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STATE OF ALASKA (labor relations analysts and)
human resource specialist II positions),)
)
Petitioner,)
)
vs.)
)
CONFIDENTIAL EMPLOYEES ASSOCIATION,)
APEA/AFT,)
)
Respondent.)
)
)
)

Case No. 04-1302-UC

DECISION AND ORDER NO. 278

The ALRA Board (Vice Chair Aaron Isaacs, Jr., and Members Colleen Scanlon and Matthew McSorley) heard this petition for unit clarification on February 13, 2006, in Juneau. Assistant Attorney General Jan Hart DeYoung represented Petitioner State of Alaska (State). Attorney Brad Owens represented Respondent Confidential Employees Association (CEA). Hearing Examiner Mark Torgerson presided. The record closed at the conclusion of the hearing on February 13.

Digest: The petition to remove the Labor Relations Analysts and Human Resource Specialist from the CEA bargaining unit and take away their collective bargaining rights is denied. The Labor Relations Analysts and the Human Resource Specialist are not a public employer under AS 23.40.250(7); they are public employees under AS 23.40.250(6), and therefore have collective bargaining rights. They are confidential employees under 8 AAC 97.990(a)(1). They share a community of interest with other employees in the CEA bargaining unit. Although they have a conflict of interest, it has not interfered with their work duties; regardless, the Alaska Legislature has not included this group of employees under an exception to "public employee" in the Public Employment Relations Act.

DECISION

Statement of the Case

The State filed this petition seeking unit clarification of several positions in the Department of Administration's Labor Relations Division. The State petitions for removal of the Division's Labor Relations Analysts and a Human Resource Specialist II from collective bargaining. CEA maintains that the Board should dismiss this petition and keep the Labor Relations Analysts and the Human Resource Specialist in the confidential employees bargaining unit.

Issues

1. Are the Labor Relations Analysts and Human Resource Specialist II a "public employer" as defined by AS 23.40.250(7)?
2. Do the Labor Relations Analysts and Human Resource Specialist II meet the definition of "confidential employee" in 8 AAC 97.990(a)(1)? If so, should they be removed from the confidential employees bargaining unit?
3. Do the Labor Relations Analysts and Human Resource Specialist II share a community of interest with other employees in the confidential bargaining unit?

Findings of Fact

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

1. The State and CEA entered into a collective bargaining agreement, effective July 1, 2004, through June 30, 2007. (Exh. 6).
2. The CEA, affiliated with the Alaska Public Employees Association (APEA), represents a unit containing 141 employees and a variety of job classifications, with salaries extending from Range 7 to Range 22. (Jt. Exh. 2). The unit includes employees from the Department of Administration's Divisions of Labor Relations and Personnel, along with a few employees from the Alaska Marine Highway system. There are 14 employees in the Division of Labor Relations.
3. The confidential unit includes several Labor Relations Analysts (LR Analysts) and Human Resource Specialists (HR Specialists) I, II, and III. The State seeks to remove seven of these positions from the CEA bargaining unit and from collective bargaining altogether: six LR Analysts and one HR Specialist II.
4. The LR Analysts perform several tasks for the Division of Labor Relations. Their duties include representing the State in collective bargaining negotiations, in grievance and arbitration proceedings, and in disputes before this Agency. Some of the LR Analysts also provide training and supervise other Division employees.

5. The LR Analysts included in the State's petition are Kent Durand, Nancy Sutch, Dianne Kiesel, Katherine Stahly, and Benthe Mertl-Posthumus.¹ These individuals belong to the confidential unit. There is currently one vacant position included in the petition.

6. Kent Durand is an LR Analyst III. He is the most senior ranking LR Analyst. His position control number is 02-2098. A September 16, 2002, memorandum describes the results of a Human Resource Study on his position:

As currently written the position description is not accurate . . . The primary focus of this position is to serve as the State's advocate in all assigned labor relations activities; research and make recommendations and prepare for interest arbitrations, mediations, and other dispute resolution activities; lead contract negotiations and provide consultative and training services to managerial and supervisory personnel. This position serves as the state's principal labor relations advisor for assigned cases and labor agreements and offers [technical] direction to section staff.

(Jt. Exh. V, at 2). He may also serve as supervisor of a personnel Specialist I and participate in training of subordinate staff. (Jt. Exh. XII, at 4).

7. Durand performs duties that require him to assist and act in a confidential capacity to Division Director Art Chance, the Commissioner of the Department of Administration, and individual agencies to which Chance assigns him. (Jt. Exh. VI, at 2).

8. Durand has "been called upon to assist in establishing goals and objectives and policy associated with labor contract negotiations, and the employment/labor issues as they relate to or involve the state legislature, the administration, and labor representatives." (Jt. Exh. VI, at 4). His policy recommendations are rarely overturned, but his superiors have the final say. (Jt. Exh. IV, at 8).

9. Durand could not recall any situation where his role as a negotiator conflicted with his membership in CEA. However, he did recall a Sitka case in which a confidential unit member testified on behalf of APEA, and Durand represented the State. Durand testified that if a conflict arose, he could set aside the conflict and do his job. His membership has not affected his ability to advise the State on labor relations matters. (Jt. Exh. IV, at 8). Durand prefers to remain in the confidential employees bargaining unit.

10. Nancy Sutch is an LR Analyst III. She has worked for the State for 18 years and has been employed with the Labor Relations Division since October 11, 2001. Her position control number is 02-2002. Effective August 16, 2004, the State reclassified Sutch's position from LR Analyst II to LR Analyst III, (Jt. Exh. IX). An LR Analyst III performs the advanced professional level of labor relations work. (Jt. Exh. IX, at 2).\

11. Sutch's responsibilities for setting agency goals, objectives, or policies for labor relations matters include working as chief spokesperson in labor negotiations, making recommendations to the state departments to which she is assigned, and also to her supervisor, currently Art Chance. (Jt. Exh. X, at 4).

