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STATE OF ALASKA (ten Dept. of Administration confidential positions with supervisory duties),	)
Petitioner,	)
vs.	)
CONFIDENTIAL EMPLOYEES ASSOCIATION, APEA/AFT, AFL-CIO,	)
Respondent.	)

Case No. 04-1312-UC

DECISION AND ORDER NO. 281

The ALRA Board (Vice Chair Aaron T. Isaacs, Jr., and Members Colleen E. Scanlon and Matthew R. McSorley) heard this petition for unit clarification on February 14, 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 14.

Digest: The petition to remove ten confidential employees from the confidential bargaining unit and eliminate their collective bargaining rights is denied. The ten positions do not meet the definition of "public employer" under AS 23.40.250(7). Rather, the individuals in the positions are each a "public employee" under AS 23.40.250(6) and none of them comes within any exception provided in subsection 250(6). The Alaska Legislature has not included this group of employees under an exception to the definition of "public employee" in the Public Employment Relations Act. They therefore have collective bargaining rights and are confidential employees under 8 AAC 97.990(a)(1). They share a community of interest with other employees in the CEA bargaining unit despite supervising some of those employees. Any conflict of interest they have has not interfered with their work duties. The requirement in AS 23.40.090 that "unnecessary fragmenting shall be avoided" outweighs any potential conflicts of interest these employees might have based on both confidential and supervisory duties.

DECISION

Statement of the Case

The State filed this petition seeking unit clarification of ten positions in the Department of Administration's Personnel and Finance Divisions. The State petitions for removal of the ten positions from the confidential unit and from collective bargaining altogether. CEA maintains that the Board should dismiss this petition and keep the positions in the confidential bargaining unit.

Issues

1. Are employees in the ten positions a "public employer" as defined by AS 23.40.250(7)?

2. Do the ten positions meet the definition of "confidential employee" in 8 AAC 97.990(a)(1)? If so, should the positions remain in the confidential employees bargaining unit even if the employees in these positions also have some supervisory duties under 8 AAC 97.990(a)(5)?

3. Do the ten positions share a community of interest with other employees in the confidential bargaining unit? Do their supervisory duties prevent them from sharing a community of interest with other confidential unit employees?

4. Should the ten positions be removed from the confidential unit because 8 AAC 97.090(a)(1) provides that at the state level, bargaining units that combine supervisory personnel with nonsupervisory personnel are not an appropriate unit? What effect does 8 AAC 97.090(a)(2) have on the outcome of this issue?

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 23. (Jt. Exh. 2). Among others, the unit includes employees from the Department of Administration's Divisions of Personnel, Finance, and Labor Relations.

3. In October 2003, the human resource employees in the State's 14 separate departments were consolidated and integrated into the Division of Personnel in the Department of Administration. This change increased the number of employees in the Division of Personnel from 38 to 200 employees. This reorganization of personnel and human resource functions was mandated by the Governor to improve efficiency. Before this change, human resource staff members were in a direct organizational line with each department's Commissioner, and they reported through their department's Director of Administrative Services. Now they advise and consult departments from the Department of Administration. The ultimate personnel decisions still remain in each department.

4. Mila Cosgrove has been Director of the Division of Personnel since September 16, 2004. Before her appointment to Director, Cosgrove served as Deputy Director of the Division of Personnel. In that capacity, she was instrumental in reorganizing and integrating personnel and human resources employees whose positions were located within the 14 government departments of the State of Alaska. Prior to working in these two positions, Cosgrove worked in other state positions and also worked as Southeast Manager of the Alaska Public Employees Association, which represents both the confidential unit and the State's supervisory unit.

5. The Division of Personnel and Division of Finance include several employees whose duties require supervision of other employees. Some of these employees belong to the supervisory unit and some belong to the confidential unit. The State seeks to remove ten of the confidential positions from the CEA bargaining unit and from collective bargaining altogether.

