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MATANUSKA-SUSITNA)
EDUCATION ASSOCIATION,)
NEA-ALASKA,)
Complainant,)
)
vs.)
)
MATANUSKA-SUSITNA)
BOROUGH SCHOOL DISTRICT,)
)
Respondent.)
_____)

Case No. 02-1148-ULP

DECISION AND ORDER NO. 268

This unfair labor practice complaint was heard in Anchorage, Alaska, before the Alaska Labor Relations Agency, on December 10, 2003. The panel hearing the matter includes board Vice Chair Aaron Isaacs, Jr., and member Colleen Scanlon.[1] The record closed on December 10. The Agency issued an abbreviated order on June 16, 2004. This memorandum decision follows.

Appearances: Mark Jones, Uniserve Director for the Matanuska-Susitna Education Association, NEA-Alaska (Association); Saul Friedman, attorney for Matanuska-Susitna Borough School District (District).

Digest: The District did not commit an unfair labor practice by directly informing the Association's members of the facts regarding the District's contract proposals or by delaying the selection of an arbitrator.

[1] Former Board member Raymond Smith also heard the case but was replaced on the Board before this decision was issued. A quorum of the Board still exists to decide the case.

DECISION

Statement of the Case

The Association filed a complaint charging the District with an unfair labor practice for refusing to bargain in good faith. The District denied the charges. Hearing Officer Jean Ward investigated the charges and found probable cause that the District committed a violation. This hearing followed.

Procedure in this case is governed by 8 AAC 97.340. Hearing examiner Mark Torgerson presided.

Issues

1. Did the District commit an unfair labor practice under AS 23.40.110(a)(5) by 1) refusing to follow the parties' ground rules for selecting an arbitrator by February 15, 2002; and 2) sending a proposal, to bargaining unit members, that was never communicated to the Association's bargaining team, and that mislead the Association's members?

2. If the District committed an unfair labor practice, what is the appropriate remedy?

Findings of Fact

The panel, by a preponderance of the evidence, finds the facts as follows:

1. The Association is recognized as the exclusive collective bargaining representative of teachers in the Matanuska-Susitna Borough School District.

2. The most recent collective bargaining agreement (CBA) between the Association and the District covered the period July 1, 1999, to June 30, 2002.

3. The parties commenced negotiations for a new collective bargaining agreement on December 4, 2001. The parties discussed ground rules.

4. The parties' ground rules include a procedure for selecting an arbitrator. The procedure states in relevant part: "(6) On February 1, 2002, MSEA and MSBSD shall establish a time line to allow for mediation and arbitration, and (7) By February 1, 2002, both parties shall review the list prepared by American Arbitration Association and shall agree upon an arbitrator."[2] (Association Exh. 8). The Association wanted a procedure to select an arbitrator because it would

[2] "MSEA" is the Matanuska-Susitna Education Association. We will refer to it as "the Association." The acronym "MSBSD" is the Matanuska-Susitna Borough School District. We will simply refer to it as "the District."

reduce the amount of time needed to complete the bargaining process with the District, particularly to finish the process before district schools recess for the summer. The District desired a procedure to reduce the time between mediation and arbitration, should either procedure become necessary.

5. Notes taken at a December 4, 2001, negotiations session provide additional dates in the arbitrator-selection process. The notes provide:

"On [February] 1, 2002 MSEA - MSBSD will establish timeline for arbitration."
By January 15, 2002, MSEA and MSBSD will review a list of arbitrators and select one.
Mutual proposal exchange will occur on Monday December 10, 2001, at 11:30 a.m. at Vagagbond Blues."

(Association Exh. 10).

6. On January 11, 2002, the parties faxed a letter to the American Arbitration Association (AAA). (Ass'n Exh. 9). The letter requested that the AAA send them an arbitrator list. The letter stated in part: "We are submitting a joint request for the services of an arbitrator, if those services become necessary. It is our intention to mutually identify an acceptable arbitrator from the list you send to both parties. We will then contact that arbitrator personally and establish dates for an advisory arbitration hearing." The letter is dated December 7, 2001, but Spokespersons Kathy Summers from the Association and Mike Chmielewski from the District did not sign and date the letter until January 8, 2002. This date was the first opportunity for the parties to get together after they wrote the letter. (District Exh. 1).