¹ The State withdrew employee Tyler Andrews' name from the Petition. Andrews, previously an LR Analyst II, is now a Human Resource Manager II.

12. Sutch does not formulate, determine, and effectuate management policies in labor relations matters by herself. She must first obtain approval from a higher-level, appointed position. (Jt. Exh. XI, at 1). Sutch assists and acts in a confidential capacity to Chance, who formulates, determines, and effectuates management policies in labor relations matters.

13. Sutch has not experienced any conflict of interest, as a confidential bargaining unit member, while representing the State in collective bargaining negotiations, because she has "effectively" removed herself from "active membership" in the confidential unit. However, while representing the State, Sutch has investigated or participated in a pre-disciplinary interview that involved a dispatcher from the Alaska Marine Highway System. Both the dispatcher and Sutch are members of the confidential unit. She does not feel comfortable "recommending an action that could result in a dispute against a Union member" while she is a member of and represented by the same union. (Jt. Exh. XI, at 2).

14. Sutch opined that LR Analysts do not belong in the confidential bargaining unit. "I do enjoy the protections of being in a 'covered' position, but don't believe any of the existing bargaining units are appropriate for positions like mine." (Jt. Exh. X, at 4). She did not express a specific preference to be included in or excluded from the confidential unit.

15. Dianne Kiesel is an LR Analyst III. Her position control number is 02-9013. Kiesel has labor relations duties similar to those performed by Durand and Sutch. In addition, she serves as a day-to-day supervisor of the LR Analysts I and II, as well as administrative staff, and she participates in various training efforts. (Jt. Exh. XII, at 4).

16. Regarding the setting of agency goals, objectives, or policies for labor relations matters, Kiesel "effectively recommends" them and promulgates and implements policies. (Jt. Exh. XIII, at 4). She mainly recommends policies to Chance, who rarely overturns her recommendations. (Jt. Exh. XIV, at 1). Kiesel does not formulate, determine, and effectuate management policies in labor relations matters.

17. Kiesel has not faced any conflicts of interest in her dual status as a negotiator representing the State and as a member of the confidential unit. She has experienced conflicts advocating against CEA union officials who represent both her as a member and other member employees. (Jt. Exh. XIV, at 2). She does have an upcoming hearing in which she will advocate for the State, and APEA Business Manager Pete Ford represents the other side. APEA represents the confidential unit.

18. Kiesel expressed no preference on whether her position should continue to be included in the confidential unit or excluded from collective bargaining. (Jt. Exh. XIII, at 4). In Kiesel's opinion, the conflict of interest is "heavier than the benefit."

19. Katherine Stahly has worked as an LR Analyst II since approximately September 2004. Her position control number is 02-2096. She analyzes grievances and recommends disposition. She also handles arbitrations and represents the State in contract negotiations. (Jt. Exh. XVI, at 3). Stahly provides input into setting goals and policies but the ultimate decision belongs to Director Chance. (Jt. Exh. XVI, at 4). Sometimes all of her policy recommendations are implemented, and sometimes none are implemented. (Jt. Exh. XVII, at 1). She assists in formulating, determining and effectuating management policies, but the final decision on the nature of the policy implemented belongs to Chance or other higher-level positions.

20. Stahly prefers to have her position excluded from collective bargaining. She believes there is a conflict when an LR Analyst handles grievances involving employees who are members of the same union in which she is a member. (Jt. Exh. XVI, at 7). "It's basically like I'm arguing with the people who are supposed to be looking out for me." (Jt. Exh. XVII, at 1).

21. The conflicts have not impacted Stahly's ability to advise the State, but she would be "quite uncomfortable" with her union representing her in a grievance. She does not believe she could trust the union to represent her to the greatest extent possible. (Jt. Exh. XVII, at 1).

22. Benthe Mertl-Posthumus is an LR Analyst II.² Her position control number is 02-9008. She has worked in the position for more than three years. She has participated in negotiations, briefed superiors, and acted as a team member. She handles Step 3 grievance responses and represents the State as first or second chair in arbitrations. (Jt. Exh. XIX 19, at 3). Mertl-Posthumus does not have responsibility for setting agency goals, objectives, or policies in labor relations matters.

23. Mertl-Posthumus believes she formulates labor relations policies herself, but she does not determine and effectuate those policies. All of her policy-writing work is reviewed, edited, and approved or disapproved at a higher level. (Jt. Exh. XX at 1). Her proposals usually go through two levels of review, as she is supervised by Dianne Kiesel, who in turn is supervised by Chance. (Jt. Exh. XX, at 2).

24. Mertl-Posthumus sees a potential conflict of interest with APEA (with whom the confidential unit is affiliated), because APEA would be required to represent her as a member, and also represent other confidential unit members whom Mertl-Posthumus may be opposing as an advocate for the State. She has not experienced any conflicts yet. (Jt. Exh. XX, at 2).

25. Mertl-Posthumus desires to have her position included in the confidential unit because it gives her protection, a just cause standard, better pay and certain benefits. (Jt. Exh. XIX, at 4).

