IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

UNIVERSITY OF ALASKA, FEDERATION OF TEACHERS, LOCAL 2404, Appellant, vs. ALASKA LABOR RELATIONS AGENCY, UNIVERITY OF ALASKA, and UNITED ACADEMICS–AAUP, AFL-CIO, Appellees.	Case No. 3AN-14-04472 CI

DECISION AND ORDER

I. INTRODUCTION

This appeal from the Alaska Labor Relations Agency ("Agency") is the latest chapter in a long-running dispute between two labor unions which represent full-time, non-adjunct faculty at the University of Alaska ("University"). The University of Alaska Federation of Teachers ("Federation") has appealed the Agency's Decision and Order No. 301 ("D&O 301"), which assigned several Federation members to rival union and Appellee United Academics. The Federation argues that the Agency exceeded its authority and that the Agency's decision lacks a sufficient evidentiary foundation. Because the Agency fully considered the relevant facts and adhered to established legal principles, the court upholds the Agency's decision.

II. BACKGROUND

A. Procedural History

The incident case began in October 2007, when the Federation filed a series of unfair labor practice complaints against the University. D&O 301 at 5. The complaints alleged that the University improperly placed certain faulty members

into United Academics' collective bargaining unit. *Id.* The Agency investigated the complaints and found probable cause to conclude that the University had placed over 25 faculty members in the wrong unit. *Id.*

On August 15, 2008 the University filed a unit clarification petition with the Agency. *Id.* The University's petition requested that the Agency clarify the boundaries between the Federation and United Academics bargaining units. *Id.* at 6. On August 25, 2009 the Agency held the unfair labor practice complaints in abeyance pending resolution of the University's petition. *Id.*

The Agency issued D&O 301 on December 18, 2013, after a lengthy proceeding which produced a voluminous record. The Agency's decision significantly redrew the representation boundaries between the Federation and United Academics. It placed all faculty who teach primarily in vocational/technical programs in the Federation bargaining unit and assigned all faculty who teach primarily in baccalaureate or graduate programs to the United Academics unit. *Id.* at 61-62. In January 2014, the Federation appealed the Agency's decision to the Superior Court, arguing that the Agency lacked authority to reshape the unit boundaries to the extent that it did. The Federation also argues that the Agency's decision was not supported by substantial evidence in the record. Finally, the Federation claims the Agency deprived it of its due process rights because it ignored stipulations between the parties which limited the scope of the proceedings.

B. Factual Background

The present dispute goes back to 1987, when the University of Alaska merged with the state's community college system. Before the merger, the University offered programs that led to either baccalaureate or graduate-level degrees. *Id.* at 11. The community college system, on the other hand, specialized in vocational/technical education, college prep courses, developmental and community interest classes, and courses for academic transfer. *Id.* at 10. The

community colleges offered only lower division courses, while the University offered both lower division and upper division courses in addition to graduate level curricula. *Id.* at 10-11.

In 1973, Alaska's community college faculty organized into the Federation—then known as the Alaska Community Colleges' Federation of Teachers. *Id.* at 13. The Federation signed its first collective bargaining agreement with the University in 1974 and continued as the sole faculty representative until the 1987 merger.

In 1987 the University absorbed all of the state's community colleges except for Prince William Sound Community College in Valdez. *Id.* at 12. The Federation continued to represent the former community college faculty after the merger. The remaining faculty within the University system—mostly professors located at the three main University campuses in Fairbanks, Anchorage and Juneau—went unrepresented. *Id.*

In 1995 the unrepresented faculty sought representation by United Academics. After a disputed representation proceeding, the new bargaining unit was certified in 1996. *Id.* at 14. The new unit represented faculty who taught courses leading to baccalaureate or graduate degrees. *Id.* It also included faculty whose workloads included a research component. *Id.* The Federation continued to represent faculty who taught in vocational and technical programs. However, Federation faculty occasionally taught upper division courses. *Id.*

After certification, the new United Academics unit "experienced a chaotic period that included difficulties with record keeping and other organizational matters." *Id.* at 28. As one professor put it, "it was a brand new local" made up of academics who were "neophytes when it came to labor relations." *Id.* at 15.