6. The employees who currently work in nine of the positions and who are included in the State's petition are Nikki Neal, Pamela Day, Amanda Holland, Marybeth (Maritt) Miller, Jackson Steele, Carol McLeod, Steve Rice, Debra Bump, and Mark Minthorn. The tenth position, formerly held by Cosgrove, is vacant. This position, titled a Human Resource Specialist V,[1] has essentially been the Deputy Director position in the Division.

7. The ten positions perform a variety of tasks for the Divisions of Personnel and Finance. Each of the ten positions has both confidential and supervisory duties.

8. Cosgrove directly supervises Neal, Holland, Day, Miller, Rice, and Steele. She would also supervise the vacant position. McLeod is supervised by Steele. Kim Garnero, Director of the Division of Finance in the Department of Administration, supervises Bump, and Bump supervises Minthorn.

9. Cosgrove testified that the employees she supervises are "managers in the true sense of the word" because they supervise supervisors. They have "almost complete" personnel management authority. Approval for hiring and discipline rests solely with them. Cosgrove testified she handles grievances within the Division but relies heavily on the advice of her team members. However, Neal stated that she has no authority to adjudicate grievances because she is in the same bargaining unit as her subordinates. (Jt. Exh. V, at 11).

10. Neal was promoted to Human Resource Specialist IV effective January 1, 2005. Neal is Cosgrove's "second" and is a "very key" person on Cosgrove's "management team."[2] Neal supervises the Management Services section of the Division of Personnel. She directly supervises the five "team leaders" of the section, and these team leaders each supervise another five or six employees "who are fairly high-level professional staff." (Jt. Exh. I, at 4). Neal is "heavily involved" in drafting and formulating policy. She also serves as a consultant to the Division of Labor Relations and the State's collective bargaining teams. (*Id*. at 3).

[1] The position control number (PCN) of the vacant position is 02-2108.
[2] Neal's PCN is 08-1104. She was reclassified from a Human Resource Specialist III to a Human Resource Specialist IV in November 2004. (Jt. Exh. IV, at 1, 9).

11. Neal is undecided on whether her position should be removed from the confidential unit and from all collective bargaining. She is also undecided on her personal preference to be in or out of the confidential bargaining unit. (Jt. Exh. V, at 12).

12. Neal did not respond to the question, on the Agency's "Questionnaire Regarding Supervisory Duties" (Questionnaire), which asked whether she had encountered any conflicts of interest while supervising other confidential unit members.
[3]

13. Amanda Holland is a Human Resource Specialist IV. She was promoted from Human Resource Specialist III when former HR Specialist IV Lee Powelson moved to another position in state service.[4] (See Powelson July 10, 2004, position description, Jt. Exh. X, at 1). Holland manages the classification section and directly supervises three employees who in turn supervise other employees.[5] Holland's primary responsibility is managing the position classification plan. Holland and her staff determine minimum qualifications for a job class within the state system. (*Id*. at 9).

14. Holland is undecided on whether her position should be transferred out of the bargaining unit, as well as whether she prefers to be in or out of the unit, or out of collective bargaining altogether. (Jt. Exh. VII, at 12).[6]

15. Day is a Human Resource Specialist IV and program manager of the Employee Services section of the Division of Personnel. (Jt. Exh. I, at 5 & 6). She started in this job on September 19, 2003. (Jt. Exh. XIII, at 3). This section oversees equal employment opportunity and absence management, employee records and the call center, and recruitment. Day oversees all job recruitment for the State, and she works on streamlining in and out-of-state recruitment, to give Alaskans priority hiring. Day directly supervises five employees, and each of these employees supervises between four and six employees.

16. When asked whether she believes her position should be excluded from the confidential unit and from collective bargaining, Day replied, "no comment." She made the same reply when asked her preference to be in or out of a collective bargaining unit. (Jt. Exh. XIII, at 12).

