. 390, 393 (1980).

"A party claiming an impasse as the basis for its unilateral actions bears the burden of proving that an impasse in negotiations actually existed." *Grinnell Fire Protection Systems Co. v. N.L.R.B.*, 2346 F.3d 187, 196 (4th Cir. 2000). Therefore, the District has the burden of proving by a preponderance of the evidence that the parties were at impasse.

In this case, the District has failed to prove by a preponderance of the evidence that the parties had reached the point where further bargaining would be futile. There is very little evidence supporting a finding that the parties reached a deadlock between July 1 and September

11, 2006. The only evidence that could support impasse is the Association's rejection of the May 2006 tentative agreement. However, after the Association's members rejected that agreement, the Association notified the District of the rejection and simultaneously requested a return to the bargaining table "as soon as possible." In other words, the Association did not believe at that time that bargaining would be futile. The Association was still willing to negotiate. This willingness to negotiate contradicts a state of impasse. "If either negotiating party remains willing to move further toward an agreement, an impasse cannot exist: the parties' perception regarding the progress of the negotiations is of central importance to the Board's impasse inquiry. *Teamsters Local Union No. 639 v. N.L.R.B.*, 924 F.2d 1078 (D.C. Cir. 1991). *See Saunders House v. N.L.R.B., 719 F.2d 683, 688 (3d Cir. 1983), cert.* denied, 466 U.S. 958, 104 S.Ct. 2170, 80 L.Ed. 2d 554 (1984) (impasse finding "often depends on the mental state of the parties"); *O'Reilly Enterprises, Inc*., 314 NLRB 378, 146 L.R.R.M. 1250 (1994) (statement by employer's counsel that employer was willing to meet again showed that parties were not at impasse).

Further, the District's declaration of impasse contradicts its actions to work toward settlement with the Association for a new contract. The District's statements in its July press release and memorandum to staff indicate its willingness to continue working toward agreement through the negotiating process. Its agreement to meet and negotiate with the Association prior to the scheduled September 2006 arbitration shows the District believed that settlement was still possible through the negotiating process. This evidence militates against a deadlocked state of impasse.

The record simply lacks evidence to support a finding that when the District declared impasse, bargaining was deadlocked, and further negotiations would be futile. The parties' subsequent cooperation, progress, and eventual resolution prove otherwise. Accordingly, the Agency concludes that the District committed an unfair labor practice violation by making a unilateral change in a mandatory term of the expired contract before reaching agreement or bargaining to impasse.

There is further evidence of bad faith bargaining by the District. The District announced its unilateral change to the expired 2003 – 2006 agreement without providing advance notice and an opportunity to bargain. *Stone Boat Yard v. N.L.R.B*, 715 F.2d 441 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), is instructive. There, the parties negotiated for a new agreement, as the expiration date for their current agreement approached. On May 21, 1980, the employer sent a one-sentence letter to the union, notifying it that the employer intended to "offer substantial changes in the entire contract effective 1 July 1980." *Id.*, 715 F.2d, at 443. In late June 1980, the employer called an employee meeting and announced the employer's new health insurance program. On July 1, immediately after the expiration of the parties' most recent collective bargaining agreement, the employer ceased making payments into the union's health, welfare, and pension funds, and instituted a company-paid health insurance plan.

The union had no direct notice of the employer's change in fringe benefits until July 24, 1980. The union filed an unfair labor practice. The National Labor Relations Board (NLRB)

held that the one-sentence letter lacked detail and therefore failed to excuse the employer's obligations under the old agreement. The NLRB ordered the employer to make payments into the union's health, welfare, and pension funds, retroactive to July 1, 1980. The employer appealed.

The Ninth Circuit Court of Appeals affirmed the NLRB's decision and enforced the decision in its entirety. Regarding notice, the court held: "The Board's requirement, that an employer give detailed notice of proposed changes before unilaterally implementing them, is a reasonable interpretation of the Act [National Labor Relations Act]." *Id.* at 444. The court noted that "other cases permitting unilateral changes have involved changes fully described to the union before their implementation. *See, e.g., M&M Building & Electrical Contractors, Inc.,* 262 N.L.R.B. 81 (1982)." *Id*.

The court further reasoned: "Requiring notice of specific proposals before allowing unilateral changes after an unwarranted delay in bargaining is consistent with our cases that require such notice before impasse and before the right can arise to implement unilateral changes." *Id.* (citations omitted). The court added: "Disclosure of proposed changes will facilitate open discussions by requiring employers to specify proposed changes in conditions of employment before implementing them unilaterally. Such disclosure will give the unions notice of exactly what might be lost if they waive the opportunity to bargain by continual and unwarranted delay." *Id.* at 445.