In the late 1990s, as United Academics struggled to establish itself, several departments within the University system began changing from strictly technical or vocational programs to hybrids of technical training and academic education.

Id. at 27. Many programs that once offered only associates degrees or certificates began to offer bachelors or masters degrees. *Id.* Consequently, disputes soon arose between United Academics and the Federation regarding the placement of faculty. *Id.* at 27.

By 1997 United Academics had become concerned about Federation faculty teaching upper division courses. In response to United Academics' concerns, the University and the Federation removed language from the Federation's collective bargaining agreement that had expressly permitted Federation faculty to remain in the unit while teaching upper division courses. *Id.* at 28.

According to the Agency, "the dispute over assigning upper division courses to [Federation] bargaining unit members came to a head" during the 2003-2004 academic year. *Id.* at 29. In 2004 the two unions unsuccessfully attempted to settle their differences. *Id.* Finally, in 2007, in an attempt to appease the parties, the University "grandfathered" Federation members who had previously taught upper division courses into the Federation unit. *Id.* at 31. In other words, Federation faculty who were already assigned to teach upper division courses could continue to do so and remain within the Federation bargaining unit. However, the University made clear that it would no longer assign upper division courses to newly-hired Federation faculty. *Id.*

Placement disputes continue at the University. *Id.* at 32. In D&O 301, the Agency found that these disputes can affect "work assignment and the quality of teaching." *Id.* Specifically, the artificial barrier between vocational and academic programs makes it difficult for the University to assign work properly. *Id.* The University must often hire additional adjunct faculty to teach upper division courses despite the presence of qualified full-time instructors in the Federation bargaining unit. *Id.*

The present chapter in this ongoing dispute began in 2007 when the Federation filed its unfair labor practice complaints against the University. Appellant's Br. 2. The Federation alleged that the University unlawfully prohibited Federation faculty members from teaching upper division courses and arbitrarily reassigned Federation faculty members to the United Academics unit. *Id.* at 2-3. Now, the Federation challenges the D&O 301 because it "left in [the Federation's] bargaining unit only those [faculty members] teaching in vocational programs." The Federation claims this decision unlawfully reconfigured the bargaining units and exceeded the scope of the proceedings below.

III. LEGAL STANDARDS

A. Appellate Standard of Review

The Federation appeals the final decision of an administrative agency pursuant to AS 44.62.305. In such cases, the "substantial evidence" standard applies to questions of fact and the "reasonable basis" standard applies to questions of law. *State v. Pub. Safety Employees Ass'n*, 93 P.3d 409, 413 (Alaska 2004). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Handley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992). Under this standard, the court does not "evaluate the strength of the evidence" or "choose between competing inferences." *Id.* Similarly, the "reasonable basis" standard requires the court to determine only whether "the agency's decision is supported by the facts and has a reasonable basis in law." *Davis Wright Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 299 (Alaska 2014).

B. When Unit Clarification is Appropriate

Unit clarification is an adjudicatory process through which the Agency may add positions to a collective bargaining unit on the theory that the "added employees functionally are within the existing bargaining unit but ha[ve] not formally been included due to changed circumstances." *National Labor Relations*

Bd. v. Mississippi Power & Light Co., 769 F.2d 276, 279 (5th Cir. 1985). Under 8 AAC 97.050, a collective bargaining agent or public employer may petition the Agency for unit clarification in order to resolve a dispute regarding a bargaining unit's composition.

The Agency has previously held that unit clarification is appropriate "if there is some confusion over the contours of the unit or [if] the parties dispute whether a particular position belongs in the unit." *Northwest Arctic Education Association, NEA/Alaska v. Northwest Arctic Borough School District*, Decision and Order No. 162 at 6 (June 30, 1993). However, the Agency will not "modify the scope of a unit" or "add a position historically excluded" absent "changed circumstances." *Lower Kuskokwim Education Association/NEA-Alaska v. Lower Kuskokwim School Dist.*, Decision and Order No. 172 (March 2, 1994). The parties before the court dispute the proper scope of the term "changed circumstances," but the National Labor Relations Board ("NLRB") has held that the term encompasses situations which raise "real doubts" as to whether certain employees "continue to fall within the category . . . that they occupied in the past." *Union Electric Co.*, 217 NLRB 666, 667 (May 1, 1975).