17. Marybeth (Marritt) Miller is a Human Resource Specialist IV responsible to "[p]rovide management and strategic direction for the Technical Services Section of the Division of Personnel."[7] (Jt. Exh. VIII, at 3). In this capacity, Miller oversees the work of approximately one-half of all the employees in the Division of Personnel. (Jt. Exh. I, at 7 – 14); (Cosgrove testimony). She also serves as a consultant in collective bargaining negotiations when issues of payroll and recruitment arise. (Jt. Exh. VIII, at 3). Miller has worked in this position since

[3] Day's PCN is 02-2100.
[4] The PCN for Holland's current position is 02-2033.
[5] Cosgrove testified Holland supervises three supervisory employees, but Powelson's May 25, 2005, position description indicates he supervised four employees. (Jt. Exh. XI, at 3). Cosgrove may have changed Holland's supervisory responsibilities when she promoted Holland into Powelson's position.
[6] Holland occupies a position that is different than that reflected in the "Questionnaire Regarding Supervisory Duties." (Jt. Exh. VII). Holland may have different feelings or beliefs now, but at the time the questionnaire was completed, Holland was undecided.
[7] Miller's PCN is 02-2120. (Jt. Exh. IX, at 1).

September 16, 2003. (Jt. Exh. IX, at 3). She directly supervises four employees. (*Id*.)[8] The recruitment functions listed in her position description have been transferred to the employee services section. (*Id*. at 13).

18. Miller has no preference on whether her position should be in or out of the confidential unit. (*Id*. at 12). She has not encountered any conflicts of interest while acting as a supervisor to other confidential unit members. (*Id*.)

19. Jackson Steele was reclassified from Training Specialist II to Training Specialist III effective September 16, 2003. (Jt. Exh. XIV, at 1).[9] He manages and provides strategic direction for the statewide training and development program. (*Id*. at 3). Steele is a key policy maker on Cosgrove's team. He works on performance coaching, and he gives supervisors and managers the tools they need to head off problems before they become serious.

20. Steele believes his position should be out of the confidential unit, and he personally prefers to be out of the unit. He questioned why he should pay dues to a union that acts adversatively to him or the employer that pays him to manage his section. (Jt. Exh. XV, at 12). He believes his position should be excluded from collective bargaining units because it is his "job to follow the law and enforce labor contractual agreements. I have to be free to manage for the organization without fear of union retaliation or union influence." (*Id*.).

21. Steele did not list any conflicts of interest he encountered while supervising other confidential unit employees. (*Id*.)

22. Because of ongoing changes, promotions, and vacancies within the Division of Personnel, several employees now occupy positions previously held by other Division employees. For example, Carol McLeod is the statewide research and planning manager and is a Human Resource Specialist III. McLeod occupies Amanda Holland's position, and the relevant position description (PD)[10] was updated effective August 16, 2004. Holland completed this PD, marked as Joint Exhibit VI, on May 19, 2004. The PD shows Mila Cosgrove, Management Services Manager, as Holland's supervisor. After Holland completed this PD, both she and Cosgrove were promoted. In addition, Neal was promoted into Cosgrove's position, so when Holland completed the Agency's Questionnaire Regarding Supervisory Duties on May 2, 2005, Holland's supervisor is shown as Nikki Neal. After May 2005, both McLeod and Holland were promoted. McLeod is part of Cosgrove's team but is supervised by Jackson Steele.[11] McLeod did not fill out the Agency Questionnaire.

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[8] Her position description indicates she supervises two employees, but this description was completed in September, 2003, and Joint Exhibit IX, the Questionnaire Regarding Supervisory Duties, was completed in April, 2005. We give more weight to the more recently completed document.

[9] Steele's PCN is 02-2122. Cosgrove testified that the Division is in the process of reclassifying Steele to a Human Resource Specialist IV.

[10] The Position Description, or PD, was formerly titled Position Description Questionnaire -- PDQ. These documents are completed by the employee working in the specific position control number, and the employee's supervisor. The documents describe a job's duties in significant detail, including supervisory responsibilities.

[11] McLeod's position control number is now that shown as Amanda Holland's PCN, 18-7654 (Jt. Exh. VI, at 1). The last three pages of Exhibit VI (pp. 7-9) are marked "Jt. Exh. IV."

23. Steve Rice is a Data Processing manager II in the Division of Finance. He was reclassified to this position, from a Data Processing Manager I, effective October 26, 2000. (Jt. Exh. XX, at 1).[12] His supervisor is Cosgrove.