7. The parties' request for a list of arbitrators was mailed to AAA on January 14, 2002, and received by AAA on January 18, 2002. (Ass'n Exh. 9).

8. Vince Speranza works for the National Education Association --Alaska (NEA). He is assigned primarily to represent the Association in collective bargaining issues. He participated on the Association's behalf in negotiations with the District. He testified that after parties submit a request, it typically -- but not always -- takes a couple weeks to receive a list from the AAA.

9. On January 30, 2002, the Association received a standard letter from AAA acknowledging that AAA had received the parties' request for a list of arbitrators. The Association tried to be patient, but on approximately February 15, 2002, Speranza contacted case administrator Kathy Stewart to find out when to expect the list of arbitrators. Stewart said the parties could expect a list the next day. However, on February 18, 2002, a representative from AAA contacted the Association and the District to verify fax numbers for the purpose of sending the arbitrator list. (Association Exh. 1, page 1).

10. Between January 11, 2002 -- when the list was faxed to AAA -- and February 1, 2002, neither party made an attempt to contact the other or AAA regarding the status of the list of arbitrators.

11. On February 8, 2002, District Spokesperson Mike Chmielewski faxed a letter to the Federal Mediation Conciliation Service (FMCS). In it, he informed the FMCS that the parties had reached impasse and requested "mediation services prior to advisory arbitration," in accord with Alaska Statute 23.40.190. Chmielewski sent a copy of the fax to Association Spokesperson Kathy Summers. The parties agreed they reached impasse on this date.

12. On February 21, 2002, Stewart of AAA left a voice message on Speranza's cell phone. In her message, Stewart said she contacted someone at the District who told her it was inappropriate and premature to send an arbitrator's list. The District representative said that the parties had not even conducted mediation, and the District would refuse the list if AAA sent one.

13. Paula Harrison, the District's Director of Human Resources and Labor Relations, took the AAA's February 21 call for the District because Spokesperson Chmielewski was on vacation. Harrison refused to accept the list. She admitted telling the AAA representative that the District would refuse to pay its share of the cost if AAA sent the list. Although Harrison was involved in the collective bargaining process, she was not on the District's negotiating team, and she was not familiar with the ground rules.

14. The AAA representative called a second time and Harrison again refused to accept the list. Harrison was concerned that if mediation was successful, the District would be required to pay unnecessary costs related to selection of an arbitrator. She gave the AAA representative Chmielewski's cell phone number.

15. Kathleen Summers has worked for the District for 20 years. During that time, she has held many positions with the Association, including executive board, vice president and secretary, and member of the negotiating team. Summers spoke with both Chmielewski and Stewart on February 27 regarding the list of arbitrators. The parties subsequently agreed to accept the list.

16. On March 9, 2002, AAA sent the parties a list of arbitrators. (District Exh. 3). The delay caused by the District's refusal to accept the list was, at most, the period between February 21, 2002, and March 9, 2002, when AAA sent the list. This period totals 16 days.

17. On March 20, 2002, the parties selected Richard Oglesby of the Federal Mediation Conciliation Service to mediate their deadlock. Oglesby provided mediation services, without success, on April 2, 2002.

18. Bob Doyle is the Chief School Administrator for the District. He testified that the Anchorage School District (ASD) reached agreement with its teachers in March 2002. The ASD agreement prompted the District to seek a similar settlement with the Association.

19. Prior to the April mediation, the Matanuska-Susitna School Board met in executive session on the third Wednesday in March 2002. Doyle attended this session along with Harrison. The School Board discussed issues related to the deadlock, the ASD's settlement with its teachers, and new proposals, including dropping steps in the salary scale of the District's teachers.

20. After discussion of its options, the School Board instructed the District's negotiating team to draw up a new offer. The School Board urged its team to work for settlement in mediation. The District prepared a new offer prior to the April 2, 2002, mediation.

