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STATE OF ALASKA,	)
	)
Petitioner,	)
	)
v.	)
	)
ALASKA STATE EMPLOYEES ASSOCIATION,	)
	)
Respondent,	)
	)
	)

Case No. 20-1753-ULP

NOTICE OF PRELIMINARY FINDING AFTER INVESTIGATION AND ORDER OF DISMISSAL

The Alaska Labor Relations Agency (ALRA or Agency) has concluded its investigation of an unfair labor practice charge (ULP) filed on March 5, 2020, by the State of Alaska (State). The State alleges that the Alaska State Employees Association (ASEA) violated AS 23.40.110(c)(2) arguing that it refused to bargain a Letter of Agreement (LOA) to modify the General Governmental Unit's (GGU) Collective Bargaining Agreement (CBA) to change to a bi-weekly payroll system from a semi-monthly payroll system. After investigation, I find the charge is not supported by probable cause.

Bargaining History.

On August 8, 2019, the parties signed the 2019-2022 CBA which includes a clause pertaining to a bi-weekly payday.[1] It reads in part,

> 21.07 Pay Procedures. (A) Payday. (1). As soon as feasible, payday shall be on a bi-weekly basis with direct deposit on Thursday or Friday. The parties agree that when a bi-weekly pay schedule is implemented, it will be done through a Letter of Agreement.

[1] Collective Bargaining Agreement between the Alaska State Employees Association, American Federation of State, County and Municipal Employees Local 52, AFL-CIO and the State of Alaska covering the General Government Bargaining Unit July 1, 2019, through June 30, 2022.

. . .

> The parties agree that when a bi-weekly pay schedule is implemented through a Letter of Agreement, leave accrual and other conditions or benefits calculated based on a semi-monthly pay cycle will be recalculated to reflect conversion to a bi-weekly pay cycle.[2]

Language pertaining to conversion to the bi-weekly payroll has been included in the CBA between the parties since 2013.[3] While the conversion has been discussed over the years during negotiations,[4] the State made no concrete move towards implementation until August 22, 2019, when State Labor Relations Manager Jared Goecker emailed a proposal to ASEA Executive Director, Jake Metcalfe.[5]

Following the August 22, 2019, email referenced above, the parties met for the first time on October 7, 2019, when the State hosted a conference call with representatives from ASEA and the State Division of Finance to discuss the conversion.[6] At the call ASEA expressed concerns about the LOA.[7] The State requested permission to begin communicating with state employees about the conversion. ASEA indicated it would discuss the request internally.[8] On October 9, 2019, Metcalfe agreed to let the State conduct outreach to employees.[9] The next day, Goecker emailed Metcalfe an updated LOA which addressed the concerns that ASEA raised in the October 7, 2019, teleconference.[10] Metcalfe contacted Division of Personnel and Labor Relations Director, Kate Sheehan, on October 11, 2019, indicating he was receiving emails from members regarding the loss of leave and significant loss based on the State's online calculator. He requested that they talk to discuss it.[11] Sheehan responded that day and wrote

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[2] *Id*. at 53.
[3] Response at 3.
[4] Affidavit of Benthe Mertl-Posthumus Regarding Bargaining for 2019-2022 Collective Bargaining Agreement With The Alaska State Employees Association.
[5] Affidavit of Jared Goecker, State's Ex. 2-3.
[6] *Id.*
[7] Goecker's affidavit does not indicate what ASEA's specific concerns were.
[8] Affidavit of Jared Goecker.
[9] State's Ex. 4.
[10] State's Ex. 6-7.
[11] State's Ex. 8.

"[w]e're looking at the calculator. We may have errors but I will certainly know more next week."[12] Subsequently, the State hosted another conference call with ASEA and other union representatives to discuss the bi-weekly conversion on October 11 and October 15, 2019.[13]

On October 23, 2019, Metcalfe and Sheehan met to discuss the implementation where Metcalfe requested that the State postpone implementation until April 16, 2020, since there would be three pay periods that month and it would give members time to "adjust their budgets, work out arrangements with their financial institutions, make possible changes to their housing situations, etc."[14] Following the meeting Metcalfe sent an email to ASEA members saying a postponement had been requested.[15] A few days later on October 29, 2019, the State emailed Metcalfe to inform him it had explored the feasibility of an extension until April 2020, but found it unworkable because the State would incur additional costs.[16]

On November 1, 2019, the State sent an email to employees in response to inquiries it was receiving concerning the implementation of bi-weekly pay.[17] That day, Metcalfe sent a letter to Goecker accusing the State of bargaining in bad faith and asking that it not directly contact State employees.[18] Four days later on November 5, 2019, Goecker responded to Metcalfe with a proposed LOA that waived leave cash in rules, modified the leave accrual rates, and included a roundup of leave accrual at the end of the year.[19] He followed up the LOA with a phone call to ASEA representative Susan Hartlieb on November 8, 2019, and hosted another conference call with Metcalfe and ASEA representatives on November 12, 2019.[20] According to Goecker, during the call Metcalfe indicated his biggest concern was with the quickness of the implementation and that Metcalfe suggested a June 2020, implementation and a