C. Community of Interest

In order to determine the appropriate units for collective bargaining, the Agency looks to factors such as "community of interest, wages, hours, working conditions . . ., the history of collective bargaining, and the desires of the employees." AS 23.40.090. Pursuant to its authority under AS 23.40.090, the Agency has applied the NLRB's "community of interest factors" to unit clarification proceedings. *Northwest Arctic Education Association v. Northwest Arctic Borough School District*, Decision and Order No. 162 (June 30, 1993) citing *NLRB v. Saint Francis College*, 562 F.2d 246, 249 (3d Cir. 1977). These factors include:

> (1) similarity in the scale and manner of determining earnings; (2) similarity in employment benefits, hours of work, and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skills, and training of the employees; (5) frequency of contact or interchange among the employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (9) relationship to the administrative organization of the employer [and]; (10) history of collective bargaining . . . .

Id. The Federation challenges the Agency's analysis of all of the above-listed factors.

III. DISCUSSION

A. Did existing collective bargaining agreements bar the University's unit clarification petition?

The Federation first argues that the Agency erred in entertaining the University's unit clarification petition because the adjudicatory proceeding and subsequent Decision and Order disrupted existing collective bargaining agreements. See Appellant's Opening Br. 4-8. However, both Alaska and Federal labor law allow a labor relations agency to entertain a unit clarification petition when the boundaries between bargaining units are not clearly defined. Thus, the Agency acted properly.

The Federation relies on *Alaska State Employees Ass'n, AFSCME Local 52, AFL-CIO v. State*, 990 P.2d 14 (Alaska 1992) [hereinafter "*Local 52*"], in which the Alaska Supreme Court, citing the NLRB's decision in *Edison Sault Electric Co.*, commented that "entertaining a unit clarification petition during the midterm of a contract that clearly defines the bargaining unit would disrupt the parties' collective bargaining relationship." *Id.* at 22 citing *Edison Sault Electric Co.*, 313 NLRB 753, 753 (1994) (emphasis added). The Federation argues that the *Local 52* opinion adopted the *Edison Sault* rule. However, the Court simply stated that "[t]he policy enunciated in *Edison Sault*" was "met" in that case because "the

contract [at issue] . . . was clearly open to negotiation." *Local 52*, 990 P.2d at 22. As the Agency later noted in *Alaska Vocational Technical Education Center Teachers' Association, NEA-Alaksa v. State* [hereinafter *Alaska Vocational*], "the Court [in *Local 52*] did not adopt th[e] labor policy [articulated in *Edison Sault*] for purposes of the Alaska Public Employees Relations Act." Decision and Order No. 262 at 18 (ALRA 2003). Thus, Alaska labor law permits the Agency to entertain a unit clarification petition while a collective bargaining agreement is in effect. *See Alaska Vocational*, D&O 262 at 20 (holding that 8 AAC 97.050 "eliminates any ambiguity about whether the Agency intended a contract bar to apply to unit clarification petitions").

Assuming, however, for the sake of argument, that the Court did adopt the *Edison Sault* rule, it did so with language that limits the rule's application to circumstances where a collective bargaining agreement "clearly defines the bargaining unit[s]." *Id.* Consequently, the Agency's decision in this case would still stand because the boundaries between the Federation and United Academics bargaining units were not clearly defined.

Normally, under federal law, an agency should not entertain a unit clarification petition during the midterm of a contract because to do so "would disrupt the parties' collective-bargaining relationship." *Local 52*, 990 P.2d at 22 citing *Edison Sault Electric Co.*, 313 NLRB 753, 753 (1994). However, this rule applies only when the bargaining units are clearly defined. *Local 52*, 990 P.2d at 22; *Edison Sault*, 313 NLRB at 753; see also *Wallace-Murray Corp.*, 192 NLRB 1090 (1971). Moreover, the policy rationale behind the rule—that an agency should not interfere with a negotiated agreement between a union and an employer—loses force in the present circumstances. Since United Academics' certification in 1996, placement disputes have continually disrupted the collective bargaining relationship between the unions and the University. In fact, the Federation admitted to the Agency that the existing unit boundaries were

"unworkable, impractical, and impossible to apply." D&0 301 at 8. The Agency had little to lose by changing an arrangement that had proven inherently disruptive.

