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ALASKA CORRECTIONAL)
OFFICERS ASSOCIATION,)
)
Petitioner,)
)
vs.)
)
STATE OF ALASKA,)
)
Respondent,)
)
and)
)
ALASKA STATE EMPLOYEES)
ASSOCIATION,)
AFSCME LOCAL 52, AFL-CIO,)
)
Intervenor.)
)

Case No. 07-1495-RC/RD

DECISION AND ORDER NO. 284

The board heard this petition for decertification and certification of a new bargaining representative on August 23 and 24, 2007. This decision was based on the evidence submitted and the testimony of witnesses at hearing. The parties' arguments were considered, including those presented in post-hearing briefs filed on October 1, 2007. The record closed on October 23, 2007, the date the Board deliberated after post-hearing briefs were filed.¹ Hearing Examiner Mark Torgerson presided.

Digest: The petition of the Alaska Correctional Officers Association is granted to sever the Department of Corrections adult probation and parole officers² from the general government unit represented by the Alaska State Employees Association. The petitioner proved by a preponderance of the evidence that the unit

¹ Due to a last-minute, unexpected event, Board Chair Gary P. Bader was unable to attend the hearing in person or by teleconference. Chair Bader reviewed the record and subsequently deliberated with board members Scanlon and McSorley.

²The general government unit's Department of Corrections adult probation and parole officers will be referred to as adult probation officers, or probation officers.

appropriate for collective bargaining for the adult probation officers in the petition is the Alaska Correctional Officers Association. The adult probation officers have a greater community of interest with the correctional officers unit than with the general government unit. The Alaska State Employees Association's motion to dismiss the petition on res judicata grounds is denied because the Alaska Correctional Officers Association is not in privity with the Public Safety Employees Association, and the issue regarding severance in this case is different from the severance issue presented in *Public Safety Employees Association v. State of Alaska*, Decision and Order No. 270 (December 21, 2004).

Appearances: Art Chance, representative for the Alaska Correctional Officers Association; Douglas A. Carson, Business Agent, Alaska State Employees Association, and Dianne Kiesel, State of Alaska;

Panel: Gary P. Bader, Chair, Colleen E. Scanlon and Matthew R. McSorley, Members.

DECISION

Statement of the Case

The Alaska Correctional Officers Association (ACOA) filed a petition to sever the adult probation officers from the general government unit, currently represented by the Alaska State Employees Association (ASEA), and add them to the correctional officers' unit ACOA represents. ASEA contends that res judicata bars this petition, and alternatively, the Board should deny the petition because the adult probation officers share a community of interest with the other members of the general government unit. The State takes a neutral position on ACOA's petition.

Issues

1. Is the Agency's showing of interest determination confidential?
2. Does the Agency's determination in Decision and Order No. 270 and the doctrine of res judicata bar ACOA from proceeding to election on its petition to sever adult probation officers from the general government unit?
3. Is the unit proposed by ACOA -- severing the adult probation officers from ASEA and adding them to the correctional officers' unit-- appropriate under AS 23.40.090?
4. Has ACOA satisfied the requirements in 8 AAC 97.025(b)?

Findings of Fact

The panel, by a preponderance of the evidence, finds the facts as follows:³

1. The Alaska Correctional Officers Association (ACOA) is the exclusive bargaining representative of the nonsupervisory correctional officers employed by the State of Alaska (State).
2. The Alaska State Employees Association (ASEA) is the exclusive bargaining representative of the State's general government unit employees. (ASEA/State Collective Bargaining Agreement, Exhibit T).⁴
3. The State's adult probation and parole officers (adult probation officers, or probation officers) are part of the State's general government unit, which is represented currently by ASEA.
4. ASEA had previously represented the correctional officers in the general government unit. However, in a February 10, 1995, petition, the Public Safety Employees Association (PSEA) successfully carved out the correctional officers from ASEA's wall-to-wall general government unit. The Alaska Labor Relations Agency (ALRA) Board issued a decision and order ruling that a representation election must be held because a separate unit of correctional officers was an appropriate unit. *Public Safety Employees Association v. State of Alaska*, Decision and Order No. 211, (January 16, 1997). PSEA subsequently prevailed over ASEA in the election and began representing the correctional officers. The correctional officers were placed into their own separate bargaining unit within PSEA. PSEA also represented a unit of state troopers.⁵
5. On March 28, 2003, PSEA petitioned to carve out the adult probation officers from the general government unit. The issue for decision, and the issue that the ALRA Board panel decided, was whether to grant PSEA's petition to sever the probation officers from ASEA's general government unit and place them into their own separate unit within PSEA. In *Public Safety Employees Association v. State of Alaska*, Decision and Order No. 270 (December 21, 2004), the ALRA Board denied and dismissed PSEA's petition. Two primary considerations for the Board were the fact that the probation officers did not have law enforcement as their primary responsibility, and the proposed unit would create unnecessary fragmentation because the number of bargaining units would be increased. The Board concluded that the "core factor for determining a community of interest in the public safety unit lies in a primary responsibility for law enforcement," and "the preponderance of evidence support a conclusion that law enforcement is not the adult probation officers' primary duty." (D&O 270 at 10). It also determined that PSEA's "proposed unit would increase the number of bargaining units. (D&O 270 at 11).

³ This decision was based upon the entire hearing record.

⁴ The parties agreed to admit all exhibits into the record. ASEA initially objected to admission of ACOA's Exhibit 38 but later agreed to its admission. (Transcript II at 6, 47).