[12] *Id*.
[13] Affidavit of Jared Goecker.
[14] Affidavit of Kate Sheehan In Support of Petition to Enforce ASEA Collective Bargaining Agreement and Unfair Labor Practice Complaint, Response at 4.
[15] State's Ex. 9.
[16] State's Ex. 10, Response at 4.
[17] State's Ex. 11.
[18] State's Ex. 12-13, Response at 5.
[19] State's Ex. 14-16.
[20] Affidavit of Jared Goecker.

lump sum payment to members to make up for the missed earnings they would receive if the transition were to occur in December of 2019.[21] Metcalfe also raised concerns about the 4-hour rule regarding pay status for health insurance.[22] The state rejected this proposal.[23] Due to the concerns raised about the 4-hour rule, Goecker sent Metcalfe a memo on November 14, 2019, from the Division of Retirement and Benefits which explained how the 4-hour rule would function under a bi-weekly system.[24] The next day, Metcalfe sent a letter to Goecker proposing April 16, 2020, as an implementation date. Metcalfe reminded Goecker of the outstanding issues related to medical and health benefits and pointed out that they were mandatory subjects of bargaining.[25] Goecker responded on November 19, 2019, indicating that the April 16th date was impossible. He indicated that the "State desired to inform employees in August but was prevented by factors beyond its control."[26] Goecker confirmed that the State intended to implement the ASEA health trust medical benefit coverage for GGU employees in the same way as employees covered by Alaskacare.[27] Goecker flew to Anchorage on November 20, 2019, to meet with Metcalfe and other ASEA representatives in person. ASEA proposed an LOA with a June 1, 2019, implementation and a lump sum catch-up payment.[28] The next day while meeting with ASEA, Goecker requested mediation with the Federal Mediation and Conciliation Service (FMCS) and ASEA agreed.[29] Mediation occurred on November 26, 2019, with no resolution.[30]

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21 *Id*.
22 The 4-hour rule found in AAM 280.210.1- Effects of Leave-Without-Pay on Employee Benefits states that in order to be eligible for health coverage "an employee must be in pay status a minimum of four hours on the first scheduled work day of a month." See, State's Ex. 18. Further, according to ASEA, once employees were in pay status during the first working day of the month health benefit entitlements were triggered and the employee's health premiums would be deducted from their pay and sent to the ASEA Health Trust. (Response at 2). Emergency leave, donated leave and catastrophic leave are also all linked with employee health benefits. *Id.*
23 Affidavit of Jared Goecker.
24 State's Ex. 17-18.
25 ASEA Attachment 12.
26 ASEA Attachment 13.
27 *Id.*
28 Affidavit of Jared Goecker.
29 *Id*.
30 *Id.*

On December 2, 2019, Metcalfe emailed Goecker indicating his belief that the State was engaging in a "sham process" and was dictating to ASEA what the implementation date would be rather than bargaining over it.[31] Metcalfe indicated that ASEA had accepted the June 1, 2020, date that the State had proposed as an acceptable date for programming as that date would give his members time to prepare.[32] Metcalfe felt the State rejected that date because it was only interested in the December 16, 2019, date.[33] Metcalfe believed this to be sham and regressive bargaining and expressed concern that the State would ignore contract language and implement a bi-weekly pay schedule on December 16th without a letter of agreement.[34] He closed by asking whether the State intended to implement on December 16th and wrote that if he did not hear back from the State ASEA would "seek immediate relief from the Alaska Superior Court."[35] Goecker responded that day saying the State had been bargaining in good faith and that the June 1st date was never formally offered.[36] He wrote that it was mentioned as a possible date that conversion would work for payroll but that is was not offered because it would result in "hundreds of dollars of less pay per employee as opposed to going to biweekly in December 2019."[37] However, he wrote that "[b]ased on your bargaining positions, it has become apparent that ASEA will not compromise to a December 2019, start date, even though that date is in the best financial interest of employees. Therefore, reluctantly, the State is willing to agree to a June 2020, implementation date under certain specific conditions."[38] Namely, that the State have in hand a signed LOA with the June 2020, effective date no later than close of business on December 8, 2019, and that the union communicate the terms of the LOA to employees and indicate that the union chose and supported the June 2020, start date.[39]

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31 State's Ex. 19.
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id*.
38 *Id*.
39 *Id*.