21. On April 2, 2002, the parties met together briefly with Oglesby, drank coffee, and then separated at Oglesby's prompting. The District's negotiating team gave Oglesby the written offer, told Oglesby it was an offer, and made it clear to Oglesby that the District wanted to reach an agreement with the Association during mediation.

22. The District told Oglesby that he could give the offer to the Association. The District's offer differed from previous offers the District had provided to the Association. The District told Oglesby that this was a last, best offer that he could show to the Association.

23. The Association did not receive the District's written offer from Oglesby.

24. Oglesby made three trips back and forth between the parties during the April 2 mediation. During these separate briefings with each party, Oglesby asked "what if" and other theoretical questions. During one of Oglesby's discussions with the District, he asked the District to explain in more detail its salary proposal, presented in the District's new written offer. Oglesby said the Association's mediation team did not understand the affect the dropping of steps would have on teachers' salaries. Harrison wrote out and handed Oglesby a piece of paper that provided examples that reflected the effect of proposed salary increases on Employee's pay, and dropping steps. (District Exh. 6). Oglesby was familiar with the concept for increasing teacher salaries by this process, and he asked the District's team if they understood how expensive an offer like this could be. The District's team told Oglesby the School Board had "costed out" and understood the price tag of its April 2 offer.

25. The Association did not submit a written proposal during the mediation session. In its notice to bargaining unit members on April 3, 2002, the Association wrote in part: "MSEA's team offered several significant counter proposals to jump-start negotiations."

26. Oglesby reported back to the District that the Association rejected the offer because the proposal did not include cost-of-living adjustments and the proposal lacked adding a step at the top of the schedule.

27. On April 3, 2002, the District sent the teachers in the bargaining unit a flyer titled "District/MSEA Mediation Update". (Association Exh. 4). The flyer states: "The Mat-Su Borough School Board offered a three-year salary and benefit package to MSEA's bargaining team during mediation on Tuesday, April 2. The School Board's offer (detailed below) was rejected by MSEA's bargaining team." The flyer contains three boxes that describe the District's proposals for Year's 1, 2, and 3 of the contract. The flyer then provided an example, in a table, of salary increases for four different teacher salaries and how the proposed contract would affect each teacher's salary.

28. The Association wrote a statement to the media in which it denied receiving a written proposal from the District. (Association Exh. 3).

29. The parties conducted arbitration on April 22 and 23, 2002.

ANALYSIS

The Association alleges two instances of bad faith bargaining by the District during the parties' attempt to negotiate a new contract. The Association contends that the Association violated AS 23.30.110(a)(5) of the Public Employment Relations Act (PERA) when it (1) delayed unreasonably in the selection of an arbitrator, and (2) inappropriately had direct contact with bargaining unit members by sending them the District's last, best offer. In doing so, the Association asserts, the District circumvented the collective bargaining process.

The District contends it did not bargain in bad faith in any event. The District argues that even if it did not follow the ground rules exactly, neither did the Association. Furthermore, there was no bad faith in the District's action in not initially accepting the arbitrator's list.

AS 23.40.110(a)(5) states: "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." Under AS 23.40.200(b), this obligation of good faith extends to the parties' conduct after impasse. *See State of Alaska, Department of Administration vs. Public Safety Employees Association*, Decision and Order No. 159 at 7 (April 22, 1993).

In *Fairbanks Fire Fighters Ass'n, Local 1324, IAFF, vs. City of Fairbanks*, Decision and Order No. 256, at 9-10 (October 17, 2001), we stated that, in the context of collective bargaining,

> Good faith has been described as "an open mind and a sincere desire to reach an agreement" and "a sincere effort . . . to reach a common ground." I Patrick Hardin, *The Developing Labor Law*, at 608 (3d ed. 1992), *quoting NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 12 L.R.R.M.(BNA) 508 (9th Cir. 1943), and *General Elec. Co.*, 150 NLRB 192, 194, 57 L.R.R.M.(BNA) 1491 (1964), *enforced* 418 F.2d 736, 72 L.R.R.M.(BNA) 2530 (2d Cir. 1969), *cert. denied*, 397 U.S. 965, 73 L.R.R.M. (BNA) 2600 (1970). In *Hotel Roanoke*, 293 NLRB 182, 184 (1989), the Board stated: "In determining whether a party has bargained in bad faith, the Board looks to the totality of the circumstances in which the bargaining took place. *Port Plastics*, 279 NLRB 362, 382 (1986); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). The Board looks not only at the parties' behavior at the bargaining table, but also to conduct away from the table that may affect the negotiations. *Port Plastics*, 279 NLRB at 382."