Because the Local 52 Court did not adopt the Edison Sault rule, and because the boundaries between the Federation and United Academics units were not clearly defined when the University filed its petition, the Court finds that existing collective bargaining agreements did not bar the University's petition.

B. Did substantial changes justify the Agency's decision to entertain the University's position?

The Federation cites NLRB precedent and argues that the Board erred by entertaining the University's petition because no substantial changes have occurred since the Federation executed its most recent collective bargaining agreement. United Academics and the University, on the other hand, argue that Alaska law, specifically 8 AAC 97.050, does not require the Agency to limit its analysis of substantial changes to the period since the most recent collective bargaining agreement. The Court finds that Alaska law authorizes the Agency to identify and analyze any changed circumstances since certification. *See* 8 AAC 97.050(a)(1) (permiting a "public employer" to "file a petition seeking [ ] clarification of an existing bargaining unit, where no question concerning representation exists, in order to resolve a question of unit composition raised by changed circumstances *since certification*") (emphasis added). The record contains evidence of several substantial changes within the university system since United Academics' certification in the 1996. These include: the evolution of course programs, degrees, and course delivery (especially in the area of online instruction); changes to job duties and required credentials; and change in the definition "vocational technical"—a key term for defining the boundary between the two unions. See D&O 301 at 21-27, 49-50. Thus, the Agency was properly

within its discretion under 8 AAC 97.050 when it accepted the University's unit clarification petition.

However, even under federal precedent, the Court would find that the Agency acted properly. In *St. Francis Hospital*, the NLRB entertained a unit clarification petition filed two months after the parties executed a collective bargaining agreement. 282 NLRB 950, 951. The parties in that case disputed the meaning of the term "regular part-time" in the collective bargaining agreement. *Id.* The employer argued that unit clarification was inappropriate because the parties had recently negotiated an agreement. *Id.* at 950. However, the Board stated that, in circumstances where parties cannot agree on whether a disputed classification should be included in a unit, "the interests of stability are better served by entertaining a unit clarification petition during the term of a contract." *Id.* at 951.

In the present case, the Agency found, and the Court agrees, that unit clarification would serve the "interests of stability." The University and the Federation executed their latest collective bargaining agreement on April 24, 2008. The University filed its unit clarification petition about four months later, on August 15, 2008. Restricting the Agency's inquiry to one four-month period in 2008 would ignore a decades-long history of conflict over the boundary between the Federation and United Academics. The Federation's own filings before the Board argue that the arrangement before D&O 301 was "unworkable, impractical, and impossible to apply." D&O 301 at 8. The conflict between the Federation and United Academics has affected the quality of instruction at the University and diverted resources that would otherwise go to benefit students, staff, and individual faculty members. As the Federation's most recent unfair labor practice complaint shows, the 2008 agreement did little to resolve this long-running and disruptive controversy. Thus, the Agency, in the "interests of stability" chose to clarify the boundaries between the two bargaining units. Based on the substantial body of evidence in the record showing the disruptive effects and intractable

nature of the Federation-United Academics dispute, the Court cannot find that the Agency's decision lacked a reasonable basis in either Alaska or federal law.

C. Did the Agency unlawfully convert the Federation's unfair labor practice complaints into a unit clarification petition?

The Federation claims the Agency unlawfully converted its unfair labor practice complaints into a unit clarification petition. The Federation cites *Dixie Electric Membership Corporation*, in which the NLRB held that an employer cannot "unilaterally absolve its unfair labor practice liability by filing a [unit clarification] petition." 358 NLRB No. 120 at 8 (2012). However, the Agency is not bound by NLRB precedent, and the circumstances of the present case differ from *Dixie Electric*. Consequently, the court finds that the Agency had a reasonable basis to proceed with unit clarification before resolving the Federation's unfair labor practice complaints.