The parties participated in a phone call on December 4, 2019, to discuss logistics for informing the employees about the postponement of the December 16, 2019, implementation.[40] That same day, Metcalfe sent the State a signed LOA with terms for a June 2020, implementation date and a lump sum payment.[41] Two days later on December 6, 2019, Goecker emailed ASEA agreeing to the June 1, 2020, date but rejected the lump sum payment, saying,

> The State's current offer remains to institute the change on June 1, 2020, and no other time, using the calculations previously submitted to the Union by the State. Further, the State is not going to pay State employees and Union members additional amounts of money they are not entitled to, as suggested by Article 21.10. Nor is the State going to pay them for dollar amounts they might have received had their union accepted the December 2019 implementation date repeatedly offered by the State, but which ASEA repeatedly REJECTED! The December implementation date has come and gone, and the June 2020 date is now the only date under consideration. The State has indicated acceptance to the Union's proposed implementation date, but the State has not, nor will it, agree to additional payments to employees for money employees have not earned.[42]

The email went on to say that by choosing the June 2020, date over the State's objections ASEA forfeited "the benefit of the pay calculation under the bi-weekly pay system during the first half of 2020" and that the "extra money employees would have received by transitioning to biweekly payroll in December 2019 is for the leap year day in February for those under biweekly. However, your members will be semimonthly during that time and not entitled to that benefit."[43]

Metcalfe responded that day saying "any obstacle to the State's good faith participation in resolving this is self-imposed."[44] He added that the worksheet provided by the State contained flawed

40 Affidavit of Jared Goecker.
41 State's Ex. 20-2.
42 *Id.*
43 *Id.*
44 *Id*.

calculations for conversions and the State rejected the lump sum workaround proposed by ASEA.[45] He wrote,

> Here's the truth about our disagreement over bi-weekly payments starting in June 2020. The worksheet provided to ASEA by the State featured a column of payments for the June 1, 2020 implementation with bi-weekly pay period amounts borrowed from the column of payments calculated for the December 16, 2019 start date. The State's worksheet had misapplied an annualized bi-weekly amount to a shorter window of bi-weekly pay periods. In response, ASEA developed a comparison featuring the proper calculation for a June 1 transition. To date, I'm not aware that you have evaluated our demonstration and understood the problem with your June 1 calculation of bi-weekly payments.[46]

Goecker responded by text on December 12, 2019, saying that the State had reviewed ASEA's math and believed it understood the source of the disagreement on the calculations.[47] He offered to travel to Anchorage the following week so the parties could discuss the matter in person.[48] Metcalfe responded the next day and the parties agreed to meet.[49]

The parties met on December 17, 2019, and according to Goecker, ASEA appeared to be agreeable but requested time for its accountants to review the calculations.[50] According to Goecker, he offered to meet with ASEA accountants and that Assistant Payroll Manager John Foster (who presented the State's data) could also extend his trip to be available.[51] Goecker indicated that Metcalf said he would keep the State informed.[52] Goecker followed up with Metcalfe the next day to ask for an update.[53] Metcalfe responded that he was waiting to hear from accountants and later texted that he believed they could come to an agreement on the numbers.[54] According to Goecker, the State thought it had an

45 *Id*.
46 *Id*.
47 State's Ex. 24.
48 *Id*.
49 State's Ex. 25-26.
50 Affidavit of Jared Goecker, State's Ex. 26-27.
51 *Id*.
52 *Id*.
53 Affidavit of Jared Goecker, State's Ex. 27-29.
54 *Id*.

agreement.[55] Goecker emailed ASEA an LOA which included the June 2020, implementation date but not a lump sum payment.[56]

Between December 20, 2019, and December 30, 2019, the State and ASEA representatives communicated by email to discuss when Metcalfe would return from leave, that Metcalfe wanted to have a conference call to discuss the LOA, and to ask if the State could provide the five-year salary calculator that had been previously discussed.[57]

On January 2, 2020, Metcalfe emailed the State to say that ASEA had reviewed the LOA, had additional questions, and requested another meeting.[58] Goecker contacted Metcalfe and a meeting was scheduled for January 6, 2020.[59] At the meeting ASEA presented a chart showing what it believed reflected that the conversion to bi-weekly would result in ASEA members receiving lower wages.[60] According to Goecker the parties disagreed on the calculations and the meeting ended with ASEA requesting that the State meet with ASEA accountants and send them the five-year salary calculator that was developed by the State.[61] The State agreed to the meeting which Metcalfe was to set up for the following day.[62] On the 8th, Goecker texted Metcalfe requesting an update on when the State could meet with the ASEA accountants.[63] Metcalfe responded that he believed he would know by the end of the day and asked for an update on the five-year calendar which Goecker indicated it would have done the next day.[64]