26. The HR Specialist II in the petition is Adrienne Snow. Her position has been in the confidential unit, "[w]ith a short exception," since the unit was created. (Jt. Exh. XXV, at 5). Like the LR Analyst positions, Snow's position is in the confidential unit. She assists and acts in a confidential capacity to a person who formulates, determines, and effectuates management policies in labor relations matters. (Jt. Exh. XXV, at 2). In her responses to the Agency's "Questionnaire Regarding Confidential Duties," Snow described what she does when assisting and acting in a confidential capacity:

SEE POSITION DESCRIPTION FOR FULL DETAILS. Under supervision of the Director of the [Division] of Labor Relations, I conduct employee interviews/audits and investigations. These are in support of the Commissioner of [Administration] level grievance responses that I draft as well as acting as the Commissioner's hearing officer for complaints filed by

² Mertl-Posthumus noted that her unsigned position description is no longer accurate. The position description described duties of an LR Analyst I. She is now an LR Analyst II. (Jt. Exh. XIX, at 6; Petitioner's Response to Investigator's Questions at 6, (August 9, 2005)). We will give her position description, Jt. Exh. XVIII, less weight than we give her responses on the Questionnaire Regarding Confidential Duties, and her responses to questions from the Agency's Personnel Specialist I, Margie Yadlosky, on February 16, 2005. (See Jt. Exhs. XIX and XX).

employees. I evaluate union allegations and arguments to determine the viability of cases and prepare appropriate responses. Work with union agents and managers to try to come to settlement on as many cases as possible. Supervisor signs off on all such agreements.

As requested by the Director, I draft department of Administration policy and procedure memoranda to be signed by the director or the commissioner. This writing is done after considerable research of available data, laws, regulations, etc. Draft written interpretation and instructions on contract provisions, arbitrator's rulings and other LR related issues.

(Jt Exh. XXV, at 3) (capital letters in original).

27. In her current position, Snow prefers to be excluded from collective bargaining. In her responses to "Questionnaire Regarding Confidential Duties," Snow stated:

The vast majority of my work involves the drafting of high level responses to inquiries and grievance matters that often set policy for the State. I am expected to be able to conduct the necessary research and develop conclusions that are consistent with management's policies - or desired policies. I participate in the negotiations process and have been called upon to research personnel/management matters that apply to members of the Confidential bargaining unit. I believe this is not consistent with the work originally intended when the Confidential unit was first established. Many division of personnel staff are in positions well suited to being under collective bargaining. My work is not of this type.

(Jt. Exh. XXV, at 4).

28. The LR Analysts are paid from Range 18 for an LR Analyst I to Range 21 for an LR Analyst III. (Jt. Exh. II). The HR Specialist II is paid at Range 18. Like other employees paid in these ranges, the LR Analysts and the HR Specialist are exempt from overtime pay. The bargaining unit contains a total of 59 positions that are paid at Range 18 or above. This comprises 42 percent of the bargaining unit. (Jt. Exh. II, pages 1-6).

29. There was no evidence submitted on the hours or working conditions of other members of the confidential unit.

30. The working conditions of the LR Analysts and HR Specialist are similar to each other because they work for the Division of Labor Relations on grievances, arbitrations, and collective bargaining negotiations.

31. The LR Analysts became part of the confidential bargaining unit after the Alaska Superior Court's decision in *Confidential Employees Association v. State of Alaska*, 1JU-93-0656 CI (September 1, 1994). They were placed into the unit as part of an agreement between the State and CEA. Prior to 1995, the LR Analysts were partially exempt, in accordance with a letter of agreement between the Alaska Public Employees Association and the State.

32. The desires of the LR Analysts and HR Specialist are mixed on whether they want to be excluded from the confidential bargaining unit. Two wish to be included in the unit,

two wish to be excluded, and two expressed no desire though they believe it is preferable to exclude labor relations negotiators from a collective bargaining unit.

33. The LR Analysts and HR Specialist are all supervised by Director Chance. The position description questionnaire (PDQ) for Chance summarizes the main purpose of the director's position: "Under the general administrative direction of the Commissioner [of Administration], this position will manage the labor relations function for the Executive Branch by consulting with and advising the principal decision makers on labor relations policy matters and by directing the staff of the labor relations section of the Office of the Commissioner." (Jt. Exh. III, at 3).

34. Chance's PDQ lists four separate job duties/functions/tasks: Leadership, Management, and Supervision; Contract Implementation; Contract Negotiation; and Legislation. (Jt. Exh. III, at 3-4).

35. The Labor Relations Division Director's "Leadership, Management, and Supervision" duties (per the PDQ) include:

Provides statewide leadership in all executive branch Labor Relations matters. Maintains comprehensive statewide labor relations program, from policy development through contract negotiations and contract implementation, providing labor relations training and support services to all agencies.

Establishes clear priorities and procedures within the section and communicates same to subordinate staff and to Division of Personnel and agency human resources staff as appropriate.

Maintains effective working relationships with State policy-makers, managers, and supervisors.

Directly supervises senior analysts and may directly supervise other staff as desired.

(Jt. Exh. III, at 3).

36. The Director's "Contract Implementation" duties include:

Serves as the Executive Branch's authority on collective bargaining under the Public Employment Relations Act (PERA). Advises and consults with the Commissioner of . . . Administration, the Governor's Chief of Staff, and the Governor on collective bargaining policy, strategy, and tactics. . . Develop options available to executive decision-makers. Recommend courses of action.

Formulates and executes plans to carry out policy decisions made by executive decision-makers. Direct subordinate staff in developing bargaining positions, strategy, and tactics based on policy decisions. Directs subordinate staff in formulating positions in negotiations and interest arbitration and theory of cases in rights arbitration.

Oversees, reviews, and signs for the Commissioner of Administration responses to grievances prepared by staff.

(Jt. Exh. III, at 3-4).

37. The Director's "Contract Negotiating" duties include:

Solicits input from line agencies and subordinate staff on provisions of contracts that management would desire to change. Analyzes input in light of policy directives. Participates with Office of the Governor in developing overall policy objectives and bargaining parameters. . . Serves as the representative of the Commissioner of Administration to review, modify and approve all State proposals before presentation at the bargaining table. Serves as spokesperson during negotiations when the issue under discussion requires active participation by the head of the Labor Relations Section.