In *Dixie Electric*, an employer unilaterally removed certain employees from a bargaining unit, claiming they were supervisors. *Id.* at 3. The union filed an unfair labor practice complaint alleging that the employer had failed to bargain and unlawfully changed the scope of the unit. *Id.* at 4. The employer responded with a unit clarification petition. *Id.* The NLRB dismissed the unit clarification petition. *Id.* at 8. It held that entertaining the petition would "frustrate the Board's remedial powers regarding the . . . unfair labor practices" and condone the employer's use of the unit clarification process to "disrupt [the] collective-bargaining relationship." *Id.*

In *Dixie Electric* the employer removed an entire class of positions from their bargaining unit, leaving the employees unrepresented. *Id.* at 1-3. Moreover, the NLRB found that the employer violated federal labor laws by "unilaterally transferring work outside of the [union]" without providing the union an opportunity to negotiate. *Id.* The Agency's decision here did not "remove collective bargaining rights from any employee." D&O 301 at 58. In addition, the

record shows a protracted disputed between the Federation and United Academics bargaining units. Unlike in *Dixie*, all parties have had ample opportunity to negotiate and settle their differences. *See id.* at 101-15 (describing repeated attempts to settle Federation-United Academics placement disputes, including mediation and contract negotiations).

Nonetheless, placement disputes continue. The Federation entered into the most recent collective bargaining agreement with one unfair labor practice complaint pending before the Agency. At the time, the Federation disputed the placement of at least 116 faculty positions. Exc. 210, Order on Motion for Reconsideration at 3. As the Federation's more recent unfair labor practice complaint shows, the 2008 collective bargaining negotiations failed to resolve the issue of unit boundaries. Thus, the Agency reasonably concluded that placement disputes would continue unless it addressed the underlying cause by clarifying the units. As the NLRB noted in *Dixie Electric*, unit clarification is inappropriate where it would "disrupt the parties' collective bargaining relationship." 358 NLRB No. 120 at 8 (citing *Edison Sault*, 313 NLRB at 753). Here, the record shows that the parties' bargaining relationship has been inherently disruptive since United Academics' certification in 1996, which created two unions for full-time faculty at the same institution, incentivized to compete for members, and with amorphous criteria for membership. Accordingly, the Court finds nothing in law or fact to justify reversing the Agency's well-reasoned decision to clarify the units before hearing the Federation's unfair labor practice complaints.

D. Did the Agency transfer "historically excluded positions" to the United Academics unit and thereby raise "a question of representation."

The Federation argues that the Agency's order added "historically excluded positions" to United Academics and that its order "amounted to a merger" of the two units—something normally outside the scope of a unit clarification proceeding. However, the Agency did not merge the two unions. While

significantly smaller than before, the Federation unit remains a viable representative for collective bargaining. Thus, the court finds that the Agency's decision finds adequate support in the record as well as the applicable law.

"As a general rule positions intentionally and historically excluded from the unit may not be added to the unit in a unit clarification proceeding." *Northwest Arctic Education Association, NEA/Alaska v. Northwest Arctic Borough School District*, Decision & Order No. 162 citing *N.L.R.B. v. Mississippi Power & Light Co.*, 769 F.2d 276, 279 (5th Cir. 1985). The Agency must reject a petition that attempts to place historically excluded employees within a bargaining unit because such cases "present a genuine question about representation." *Id.* However, unit clarification is appropriate "for resolving disputes concerning the unit placement of employees ... whose duties and responsibilities have undergone recent substantial changes which create real doubt as to whether their positions continue to fall in the category—excluded or included—that they occupied in the past." *N.L.R.B. v. Magna Corp.*, 734 F.2d 1057, 1061 (5th Cir. 1984) citing *Massachusetts Teachers Association*, 236 NLRB 1427, 1429 (1978).