On January 9th and 10th, Goecker texted Metcalfe requesting an update on when the State would be able to meet with the accountants as well as to inquire how ASEA wanted delivery of the five-year

55 *Id*.
56 Affidavit of Jared Goecker, State's Ex. 30-31.
57 Affidavit of Jared Goecker, State's Ex. 30-32.
58 State's Ex. 34.
59 *Id*.
60 Affidavit of Jared Goecker.
61 *Id*.
62 *Id*.
63 State's Exhibit 35.
64 *Id*.

calculator.[65] On the 10th, an ASEA representative called Goecker and asked the State to provide members a floating holiday as part of the transition to bi-weekly.[66] Goecker responded that the State would investigate the floating holiday concept and follow up.[67]

A few days later on January 13, Goecker emailed Metcalfe asking for an update on when the State could meet with accountants and again asked for ASEA's preference for receiving the five-year calculator.[68] Metcalfe responded to the email the next day to say that he had put any conversations with the accountants on hold until the State responds to ASEA's request for a floating holiday.[69] Goecker replied that he did not see why the floating holiday proposal had any bearing on talking with the accountants and asked for clarification.[70] The State rejected the floating holiday proposal and again offered to send the five-year calculator.[71]

On January 20, 2020, Metcalfe emailed Goecker stating that he believed that since they were close to an agreement it was no longer necessary to facilitate a conversation with the ASEA accountants.[72] He wrote that what ASEA really needed was to see the five-year calculator and asked if the State could send it in a spreadsheet format.[73] Metcalfe went on to write that he wanted to get the LOA finalized that week but he also believed that wages were being shorted by $151.50 because of the conversion which he believed was a violation of the contract and would cause members to reject the LOA.[74] He asked to discuss the floating holiday proposal as he believed that was a way to avoid the shortage.[75] Goecker responded on January 23, 2020, expressing frustration that ASEA had delayed for two weeks after promising that the State would speak with ASEA accountants, only to say it was no

65 Affidavit of Jared Goecker, State's Ex. 36-37.
66 *Id.*
67 *Id.*
68 Affidavit of Jared Goecker, State's Ex. 38.
69 Affidavit of Jared Goecker, State's Ex. 39.
70 Affidavit of Goecker, State's Ex. 40.
71 *Id*.
72 State's Ex. 41, ASEA Attachment 21.
73 *Id*.
74 *Id*.

longer needed.[76] He sent the five-year calculator and over the next few days the parties exchanged availability.[77] The parties ultimately agreed to meet on January 30, 2020.[78]

When the parties met on the 30th, to discuss the bi-weekly conversion, they disagreed on whether the contract established a yearly amount of pay. [79] According to Goecker, he "encouraged them to put it to vote with their members and just explain the disagreement between the State and ASEA and let their members decide", but Metcalfe refused.[80] Goecker then told ASEA[81] "we are running out of time to make bi-weekly happen again and that the deadline my team had given me to have everyone signed (or not signed) was coming up in a couple of weeks." [82]

A few weeks later on February 10, 2020, Sheehan sent ASEA a proposed LOA with a June 1, 2020, implementation date.[83] She explained that the State had begun preparations to maintain the semi-monthly pay schedule if the conversion for ASEA did not happen, but that it would cost the State a significant amount of money.[84] The proposed LOA would allow for the bi-weekly schedule to begin on June 1, 2020, and would preserve the State's and ASEA's concerns by allowing for discussions on recalculations and the ability to seek relief if the State's calculations proved to be incorrect.[85] The LOA allowed for negotiations on the wage calculations to continue until July 15, 2020, and if those failed provided for the right to seek injunctive relief until June 1, 2021.[86] Sheehan requested that ASEA accept

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75 *Id*.
76 Affidavit of Jared Goecker, State's Ex. 42.
77 *Id*.
78 State's Ex. 43.
79 Affidavit of Jared Goecker.
80 *Id*.
81 According to Goecker, the only feasible dates for bi-weekly conversion are when those pay periods are aligned with the semi-monthly pay periods which are: 12/16/2019, 6/1/2020, 11/16/2020, 11/1/2021, 5/16/2022, 5/1/2023, 10/16/2023, 4/1/2024, 9/16/2024, 9/1/2025, 2/16/2026, 3/16/2026, 2/1/2027, 3/1/2027, 8/16/2027, 1/1/2029, 7/16/2029, 7/1/2030, and 12/16/2030 (Affidavit of Jared Goecker).
82 *Id.*
83 Affidavit of Kate Sheehan In Support of Petition to Enforce ASEA Collective Bargaining Agreement And Unfair Labor Practice Complaint.
84 *Id*.
85 *Id*., ASEA attachment 22-23.
86 *Id*.