(Jt. Exh. III, at 4).

38. The Director's PDQ, question number 23, asks the incumbent to list the most important purpose, service, or product expected of this position: "The critical purpose of this position is to provide policy analysis and recommendations to the Governor and Cabinet regarding collective bargaining with employees of the Executive Branch. Once policy is formulated, the incumbent must translate that into effective action by the Labor Relations section in bargaining and the administration of collective bargaining agreements." (Jt. Exh. III, at 5).

39. Chance assists and acts in a confidential capacity to a person who formulates, determines, and effectuates management policies in labor relations matters. He also formulates, determines, and effectuates policy in labor relations matters for the Department of Administration and the Executive Branch for the State of Alaska.

40. Chance testified that other than the "biggest stuff," he has authority to decide labor relations matters within parameters. Regarding his staff, Chance testified that in unfair labor practice disputes, the staff have a set of guidelines and if an issue goes outside those guidelines, the staff must check with Chance or a "higher up." Chance said he is "kind of a control freak." Final authority for state approval is the Commissioner of Administration. (Art Chance testimony).

41. In his certification of Adrienne Snow's "Questionnaire Regarding Confidential Duties," Chance provided examples of his responsibility to formulate, determine, and effectuate management policies in labor relations matters: "I develop or effectively recommend ALL SOA [State of Alaska] collective bargaining policy, objectives, and strategy, including that for the confidential unit. Consequently, I must either ask my staff to ignore their interests as members of the unit or I am deprived of the services of my staff in dealing with the [confidential unit]." (Jt. Exh. XXV, at 6) (capital letters in original).

42. Regarding economic decisions, Chance's staff members have "a good bit of freedom" within "the parameters." (Art Chance testimony).

43. Chance believes it is technically illegal for him to discuss the confidential bargaining unit's issues with his staff members. (Art Chance testimony).

44. Chance has dedicated and loyal staff members who must sometimes act against their own interests. He testified that the State seeks removal of the staff members in this petition because there is an inherent conflict of interest. This conflict arises when "your adversary is your union representative." Chance believes his staff members should not be required to think about or be involved in this conflicting situation. (Art Chance testimony).

ANALYSIS

The State must prove each element of its petition by a preponderance of the evidence. 8 AAC 97.350(f). The issues in this case encompass questions over the State's petition to remove the Labor Relations Analysts and the Human Resource Specialist II from collective bargaining. First, are the Labor Relations Analysts and Human Resource Specialist II a "public employer" as defined by AS 23.40.250(7)? Second, do the Labor Relations Analysts and Human Resource Specialist II meet the definition of "confidential employee" in 8 AAC 97.990(a)(1)? If so, should they be removed from the confidential unit? Third, is the confidential unit the appropriate unit for the Labor Relations Analysts and Human Resource Specialist II, under AS 23.40.090? Do these employees' duties and responsibilities create a conflict of interest that requires removal from the confidential unit?

1. Are the Labor Relations Analysts and Human Resource Specialist II a "public employer" as defined by AS 23.40.250(7)?

The State argues that we should remove each of the LR Analysts and the HR Specialist from the confidential unit and from collective bargaining rights because their duties and responsibilities support a finding that they are a "public employer" as defined in AS 23.40.250(7). This statutory subsection provides:

(7) "public employer" means the state or a political subdivision of the state, including without limitation, a municipality, district, school district, regional educational attendance area, board of regents, public and quasi-public corporation, housing authority, or other authority established by law, and a person designated by the public employer to act in its interest in dealing with public employees[.]

The State contends:

Allowing an employee to serve as a public employer to carry out the obligations imposed in PERA³ and then to benefit personally from that service as a "public employee" under PERA creates a conflict of interest. That conflict can be eliminated if PERA is construed to remove from bargaining those positions that fit the act's definition of "public employer."

In Support of Petition for Unit Clarification, at 8.

CEA disagrees. CEA maintains that the LR Analysts and the HR Specialist are "public employees" under AS 23.40.250(6), with collective bargaining rights under PERA. CEA argues that in *Confidential Employees Association v. State of Alaska*, 1JU-93-0656 CI (September 1, 1994), and *Confidential Employees Association vs. State of Alaska*, Decision and Order No. 157 (April 7, 1993), "both the ALRA and the court rejected this argument [that the employees meet the definition of "public employer"] as violating clear statutory language." *Respondent Confidential Employees Association's Prehearing Brief on Employees who Deal with Collective Bargaining*, at 3. CEA adds: "The State is simply attempting to re-try the case it previously lost." *Id.* at 4.

³ PERA is the Public Employment Relations Act, the law that governs public employment, non-federal collective bargaining in Alaska, except for political subdivisions that have opted out of the Act.

AS 23.40.250(6) defines "public employee" as "any employee of a public employer, whether or not in the classified service of the public employer, except elected or appointed officials or superintendents of schools[.]" (emphasis added). AS 23.40.080 describes the rights granted public employees under PERA: "Public employees may self-organize and form, join, or assist an organization to bargain collectively through representatives of their own choosing, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Under a literal reading of the phrase "any employee" in AS 23.40.250(6), the workers in question are "public employees." Moreover, they do not fit (and the State does not argue) within one of the three limited statutory exceptions: appointed or elected officials, or superintendents of schools. In fact, the Alaska Superior Court rejected the assertion that Human Resource Managers and a Labor Relations Analyst II were appointed officials. What's more, the court concluded that the Agency's definition of "appointed official" was "inconsistent with the statute [and] is not 'reasonably necessary' to effectuate it." *Confidential Employees Association v. State*, 1JU-93-0656 CI (September 1, 1994), at 10 (*Confidential Employees Ass'n*).⁴