In determining whether a violation occurred, we will review both parties' conduct at and away from the negotiating table, not just the conduct of the party charged with a violation. In I Patrick Hardin, *The Developing Labor Law*, page 634-35 (3d ed. 1992), it states:

> The duty to bargain is a bilateral one, however, so that where both parties have been equally dilatory, or where the union has broken off negotiations and made no further request for bargaining, or has failed to request the employer to bargain, the Board has refused to find bad faith on the part of the dilatory employer.[3]

1. Violation of ground rules.

The first issue is whether the District committed an unfair labor practice regarding the parties' ground rules for negotiation of a new collective bargaining agreement. The Association contends that the District's initial refusal to accept the arbitrator's list from AAA and to follow the timelines set forth in the ground rules constitutes bad faith bargaining because it delayed the selection process.[4]

Violation of a ground rule is not per se bad faith bargaining. However, it is some evidence of bad faith and may constitute a violation if the moving party shows other evidence of bad faith. *Professional Engineers in California Government v. State of California*, 27 PERC P 52 (April 7, 2003).

We find that under the facts of this case, the circumstances that led to the delay all occurred after the parties' agreed-upon deadline to both receive and review an arbitrator's list. Specifically, the parties established February 1, 2002, as the deadline. However, they did not even receive an offer from AAA to send the list of arbitrators until February 21. Therefore, the District's refusal to accept the arbitrator's list from AAA occurred three weeks after the February 1, 2002, deadline.

Moreover, between January 8 and the February 1 deadline, neither party made an effort to contact AAA or each other to guarantee receipt of the list before the February 1 deadline. We find neither party should be charged for AAA's failure to provide a list before the deadline. Further, neither party should be charged, pursuant to the ground rules, for a delay that occurred after the agreed-upon deadline passed. Finally, while it is clear the District refused to accept the arbitrator's list, its refusal delayed the mediation/arbitration process by 16 days, at most. Under the facts of this case, we do not find this delay unreasonable, or in bad faith. That said, the District needs to clarify its lines of communication so those involved in the negotiating process understand the deadlines agreed upon in ground rules.

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[3] Case citations in Hardin omitted. *See also International Brotherhood of Electrical Workers Local Union 1547, AFL-CIO vs. City of Seldovia*, Decision and Order No. 208 (September 23, 1996).

[4] We do not need to decide whether ground rules are a permissive or mandatory subject of bargaining. The parties had already established ground rules. The issue for decision here is whether there was a violation of a ground rule, and whether that violation constituted evidence of bad faith bargaining.

2. Direct Dealing.

The Association charges that the District bypassed the Association and dealt directly with bargaining unit members when the District mailed the green sheets on April 3, 2002. The District denies direct dealing because it maintains that it submitted a written offer to the Association, during mediation, prior to mailing the green sheets, and the green sheets reflect that written offer.

In *National Labor Relations Board v. Pratt & Whitney Air Craft Division*, 789 F.2d 121, 134-35, (1986)[5] the court stated: "Direct dealing is identifiable in two ways: the employer's communications themselves can provide a basis for finding an unfair labor practice; additionally, the challenged communications can be viewed within a pattern of other unfair labor practices which, when examined in its totality, reveal direct dealing in violation of § 8(a)(5). *Adolph Coors Co.*, 235 NLRB271, 277 (1978)." Accordingly, we will first determine whether the Association has proven by a preponderance of the evidence that the District's communications regarding the notice to bargaining unit members provide a basis -- by itself -- for an unfair labor practice. If not, we will then analyze whether the Association proved, under the totality of the conduct, that the District violated AS 23.40.110(a)(5).