or reject the proposal by February 13, 2020.[87] Metcalfe responded that day to say that he was having trouble communicating with Goecker, and renewed his concern that the wage dispute was not an accounting issue but a contract issue and reiterated his concern that ASEA members would not be paid correctly for 2020.[88] He rejected the proposal and indicated that, "[w]hen the SOA proposes a bi-weekly conversion and recalculation that reflects the promised wages for 2020, we will be happy to agree to your letter of agreement."[89] He indicated he wanted to have further discussions with Sheehan and the parties communicated on February 28, 2020.[90] However, subsequent conversations between the parties only addressed the COVID-19 epidemic.[91]

On March 4, 2020, Goecker emailed Metcalfe to inform him that the State would be filing a ULP and Petition to Enforce the Contract (CBA) against ASEA and another union.[92] The State filed the next day and investigation reveals that no further proposals were exchanged by the parties.[93]

Refusal to bargain allegation.

The State alleges that during the course of bargaining for the letter of agreement that ASEA engaged in bad faith bargaining to delay the State's implementation of a bi-weekly pay schedule such that implementation would become impossible.[94] It contends, "[t]he statements made by ASEA representatives, their conduct and their delaying actions, make it undeniable that they refused to agree to any bi-weekly implementation terms solely to blow the state's deadlines and to prevent the transition to bi-weekly."[95]

87 *Id*.
88 Affidavit of Kate Sheehan, ASEA Attachment 24.
89 *Id*.
90 Response at 8.
91 *Id*.
92 *Id*.
93 This information is current as of April 3, 2020.
94 Charge at Statement of Facts.
95 *Id*.

ASEA disputes the allegation and responds that, "it has, and continues to, negotiate in good faith each point of disagreement with the State, offering multiple proposals and showing flexibility."[96] It contends that it has never opposed transition to a bi-weekly payroll and has always insisted that a Letter of Agreement would need to be negotiated to ensure the protection and transition of the GGU members' contractual wages and benefits.[97] ASEA argues that in a show of good faith it did not file a ULP charge against the State even though it believed the State had engaged in direct dealing,[98] the State's negotiators did not have reasonable knowledge of the issues, were not capable of actually making bargaining decisions, and were "patently unable to meaningfully respond" to issues concerning mandatory subjects of bargaining.[99] Further, ASEA responds it was aware the State wasn't able to begin the conversion until June 1, 2020, because of technical errors, and despite what it believed to be the State "feigning to ASEA" that the conversion needed to occur sooner and an LOA needed to be signed by December 8, 2019, it did not confront the State so as to avoid disrupting negotiations.[100]

Last, ASEA contends wages are still in dispute and offers that the State still has not provided conversion wage tables[101] and "has offered no responsive counterproposals on any of the remaining points of disagreement."[102] According to ASEA it believes, the parties are close to resolution and says it continues to request counterproposals from the State.[103]

The State rebuts that by saying ASEA's attempt to blame the State for delays in implementing the bi-weekly pay schedule are misguided and misleading.[104] It contends that ASEA has had more than five years "of understanding about issues an LOA would have to address" and "does not explain why it waited

96 Response at 1.
97 *Id.* at 3, 9.
98 *Id.* at 12.
99 *Id.* at 11.
100 *Id.*at 10-11.
101 *Id.*at 10.
102 *Id*.
103 *Id.*
104 Rebuttal at 2.

for forty-six days (from August 22 until October 7) to respond to the email transmitting the proposed LOA."[105]

The State also contends in its rebuttal that ASEA's conduct away from the bargaining table does not support an inference that it bargained in good faith at the table and that its "forbearance from filing a meritless unfair labor practice charge does not support an inference of its good faith in negotiations with the State."[106] It goes on to say that is has satisfactorily responded to ASEA's concerns about leave accrual and health benefits and ASEA's claims that the state did not respond in a meaningful way lack merit.

Additionally, the State contends that the switch to bi-weekly pay will not result in a loss of pay and that employees will earn wages equivalent to or greater than the wages they would have received under a semi-monthly pay schedule.[107] The State argues that ASEA had not offered any meaningful response to the State's proposed recalculation of the wage table and that ASEA has been disrespectful to the State by referring to the State's calculations as "garbage in, garbage out."[108]

Last, the State rebuts ASEA's assertion that it learned from Laborers Local 71 (Local 71) that the December 2019, implementation date was delayed due to technical errors. The State contends that "ASEA fails to appreciate that the State could have implemented bi-weekly for Local 71 on December 16, 2019, if ASEA also agreed to that implementation date".[109] According to the State, "the only reason it was not feasible for the State to convert Local 71 to a bi-weekly pay schedule on December 16, 2019, was ASEA's refusal to sign its own LOA."[110]

Analysis.

ASEA did not engage in surface bargaining.