More importantly for this issue, the Alaska Superior Court in *Confidential Employees Ass'n* rejected the State's argument that the "affected members of the union" were a "public employer." The court concluded that "[t]he Agency's treatment of this argument is well supported by both the facts and the law and is affirmed." *Id.* at 11. In rejecting the State's argument that the affected employees were not a "public employer" under AS 23.40.250(7), the Agency panel in D&O 157 stated:

The State's argument would appear to exclude anyone employed by the State as a supervisor or in some labor relations or personnel capacity. The argument is contrary to twenty years of bargaining history with the supervisory and confidential units and the regulations 2 AAC 10.110 and 2 AAC 10.220. SLRA Order & Decision No. 1, at 6 - 8 (Feb. 2, 1973) (establishing the confidential unit). The State further suggests that a major reconfiguration of bargaining units is needed. It questions the community of interest of some of the bargaining units and would exclude from bargaining all managers -- those persons possessing significant judgment and discretion furthering management policy. We believe such sweeping changes, affecting all State bargaining units, are more appropriate through legislative or regulatory action rather than in the context of a unit clarification petition involving one bargaining unit.

(Decision & Order 157, at 19).⁵

⁴ As a result of the superior court's invalidation of the Agency's regulation describing "appointed officials" in *Confidential Employees Ass'n*, the Agency amended regulation 8 AAC.990(b) to provide in pertinent part: "In AS 23.40.250 'appointed officials' includes (1) at the state level, only persons appointed directly by the governor[.]"

⁵ In its Memorandum of Decision on the appeal of D&O 157, the superior court remanded the decision "for a new hearing to be held in a manner consistent with this opinion." *Confidential Employees Association v. State of Alaska*, 1JU-93-656 CI, at 13 (September 1, 1994). However, the court affirmed the Agency's finding on the issue of "public employer." Subsequently, in response to a Motion for Clarification, the court vacated D&O 157 and returned the parties to status quo ante. (*Order of Clarification*, 1JU-93-656 CI (October 12, 1994). Nonetheless, we find the D&O 157 analysis on "public employer" persuasive and adopt it here.

We agree with the analysis of the D&O 157 panel. Although the court subsequently vacated D&O 157, we incorporate the above language into this decision, as we find it apt to address the State's "public employer" assertion, and because the superior court affirmed the D&O 157 panel's treatment of this argument. *Confidential Employees Ass'n* at 11. Admittedly, the State is requesting removal of a smaller group of employees than the group petitioned for in D&O 157. The State frames its "public employer" argument by asserting there is a conflict of interest that necessitates removing the positions from collective bargaining. Regardless, we believe, like the D&O 157 panel, that changes to bargaining units, particularly changes that would remove a group of public employees from the right to collectively bargain, should be a decision of the legislature, and not this Agency.

Given that the Alaska Legislature's definition of "public employee" includes *any* employee of a public employer, with only three limited exceptions that do not include confidential employees, we decline to except from this definition what the Legislature itself chose not to except. Moreover, because of the comprehensive definition of "public employee," we find the definition of "public employer" should be read more narrowly than proposed by the State. We believe the Legislature's declaration of policy signals a mandate to include public employees under PERA's jurisdiction unless the Legislature provides exceptions by statute.

We especially would hesitate to consider removing this particular group of employees from collective bargaining due to recent legislative activity. Appendix I is a bill filed with the Legislature in 2004. The bill would have excluded those who met the proposed definition of "confidential employee." We do not know if the legislators considered the issue of conflict of interest because there is nothing in the legislative history. However, the proposed "Legislative Findings and Purpose" did contain a statement that "participation in collective bargaining can create a conflict between an employee's loyalty to an employer and to a labor or employee organization[.]" Despite this proposed statement on conflict, the bill failed in the Legislature. Regardless, we again reaffirm, in the context of this case, the D&O 157 panel's underlying principle that efforts to remove groups of public employees from collective bargaining under PERA should occur through legislative action.

Many states do specifically exclude confidential employees from collective bargaining. Even so, these states exclude the employees by means of a specific, statutory exception to their definition of "public employee." Employees in many of these states who meet the definition of "confidential employee" do not have collective bargaining rights because the statutes provide that "confidential employees" are an exception to "public employees." *See, e.g.,* Connecticut, Sec 5-270 of Chapter 68 ("Employee" means any employee of an employer, whether or not in the classified service . . . except elected or appointed officials . . . board and commissions members, managerial employees and confidential employees); Ohio Revised Code Annotated, Title XLI, Chapter 4117, subsection (c)(6) (confidential employees are one of 18 exceptions to the term "public employee"); Pennsylvania, 43 P.S. § 1101.301(2) and 43 P.S. § 1101.301(13); and Washington ("[T]he legislature chose to exclude confidential employees from the act's coverage." *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission*, 29 Wash. App. 599,605, 630 P.2d 470,474 (1981). *But see* California (confidential employees have collective bargaining rights, at least at the local level. West's Ann.Cal.Gov.Code § 3501, *Santa Clara County Counsel Atty's Assn. v. Woodside*, 28 Cal Rptr. 2d 617. 869 P.2d 1142 (1994) (rehearing denied).

As we stated earlier, Alaska's Public Employment Relations Act (PERA) does not specifically exclude confidential employees from collective bargaining. We do not deem it wise to exclude by decision and order what the Alaska Legislature itself chose not to exclude. We will leave to the Legislature the decision on excluding or including public employees in collective bargaining.

For the above reasons, we conclude that the Labor Relations Analysts and Human Resource Specialist II are not a "public employer" under AS 23.40.250(7). The State's petition is denied in this respect.

2. Do the Labor Relations Analysts and Human Resource Specialist II meet the definition of "confidential employee" in 8 AAC 97.990(a)(1)? If so, should they be removed from the confidential employees bargaining unit?