⁵ PSEA also represents some municipal police and "airport police and fire." (Jim Duncan testimony, Transcript II at 333).

6. During the period between the hearing on PSEA's 2003 petition and the issuance of D&O 270 in late 2004, the Alaska Correctional Officers Association (ACOA) was created. ACOA petitioned to represent the correctional officers, and in July 2004, ACOA won an election over PSEA and ASEA and was certified as the exclusive representative of the correctional officers. (Transcript II at 106).⁶

7. For the remainder of the contract period, ACOA agreed to assume the rights and responsibilities provided for in the collective bargaining agreement then existing between PSEA and the State of Alaska.

8. Beginning in May or June of 2005, ACOA began negotiating for a new three-year contract, which would commence on July 1, 2006. (Transcript II at 108). After several months of negotiations, the parties agreed on several contract terms but reached impasse on several other terms, including wages. The State had offered the correctional officers a 3-3-3 wage proposal (percent wage increase for each year of the three-year contract); ACOA proposed a 9-4-4 increase. The parties were also unable to agree on two geographical differentials and a few other items. Because correctional officers are Class I employees, ineligible to strike, the parties scheduled binding interest arbitration, which was held in January, 2006. (Transcript II at 109 – 112).

9. Among other things, the arbitrator subsequently awarded ACOA a 4-3-3 increase and granted ACOA's two proposed geographic differential increases. The Alaska Legislature approved funding for the monetary terms of the new State/ACOA agreement. (Transcript II at 113).

10. At some point, several probation officers approached ACOA staff and asked if ACOA would "consider bringing them over as a group to ACOA." (Transcript II at 114).

11. Meanwhile, ASEA and the State had entered into a collective bargaining agreement for the period July 1, 2004, to June 30, 2007. (Exhibit T). They were still negotiating for a new three-year agreement on March 30, 2007, when ACOA filed a petition to carve out approximately 120 adult probation officers from ASEA's general government unit. (March 30, 2007, Petition, section 3). The proposed unit is described as follows:

Included: All nonsupervisory adult probationary officers currently represented by ASEA in the general government unit.⁷

Excluded: All other employees.

⁶ For reference, Hearing Exhibit B is the transcript of the 2003 proceedings between Public Safety Employees Association, Alaska State Employees Association and the State of Alaska. We will refer to Exhibit B as Transcript I. We will refer to the transcript of the ACOA/ASEA/State 2007 hearing as Transcript II.

⁷ The petition does not include or request severance of the general government unit's youth probation officers, or the nonsupervisory probation officers who are employed by the Department of Health and Social Services to work in the alcohol safety program.

Subsequently, ACOA clarified that the unit it sought was “Department of Corrections Adult Probation Officers included in the general government unit, currently represented by ASEA, to be added to the bargaining unit of Correctional Officers I, II, and III, currently represented by the Alaska Correctional Officers Association (ACOA).” (Notice of Petition, section 4). This is the unit description that the Agency asked the State to post in the employees’ worksites.

12. ALRA staff reviewed the petition and interest cards and concluded that ACOA had met the required 30 percent showing of interest. Under 8 AAC 97.060(d), “The employee petition or interest cards in support of a showing of interest are confidential records that may not be disclosed and are not a part of the public record.”

13. Unlike the petition filed by PSEA in 2003,⁸ ACOA’s petition requests that the ALRA Board place the probation officers into the same bargaining unit as the unit occupied by the correctional officers, rather than in a separate probation officers’ unit, as PSEA had proposed in its 2003 petition.

14. Adding the probation officers to the current correctional officers unit would create a bargaining unit of approximately 865 members. (Petition at section 5a).

15. The general government unit currently consists of approximately 8,500 employees, including the 120 adult probation officers. (Transcript II at 328). By comparison, there were approximately 7,000 employees in the unit in 2004. (Finding of Fact number 5, Decision and Order No. 270, at 3).⁹

16. The adult probation officers have a lengthy history in the state’s general government unit. The positions have been part of the general government unit since its creation in 1973. (Order & Decision No. 1, at 13 (Feb. 2, 1973)). ASEA has represented the general government unit since 1989. Prior to 1989, the Alaska Public Employees Association (APEA) represented the unit.

17. Prior to the ALRA Board’s granting the petition to sever the correctional officers from ASEA in 1997, the correctional officers had been in the general government unit since the unit was formed in 1973. (*Public Safety Employees Association v. State of Alaska*, Decision and Order No. 211, at 18 (January 16, 1997)).

18. Probation officers and correctional officers both work under the supervision of the State of Alaska, Department of Corrections.

19. State Department of Corrections Policies and Procedures define “probation officer” as “[t]he assigned community corrections employee who is responsible for all supervision activities involving or relevant to a person who is on probation; ‘probation officer’ also means an officer of the court and presentence investigator for the superior court.” (Exhibit S¹⁰; Exhibit C at 2; AS 33.05.030; Exhibit R).

⁸ See Finding of Fact number 5.

⁹ The probation officers comprise a smaller percentage of the general government unit now than they did in 2004.