[105] *Id*. at 3.
[106] *Id*. at 5.
[107] *Id*. at 6.
[108] *Id*. at 7.
[109] *Id*. at 9.
[110] *Id*.

In the instant case, the parties were engaged in negotiations for the limited purpose of amending the 2019-2022 contract to develop a LOA to implement a bi-weekly pay schedule in accordance with Article 21.07(A)(1) of the CBA. As noted above, the State alleges that ASEA violated AS 23.40.110(c)(2) and committed an unfair labor practice by engaging in surface bargaining[111] by refusing to bargain with the State with the intent to delay the State's implementation of bi-weekly pay schedules.[112]

First, to establish a violation of a refusal to bargain under AS 23.40.110(c)(2), the State must show that ASEA violated the duty to bargain in good faith.[113] It is also well established that a union's duty to bargain in good faith is parallel to the duty placed on employers. [114] Collective bargaining is to be undertaken in good faith, but neither party is compelled to agree to the terms and conditions of the other party, provided that discussions have been engaged in with good faith in an attempt to amicably resolve the differences.[115]

Additionally, in *Fairbanks Fire Fighters Ass'n Local 1324, IAFF, v. City of Fairbanks*, Decision and Order No. 256, at 9-10, the Agency said 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 Cor. 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

111 Surface bargaining is defined as " 'going through the motions of negotiating,' without any real intent to reach an agreement." *K-Mart Corp. v. NLRB*, 626 F.2d 704, 706 (9 Cir. 1980).
112 Charge at Statement of Facts.
113 AS 23.40.110(c)(2) states, "A labor or employee organization or its agents may not refuse to bargain collectively in good faith with a public employer, if it has been designated in accordance with the provisions of AS 23.40.070—23.40.260 as the exclusive representative of employees in an appropriate unit."
114 *See, Teamsters Local 959 (Frontier Transportation Co.*), 244 NLRB 19 (1979); *Tool & Die Makers Local 78 (Square D Co.)*. 224 NLRB 111 (1976); *Printing & Graphic Communications Local 13 (Oakland Press)*, 223 NLRB 994 (1977), enfd. 598 F.2d 267 (D.C. Cir 1979).
115 *Alaska Emps. Ass'n v. Cowper, Order and Decision No. 115*, 17 (SLRA Oct. 20, 1988).

> the bargaining took place. *Port Plastics*, 279 NLRB 362, 282 (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."

Second, to establish behavior that constitutes surface bargaining the Agency said in *Int'l Org. of Masters, Mates & Pilots v. State,* Decision and Order No. 311, 10 (ALRA Apr. 25, 2017),

> When deciding whether an employer has engaged in surface bargaining, we examine the "totality of the employer's conduct, both at and away from the bargaining table." *People Care, Inc*., 327 N.L.R.B. 144 (1999), citing to *Overnite Transportation Co*., 296 N.L.R.B. 669, 671 (1989). Surface bargaining is addressed in *I Patrick Hardin, The Developing Labor Law*, 3d ed. (1992) at 616:
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> > When examination of the "totality" of a party's conduct during bargaining discloses that forms of negotiation have been employed to conceal a purpose to frustrate or avoid mutual agreement, the party is said to have engaged in "surface bargaining." Any single factor, standing alone, is usually insufficient to support such a conclusion, but its "persuasiveness grows as the number of issues increases."
> >
> > Although an employer may be willing to meet at length and confer with the union, the Board will find a refusal to bargain in good faith if it concludes the employer is merely going through the "motions of bargaining."

Additionally, in *Southwest Region Sch. Dist. v. Southwest Region Educ. Ass'n,* Decision and Order No. 257, 21 (ALRA Dec. 19, 2001), the Agency addressed a surface bargaining allegation stating,

> The NLRB has stated that, "it is 'not the Board's role to sit in judgment of the substantive terms of bargaining,' and stated further that, '[t]he Board will not attempt to evaluate the reasonableness of a party's bargaining proposals, as distinguished from bargaining tactics in determining whether the party has bargained in good faith." *Horsehead Resource Development Co*., Inc. 321 N.L.R.B 1404, 153 L.R.R.M. (BNA) 1200 (1996). "The obligation to bargain collectively 'does not compel either party to agree to a proposal or require the making of a concession.' If a term 'is genuinely and sincerely held, if it is not mere window dressing, it may be maintained forever though it produces a stalemate.'" *CJC Holding, Inc*., 320 NLRB 1041, 1045, 152 L.R.R.M. (BNA) 1254 (1996), citing to *NLRV v. Herman Sausage Co*., 275 F.2d 229, 231 (5th Cir. 1960).

Totality of the circumstances.