Agency regulation 8 AAC 97.990(a)(1) defines "confidential employee" as "an employee who assists and acts in a confidential capacity to a person who formulates, determines, and effectuates management policies in labor relations matters[.]" We find that the LR Analysts and HR Specialist assist and act in such a capacity to Art Chance, the Commissioner of Administration, and the Governor, who formulate, determine, and effectuate management policies in state labor relations matters. We further find that all of these employees answered "yes" when they each responded to an Agency question that mirrored the definition of "confidential employee." Likewise, neither the State nor CEA disputes the employees' status in this regard. We therefore conclude that all of the Labor Relations Analysts and HR Specialist are confidential employees under 8 AAC 97.990(a)(1).

Nevertheless, the State contends that these confidential employees have a "dual role" because they not only assist but actually formulate, determine and effectuate management policy in labor relations matters, and they therefore should be removed from the confidential unit. The State argues that we cannot "ignore the fundamental role these employees play in setting that policy." *Petitioner's Response to Investigator's Questions*, at 8 (August 9, 2005). The State adds: "As the Michigan Supreme Court has stated, including in bargaining those employees who determine state labor relations policy 'would damage, not enhance, the statutory purpose.' *Grandville Municipal Executive Ass'n v. Grandville*, 533 N.W. 2d 917, 922 (Mich. 1996)." *Id.*

First, we find the employees do not formulate, determine, and effectuate labor relations policy on behalf of the State. Their primary role is to assist the Labor Relations Director who, along with the Governor and the Governor's staff, formulates and determines the policy. The evidence, particularly the responses by the Labor Relations Analysts and the Human Resource Specialist to the Agency's investigatory questions, supports a finding that while they assist the Director, they do not act with the type of independence that would support formulating, determining, and effectuating policy. Although they carry out state policy through their duties as negotiators on behalf of the state, they only do so within parameters provided by the Director, the Commissioner, and the Governor.

Secondly, Chance's position description questionnaire (PDQ) reveals his direct connection with the Governor's office regarding policy-making. This is reflected in the "contract implementation" section of his PDQ: he advises the Governor, his Chief of Staff, and the Commissioner of Administration (his direct boss) on "collective bargaining policy, strategy, and tactics." He also "[f]ormulates and executes plans to carry out policy decisions made by executive decision-makers." Then, he "[d]irects subordinate staff in developing bargaining

positions, strategy, and tactics based on policy decisions." (Jt. Exh. III, at 3-4). These duties reflect the Director's close connection and relationship to the Governor and the Governor's staff regarding policy formulation, determination, and effectuation.

The PDQs of the Director's staff do not reflect that same close connection. The Director communicates the policy and strategy to the subordinate staff. These staff members carry out that policy and strategy by negotiating on behalf of the State, but within specific parameters drawn by their superiors, who have the final say in policy formulation, determination, and effectuation. The Director acknowledged his strategic role when he stated that he "develop[s] or effectively recommend[s] ALL [State of Alaska] collective bargaining policy, objectives, and strategy, including that for the confidential unit." (Finding of Fact 41)(emphasis in original).

Because the employees who are the subject of this position are "confidential employees" under 8 AAC 97.990(a)(1), they are appropriately included in the bargaining unit containing other "confidential employees," as defined by the regulation. Any dual role that they serve does not justify removing them from either the confidential unit, or from bargaining rights under PERA.

We conclude the Labor Relations Analysts and Human Resource Specialist II are confidential employees with collective bargaining rights. The State's petition in this respect is denied.

3. Do the Labor Relations Analysts and Human Resource Specialist II share a community of interest with other employees in the confidential bargaining unit?

The State contends that we should exclude the professional labor relations employees from collective bargaining because they do not share a community of interest with other employees in the confidential unit, primarily because their duties and responsibilities create an irreconcilable conflict of interest that requires removal from the unit.

The State contends that "changes in duties, position titles, and organization" since the confidential unit's certification in 1974 justify an exercise of this Agency's authority "to determine appropriate unit assignments." *In Support of Petition for Unit Clarification*, at 2 (April 23, 2004). The evidence shows that the LR Analysts were added to the confidential unit in late 1994 or early 1995. The evidence does not support a finding that there have been substantial changes to the LR Analysts' duties since that time. Although their responsibilities have changed to a certain extent, this change is due to individual promotions and changes in duties within the group. It is not due to a dramatic reorganization of the Labor Relations Division that results in granting them substantially increased authority. Nor does the evidence show changes to the duties of the Human Resource Specialist II.

The State maintains that the confidential unit "has expanded to include, not only those employees who *assist and work in a confidential capacity* to persons who formulate, determine, and effectuate management policy, but the persons who actually formulate, determine and effectuate the policy." *Id.* at 5. The State concludes that these employees do not have a community of interest with other unit employees because these employees "have a role in setting and implementing management policy (rather than merely support of those who do) . . ." (*Id.* at 5-6). As we indicated earlier, we find the employees have a role, but they do not have the final say. They assist a person or persons who formulate, determine, and effectuate policies, within parameters, and they recommend, promulgate, and implement policies.

AS 23.40.090 grants this Agency authority to "decide in each case, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [PERA], the unit appropriate for the purposes of collective bargaining, based on such factors as community of interest, wages, hours, and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees. Bargaining units shall be as large as is reasonable, and unnecessary fragmenting shall be avoided."