In the case between the District and the Association, there was no unwarranted delay in bargaining. However, the District did fail to give advance notice of proposed changes and the specifics of the changes; the District made the changes without any advance notice or opportunity to bargain, despite the Association's request to bargain. Even when it sent the notice, the District did not provide information on the number of employees who would be affected by the change to the expired agreement; nor did it give an opportunity to bargain.

N.L.R.B v. Auto Fast Freight, Inc., 793 F.2d 1126 (Ninth Cir. 1986) illustrates a narrow exception to the general requirement to bargain to impasse before making unilateral changes. As the court notes, an "employer is required to maintain [the] status quo following the expiration of the collective bargaining agreement until the parties negotiate a new agreement or bargain in good faith to impasse." *Id.*, 793 F.2d at 1129. The court then pointed out an exception to this general rule: "There exists a narrow exception to the bargain to impasse rule: where, upon expiration of a collective bargaining agreement, the union has avoided or delayed bargaining, and the employer has given notice to the union of the specific proposals the employer intends to implement, the employer may unilaterally implement the proposals without first bargaining to impasse." *Id.* As indicated above, there was no evidence of unwarranted delay or avoidance of bargaining by the Association. To the contrary, the Association had requested a return to negotiations. Instead of agreeing to return to the bargaining table, the District abruptly implemented the unilateral changes effective retroactively to July 1, 2006, at the same time it announced the unilateral changes, then later declared impasse. The Agency concludes that under these facts, the narrow exception noted above does not apply here.

The District's rationale for impasse – that the offer rejected by the Association was the District's last, best offer – is troubling under these facts. This pronouncement in July 2006 appears to be the first notification to the Association that the District's previous offer, already considered and voted on by the Association's members, was the last, best offer.[9] Given this information in advance, bargaining unit members may have considered their options in a different light before voting whether to approve or reject the May tentative agreement.

The District suggests that by not specifically disputing the declaration of impasse, the Association implicitly stipulated that the parties were at impasse. The Association contends that it never stipulated to impasse and there was no reason to respond in July 2006. Buck George testified that the Association did not respond because he did not believe the parties were at "true impasse," and there was no reason to respond. He testified that under the Agency's regulations, a party can declare impasse and "impose economic sanctions" only after the parties complete the advisory arbitration process.

While it is correct under 8 AAC 97.280 that a school district employer may implement its last, best offer only after the parties complete all of the steps in the advisory arbitration process, a party may validly declare impasse before the parties complete the advisory arbitration process. Indeed, the parties' stipulation that they are at impasse, or an Agency finding that they are at impasse, starts the advisory arbitration process. Impasse can occur at any time in the negotiations process if the parties reach a genuine deadlock.

Impasse is a fluid state in the negotiations process. As recognized by the National Labor Relations Board, courts, and commentators, "impasse is only a temporary deadlock or hiatus in the negotiations, 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" *Financial Institution Employees of America v. N.L.R.B,* 738 F.2d 1038, 1043 (9th Cir. 1984) (quoting *Charles D Bonanno Linen Serv., Inc. v. N.L.R.B.*, 454 U.S. 404, 412 (1982). "When a deadlock is reached between the parties, the duty to bargain about the subject matter of impasse merely becomes dormant until changed circumstances indicate that an agreement may be possible." *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22, 23 (1973); *see also Civic Motor Inns,* 300 N.L.R.B. 774, 775 (1990) (The National Labor Relations Board required that there be an "intervening event . . . that would be likely to affect the existing impasse or the climate of bargaining."). Thus, depending on the particular facts of each case, the parties could go into and then out of a state of impasse multiple times during the entire negotiations process.

Regulation 8 AAC 97.280(c) gives school district parties one last opportunity to negotiate, after advisory arbitration or a specified time period, to avoid drastic measures: implementation of the last, best offer by the employer and a strike by the employees if a majority

[9] There is no evidence in the record that the District had previously told the Association that the offer voted on by the bargaining unit members was the District's last, best offer.

vote in favor of a strike. But before either side may take these measures, they must reach "mutually recognized" impasse. This regulation specifies that after this mutual impasse recognition following the advisory arbitration process, or after the arbitration requirements in the regulations are met, a school district "may implement its last, best offer, and the employees may engage in a strike . . . ." The regulations, as written, are meant to encourage the parties to return to bargaining even during the advisory arbitration process, and after they have completed this process, in order to afford them every opportunity to avoid implementing economic sanctions against each other.