The contract language in 21.07(A)(1) (2019-2022) states, "As soon as feasible, payday shall be on a bi-weekly basis with direct deposit on Thursday or Friday." As soon as feasible is not defined. Due to programming requirements, there were a limited number of dates where payroll programming would align to afford a smooth transition.[116] While the record reflects that both parties were aware that a shift to bi-weekly pay would eventually need to occur, the evidence shows that the first official proposal was made by the State on August 22, 2019.[117] The State also made it known that it desired to implement by the December 16, 2019, date.[118] It held a series of conference calls with ASEA and other unions that would be impacted by the change.[119] ASEA pushed back against the December date citing the need for more time to avoid harming its members.[120] Proposals were exchanged and the State ultimately agreed to the next viable date of June 1, 2020.[121] The parties shifted their focus to that date and up until February 28, 2020, the parties were exchanging proposals and were engaged in conversations about the proposals.[122] According to ASEA discussions came to a halt when the parties shifted their focus to matters concerning the COVID-19 epidemic.[123] Shortly after that on March 5, 2020, the State filed the ULP petition and investigation shows that no further negotiations have taken place.

Both the State and ASEA were fixed in their belief that their own respective wage calculations were correct. ASEA made proposals such as a lump sum payment and a floating holiday as a way to offset what it believed were a change to employee wages under the contract and as a means to incentivize

116 See, footnote No. 2. above.
117 In his affidavit, Jared Goecker indicated that he began seeking to implement transition on June 18, 2019, but does not specify how that occurred. The rebuttal also references that the State provided notice that the Division of Finance would perform tests to the payroll system to prepare for the change. However, there was no evidence provided to support those statements. Nor is it clear that performing a test is a notice of intent to bargain the issue.
118 Affidavit of Jared Goecker.
119 *Id*.
120 *Id.*
121 State's Ex. 19.
122 Response at 8.
123 *Id*.

employee support for the LOA. The State did not stray from its position that wages were not changed but as shown above did show some flexibility by agreeing to move the implementation date from December 16, 2019, to June 1, 2020. Accordingly, up until the filing of the ULP, and absent the COVID-19 pandemic, both parties appear to have been willing to continue discussions on the implementation even though they both appear to have been somewhat fixed in their bargaining stances.

The Agency has said "The distinction between lawful "hard" bargaining and unlawful 'bad faith' or 'surface bargaining is a difficult one to draw and depends on the facts of each case."[124] Additionally, according to the *Developing Labor Law*,

> Where a review of the record as a whole has shown neither dilatory tactics nor an attempt to stall efforts to reach an agreement, hard bargaining rather than unlawful bargaining has been inferred from an unyielding position by employers on clauses addressing security, wages, checkoff, management rights, and arbitration and no-strikes.[125]

Further, the State must also show that ASEA intended to delay and "[t]he presence or absence of intent" must be discerned from the record."[126]

Looking at the totality of the circumstances for this case it's clear that clause 21.07 of the parties 2019-2022 CBA requires the parties implement a bi-weekly pay schedule as soon as feasible. However, as soon as feasible is not defined. The evidence shows that negotiations took place over a six month period as the State first emailed a proposal to ASEA on August 22, 2019, and the last meeting to discuss the LOA was February 28, 2020. The State originally hoped for implementation by December 16, 2019 (less than four months after the first proposal) but the parties exchanged proposals and ultimately agreed to a June 1, 2020, implementation date. The record also shows that there may have also been a disconnect between Metcalfe and Goecker such that Metcalfe preferred to work with Director Sheehan, but the negotiations between the parties continued.

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124 *See, Southwest Region Sch. Dist. v. Southwest Region Educ. Ass'n,* Decision and Order No. 257 at 22 (ALRA Dec. 19, 2001).
125 I John E. Higgins, Jr., *The Developing Labor Law*, at 13-51 (7th ed. 2017).

Where there was little movement however, was both parties belief as to how wages would be calculated. Both sides were adamant that their position on contractual wages was correct. The parties had been exchanging proposals and even went to mediation with FMCS to try and resolve the differences. When the wage issue did not resolve due to each parties position on the calculations, the parties agreed to meet with ASEA accountants. The meeting was so the State could present its information and therefore attempt to clear any confusion about how the state's calculations worked but the meeting was cancelled by Metcalfe because he believed they were close to an agreement. Then, according to ASEA, further negotiations on the LOA were sidetracked by a shift to negotiations regarding COVID-19.

These items when viewed independently are not a per se violation and when viewed with an eye towards the totality of the circumstances do not constitute surface bargaining or an intent to simply go through the motions so as to frustrate bargaining. Further, there is no evidence in the record of animus or conduct away from the bargaining table establishing an intent by ASEA to frustrate arriving at a letter of agreement. The evidence supports a sincerely held belief by ASEA that the contractual wages of its members would be shorted approximately $150.00 by the LOA proposed by the State. [127] The evidence also supports that ASEA believed the State's plan to implement in December 2019, was too soon and that its members needed more time to prepare for the financial changes the transition from a semi-monthly to a bi-weekly pay system would cause.