1. Community of Interest.

In weighing all the evidence on this issue, we find it favors supporting a community of interest in the current bargaining unit. The LR Analysts' and HR Specialist's community of interest is not so distinct or dissimilar from that of the other bargaining unit employees that it warrants granting the State's petition. The community of interest that confidential employees share with each other by virtue of the duties they perform is a significant factor.⁶ In *State of Alaska vs. Alaska State Employees Association/AFSCME Local 52, AFL-CIO*, Decision and Order No. 219 (May 27, 2997), we found that state supervisory responsibilities distinguish supervisors' duties from those of nonsupervisory employees. Similarly, we find that state employees who meet the definition of "confidential employee" in 8 AAC 97.990(a)(1) share a substantial community of interest with each other and are appropriately in the confidential unit. See D&O 219, at 30. See also *The State System of Higher Education v. Pennsylvania Labor Relations*, 757 A. 2d 442, 447-48 (2000) (an identifiable community of interest does not require perfect uniformity in conditions of employment and can exist despite differences in wages, hours, working conditions or other factors). Agency regulation 8 AAC 97.090(a)(2) reflects this sharing of community by providing that at the state level, confidential employees may not be combined with other employees.⁷

The State's primary argument is that the LR Analysts and HR Specialist do not share a community of interest because their duties in collective bargaining create a conflict of interest that warrants removing their positions from the right to bargain collectively under PERA. The conflict arises when the State negotiates with the union (CEA) that represents the State's own bargainiers.

As noted above, many states have recognized this conflict. However, the evidence here shows that the Division of Labor Relations -- including Art Chance and his staff -- has handled this issue in a professional manner. There was no evidence presented that any confidential employee violated the employer's trust by tipping off their union representative about the State's position in collective bargaining, and the State makes no such allegation. On balance, any conflict of interest these employees might have is not so substantial as to require the serious step

⁶ We recognize that in *Order and Decision Concerning Challenges to Certain Classifications in the Confidential Unit*, Order and Decision No. 13 (May 14, 1974), the former State Labor Relations Agency found that community of interest was "seriously in question" if the State must negotiate with a bargaining unit that contains the State's representatives in collective bargaining. On the other hand, the panel in O&D 13 concluded that "[t]he Alaska Public Employment Relations Act clearly intends all state employees, except elected and appointed officials, to have the right to organize for collective bargaining purposes." O&D 13, at 8. We believe that unless PERA clearly states otherwise, the Legislature intends inclusion of public employees, rather than exclusion. See also *Order and Decision Pertaining to Confidential Bargaining Unit and By Confidential Employees Association*, Order and Decision No. 9 (January 17, 1974).

⁷ Agency regulation 8 AAC 97.090(b) provides: "As defined in 8 AAC 97.990 and as used in this section, the term 'confidential employee' must be narrowly construed."

of removing them not only from the confidential unit, but from collective bargaining rights under PERA.

Moreover, we have already concluded that the Legislature chose to exclude only elected or appointed officials and superintendents of schools from the right to bargain collectively under PERA. Although the following analysis of coverage for public employees under PERA did not specifically address the conflict of interest issue before it, the Alaska Superior Court provided a reasoned analysis for expansive coverage under PERA, and the Agency's role in determining that coverage:

The agency's definition of "appointed official" in 2 AAC 10.220(a) excludes a significant number of state employees from PERA coverage. In light of the broad declaration of policy set out by the legislature in 23.40.070, the trend of the legislature to expand PERA coverage rather than retract it, and absent any other specific legislative direction to exclude all employees that "exercise significant responsibility on behalf of the state in collective bargaining policy formulation and implementation," it is inconsistent with PERA to do so.

Nor is it obvious that the legislature has not already spoken directly to the issue. It has excluded only elected or appointed officials from the definition of "public employee." It is consistent with the policy of PERA to include all employees but the highest state officials from coverage. *Apparently, the legislature believed that the state's interest in having its bargaining interests represented with non-unionized employees was adequately met by the exemption provided, or else they believed that interest to be less important than broad ranging state employee unionization and participation in the collective bargaining process. It is not the place of the court, nor the ALRA, to second guess that decision.*

Confidential Employees Association v. State, 1JU-93-0656 CI, at 9-10 (September 1, 1994) (emphasis added).

The State presented evidence that House Bill 518, filed in 2004 with the Alaska Legislature, would have excluded confidential and managerial employees from collective bargaining rights under PERA. (See Appendix H). However, that bill failed in the Legislature, notwithstanding the conflict of interest issue. The State now asks us to endorse what the Legislature itself chose not to approve. We decline to do so. We agree with the Superior Court that it is not our province to second-guess the Legislature.

2. Wages.

The wages of the LR Analyst and the HR Specialist support the status quo. The evidence in the record indicates that the LR Analysts and HR Specialist are paid under the same wage scale as are other employees in the confidential bargaining unit. Forty-two percent of the employees in the confidential unit get paid at Range 18 or higher. These ranges include the LR Analysts and HR Specialist. The State does not contend that these employees' wages compare unfavorably or differ substantially from the wages of others in the unit, and we found no evidence that distinguishes these employees from other employees in the unit.

3. Hours.

The only evidence submitted on hours shows that these employees are exempt from payment of overtime under the Fair Labor Standards Act. We conclude that this factor supports the existing bargaining unit structure. There is no evidence that distinguishes these employees' hours from those of other employees in the bargaining unit. This factor favors the status quo.

4. Other working conditions.

Like all other employees in the unit, the LR Analysts and HR Specialist have the right to strike under AS 23.40.200(d).⁸ All employees in the confidential unit are Class III employees, with the unlimited right to strike. Other than strike rights and their specific job responsibilities, there was no other evidence submitted regarding the working conditions of the employees subject to the petition and other employees in the bargaining unit. This factor favors the status quo.