In this case, we have found that the District implemented a change to a mandatory term of bargaining prior to impasse. The problem originated with the District's premature and unilateral declaration of impasse, and its unilateral change without giving advance notice and the opportunity to bargain. [10] In doing so, the District refused to honor and maintain a mandatory term of the parties' expired agreement. Accordingly, the Agency concludes that the District committed an unfair labor practice by failing to honor the dynamic status quo when it unilaterally decided, without advance notice and an opportunity for the Association to bargain, that it would not honor the entry-to-base wage provision, a mandatory subject of bargaining. If the District were allowed to make this change – retroactively, without notice and opportunity to bargain, and without bargaining to impasse – there would be no legal basis to stop the District from changing other mandatory terms of the agreement at any time after its expiration. Because we have determined already that the District unilaterally implemented changes to a mandatory term of the expired contract without reaching impasse, in violation of AS 23.40.110(a)(5), we need not rule on the Association's argument that the District cannot "impose economic sanctions" until after the parties complete the advisory arbitration process.

2. Did the Association waive the right to bargain over the District's unilateral change to a term or condition of the 2003 – 2006 collective bargaining agreement?

The Agency has concluded that the District committed an unfair labor practice violation by implementing a unilateral change to a mandatory term in the parties' expired collective bargaining agreement without bargaining to impasse or giving adequate notice and opportunity to bargain the change. The burden is now on the District "to show that the unilateral change was in some way privileged." *Success Village Apartments, Inc.*, 347 N.L.R.B. No. 100, at 30; 181 L.R.R.M. (BNA) 1269 (2006), citing *Cypress Lawn Cemetery Assn.*, 300 N.L.R.B. 609, 628 (1990**)**.

The District contends that a Memorandum of Understanding (MOU) included in the 2006 – 2009 collective bargaining agreement was the appropriate place to address any issues regarding pay for employees during the transitional period provided for in the MOU. The District seems to argue that by not addressing the entry-to-base pay issue under the expired agreement, the Association somehow waived the right to dispute the issue. The Association disagrees and

[10] Furthermore, unilateral changes must be reasonably comprehended within preimpasse proposals. *Am. Fed'n of Television Artists v. N.L.R.B.*, 395 F.2d 622, 624 (D.C. Cir. 1968).

points out that the MOU is part of the new collective bargaining agreement that commenced September 18, 2006, an effective date that does not include the period July 1, 2006, to September 17, 2006. The Association makes a valid point. By refusing to start the 2006 – 2009 contract until September 18, 2006, the District left a gap in contract-to-contract coverage. The mandatory terms of the expired contract therefore continued to apply until September 18, 2006. Further, the fact that the entry-to-base pay issue was not addressed in the MOU shows that the issue was still unresolved.

The District argues in essence that regardless of any findings and conclusions on impasse and unilateral change, the Association waived its right to bargain the unilateral change on entry-to-base level increments because the Association failed to request bargaining within a reasonable time after the District provided notification of the unilateral change. In accordance with the above cases, the District has the burden of proving a waiver.

The Alaska Supreme Court has analyzed waiver as follows:

> Waiver is generally defined as "the intentional relinquishment of a known right." However, waiver is:
>
> > a flexible word, with no definite, and rigid meaning in the law . . . . While the term has various meanings dependent upon the context, it is, nevertheless, capable of taking on a very definite meaning from the context in which it appears, and each case must be decided on the facts peculiar to it.
>
> A waiver can be accomplished either expressly or implicitly. An implied waiver arises where the course of conduct pursued evidences an intention to waive a right, or is inconsistent with any other intention than a waiver, or where neglect to insist upon the right results in prejudice to another party. To prove an implied waiver of a legal right, there must be direct, unequivocal conduct indicating a purpose to abandon or waive the legal right, or acts amounting to an estoppel by the party whose conduct is to be construed as a waiver.

Carr-Gottstein Foods Co. v. Wasilla, LLC, 182 P.3d 1131, 1136 (Alaska 2008), citing *Milne v. Anderson*, 576 P.2d 109, 112 (Alaska 1978) (other citations omitted).

In *Carr-Gottstein Foods*, the Alaska Supreme Court noted that in cases subsequent to *Milne*, it had "added an objective gloss to this formulation. '[N]eglect to insist upon a right,' we have said, may result in an implied waiver, or an estoppel, when 'the neglect is such that it would convey a message to a reasonable person that the neglectful party would not in the future pursue the legal right in question.'" *Carr-Gottstein Foods*, citing to *Anchorage Chrysler Ctr., Inc. v. Daimler Chrysler Corp.*, 129 P.3d 905, 917 n. 35 (Alaska 2006) (citing *Wausau Ins. Cos. v. Van Biene*, 847 P.2d 584, 589 (Alaska 1993)).