In *Alaska State Emps. Ass'n v. State*, Order and Decision No. 124, 6 (SLRA Sept. 18, 1989), the State and ASEA were bargaining but were not making progress on wages or health insurance benefits. The State had taken an "adamant position" regarding wages which the Agency found did not constitute

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126 *Id*. at 13-33.

127 As previously noted, in *Southwest Region Sch. Dist. v. Southwest Region Educ. Ass'n*, Decision and Order No. 257 at 21 (ALRA Dec 19, 2001) the Board said that "it is 'not the Board's role to sit in judgment of the substantive terms of bargaining and will not attempt to evaluate the reasonableness of a party's bargaining proposal as distinguished from bargaining tactics. Accordingly these findings do not explore the reasonableness of ASEA's position regarding the $150.00.

surface bargaining.[128] The Agency held that "mere surface bargaining is inappropriate." and found that when a party,

> has taken an adamant position regarding wages and certain other mandatory conditions, but has indicated a disposition to accept a menu of contractual terms designed to reach a certain budge level such that, for example, if wages are reduced health insurance benefits might be increased. Such bargaining is not in and of itself unlawful or in violation of AS 23.40.110(a) or outside the scope of appropriate actions under the term "collective bargaining" as defined.

In the instant case, the role of the parties are reversed with regard to who filed the ULP but the fact pattern is not so different. Both parties in the instant case have taken an adamant position regarding the wages it believes that members will receive under the new bi-weekly pay plan and both believe its wage calculations are correct. As found in the case above, an adamant position during bargaining does not constitute surface bargaining. As the NLRB said in *Coastal Elec. Co-Op*., 311 NLRB 1126, 1132 (1993), "it must always be borne in mind that good-faith bargaining may be quite hard and still be lawful." Further, "A party's failure to modify its bargaining position is not, however, bad-faith bargaining because an adamant insistence on a bargaining position is not itself a refusal to bargain in good faith."[129] Accordingly, hard bargaining is not a ULP and the evidence does not support that ASEA was intentionally stalling with the intent to make the State miss programming deadlines when it asked to push the implementation from December 2019, to June 2020, and later cancelled a proposed meeting with ASEA accountants.

Conclusion.

PERA does not require parties reach agreement on matters being negotiated.[130] It does however, require that the parties undertake collective bargaining in good faith and attempt to amicably resolve

128 *Id*.
129 *Id.*
130 *See, Alaska Emps. Ass'n v. Cowper, Order and Decision No. 115*, 16 (SLRA Oct. 20, 1988).

differences.[131] In reviewing the evidence I find it does not support an intent by ASEA to engage in delaying tactics such that bad faith bargaining or a refusal to bargain occurred. The parties were engaged in negotiations to develop a letter of agreement to allow the State to transition from a semi-monthly pay schedule to a bi-weekly pay schedule. Proposals were exchanged and the evidence supports that ASEA firmly and sincerely believed its own interpretation of the contract regarding wages and offered proposals in support of that position. As shown above, a sincerely held and adamant position does not always constitute bad faith with an intent to frustrate bargaining. Therefore, based on the evidence submitted and given the totality of the circumstances noted above, I find no probable cause to believe that ASEA violated AS 23. 40. 110(c)(2). I find that the charge under AS 23.40.110(c)(2) is not supported by probable cause and the complaint is dismissed.

ORDER OF DISMISSAL

The Alaska Labor Relations Agency has concluded its preliminary investigation of the unfair labor practice charge filed in this case and determined that probable cause does not exist to support the charge for an alleged violation of AS 23.40.110(c)(2). Therefore, the charge is DISMISSED.

APPEAL RIGHTS

Complainant may file an appeal of this dismissal with the Alaska Labor Relations Board under 8 AAC 97.250(a) which states, "Within 10 days of the date of service of dismissal of an unfair labor practice complaint or accusation, the complaining or accusing party may file an appeal of the dismissal with the labor relations board. Proof of service on the respondent is required in accordance with 8 AAC 97.015." The appeal must state reasons supporting reinstatement of the complaint or accusation. Complainant may provide additional evidence in accordance with 8 AAC 97.250(b).

131 *Id*.

Dated: May 18, 2020.

ALASKA LABOR RELATIONS AGENCY

By: /S/
Tiffany Thomas
Hearing Officer

This is to certify that on the 18th day of May, 2020, a true and correct copy of the Notice of Preliminary Finding After Investigation and Order of Dismissal was e-mailed, to:

Jared Goecker, State
William Walters, ASEA
Signature
/S/
Tiffany Thomas