The Agency found that "the structure of teaching in many programs has changed since ... the 1987 merger, and even since [United Academics'] 1996 certification." D&O 301 at 49. These changes—particularly the evolution of several programs from two-year vocational into four-year baccalaureate or even graduate—"have increased the integration of many faculty members" and rendered the two existing unit descriptions "impractical, ambiguous, and inappropriate." *Id.* at 50. Moreover, the Agency noted, as does the Court, that "the [previous] bargaining unit descriptions [were] not working because the parties continue[ed] to dispute the meaning of terms in the descriptions." *Id.* at 54. In sum, the Agency concluded, based on the "massive record" before it, that changing circumstances at the University during the past two decades warranted unit clarification. *Id.* at 49-50. The Court finds that substantial evidence supported

the Agency's decision and finds no reason to alter it. *See, e.g. Magna Corp*, 734 F.2d at 1061 ("Factual determinations by the NLRB such as whether unit clarification is 'squarely presented' due to a change in job classification should be sustained if they have 'warrant in the record' and a reasonable basis in the law.") (citations omitted).

The Federation also contends that the Agency effectively merged the two bargaining units by moving "approximately 301 faculty members" out of the Federation and into United Academics. Appellant's Opening Br. at 17. Strictly speaking, the Federation is incorrect. D&O 301 unequivocally states that "[t]wo full-time faculty bargaining units remain appropriate." D&O 301 at 62. The Agency clarified the Federation unit to include "regular faculty whose principal assignment is instruction in vocational technical programs or certificate programs; Developmental Education Program faculty including community interest faculty; and faculty, librarians, and counselors of a community college established by the University of Alaska's Board of Regents." *Id.* at 62-63. According to Nancy Bish, the Federation's Secretary-Treasurer, the Federation will retain 80-100 members as a result of D&O 301. Affidavit of Nancy Bish at 2.

Furthermore, the Court must conclude that the parties differ not on whether the Agency should have redrawn the unit boundaries, but on how. The Federation argues, as it did before the Agency, that the only reasonable distinction between faculty members at the University of Alaska is whether or not a faculty member's workload contains a research component. See UAFT's Post-Hearing Brief at 3, EXC000196. The Federation believes that United Academics should represent exclusively research faculty. Appellee's Opening Br. at 22-23. However, the Agency considered the Federation's arguments on this point and rejected them because it found that University of Alaska faculty "can no longer be distinguished" based on their workloads. D&O 301 at 38. For example, the Agency found that research and non-research faculty frequently "work side by

side" and that faculty members without a formal research component in their workloads "still conduct research as part of their teaching mission." *Id.* at 38-39.

On the other hand, the Agency found that the "community of interest" factors support a distinction between vocational/technical and academic instructors. *Id.* at 56-60. Given the recent growth in baccalaureate and graduate courses, one would expect such a distinction to reduce the number of faculty in the Federation unit. However, the fact that the Agency reduced the size of one unit does not render its decision arbitrary or irrational. Therefore, the Court finds that the Agency did not exceed the proper scope of a unit clarification proceeding.

E. Did the Agency deprive the Federation of its right to due process by ignoring stipulations between the parties?

The Federation argues that the Agency violated its due process rights because D&O 301 affects the placement of faculty working at extended sites within the University system. During the proceedings below, United Academics stipulated with the other parties to withdraw its claim to represent faculty at extended sites. However, the Agency included in the newly-defined United Academics unit extended site faculty "who teach in programs leading to baccalaureate or graduate degrees." D&O 301 at 63. The court finds that although the Agency expressly disregarded the stipulation, it did not violate the due process rights of any party.

Due process requires notice and an opportunity to be heard. *Frontier Saloon, Inc., v. Alcoholic Beverage Control Bd.*, 524 P.2d 657, 659 (Alaska 1974). "The determination of whether a state action or procedure" deprives a party of due process "is a question of law," and the court will review the matter using its "independent judgment." *Carvalho v. Carvalho*, 838 P.2d 259, 261 n.4 (Alaska 1992).