¹⁰ Title 33, Chapter V of the Alaska Statutes contains the Probation and Administration Act. This title applies to both adult and juvenile probation officers. Again, juvenile probation officers are not included in this petition. In *Smith v.*

20. Correctional officers work in institutions with institutional probation officers. Correctional officers “learn and perform skills for the custody, security and reformation of prisoners in an adult correctional institution. (Exhibit BB, Class Specification for Correctional Officer I). Like probation officers, correctional officers have a multitude of duties and responsibilities, depending on their title, rank, and the institution in which they work. Their primary responsibilities are to insure the safety and security of the institutions. (Transcript I at 110). Among many duties, they “[a]ssist in creating and maintaining an atmosphere conducive to the rehabilitation of prisoners.” (*Id.*). They book prisoners, observe and record their behavior, prepare reports for supervisors, and promote “acceptable attitudes and behavior . . .” (*Id.*; see Class Specifications for Correctional Officer I, II, and III). They also may work as prisoner transport officers if they become qualified.

21. There is a career path between the correctional officer job series and the probation officer job series. While individuals may qualify for application to a probation officer I position if they possess a bachelor’s degree, a college degree is not an absolute requirement. There are now four alternative substitutes that qualify applicants for the position of probation officer, and one acceptable substitution is that an individual may qualify after working for one year as a correctional officer II. (Exhibit D at 4. See also Exhibits 1 - 8).¹¹ There are also similar substitute qualifications for probation officers II and III. (See Exhibits 2 and 3). Applicants for a correctional officer position need not possess a college degree.

22. The job qualifications to become a correctional officer or probation officer have similarities. Index number 201.05 of the Department of Corrections Policies and Procedures provides that prior to an offer of employment, probation officers and correctional officers must submit to a psychological assessment to determine their suitability to work in the field of corrections. This assessment is also administered to correctional and probation officers who wish to work as prisoner transport officers. No other Department or state employees are subject to this particular policy and procedure. (Exhibit 21).

23. There are also similarities in the training received by correctional officers and probation officers, among others. The Alaska Police Standards Council (APSC), located in the Department of Public Safety, establishes minimum qualifications for police officers, correctional officers, probation officers, and village safety officers. (Exhibits DD and EE). These officers are required to receive training certification in order to continue working for the State of Alaska. (Transcript I at 92-93, 99). These are the only public employees who must receive APSC certification as a prerequisite for continuing their employment. Probation officers and correctional officers must obtain certification from the Alaska Police Standards Council within 14 months after starting employment with the Department of Corrections. (Exhibit DD).¹²

State, Dept of Corrections, 872 P.2d 1218 (Alaska 1994), the Alaska Supreme Court noted that the probation function “appears to be one of those areas of shared responsibilities among the executive and judicial branches.” *Id.* at 1227.

¹¹ A line of questioning and testimony by Doug Lloyd during hearing suggested an individual needed a bachelor’s degree to qualify as a probation officer I. (Transcript II at 98). This was later corrected during questioning by Board Member Scanlon. (Transcript II at 101 – 102). There apparently used to be a degree requirement, but the requirement was changed. (Transcript II at 102).

¹² By comparison, state troopers must have “not less than six months training as a Trooper Recruit and complete Department of Public Safety Field Training, and [be] determined by the Executive Director of the Alaska Police

24. Doug Lloyd is current Program Coordinator for the Department of Corrections training academy. (Transcript II at 78). He and his staff conduct training for correctional officers, probation officers, and prisoner transportation officers. They also conduct “ancillary classes for support staff” and they teach other courses. (*Id.* at 78-79).¹³ The training for correctional officers and probation officers is similar, and it is comprehensive. (Transcript II at 80 - 83) (See also Exhibit P).

25. The APSC requires that correctional officers must be certified for a minimum of 200 hours of training, while adult probation officers must be certified for a minimum of 80 hours. (Transcript I at 103-104). However, actual training hours may vary from APSC’s minimum hour requirements. In fact, actual training hours for probation officers have substantially exceeded the minimum requirements in recent years. In the two training academies prior to issuance of D&O 270 in 2004, the adult probation officers’ total training time comprised 166 hours and 204 hours, respectively. (Transcript I at 95). Training time for the most recent academy increased substantially, totaling more than 250 hours (one day short of 6 weeks). (Transcript II at 83 - 84).¹⁴ This compares to correctional officers’ current training time of 262 hours (six weeks). (*Id.* at 83).

26. Lloyd testified that there have been significant changes in the approach and focus of training for probation officers from the administration of Governor Frank Murkowski to the current administration. Lloyd had worked in APSC training prior to the Murkowski administration but returned under the current administration. Lloyd stated:

There . . . were some – from the time I left to the time that I was gone, there, obviously, were some – some significant changes. Alaska Police Standards Council only requires and – and it’s ludicrous, we’ve never done this, at least in my tenure in the academy – only requires probation officer[s] to receive 80 hours of training in the academy and that’s just absolutely – that’s insane. That doesn’t get them prepared to go do their job whatsoever.

(Transcript I at 89).

27. After initial certification by the Alaska Police Standards Academy, adult probation officers and correctional officers must each amass 40 hours of continuing training per year to keep their certification.

28. Probation officers and correctional officers “share all kinds of training together. Suicide prevention, pressure point control tactics, defensive tactics, policy and procedure training. There’s a lot of stuff that we do that’s kind of generic to everybody that works in the facility.” The training occurs on a regular basis. (Transcript I at 120) . (See also Transcript I at 309 and 489).

Standards Council to be eligible to possess a police officer ‘Basic Certification’ issued by the Council.” (Exhibit CC). Troopers must undergo at least 400 hours of training at the Alaska Police Training Academy. However, actual training now exceeds 1000 hours. (Transcript I at 104).

¹³ Lloyd asserted that the training for support staff is nothing like the six-week academies for probation officers and correctional officers, “not even close.” (Transcript I at 87).

¹⁴ Doug Lloyd testified that probation officers’ training “is one day short of six weeks.” (Transcript II at 84).