24. Rice has worked in his current position since February, 2001. (Jt. Exh. XXI, at 3). He administers and manages all internet technology (IT) functionality at the Division of Personnel except the AKPAY system. Rice works in labor relations issues. He works on these issues via the State's grievance tracking system, and he works with other staff to get access to data regarding labor relations.

25. Rice is not sure whether his position should be in or out of the confidential unit. He stated that he was "not aware of the issues surrounding the matter, other than some language in the contracts." (Jt. Exh. XXI, at 12). However, he prefers to be included in a collective bargaining unit: "I don't see any advantage to the exclusion." (*Id*.).

26. Rice has not experienced any conflicts of interest while supervising confidential unit employees. (Jt. Exh. XXI, at 12).

27. Kim Garnero is the Director for the Division of Finance for the Department of Administration. She has been with the Division since 1999. The Division does the financial reporting for the State, and Garnero's primary responsibility is to make sure the Division meets its responsibilities. These responsibilities include financial reporting for the State, tax compliance on payroll and vendor reporting issues, operating the statewide accounting payroll and operating system – AKPAY, and operating AKSAS, which pays vendors and grantees and tracks all accounts.

28. Debra Bump is an Administrative Services Manager for the Department of Administration's (Department) Division of Finance.[13] She serves as Deputy Director under Garnero. She also serves as operations manager for the Division of Finance. Bump supervises the payroll, finance, and systems security managers, including Mark Minthorn. These subordinates belong to either the confidential, supervisory, or general government units.

29. Bump's most recent position description was completed in July 1998 when she was a Data Processing Manager III. (Jt. Exh. XVIII, at 1). At that time she was reclassified to Administrative Services Manager. In this position, she "is responsible for the day-to-day control and allocation of resources to ensure division goals and objectives are accomplished times and in compliance with federal and state laws, collective bargaining agreements, and Generally Accepted Accounting Principles (GAAP)." (*Id*. At 2).

30. Bump performs duties that require her to assist and act in a confidential capacity to Labor Relations Division Director Art Chance and his staff. (Jt. Exh. XIX, at 3). Other examples of her duties include assisting "the Director in planning and implementing department and statewide special projects such as the transfer of the Division of Motor Vehicles from Public Safety to DOA, a new purchasing card process and its associated client/server purchasing card system, [and] the new travel card and travel efficiency project . . . ." (*Id*.).

[12] Rice's PCN is 02-2101.

[13] Bump's PCN is 02-4086. The name on this PDQ shows "vacant." The PDQ was signed by the position's supervisor on July 27, 1998.

31. Bump's 1998 supervisor[14], who reviewed the PD in 1998, asserted that the most important purpose, service, or product expected of Bump's position is to "provide continuing top quality service to employees, vendors, program managers, accounting and payroll operations personnel, the legislative and judicial branches of government and the general public. To provide that service requires error free, uninterrupted operation of AKSAS and AKPAY, two of the State's largest and most visible data processing systems. Also requires extensive hands-on knowledge of purchasing cards and state agency operations." (Jt. Exh. XVIII, at 9).

32. Bump has not encountered any conflicts of interest while acting as a supervisor to other confidential bargaining unit members. (Jt. Exh. XIX, at 12).

33. Bump has no opinion or preference on whether her position should be out of the confidential unit or excluded from collective bargaining altogether. (Jt. Exh. XIX, at 12).

34. Mark Minthorn was reclassified to Payroll Manager of the Division of Finance, effective September 1, 1995. The position has been in the confidential unit since 1995. (Jt. Exh. XVII, at 12). Previously, he worked as an Accountant V in the Division.[15] (Jt. Exh. XVI, at 1; July 1995 PDQ). He is an expert on the ins and outs of payroll. His 1995 PDQ states that he "[p]articipate[s] as a member of management team. Acts as a member of division management team to plan and coordinate division-wide activities, strategies for development and implementation of statewide systems; develop yearly division management plan." (*Id*. at 3). Among other duties, he "[p]articipates regularly in the development of wage and pay system proposals. Evaluates and/or provides cost analyses of union proposals in collective bargaining." (*Id*.)