The Federation claims that because the parties stipulated regarding extended site faculty, it lacked notice that the Agency would consider the

placement of those faculty members in its decision. However, Courts are not bound by stipulations between the parties. *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985); *Jerrel v. Kenai Peninsula Borough School District*, 567 P.2d 760, 764 (Alaska 1977). And the existence of the issue was not a surprise. The Agency heard testimony from all three parties regarding the placement of extended site faculty. The Federation itself offered several witnesses who testified about extended site faculty, including Ira Rosnel, Dr. Paul Reichart, Michael Turner, and former Federation president Michael Congdon. *See* Exc. 202. The Federation also argued in its briefing that distance learning had erased the distinction between extended site faculty and main campus faculty. Exc. 211.

Moreover, the parties received notice that the Agency would consider the placement of extended site faculty when it ordered the parties to submit post-hearing briefs on the appropriateness of a single bargaining unit. Exc. 214. By definition, a single unit would include extended site faculty. Because the Federation participated in proceedings that discussed the status of extended site faculty, it had notice that the Agency would consider the placement of extended site faculty in its decision. The court therefore finds that the Federation had adequate notice and an opportunity to be heard. The Agency did not violate the Federation's right to due process.

F. Was the Agency's application of the "community of interest" factors supported by substantial evidence on the record.

The Federation disputes the Agency's application of the "community of interest" factors. According to the Federation, the record supports only one sensible distinction between faculty members at the University—whether or not a faculty member's workload contains a research component. However, the Agency found more similarities than differences between research and non-research faculty. D&O 301 at 36-44. The Federation thoroughly and accurately highlights the differences, but does not provide enough evidence for the court to reverse the

Agency on appeal. Because the Federation merely presents an alternate basis on which to distinguish the bargaining units, the court must uphold the Agency's decision. *See Handley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992) (holding that a court may no substitute its judgment for that of the agency).

Neither Alaska nor federal precedent contains per se rules which would govern the court's evaluation of the "community of interest" factors. On appeal, the court must find that the Agency found "adequate justification" for its decision in the record and "acted in its discretion in assessing the preponderance of the circumstantial evidence." *N.L.R.B v. Purnell's Pride*, 609 F.2d 1153, 1156 (5th Cir. 1980).

Based on its review of the record, the Agency's decision, and the parties' briefs, the court concludes that the Federation has failed to show that the Agency's application of the "community of interest" factors lacks adequate justification in the record. The Federation's briefs merely demonstrate that some evidence exists for a research-based distinction between the two bargaining units. However, the fact that evidence exists to support an alternate conclusion does not speak to the weight of the evidence nor the reasonableness of the Agency's decision.

For example, the Federation argues that "[research faculty members] seeking promotion or tenure have to demonstrate productivity in research and [non-research] faculty members have to demonstrate productivity and successful teaching, so the process of evaluation for promotion and tenure is different in each group." Appellant's Opening Br. at 45. This statement is incorrect. First, all faculty have teaching responsibilities. Second, the process of evaluation does not differ significantly between research and non-research faculty. All tenure-track faculty members, whether or not they conduct research, must assemble a portfolio documenting their work-product, teaching performance, and service activities. *Id.* at 43-44. In all cases, "the department chair, the dean," and multiple evaluation committees review the materials in the portfolio. *Id.* at 44. Research faculty

include their research in the portfolio while non research faculty do not, but the process remains the same. *Id.* In addition, the University evaluates all tenure-track faculty, research and non-research alike, using the same matrix—the SOTL. *Id.* at 45.

The history of the bargaining units also supports the Agency's decision. The Federation historically represented the state's community college faculty. *Id.* at 24. After the 1987 merger, the Federation continued to represent the former community college faculty to the exclusion of the full-time academic faculty at the University's three main campuses. *Id.* at 25. Beginning in 1996, United Academics represented positions historically excluded from the Federation unit. These included both research and non-research positions. See D&O 301 at 56. At no time in the two units' history has a faculty member's placement depended on whether or not their workload includes a research component.