29. Probation officers and correctional officers both work toward the common goal of offenders' safety and security by monitoring and supervising their activities. They supervise "the same people just at different times." (Transcript II at 97); (see also Transcript I at 331 and 355). Probation officers and correctional officers share a common purpose of contributing to the public security. Institutional probation officers and correctional officers work to maintain security in institutions. (Transcript I at 355). Field probation officers help maintain public security by supervising activities of offenders in the community, and arresting them if they violate their conditions of parole or probation.

30. By statute, probation officers must 1) furnish probationers with conditions of probation and instruct them accordingly; 2) keep informed of probationers' conduct and report conduct to the court; 3) "use all suitable methods not inconsistent with the conditions imposed by the court to aid probationers and to bring about improvements in their conduct and conditions;" 4) keep accurate records and accounts, make required reports to the court and commissioner of corrections, and perform other duties as directed; and 6) "perform such duties with respect to persons on parole as the commissioner shall request, and in such service shall be termed a parole officer." AS 33.05.040. Field probation officer Dwayne Hanson summarized his duties: "My job is to assist individuals to get back into the community in a safe manner. And to supervise them with the conditions of the court and parole board." Hanson added that part of his job is to "make sure that their environments and – and that they have support networks in set places to address any treatment, substance abuse issues that they might have and/or sex offender treatment that might be ordered by the court or parole board." He testified that to assist offenders, "[w]hat we do is a lot of referrals.¹⁵ We will refer them to substance abuse treatment; we will refer them to . . . sex offender treatment.¹⁶ They come to us and they will ask, I have my mother – you know, I live with my mother. We will go and conduct a home visit and see the type of environment that they actually live in." The visit is done to "make sure that the environment is safe." (Transcript I at 196 – 198).

31. In essence, probation officers classify offenders, evaluate probationers, and refer them to appropriate care or counseling.¹⁷ Referral resources may include, but are not limited to, the State Department of Labor and Workforce Development's Job Center, the Division of Vocational Rehabilitation, or one of the Native corporations in Alaska. The officers then monitor probationers and determine whether the probationers meet or violate their conditions of probation or parole. The probation officers, as officers of the court, report revocations to the courts.¹⁸ (Transcript II at 25).

32. Adult probation officers work as either field (community) officers or institutional officers. There is no separate position description classification for these two types of probation officers. (Exhibit D). The duties of these two types of officers differ in some respects. Institutional

¹⁵ The Department of Corrections has a list of agencies approved for the referrals. (Transcript I at 198 – 199).

Institutional probation officer Kevin Holmes put it this way: "I make the connection between the program and the inmate [in making referrals and sending them out on furlough]." (Transcript I at 333).

¹⁶ Probation Officer Cynthia Davis explained that the term "furlough" means to refer offenders to a halfway house, for example. (Transcript I at 261).

¹⁷ Probation officers may forward probationers to a criminal justice technician who works with probationers to assist them in completing their community work service requirements.

¹⁸ See Transcript I at 65 – 71 for testimony describing the multitude of probation officers' duties .

officers have more paperwork, conduct case management tasks such as classifications (determine inmate security risk), participate in administrative and disciplinary hearings, prepare parole board packets, and make recommendations to the parole board, among other tasks. (Transcript I at 21-23). Field probation officers have similar duties, but instead of working with institutional offenders, they work with offenders who have been placed into the community on probation or parole. Field probation officers receive training on how to conduct home visits, make probation or parole revocations, request warrants, and how to work the radio. They conduct presentence investigations, prepare reports for the court, and monitor community probationers' progress. (*Id.* at 212-23, 113). Both types of probation officers provide offenders with rehabilitation options and make appropriate referrals. (*Id.* at 424).

33. Field and institutional probation officers work together frequently to coordinate movement of offenders into and out of institutions. These officers coordinate furlough assignments, parole paperwork, and other parole actions for the Alaska State Board of Parole. (Transcript I at 240 – 241).

34. Probation officers counsel offenders, not in the traditional sense of, for example, psychological or psychiatric mental health counseling, but in the sense that they supervise the course of offenders' rehabilitation by determining their needs, advising the offenders on their options, and making appropriate referrals. (Transcript II at 248 – 249; 296 – 297).

35. Correctional officers may also counsel offenders. The Hiland facility had correctional officers working as sex offender counselors. (Transcript I at 123).

36. General counseling is only one of a multitude of skills adult probation officers apply in carrying out their responsibilities. The class specifications for Adult Probation Officer I describe 12 different types of duties, one of which includes learning counseling skills. (Exhibit D, Exhibit 1) Learning counseling skills is also one of the 19 different examples of duties listed in the class specifications of probation officers II. (Exhibit D, Exhibit 2).

37. In the examples of duties, the class specifications for probation officers I, II, and III provide that these officers “[learn] the techniques of caseload management, involving office and fieldwork, pre-sentence investigation, intake supervision, *counseling skills*.” (Exhibits 1, 2, & 3) (emphasis added). Another example provides: “[a]dvises and *counsels with other agency staff*, such as public assistance, whose activities relate to persons under supervision of probation and parole.” (*Id.*) (emphasis added).

38. Some adult probation officers disagree over the meaning of the term “counseling” and its application to their job duties. They disagree whether the following statutory duty includes a counseling requirement: “[U]se all suitable methods not inconsistent with the conditions imposed by the court to aid probationers and to bring about improvements in their conduct and conditions.” AS 33.05.040. (See Exhibit C, and Transcript II at 31-32).