35. Minthorn supervises two employees, including Sheryll Cox, a Payroll Specialist II, and Brian Sylvester, a Payroll Specialist III. (Jt. Exh. XVII, at 3). These two employees supervise all other subordinates in Minthorn's section.

36. Minthorn did not respond to questions asking him if he believes his position should be in or out of the confidential unit, or whether he prefers union representation, or not. (*Id*. at 12). Minthorn certified that he has not experienced any conflicts of interest while supervising other confidential unit members. (*Id*.)

37. Along with Bump, Minthorn oversees labor relations issues on behalf of the Division of Finance. For example, Bump and Minthorn would be involved in an arbitration decision involving a back pay award. Although they are not the only two people working on an issue such as this, Bump and Minthorn are consulted. (Garnero testimony).

38. All ten employees who are part of this petition assist and act in a confidential capacity to a person who formulates, determines, and effectuates management policies in labor relations matters.[16] These employees assist Cosgrove, Garnero, and/or Labor Relations Director Art Chance. They also formulate, determine, and effectuate policy to varying degrees.

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[14] The supervisor's name is illegible on the 1998 PDQ. The supervisor was not Kim Garnero, Bump's current supervisor. Garnero's signature on various exhibits is legible. (Jt. Exh. XIX, at 1).

[15] Minthorn's PCN is 02-4035.

[16] Question number 2 in the Agency's "Questionnaire Regarding Supervisory Duties asks incumbent employees if they "assist and act in a confidential capacity . . . ." The only employee who said he did not assist and act in a confidential capacity was Steve Rice. However, we find that, based on Cosgrove's testimony, Rice confidentially assists the lead team on how to gain efficiencies from an IT standpoint.

39. There was no specific evidence submitted on the wages or hours of members of the confidential unit, other than the fact the employees are paid at a given pay range depending on their specific job classification.

40. The working conditions of the ten positions are similar to each other because they work on grievances, arbitrations, and collective bargaining-related issues. There was no specific evidence submitted on the working conditions of other employees in the confidential unit.

41. The confidential bargaining unit was created in 1974.

42. The desires of the employees are mixed on whether they want to be included or excluded from the confidential bargaining unit. However, the majority of the employees who responded have no opinion or preference on exclusion from the bargaining unit or collective bargaining.

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 ten positions from collective bargaining. First, are the employees in the ten positions a "public employer" as defined by AS 23.40.250(7)? Second, do the employees in the ten positions 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 ten positions, under AS 23.40.090? Do these employees' duties and responsibilities create a conflict of interest that requires removal from the confidential unit? Fourth, should the ten positions be removed from the confidential unit because 8 AAC 97.090(a)(1) provides that at the state level, bargaining units that combine supervisory personnel with nonsupervisory personnel are not an appropriate unit? What effect, if any, does 8 AAC 97.090(a)(2) have on the outcome of this issue?

1. Are the employees in the ten positions a "public employer" as defined by AS 23.40.250(7)?

The State argues that we should remove each of the ten positions 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[.]

Further, he assists Cosgrove, who clearly formulates, determines, and effectuates management policies in labor relations matters on behalf of the Division of Personnel.

The State contends that, "because employees formulating and implementing personnel policies are 'persons designated to act in the interest of a public employer in dealing with public employees,' they are a 'public employer' as that term is defined in AS 23.40.250(7), which logically excludes them from the definition of 'public employee' in AS 23.40.250(6)." (Petitioner's Prehearing Brief, at 8, January 30, 2006).

CEA disagrees. CEA maintains that "all state employees are 'public employees' with the right to organize unless they are elected, appointed by the governor, or superintendents of schools." (Respondent's Prehearing Brief, at 2, January 30, 2006). CEA contends that both the Alaska Superior Court and this Agency previously rejected the State's argument that human resource managers were a "public employer." (*Id*., citing *Confidential Employees Association v. State of Alaska*, 1JU-93-0656 CI (September 1, 1994), at 9). CEA adds: "The State is simply attempting to re-try the case it previously lost." *Id*. at 3.