Federal cases have held that waivers of statutory rights (here, the right to bargain collectively) are not to be "lightly inferred." *Georgia Power Co*., 325 N.L.R.B. 420 (1998). "National Labor policy disfavors waivers of statutory rights by a union and thus a union's intention to waive a right must be clear before a waiver can succeed." *C&P Telephone Co. v. N.L.R.B.*, 687 F.2d 633, 636 (2d Cir. 1982). The Alaska Supreme Court has similarly required waiver to be clear and unequivocal. *See Carr-Gottstein Foods Co. v. Wasilla*, above.

Here, the Association never conveyed a message, either explicitly or implicitly, that it would not pursue remedial action for the bargaining unit members affected by the District's unilateral action to stop paying anniversary increments. To the contrary, the Association advocated on behalf of these bargaining unit members as soon as it realized the District would not agree to make the 2006 – 2009 agreement retroactive to July 1, 2006. Prior to the negotiations that took place on September 8 and 9, 2006, there was no reason for the Association to pursue remedial action. If the District agreed – in either negotiations or mediation -- to start the new contract retroactive to July 1, the Association would have no reason to file a grievance with the District or file a complaint with this Agency. It filed both as soon as it became clear that the District did not intend to pay the anniversary increments.

The facts of this case are an example of a fait accompli. In *Pontiac Osteopathic Hospital*, 336 N.L.R.B. 1021 (2001), the NLRB provided that "[t]he issues of 'fait accompli,' 'request to bargain,' and 'waiver' are related in the sense that a finding of fait accompli will prevent a finding that a failure to request bargaining is a waiver." *Id.* at 1023.[11] The NLRB analyzed fait accompli in waiver cases:

> The Board has long recognized that, where a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than a fait accompli.

Ciba-Geigy Pharmaceutical Division, 264 N.L.R.B. 1013, 1017 (1982).[12]

Here, the District did not convey timely notice of its intent to stop paying entry-to-base pay under the expired agreement. The notice was not in advance of the implementation. Since there was no advance notice, there was no opportunity to bargain the change prior to implementation. Under these facts, it cannot be said that the Association waived the right to

[11] "Fait accompli" is defined as follows: "Fact or deed accomplished, presumably irreversible." *Black's Law Dictionary, 6th ed.,* at 599 (1990).

[12] See also *PRC Recording Co.*, 280 NLRB No. 77, 280 N.L.R.B. 615, 124 L.R.R.M. (BNA) 1081 (1986) (the employer's fait accompli is significant, not the union's silence and continued bargaining.

bargain because it could not relinquish a right it was not given in the first place. Moreover, the evidence indicates the District had no intention of changing its mind on the retroactivity issue in any event. Had the District done so, that is, agreed to an effective date for the new contract to July 1, 2006, the entry-to-base issue would not have arisen because the 19 employees would have been paid under the wage schedule contained in the 2006 – 2009 collective bargaining agreement.

The cases and opinions submitted by the District to support its position, and Exhibit S, do not support its contentions or change the facts in this case.[13] The District did not specifically argue during the hearing or in its brief how these cases support its position. A review of these cases shows that none of them are factually on point with the facts in this case. For example, in Exhibit L, *N.L.R.B v. Rural Electric Co. (Rural Electric*), 296 F.2d 523 (10th Cir. 1961), the Court of Appeals for the Tenth Circuit held that the employer's duty to bargain with a union does not arise until the union requests bargaining. The court concluded the union had not requested bargaining and the employer was not therefore required to bargain. Clearly, in the case between the District and the Association, the Association had requested bargaining in late June 2006 but the District refused the request in July 2006. It is noteworthy, though, that in *Rural Electric* the court concluded that the employer did commit an unfair labor practice by making a unilateral change (wage increases) without notice and consultation with the union. In this regard, the facts in *Rural Electric* favor the Association.

Exhibit R is an Alaska Supreme Court opinion, *University of Alaska v. University of Alaska Classified Employees Ass'n* (Alaska 1998). The issue and facts in this opinion are completely different from this case and do not support the District's position. The question in the supreme court's opinion was whether the union waived its right to bargain a restrictive smoking policy adopted by the University through its policies and procedures. The union had agreed in the parties' collective bargaining agreement that the University's policies and regulations, as amended from time to time, would apply to the union's members unless provisions in the parties' agreement supersede those policies. Application of University policies was effective without obligation to bargain over periodic changes made by the University. When the University instituted the restrictive smoking ban policy, the union protested.