39. Probation Officer Mike Reed is a field officer currently carrying a sex offender caseload. He also trains for the Department of Corrections and teaches “various subjects through both the probation officer academy and correctional officer academy.” (Transcript II at 21). He

testified he does not use counseling skills “per se” but instead uses interview and interrogation techniques. He further testified that the job descriptions had been recently updated. (*Id.* at 34).

40. Institutional Probation Officer Chris Lyou has worked for the Department of Corrections since June 1988. (Transcript II at 159). He asserted counseling is required by statute. (Transcript II at 172).

41. Kevin Holmes asserted that, as an institutional probation officer, he counsels inmates “all the time. It’s how we get to know them quite a bit. . . . So we get – a lot of information like pours really into us and the correction – correction officers come to us and tell us . . . you need to talk to Kevin ‘cause . . . he’s flipping out, he’s gone nuts. He – we’re probably going to have to drag him down, classification is going to go up because he’s cursing at the correction officers. It’s going to be closed custody, can you talk to the guy” (Transcript I at 329 – 330).

42. Probation Officer Jenne Danzl said counseling is a “huge part” of her job. (Transcript II at 248). Jennifer Sapp, an institutional probation officer, testified: “I don’t typically like the word counseling, just coming from a mental health background. I – I prefer that I assist and facilitate and inform inmates as to what options they have and their abilities and – and what they can do. I – I try to stay away from counseling just because I’m . . . not a certified counselor” (Transcript II at 297 – 298).

43. Notwithstanding the various probation officers’ interpretation of whether they provide any type of counseling service, their testimony shows that each probation officer talks with offenders to assist them with various types of problems, whether it is helping them understand the requirements of their probation, evaluating choices they are making, or referring them to appropriate agencies that might be able to assist them.

44. By state regulation, all probation officers and correctional officers share a work-related requirement to adhere to the same Code of Ethics. They must “attest and subscribe to” this Code, which is unique to their job positions. (13 AAC 85.230(d)). Among other requirements, this Code of Ethics requires each probation officer and correctional officer to:

make available for review all case information that could contribute to sound decisions affecting the public safety, or an inmate, probationer, or parolee. I will maintain the integrity of private information, and will neither seek personal data beyond that needed to perform my duties, nor reveal case information to anyone not having a proper professional use for the information. . . . I will not use my official position to secure privileges or advantages for myself, and will not accept any gift or favor that implies an obligation inconsistent with the objective exercise of my professional duties. I will not act in my official capacity in any matter in which I have a personal interest that could in the least degree impair my objectivity. I will not engage in undue familiarity with inmates, probationers, or parolees. I will report any corrupt or unethical behavior of a fellow correctional, probation, or parole officer that could affect either an inmate, probationer, or parolee, or the integrity of the agency, but will not make statements critical of colleagues or other criminal justice agencies unless the underlying facts are

verifiable. I will . . . develop relationships with colleagues to promote mutual respect for the profession and improvement of the quality of service provided.

Alaska Administrative Code, 13 AAC 85.230(d). By Department Policy and Procedure Index Number 202.01, the Department expanded application of this ethics code “to all employees who are directly responsible for the custody, care, reformation, and supervision of offenders, and all employees who supervise or manage the activities of such employees, and volunteers and contract personnel who perform such work. (Exhibits 25 & 26).

45. Under this Code, probation officers and correctional officers must avoid “undue familiarity” with offenders, whether they are inmates in prison or probationers or parolees outside the prison. Doug Lloyd explained undue familiarity:

Basically, there are certain things that we are supposed to know about offenders and certain things that offenders are supposed to know about us and when we’re – we’re talking about . . . either class of employee, the bottom line is what they need to know is your name is Officer Jones and they need to know where you work and they need to know that you are supervising them. They don’t need to know anything about your personal life, etcetera, and, on the other side of the coin, it works exactly the same way, the . . . officers, they do need to know a lot more about offenders but – the probation officers, excuse me, need to know a lot more about the offenders, obviously, than the average correctional officer who’s supervising inside the institution because the probation officer is, basically, supervising them sometimes in their home. So there’s some familiarity that – that comes from that but it needs to be a professional familiarity and . . . it’s stressed quite . . . strongly to them.

(Transcript II at 85).

46. Regulation 13 AAC 85.900(17) defines “undue familiarity” as “developing, or attempting to develop, an intimate, personal, or financial relationship, or otherwise failing to maintain an appropriate professional relationship[.]”

47. By Policy and Procedure Index Number 202.15, a comprehensive seven-page document, all Department of Corrections employees must adhere to certain standards of conduct. These standards include avoiding conflicts of interest and avoiding relationships with offenders and family members of offenders. Among the policies, department employees are prohibited from “knowingly [maintaining] social, sexual, business or financial associations with offenders or a member of the offender’s immediate family. This includes, but is not limited to, telephone calls, letters, notes, or other communications outside the normal scope of employment.” (Exhibit 27).

48. ASEA’s Anchorage office hired an individual who had been convicted of a felony and was on probation at the time of hire. Some probation officers eventually discovered this and became concerned because the individual worked in the reception area of the Anchorage office. They were concerned about the prohibition against undue familiarity, and because the individual would have access to their personal information, which could potentially put them or their families at risk. Twenty-five probation officers submitted a letter to ASEA management expressing their

concern. (Exhibit 38 at 1-2). After reviewing probation officers' concerns, ASEA restricted the individual's access to information about bargaining unit members, except that the individual remained employed as the receptionist. ASEA business manager Jim Duncan wrote to the concerned probation officers and explained the modified procedure, but ASEA declined to terminate the employee. (Exhibit 38 at 3-5). Eventually, the employee resigned for reasons unrelated to her job performance.¹⁹

49. Only correctional officers, probations officers, and management personnel are allowed unescorted into modules in institutions, with offenders. Anyone else must get special permission of the superintendent. (Transcript I at 445).