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 individuals in the ten positions are "public employees." 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. Moreover, the Alaska Superior Court rejected the assertion that Human Resource Managers and a Labor Relations Analyst II were appointed officials. 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*).[17]

The Superior Court in *Confidential Employees Ass'n* also 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 should be deemed 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

[17] 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[.]"

> 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).[18]

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. The State frames its "public employer" argument by asserting there is a conflict of interest that necessitates removing the ten 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 the legislature chose to enact a 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.

Many states do specifically exclude confidential and managerial employees from collective bargaining. These exclusions occur by means of a specific, statutory exception to the states' definition of "public employee." Employees in these states who meet the definition of "confidential employee" do not have collective bargaining rights because the states' statutes provide that confidential or managerial employees are an exception to those who meet the definition of "public employee." *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); Illinois ("the unit clarification procedure may properly be used to remove statutorily excluded individuals, such as managers, supervisors and confidential employees from a bargaining unit, *College of Lake County, Employer, and College of Lake County Staff Council, Lake County Federation of Teachers, Local 504, IFT-AFT, AFL-CIO,* 9 Pub. Employee Rep. for Illinois ¶ 1030 (December 14, 1992); New Jersey ("the Legislature interpreted 'employee' to exclude 'elected officials, members of boards and commissions, managerial executives and confidential employees.' . . . . PERC continues to require that 'managerial executive[s] must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes[.]" *New Jersey Turnpike Authority v. American Federations of State, County and Municipal Employees, Council 73,* 696

[18] 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.

A.2d 585, 594 (1997); Ohio Revised Code Annotated, Title XLI, Chapter 4117, subsections (c)(6) and (c)(7) (confidential and management level employees are two 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).[19]

As stated earlier, Alaska's Public Employment Relations Act (PERA) does not specifically exclude confidential or managerial 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 to include or exclude categories of public employees in collective bargaining.

For the above reasons, we conclude that the ten positions are not a "public employer" under AS 23.40.250(7). The State's petition is denied in this respect.

2. Do the positions 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[.]" There is no dispute that the ten positions meet the definition of "confidential employee." We therefore conclude that each of the ten positions is a confidential employee under 8 AAC 97.990(a)(1).

The State contends that these confidential employees 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 "because the employees are assigned both confidential and supervisory duties, none of the existing bargaining units would be appropriate." *Petitioner's Response to Investigator's Questions*, at 1 (August 5, 2005). The State adds: "A second reason is that the employees' significant role in developing personnel policy means that the employees should be excluded from bargaining." *Id.*.

We find that even if these employees do formulate, determine, and effectuate labor relations policy on behalf of the State in labor relations, there is no statute or regulation that prohibits their involvement in public collective bargaining. While many states exclude confidential and managerial employees by statute, Alaska does not. Those who meet the

[19] The National Labor Relations Board has excluded managerial employees by policy and not by statute. In analyzing this issue, the United States Supreme Court held that it was the intention of Congress to exclude "managerial employees" from coverage under the National Labor Relations Act. *NLRB v. Bell Aerospace Co., Division of Textron, Inc.*, 416 U.S. 267 (1994). *See NLRB v. Yeshiva University*, 582 F.2d 686 (2d Cir. 1978), *aff'd* 444 U.S. 672 (1980) (managerial employees are exempted from coverage of the act not by explicit statutory language but as a matter of board (NLRB) policy and unanimous court approval). We do not find any legislative history that suggests the Alaska Legislature intended exclusion of managerial employees such as these ten positions.

definition of confidential or supervisory employee may bargain collectively with a representative of their choice, or they may choose not to do so.

Because the employees who are the subject of this position are "confidential employee[s]" 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 additional role that they serve does not justify removing them from either the confidential unit, or from bargaining rights under PERA. We conclude the ten positions are confidential employees with collective bargaining rights. The State's petition in this respect is denied.