In *Alaska Community Colleges' Federation of Teachers, Local 2404, AFT, AFL-CIO (Re: Loveland, Narangs,), vs. University of Alaska*, Decision and Order No. 204 (August 20, 1996), we addressed direct dealing:

> A fundamental component of the duty to bargain in good faith in AS 23.40.110(a)(5) is the duty to observe the labor organization's status as the exclusive representative of the employees. Bypassing the labor organization undercuts its effectiveness and can damage the relationship between the labor organization and the employees it represents. *J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 14 L.R.R.M. (BNA) 501 (1944). Direct dealing can be a *per se* violation, which means the labor organization does not need to prove motive to establish the violation. 1 Patrick Hardin, *The Developing Labor Law* 601-602 (3d ed. 1993), citing *General Electric Co.* 150 N.L.R.B. 192, 194, 57 L.R.R.M. (BNA) 1491, (1964), *enforced* 418 F.2d 736, 72 L.R.R.M. (BNA) 2530 (2d Cir. 1969), *cert. denied*, 397 U.S. 965, 73 L.R.R.M. (BNA) 2600 (1970); *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678, 14 L.R.R.M. (BNA) 581 (1944).

(Decision and Order No. 204, at 7).

Although it is vital that an employer bargain with the employees' chosen bargaining representative in the collective bargaining process,[6]

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[5] Agency regulation 8 AAC 97.450(b) provides: "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 and AS 42.40.720 -- 42.40.890."

[6] *National Labor Relations Board v. Pratt & Whitney Air Craft Division*, 789 F.2d 121, 134 (1986).

> [l]abor negotiations do not occur in a vacuum. While the actual bargaining is between employer and union, the employees are naturally interested parties. During a labor dispute the employees are like voters whom both sides seek to persuade. As discussed earlier, unions are granted extensive powers to communicate with employees in the represented unit. Consistent with the First Amendment, the employer must also be afforded an opportunity to communicate its positions.

National Labor Relations Board v. Pratt & Whitney Air Craft Division, 789 F.2d 121, 134-35, (1986), *citing NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The court in *Pratt & Whitney* went on to frame the test for direct dealing: "The fundamental inquiry in a direct dealing case is whether the employer has chosen 'to deal with the Union through the employees, rather than with the employees through the Union." *Pratt & Whitney*, 789 F.2d at 134.

The court in *Pratt & Whitney* cited *Endo Laboratories, Inc.*, 239 NLRB 1074, 1084 (1978), for the principle that "non-coercive substantially truthful comments accompanied by public proposals first submitted to the union do not constitute direct dealing since the possibility of circumventing the union is remote." The court concluded: "Thus, determining whether direct dealing has taken place is a complex task involving a balancing of the rights of the workers, the union, and the employer. In that balancing process, the employer's right to present its position so that employees may hear both sides should not be downplayed." *Pratt & Whitney*, 789 F.2d at 135.

We find that, in determining whether the District bypassed the union by mailing the green sheet offer to bargaining unit members on April 3, 2002, we must decide whether the District communicated its last, best offer to the Association when it provided the mediator with its written offer on April 2, 2002. In this analysis, we must also decide whether the District should be able to rely on the word of the parties' chosen mediator, who told the District that the Association had rejected its last, best offer.

In *Southwest Teachers Association, CTAS/NEA, v. South Bay Union School District*, 14 PERC P 21084 (April 10, 1990) (*Southwest Teachers*), the Southwest Teachers' Association charged the South Bay Union School District with direct dealing by making offers to employees not previously presented to the teachers' union. Citing federal decisions, the administrative law judge reiterated the law and the test for determining direct dealing:

> Consequently, as in federal jurisdiction, actions of a public school employer which are in derogation of the authority of the exclusive representative are evidence of a refusal to negotiate in good faith . . . . They are precluded from using direct communications with the employees to bypass the exclusive representative and undermine that representative's exclusive authority to represent the unit members and negotiate with their employer. In each case, the touchstone for determining the propriety of public school employers' direct communications with their employees is the effect on the authority of the exclusive representative. (citation omitted).