50. Adult probation officers share a community of interest with both correctional officers and some members of the general government unit due to their case management responsibilities. In particular, the institutional probation officers share a community of interest with many members of the general government unit, such as juvenile probation officers and social workers because a substantial part of the job entails case management. . (Exhibits X and Z). However, probation officers share a strong community of interest with correctional officers regarding case management because their case management focuses on offenders.

51. The amount of work time spent by field and institutional probation officers in various tasks varies by position and location.

52. Teena Calkin has worked as both an institutional and field probation officer. She testified: "[T]he biggest difference is probably the fact that the offenders are out in the community so you go to their homes, you conduct home visits, you do -- you make arrests, which we never did in the institution." (Transcript I at 31). Fieldwork is "much more hands on as far as making any kind of arrests, searching their homes, searching their cars." (*Id.*).

53. Institutional probation officers work closely with correctional officers, field probation officers, clerical staff, and criminal justice technicians. Field probation officers work with the same group, as well as with police officers. Both types of probation officers work with various groups and agencies for offender referral purposes. (See Transcript I at 425).

54. Probation officers are not required to wear uniforms, but, like other Department of Corrections personnel, they have been and are required to wear identification badges at all times. (Transcript I at 323; Exhibits M and O).²⁰ Not requiring uniforms is a significant, recent change in policy. In Governor Frank Murkowski's administration, probation officers were required to wear a type of uniform that identified them as probation officers. Now, probation officers must wear "appropriate clothing" (Transcript I at 26) and "maintain a neat, well-groomed, professional appearance." (Exhibits M and O). They must also wear professional business attire when they

¹⁹ The undisputed evidence indicates that the individual hired by ASEA made a stellar effort to successfully complete the conditions of probation. However, the individual's efforts to meet conditions of probation and the results of those efforts are not at issue in this matter.

²⁰ Department of Corrections Policies and Procedures, Personnel Chapter, Index # 202.10: Identification of Authority. The various colors of the stripes, background, and bordering of the Department of Corrections' badges denote the type and extent of security clearance.

attend court. Correctional officers must wear uniforms, except when they participate as prisoner transport officers for out-of-state transfers, or unless otherwise exempted by the Superintendent. (Exhibit N). There was no other testimony on uniform or badge requirements for other general government unit employees.

55. Most probation officers are not required to carry firearms but may request qualification to do so. Field probation officers may carry firearms, but no one, including institutional probation officers and correctional officers, is allowed to carry firearms inside prisons. Prisoner transportation officers must be certified to carry firearms. Otherwise, each individual probation officer exercises discretion whether to carry firearms. (Transcript I at 115). If a probation officer or correctional officer decides to seek qualification to carry a gun, the officer must pass both the physical standards and a psychological examination.

56. Only probation officers and correctional officers work as prisoner transport officers. (Transcript I at 115 – 118, 386). They must get special training to be certified. Occasionally, the probation officers and correctional officers work together in prisoner transports, especially when making the “big moves to Arizona and things like that” (Transcript I at 120 – 121). They also work with local and State law enforcement officials to coordinate prisoner transports.

57. Adult probation officers and correctional officers share a close relationship in the continuum of care of offenders. They share a high level of functional integration.²¹ Correctional officers work with institutional adult probation officers frequently -- on a daily basis -- to provide for the needs of offenders, promote their rehabilitation, and maintain security. Correctional Officer III Gary Damron testified:

[O]n any given day we'll interact countless times, trying to make sure the people are classified correctly, making sure that their housing assignments are appropriate. That their program levels are monitored and appropriate. Probation officers also work with processing disciplinary actions against the prisoner population for violations of the Alaska Administrative Code, or the Department policy and procedure. Probation officers also work real close with the shift supervisor in making sure that placements into . . . administrative segregation . . . there's certain time constraints that have to be met and we work real close with the probation staff to make sure that those time constraints are met and to make sure that a person that needs to be in segregations is segregated

(Transcript I at 111). Institutional probation officer Jenne Danzl testified: “I work directly with a lot of CO's and – and they cover my back. If guys [offenders] get mad at me, I have a radio and they [correctional officers] come help me” (Transcript II at 256).

58. Because they supervise offenders who reside outside prison facilities, field probation officers do not work as frequently with correctional officers as do institutional probation officers. However, field probation officers do interact with correctional officers, both when they visit

²¹ See, e.g., *Sandburg Faculty Ass'n, IEA-NEA v. Illinois Educational Labor Relations Board*, 248 Ill. App. 3d 1028, 618 N.E. 2d 989 (1993).

offenders in prisons and during prisoner transport. Gary Damron described the interaction with field probation officers within the Hiland Mountain Correctional Center where he works:

At Hiland it's pretty minimal. They come in and they'll do presentence investigations and we'll have to talk – you know, move the prisoner out to a place where they can be alone to talk and things like that. For parole violation hearings we have to interact with the field PO's then, because they violated the person, we have to set them up to come into court and things like that. And the pre-release probation officers will come in on a pretty regular basis and meet with the prisoners that are going to be released to parole or to electronic monitoring program, or one of the halfway houses, before they're released they'll come in and we'll work with them on that.