The supreme court affirmed this Agency, which held that the union had waived the right to protest by agreeing to follow the University's policies and regulations, as amended periodically. In the context of this case, the District is not arguing that the Association contractually waived the right to collectively bargain after contract expiration. There is no contractual provision that provides for such a waiver. In any event, the supreme court's opinion is inapplicable to the waiver dispute here.

[13] The District filed these cases as Exhibits L through Q. As argued by the Association, these cases are not evidence in the record. They represent arguments proposed by the District.

Exhibit S is a Notice of Preliminary Finding of Probable Cause in the matter of *Kenai Peninsula Education Association, NEA-Alaska v. Kenai Peninsula Borough School District*, Case No. 02-1159-ULP (November 27, 2002), *aff'd* by the Alaska Labor Relations Agency, May 14, 2003. Notices regarding preliminary findings of probable cause and appeals of those findings do not have legal precedent.

In the cases labeled as Exhibits M, N, O, P, and Q, the courts found that the unions had waived their rights to bargain. However, in each of the cases, the courts concluded that the unions were given advance notice and opportunity to bargain before the employers implemented unilateral changes, and the unions failed to timely request bargaining. Here, the District did not give advance notice and opportunity to bargain before implementing the change to the expired agreement.

3. If the District committed an unfair labor practice violation, what is the remedy?

The Agency has concluded that the District committed an unfair labor practice in this case. The unfair labor practice was the District's failure to continue applying Article 14.1 of the 2003 – 2006 collective bargaining agreement to maintain the dynamic status quo. Either 18 or 19 employees' wages were affected by this unilateral change. The District is ordered to make these employees whole by applying Article 14.1 of the 2003 – 2006 collective bargaining agreement, including that part of Article 14.1 that provides for salary increments from entry- to-base level based on anniversary date.

CONCLUSIONS OF LAW

1. The Education Support Staff Association, NEA-Alaska, NEA is an organization under AS 23.40.250(5). The Fairbanks North Star Borough School District is a public employer under AS 23.40.250(7).

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

3. As complainant, the Education Support Staff Association has the burden to prove each element of its claim by a preponderance of the evidence. 8 AAC 97.340 and 350(f).

4. The Education Support Staff Association proved each of the elements of its claim by a preponderance of the evidence. The Fairbanks North Star Borough School District violated AS 23.40.110(a)(5) by making a unilateral change to a mandatory subject of bargaining in the 2003 – 2006 collective bargaining agreement without giving advance notice and opportunity to bargain the change, and by failing to bargain to impasse before implementing the change. The District's conduct also violates AS 23.40.110(a)(1).

5. As the party alleging that the parties were at impasse, the Fairbanks North Star Borough School District has the burden of proving by a preponderance of the evidence that the parties were at impasse.

6. The Fairbanks North Star Borough School District failed to prove that the parties had reached impasse anytime between July 1, 2006, and September 11, 2006.

7. The Education Support Staff Association did not waive its right to bargain the unilateral change to a mandatory term in the contract that expired on June 30, 2006, after the District announced that it was not going to honor that term (Article 14.1).

ORDER

1. The complaint of the Education Support Staff Association in Case NO. 07-1506-ULP is granted.

2. The Fairbanks North Star Borough School District shall make whole all employees affected by this decision and order, specifically those employees in the bargaining unit who did not receive an entry-to-base level increment in accordance with Article 14.1 of the parties' 2003 – 2006 collective bargaining agreement.

3. The collective bargaining enforcement petition, Case No. 07-1507-CBA is dismissed.

4. The Fairbanks North Star Borough School District shall post a notice of this decision and order at all work sites where members of the bargaining unit affected by the decision and order are employed or, alternatively, serve each employee affected personally. 8 AAC 97.460.

ALASKA LABOR RELATIONS AGENCY

_____
Aaron Isaacs, Jr., Vice Chair

_____
Matthew R. McSorley, Board Member

_____
Will Askren, Board Member

APPEAL PROCEDURES

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

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of the order in the matter of *Education Support Staff Association, NEA-Alaska, NEA, v. Fairbanks North Star Borough School District*, Case No. 07-1506-ULP, and Case No. 07-1507-CBA (consolidated), dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 16th day of September, 2008.

_____
Cynthia J. Teter
Administrative Clerk III

This is to certify that on the 16th day of September, 2008,
A true and correct copy of the foregoing was mailed,
postage prepaid, to:

Paul Grant, ESSA
Gayle Pierce, FBNSBSD

_____
Signature