Id.

In *Southwest Teachers*, the parties negotiated to impasse and held a number of mediation sessions with a state mediator. None of the mediation sessions involved face-to-face meetings. All proposals, whether oral or written, were communicated through the mediator. After negotiating and mediation sessions, the South Bay District negotiating team sent flyers to teachers. For example, one such flyer was titled "Mediation Update." The teachers union contended that this flyer made an offer directly to employees not previously presented to the teachers union, and the offer misrepresented the status of negotiations.

The Administrative Law Judge found that the South Bay District's negotiator knew that the mediator was familiar with the wage concept the District was offering in mediation. He thus relied on the mediator's judgment about how to present the proposals to the teachers' union. "But because the record does not reveal what the mediator said about these proposals, it is impossible to determine what the [teachers' union] was actually told about the District's intent . . . ." *Id.* The Administrative Law Judge further stated:

> Each party had an obligation to make a good faith effort, through the mediator, to understand the other side's proposals as clearly as possible. It is not evident that [the teacher's union] made this effort. The District's comments in the April 11 letter were not inaccurate, nor did they misrepresent its bargaining position at the table. They also did not present new proposals directly to the employees. There is no evidence that the communication was intended to undermine [the teachers' union's] authority to represent its members in negotiations or to circumvent the District's negotiating obligation to [the teachers' union].

Id.

In this case, we find the Association made an effort to understand the District's offer. The mediator relayed to the District that the Association's team did not understand some aspects of the wage proposal, and the mediator asked for examples to help clarify the offer to the Association. After moving back and forth between the parties, the mediator told the District that the Association had rejected the District's offer. In essence, the mediator told the District that he had communicated the District's offer to the Association, and the District's offer had been rejected. The mediator in this case even told the District the reasons that the Association rejected the offer.

We believe that the District, or any party in its position, should be able to reasonably rely on a mediator's opinion that the other side had been told of the last, best offer, and that it rejected the offer. This is what the District did before it mailed the green sheets explaining its last, best offer in a non-coercive, objective manner to the bargaining unit employees. In doing so, the District did not bypass the Association. Moreover, we do not believe the District intended to undermine the authority of the Association when it mailed the green sheets. On this basis, we find no violation.

Nor do we find that the District violated the duty to bargain in good faith when its conduct is viewed under the totality of the conduct standard. When we examine the District’s overall actions concerning bargaining, we do not find evidence that establishes a violation of AS 23.40.110(a)(5).

Accordingly, we conclude that the Association has failed to prove by a preponderance of the evidence that the District violated AS 23.40.110(a)(5). We will dismiss the charge.

CONCLUSIONS OF LAW

1. The Matanuska-Susitna Borough School District is a public employer under AS 23.40.250(7).

2. The Matanuska-Susitna Education Association is an organization under AS 23.40.250(5).

3. This Agency has jurisdiction to consider unfair labor practice complaints under AS 23.40.110.

4. The Association failed to prove by a preponderance of the evidence that the District committed a violation under AS 23.40.110(a)(5) by delaying unreasonably in the selection of an arbitrator.

5. The Association failed to prove by a preponderance of the evidence that the District committed a violation under AS 23.40.110(a)(5) by dealing directly with the bargaining unit members or bypassing the Association in negotiations.

ORDER

1. The complaint of the Matanuska-Susitna Education Association is denied and dismissed.

2. The Matanuska-Susitna Borough School District is ordered to 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., Chair

_____
Colleen Scanlon, 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 filing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of *Matanuska-Susitna Education Association, NEA-Alaska v. Matanuska-Susitna Borough School District*, Case No. 02-1148-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 30th day of August, 2004.

_____
Sherry Ruiz
Administrative Clerk III

This is to certify that on the 30th day of August, 2004, a true and correct copy of the foregoing was mailed, postage prepaid to

Mark Jones, Matanuska-Susitna Education Association
Saul Friedman, Matanuska-Susitna Borough School District

_____
Signature