(Transcript I at 117).

59. Field probation officers go to correctional institutions, as needed, for various reasons. They sometimes go there after being contacted by correctional officers. Dwayne Hanson explained: "I've gone into Anchorage jails numerous times for preliminary hearings, final boards, to do transports. We've been contacted by correctional officers that – in one instance we had an individual that was released too early. We were then asked to go and try to find him. Luckily that night we did." (Transcript I at 187).

60. The percentage of time that field probation officers spend making field visits and making arrests while in the field has increased dramatically since 1998. (Transcript I at 196). Institutional officers and correctional officers very rarely make arrests.

61. Law enforcement is not a primary responsibility of adult probation officers or correctional officers. Their primary goal is public safety and security. (Transcript I at 203). Kevin Holmes testified that "security is number one at the Cook Inlet Pretrial facility." (Transcript I at 331).

62. Both correctional officers and probation officers act as mentors to offenders. (Transcript I at 453).

63. Probation officers share a substantial community of interest with correctional officers. The primary work focus of both probation officers and correctional officers is a person who has allegedly committed a crime or who has been convicted and sentenced in Alaska courts. Institutional probation officers work closely with correctional officers to provide assistance, counseling, security, transportation, and other needs of the offenders.

64. Like other probation officer positions in the State's classified service, the adult probation officers are paid an hourly wage rate based on the range assigned to the probation officers' position by the Division of Personnel, Department of Administration. Their wage rate is shared with other members of the general government unit through the collective bargaining agreement negotiated by ASEA. Correctional officers are also paid at an hourly rate, which is based on a range assigned by the Division of Personnel and also on the result of negotiations between

ACOA and the State. The wages of all State employees in the classified service are based on an hourly pay rate.

65. Institutional adult probation officers share a community of interest with many other members of the general government unit regarding work hours and work schedule. Under ASEA's collective bargaining agreement, institutional adult probation officers and other general government unit members usually work 37 1/2-hour weeks (7 1/2 hours per day, 5 days a week). (*Id.* at 55-56, 87-91). However, institutional probation officers sometimes work on weekends to prepare for a special project. (Transcript I at 322).

66. While field probation officers are scheduled to work a 37 1/2 hour week, they actually work substantially more overtime hours than institutional probation officers. They are required to get paid overtime compensation for hours worked in excess of their required weekly schedule. (See Exh. 3, Probation Officer Position Description Questionnaires).²² Field probation officers are sometimes required to work weekends and they get called out to duty on both evenings and weekends, depending in part on activity by offenders in their caseload. (Transcript I at 232). Field Probation Officer Dwayne Hanson testified he works “really long hours. I started yesterday at 8:00 o’clock and I worked until 2:00 o’clock this morning. And then I had to be at a mandatory meeting at 10:00 a.m. So I work a great many hours. (Transcript I at 172). Fairbanks Field Probation Officer Bobby Hanson often must work evenings, overnights, and weekends when he travels to visit rural offenders in his caseload. (Transcript I at 244).

67. There has been discussion regarding a proposal to work a four-day work week at the Fairbanks probation office. (Transcript I at 244). Field Probation Officer Cynthia Davis testified that her office in Anchorage works a four-day week. (Transcript I at 259).²³ Davis previously worked as an institutional probation officer in Ketchikan’s corrections center, where she worked a five-day, 37 ½ hour week. However, the probation officer who replaced her now has the added duty of working with the electronic monitoring program, which requires that she “gets called out in the middle of the night and on weekends.” (Transcript I at 260).

68. Correctional officers’ work schedules vary by assignment. The collective bargaining agreement between ACOA and the State provides for overtime and premium pay based on a 42-hour schedule (a maximum of seven days on and allowing for two consecutive days off), or an 84-hour schedule (maximum of seven days on and then seven consecutive days off). (Exhibit 18 at 24 – 25). In addition, the Commissioner of Corrections may approve a flexible work schedule, and the parties may agree mutually to establish a four-day workweek or other alternative work schedule. (Exhibit 18 at 56).

69. Both adult probation officers and correctional officers spend a large percentage of their work day either dealing directly with offenders or completing paperwork on offenders. Cynthia Davis is a field probation officer, but she has also worked as an institutional officer. While working in the Ketchikan Correctional Center, she helped the records officer with time accounting. The records officer is a correctional officer, a sergeant, who keeps a record of the time an inmate has spent in the facility and time remaining to serve. (Transcript I at 254).

²² Probation Officer Dwayne Hanson asserted he does not always get paid for overtime he works. (Transcript I at 210).

²³ Davis explained that she works three nine and a halves and a nine, for a total of 37 ½ hours. (Transcript I at 267).

70. Both field and institutional probation officers report to the courts regarding offenders. (Transcript II at 289).

71. When asked if the jobs of correctional officer and probation officer were similar, Doug Lloyd responded: "I always say this – this is my perspective, they're – they're supervising the same people just at different times." (Transcript II at 97).

72. A probation officer III usually supervises the adult probation officers II and I. Probation officers III are members of the supervisory bargaining unit, represented by the Alaska Public Employees Association. Although probation officers III usually supervise adult probation officers II and I, corrections superintendents or probation officers IV or V may also provide supervision, depending on the nature and location of the institution. Supervision of both probation officers and correctional officers is within the Department of Corrections.

73. Adult probation officers and correctional officers may retire after 20 years of employment. (Transcript I at 63; Transcript II at 328). The vast majority of employees in the general government unit may not retire until after working 30 years.