3. Is the confidential unit the appropriate unit for the ten positions, under AS 23.40.090? Do these employees' duties and responsibilities create a conflict of interest that requires removal from the confidential unit?

First, the State contends that we should exclude the ten positions from collective bargaining because they do not share a community of interest with other employees in the confidential unit because their duties and responsibilities create a serious conflict of interest that requires removal from the unit. The State argues that this conflict arises in their "role in formulating, determining, and effectuating management personnel policies [and they] do not belong in collective bargaining because allowing them to be the direct beneficiary of those policies creates a conflict between their personal interests and the interests of management that the employees are responsible to promote." *Petitioner's Prehearing Brief*, at 8 (January 30, 2006). The State also contends that "changes in the law, duties, and the level of responsibility of these employees and changes in the state's organizational structure since certification of the confidential unit in 1974 justify an exercise of this Agency's authority in AS 23.40.090 to clarify the confidential unit to exclude the senior personnel managers. . . ." *Id*. at 4.

The CEA maintains that these employees "share a community of interest with the employees in the confidential bargaining unit because they deal with confidential personnel and labor relations issues. Although they may have some supervisory duties, creating a new unit for ten confidential, supervisory employees would result in unnecessary fragmentation." *Respondent's Prehearing Brief*, at 4 (January 30, 2006). The CEA adds that "the argument that the positions should be excluded due to increased policy-making and supervisory duties ignores the fact that one of the positions in the original decision was the deputy director of the Division of Budget and management – someone with significant duties involving both policy and supervision." *Id*.

There was no evidence on how long these particular jobs with these position control numbers have been in the confidential unit. However, the confidential unit was created in 1974. The evidence does not support a finding that there have been substantial changes to the duties of the ten positions since that time. Although the responsibilities of some of these employees have changed, this change is due to individual promotions and changes in duties within the group. It appears to be more a shuffling around of the same responsibilities after the Division of Personnel was centralized. In fact, the shuffling is still going on, as exemplified by changes in some employees' duties after the State filed this petition. Regarding the Division of Finance, it does not appear much has changed there. Mark Minthorn, for one, indicated on the Agency Questionnaire that his 1995 position description was not accurate, but the only change was in his supervisory duties. Moreover, his PDQ indicates he worked on a team in 1995, much as he does now.

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 ten positions' 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.[20] 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.[21]

The State's primary argument is that the ten positions 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 ten positions, all of whom contribute to varying degrees to the State's negotiating process.

Although there is an appearance of conflict, as acknowledged in many states and by the NLRB, the evidence here shows that the Divisions of Personnel and Finance -- including Mila Cosgrove, Kim Garnero and their staff -- have 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

[20] 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).

[21] 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."

is not so serious as to require the significant step 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 and support for expansive bargaining unit 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 asks us to remove from collective bargaining what the Legislature itself has chosen not to exclude – managerial and confidential employees. 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 ten positions support the status quo. There was no specific evidence submitted that supports removing the ten positions from the confidential unit or from collective bargaining. 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' wages from those of other unit employees.

3. Hours.

There was no specific evidence submitted regarding hours of employment. There is no evidence that distinguishes the ten 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 ten positions have the right to strike under AS 23.40.200(d).[22] All employees in the confidential unit are Class III employees, with the unlimited right to strike. Other than strike rights and descriptions of the ten employees' specific job responsibilities, there was no other evidence submitted regarding the working conditions of the employees subject to the petition and those of 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 Agency[23] reasoned the unit was a "necessary fragmentation" from other units it created at that time.

The confidential unit has successfully negotiated numerous 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.[24] 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 ten positions 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. However, the majority of the employees expressed no preference or opinion. This factor does not support either granting or denying the petition.

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[22] In hearing testimony, Cosgrove pointed out that in the event of a strike by CEA, there would be a "huge impact" on hiring, payroll and the practical handling of employment issues in the divisions. But that is one of the reasons employees strike, to have an economic impact on the employer's business.

[23] The Alaska State Labor Relations Agency was a predecessor of this Agency.