The Agency also found that research and non-research academic faculty share similar credentials (in most cases, a terminal degree), supervision structures, and salary schedules. D&O 301 at 36, 44 57. Moreover, research and non-research faculty often interact in a professional capacity, and non-research faculty conduct research activities in order to "stay current in their field." *Id.* at 18, 39. The Federation attempts to dispute these findings by highlighting differences between research and non-research faculty. For example, the Federation points out that faculty members with a research obligation devote significant time—as much as 90% of their working hours—to research instead of teaching. Appellant's Opening Br. at 36-41. The Federation also directs the court's attention to the fact that research faculty—unlike non-research faculty—draw a major portion of their income from grant money and devote significant resources to publication in peer-reviewed journals. *Id.* at 40.

However, the Federation's arguments merely suggest that the Agency could have reached a different result. They do not convince the court that the evidence

requires it to adopt the Federation's position. The court agrees with the Federation that the historical distinction between the bargaining units had become unworkable and disruptive when the University filed its unit clarification petition in 2008. However, the record lends ample support to the Agency's conclusion that this occurred because "many programs once deemed vocational have lost that marker" and "evolved into academic . . . programs." *Id.* at 60. The Agency reasonably concluded that a preponderance of the evidence still supported a distinction between vocational/technical and academic faculty, and the court finds no basis in the evidence to disturb that conclusion on appeal.

G. Was the Agency's decision arbitrary and capricious?

Finally, the Federation argues that the Agency acted arbitrarily and capriciously because it ignored stipulations between the parties regarding the placement of extended site faculty. However, court finds that the Agency arrived at a reasonable conclusion based on the evidence before it.

In *Southeast Alaska Conservation v. State*, the Alaska Supreme Court held that the role of the court on appellate review is to ensure that the agency "has given reasoned discretion to all the material facts and issues." 665 P.2d 544 548-49 (Alaska 1983). Where an agency fails to consider an important factor, the court may regard its decision as "arbitrary." *Kachemak Bay Watch v. Noah*, 935 P.2d 816 (Alaska 1997). No Alaska authority addresses the impact of stipulations before the Agency, but the Alaska Supreme Court has held that courts are not bound by stipulations between the parties. *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985); *Jerrel v. Kenai Peninsula Borough School Dist.*, 567 P.2d 760, 764 (Alaska 1997).

The Agency considered a massive record and weighed multiple factors, including the parties' agreement. In applying the "community of interest" factors, the Agency found it most reasonable to distinguish between the vocational/technical and academic faculty. D&O 301 at 59. The Agency also

found that the growth of distance learning has reduced the differences between extended site and main site faculty. *Id.* at 57. In the context of the Agency's complete analysis, the stipulations made little sense. To clarify the boundaries between bargaining units at the main sites without dealing with the extended site faculty would only perpetuate the unworkable arrangements that occasioned the present dispute. See *id.* at 50 (finding the existing arrangement "impractical" and "inappropriate"). In addition, such a decision would have ignored the Agency's conclusion that differences between extended site faculty and main site faculty have largely disappeared. Finally, honoring the parties' stipulations would have arbitrarily limited the Agency's "community of interest" analysis to the extent that the Agency could not have meaningfully clarified the boundaries between the units.

Finally, the Federation's contention that the Agency's decision "show[ed] a disregard of the facts and law," is wholly without merit. As the court's analysis reveals, the Agency considered the facts before it and came to a reasonable conclusion. The Federation has demonstrated that evidence exists to support a different result—a distinction based on whether or not a faculty's workload includes a research component. However, this court may not reweigh the evidence. The Agency's decision finds a reasonable basis in the record, and thus, the court will not disturb it.

The court concludes that the Agency considered all relevant factors and acted reasonably under the applicable law. The Agency's decision was neither arbitrary nor capricious.

For all of the above reasons, the Agency's decision is AFFIRMED.

ORDERED this 11th day of February, 2016, at Anchorage, Alaska.

Andrew Guidi

ANDREW GUIDI
Superior Court Judge

I certify that on 2-11-16
a copy of the above was ~~mailed to~~ emailed
each of the following at their
addresses of record:
K. Burnard / T. Venneberg / A. Pullesen
B. Bloom / K. Dunn / T. Wang

J Kupper

Jackie Kapper, Judicial Assistant