5. History of collective bargaining.

The history of collective bargaining supports the status quo. The confidential unit has existed since 1974. (Order and Decision No. 1, at 6-8 (February 3, 1973). "Regulations 2 AAC 10.110 and .220 were adopted in recognition of the principle that confidential employees, defined as employees who assist and act in a confidential capacity to persons who formulate, determine and effectuate management [policies] in the area of collective bargaining, should not be in the same collective bargaining unit as other employees." (*Id.* at 6). In finding that a confidential unit was appropriate for collective bargaining purposes, the Alaska State Labor Relations Agency⁹ reasoned the unit was a "necessary fragmentation" from other units it created at that time.

The LR Analysts have been in the confidential unit since approximately 1995. The HR Specialist position became part of the confidential unit at its inception. The confidential unit has successfully negotiated several collective bargaining agreements with the State during this period.

All confidential employees at the state level are in the same bargaining unit. In other words, there are no separate bargaining units for confidential employees at the state level.¹⁰ Together, these employees have benefited from collective bargaining rights for more than 30 years. The history of collective bargaining in the confidential unit supports keeping the LR Analysts and HR Specialist in the confidential unit.

6. Desires of the employees.

The employees expressed an assortment of desires in Agency questionnaires and hearing testimony regarding placement of their positions in the confidential bargaining unit. There was no clear consensus. Some favored inclusion, some did not, and some expressed a relatively neutral opinion. This factor does not support either granting or denying the petition.

⁸ In hearing testimony, the State raised a concern that in the event of a strike by one or labor organizations, the labor relations analysts and human resource specialist would be needed to assist the employer in dealing with strike-related events. If the confidential unit goes out on strike, these employees would have the right to strike, leaving the employer with limited assistance in dealing with collective bargaining issues.

⁹ The Alaska State Labor Relations Agency was a predecessor of this Agency.

¹⁰ "Permitting more than one confidential unit would constitute unnecessary fragmentation." Order and Decision No 1, at 7 (February 2, 1973).

7. Unit size and fragmentation.

AS 23.40.090 provides in pertinent part: "Bargaining units shall be as large as is reasonable, and unnecessary fragmenting shall be avoided." If these confidential employees were removed from the bargaining unit, the unit size would be affected because the unit of confidential employees would not be as large as is reasonable. Nonetheless, there would be no unnecessary fragmentation because the State proposes to remove these employees from collective bargaining altogether. Therefore, even if we granted the petition, there would be no change in the number of bargaining units and no unnecessary fragmentation. We find that fragmentation is not a factor affecting this petition.

After considering the evidence presented by the parties in this petition, we deny the petition to remove the LR Analysts and HR Specialist II from the CEA unit and from collective bargaining. The evidence on community of interest and other factors in AS 23.40.090 supports the existing bargaining unit structure.¹¹

CONCLUSIONS OF LAW

1. The State of Alaska is a public employer under AS 23.40.250(7). The Confidential Employees Association is an organization under AS 23.40.250(5). This Agency has jurisdiction under AS 23.40.090 and AS 23.40.100 to consider this case.

2. As the petitioner, the State of Alaska has the burden to prove each element of its claim by a preponderance of the evidence. 8 AAC 97.350(f).

3. Based on the factors in AS 23.40.090, such as community of interest, wages, hours, and other working conditions of the employees involved, and the history of collective bargaining, we conclude that the Labor Relations Analysts and Human Resource Specialist II share a substantial community of interest with other employees in the confidential bargaining unit. The existing bargaining unit of confidential employees at the State of Alaska is the appropriate unit for the Labor Relations Analysts and Human Resource Specialist II.

4. The Labor Relations Analysts and Human Resource Specialist II are public employees under AS 23.40.250(6). They are not a "public employer" under AS 23.40.250(7).

5. The employees in the job positions subject to this petition are confidential employees under 8 AAC 97.990(a)(1). Confidential employees under the Public Employment Relations Act have collective bargaining rights. Under 8 AAC 97.090(a)(2), confidential employees cannot be combined in a bargaining unit with other employees at the state level.

6. Because a new unit would not be created, removing the Labor Relations Analysts and a Human Resource Specialist II from collective bargaining would not result in excessive

¹¹ We recognize the desire of the State to have the undivided loyalty and trust of its employees for collective bargaining. We also understand the concerns of the labor relations analysts, both those who wish bargaining unit protection, and those who feel the discomfort and divided loyalty in some work situations that arise. However, we believe this issue must be remedied by appropriate, narrowly-drawn legislation.

fragmentation under AS 23.40.090. However, removing the positions from the unit would reduce the unit's size, resulting in a unit that is not as large as is reasonable.

7. The State of Alaska has not satisfied the requirements in 8 AAC 97.025(b) to remove the Labor Relations Analysts and Human Resource Specialist II from the confidential employees bargaining unit.

8. The State of Alaska has not proven, by a preponderance of the evidence, the requirements needed to remove a group of employees from an existing bargaining unit, and it has not established that the employees should give up their collective bargaining rights under the Public Employment Relations Act.

ORDER

1. The petition of the State of Alaska to remove the Labor Relations Analysts and a Human Resource Specialist II from the Confidential Employees Association bargaining unit and exclude them from collective bargaining is DENIED and DISMISSED.

2. The State is ordered to post a notice of this decision and order at all work sites where members of this bargaining unit affected by the decision and order are employed, or, alternatively, personally serve each employee affected. 8 AAC 97.460.

Dated: July 5, 2006.

ALASKA LABOR RELATIONS AGENCY

Aaron Isaacs, Jr., Vice-Chair

Colleen Scanlon, Board Member

Matthew R. McSorley, 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 No. 277, in the matter of *State of Alaska v. Confidential Employees Association, APEA/AFT*, Case No. 04-1302-UC, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 5th day of July, 2006.

Sherry Ruiz
Administrative Clerk III

This is to certify that on the 5th day of July, 2006, a true and correct copy of the foregoing was mailed, postage prepaid to:
Jan Hart DeYoung, State of Alaska
Brad Owens, CEA

Signature