[24] "Permitting more than one confidential unit would constitute unnecessary fragmentation." Order and Decision No 1, at 7 (February 2, 1973). The original predecessor of this Agency, the Alaska State Labor Relations Agency, expressed a distinctive concern over the principle of fragmentation: "[I]t seems that the legislature acted in full knowledge of the fact that in a state of Alaska's geographical immensity, with but a small population, undue fragmentation of bargaining units could only frustrate collective bargaining. Finally, it would seem to carry out the purposes of the Act to remember Humpty-Dumpty, who was fragmented very easily and could not be put back together again by all the King's horses and all the King's men. The prudent carpenter knows that he can always saw more from a board that is too long; he cannot make do with one that is too short." *Decision and Order Concerning Petitions Number 1-72, 2-72, 3-72, 4-72, 5-72 and relevant interventions and objections*, SLRA Order and Decision No. 1, at 4 (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. The State argues that there would be no unnecessary fragmentation because the State proposes to remove the ten employees from collective bargaining altogether. However, we have determined that the ten employees are entitled to collective bargaining rights. Creating a separate unit of confidential employees who also supervise other employees would result in unnecessary fragmentation and would be contrary to Order and Decision No. 1. *See* footnote 23. We conclude that Order and Decision No. 1 is sound precedent.

After considering the evidence presented by the parties in this petition, we deny the petition to remove the ten positions from the confidential 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.[25]

4. Should the employees in the ten positions be removed from the confidential unit because 8 AAC 97.090(a)(1) provides that at the state level, bargaining units that combine supervisory personnel with nonsupervisory personnel are not an appropriate unit? What effect, if any, does 8 AAC 97.090(a)(2) have on the outcome of this issue?

Our regulation 8 AAC 97.090(a) provides that, "Except as provided in AS 23.40.240, at the state level a proposed bargaining unit is not an appropriate bargaining unit if it combines: (1) supervisory personnel with nonsupervisory personnel; or (2) confidential employees with other employees." We have already determined that these employees will continue to have collective bargaining rights. Since the ten positions have both supervisory and confidential duties, they would appear to fit in either subsection (a)(1) or subsection (a)(2). However, we believe it is important to keep confidential employees in the same bargaining unit. Any supervisory duties they possess in addition to their status as confidential employees is subordinate to their primary status as confidential employees. Therefore, these employees will continue to be members of the confidential unit.

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).

[25] We recognize the desire of the State and Directors Cosgrove and Garnero to have the undivided loyalty and trust of employees for personnel and collective bargaining issues. We also understand the concerns of the employees, 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.

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 ten positions share a substantial community of interest with other positions in the confidential bargaining unit. The existing bargaining unit of confidential employees at the State of Alaska is the appropriate unit for the ten positions.

4. Each of the employees in the ten positions meets the definition of "public employee" under AS 23.40.250(6). The employees in these positions 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. Confidential supervisory employees cannot be combined with nonconfidential employees, including nonconfidential supervisory employees.

6. Removing the ten positions from collective bargaining and creating a unit of confidential employees who also have supervisory duties would result in excessive fragmentation under AS 23.40.090. Any supervisory duties these confidential employees have do not require their removal from the confidential unit. The supervisory duties do not outweigh the community of interest that these confidential employees share with other members of the confidential bargaining unit. .Additionally, 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 97.050 to clarify the unit by removing the ten positions 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 **PCN 02-4086, PCN 02-2101, PCN 02-4035, PCN 02-2108, PCN 08-1104, PCN 02-2100, PCN 02-2033, PCN 18-7654, PCN 02-2120, and PCN 02-2122** 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: September 11, 2006.

ALASKA LABOR RELATIONS AGENCY

_____
Aaron T. Isaacs, Jr., Vice-Chair

_____
Colleen E. 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. 04-1312-UC, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 11th day of September, 2006.

_____
Sherry Ruiz
Administrative Clerk III

This is to certify that on the 11th day of September, 2006, a true and correct copy of the foregoing was mailed, postage prepaid to:
Jan Hart DeYoung, State of Alaska
Brad Owens, CEA

_____
Signature