74. Adult probation officers and correctional officers are Class I employees under the Public Employment Relations Act. See *Alaska Public Employees Association v. State of Alaska*, Decision and Order No. 143 (September 9, 1992).²⁴ This means they are ineligible to strike, and they have the statutory right to arbitration. AS 23.40.200(b); (Transcript II at 63).

75. There are approximately 1,500 Class I employees, including the probation officers, in the general government unit. (Transcript I at 504). The other 7,000 members of the general government unit are Class II or III employees who may vote to strike and are eligible to go out on strike.

76. Adult probation officers have received adequate representation from ASEA. Some probation officers have not had a problem with ASEA's representation. (Transcript I at 86). Some of these officers expressed frustration but still participated within the union. (Transcript I 368 - 369).

77. Other probation officers expressed concern regarding their representation with ASEA. (Transcript I at 269 – 273). For example, probation officer Dwayne Hanson became concerned when a supervisor pointed a BB gun at him and another officer and told them to get their work done. Hanson approached an ASEA steward about filing a grievance but the steward said there was probably nothing that could be done. (Transcript I at 222-223).

78. While some probation officers expressed concerns with health care benefits provided by ASEA, others expressed concerns regarding the potential costs of medical benefits if they became members of ACOA. Cynthia Davis asserted that "we had had problems with the

²⁴ Prior to issuance of Decision and Order No. 143, the State had agreed that institutional probation officers were Class I – ineligible to strike – but it contended field probation officers were Class III – strike eligible. The ALRA Board concluded that field probation officers – both adult and juvenile – were Class I. (D&O 143, at 18).

health care as provided by ASEA.” (Transcript I at 282). Jenne Denzl believes health insurance would cost probation officers about \$1000 more per year if she moved from membership in ASEA to membership in ACOA. (Transcript II at 256). She admitted that she learned this information from listening to others and from gossip. (Transcript II at 286-287). She admitted she had not done any specific calculations regarding ACOA’s insurance plan. (*Id.*).

79. ACOA and ASEA each provided evidence of employee support for their bargaining units. The evidence in the record did not provide clear support for one organization over the other organization. ACOA did obtain signed interest cards from at least thirty percent of the adult probation officers.

80. ACOA demonstrated that it could provide adequate representation for adult probation officers. ACOA has been in existence since 2004, and it has successfully negotiated a collective bargaining agreement for correctional officers with the State of Alaska.

81. The evidentiary record did not establish a clear-cut history of representation of adult probation officers in law enforcement or public safety bargaining units in Alaska or other states; there was no definitive pattern showing probation officers either in their own unit or mixed together with other specific employee groups. The record contains exhibits providing information from some states showing probation officer membership in a variety of bargaining units. For example, in Wisconsin, probation officers appear to be grouped in a mixed unit. However, the documents in the record do not indicate dates or sources of the documents or the nature of the bargaining unit composition. (Exhibit MM). The Commonwealth of Pennsylvania included the position of “parole agent” in a professional, non-supervisory “inspection, investigation and safety unit.” (Exhibit NN). Alaska does not have such a bargaining unit. In Minnesota, “corrections agents” are included in a bargaining unit titled “Minnesota Association of Professional Employees.” (Exhibit OO). There was no other evidence showing how this exhibit supports or negates issues in the record. Likewise, Michigan’s and Ohio’s bargaining unit structures are different from that in Alaska. (Exhibits PP and QQ).

82. Although the adult probation officers share some terms and conditions of employment with members of the general government unit, the adult probation officers and the correctional officers share a greater community of interest with each other based on the type of work they perform, the offenders with whom they work, their working conditions, the Code of Ethics they must follow, the training they receive, their Class 1 status under PERA, their participation in the 20 year retirement system, and a career path from the correctional officer job series to the probation officer job series.

ANALYSIS

1. Is the Agency’s showing of interest determination confidential?

Prior to the hearing, ASEA requested that it be allowed to review the documents relating to the Agency’s determination on the showing of interest. The Agency denied the request because the documents and investigation were deemed confidential. During the hearing, ACOA’s hearing representative asked ACOA witness Brad Wilson how many probation officers signed showing of

interest cards. Wilson responded, but after further questioning, ASEA objected, contending that the number of interest cards signed is confidential. (Transcript II at 116). ACOA responded that the cards and names of employees are confidential but it knew of no authority requiring the actual number of cards signed to be kept confidential.

The hearing examiner sustained the objection. Agency regulation 8 AAC 97.060(d) provides: "The employee petition or interest cards in support of a showing of interest are confidential records that may not be disclosed and are not part of the public record."²⁵ We have long concluded that the showing of interest investigation is confidential as are the showing of interest cards. (*Public Safety Employees Association (Correctional Officers) v. State of Alaska, Department of Corrections*, Decision and Order No. 211 at 9-10 (January 16, 1997)).

Since its creation in 1990, this Agency has not disclosed the number of interest cards filed in support of a petition to certify or decertify a bargaining representative. Disclosing the number of interest cards submitted could provide competing labor organizations and employers with information about a particular labor organization's strength and the employees' desires. As long as a petitioning labor organization has filed an adequate showing of interest under the regulations to proceed with the petition, we believe employee support for a particular labor organization is best determined by conducting a secret ballot election.

2. Does the Agency's determination in Decision and Order No. 270 and the doctrine of res judicata bar ACOA from proceeding to election on its petition to sever adult probation officers from the general government unit?

ASEA filed a motion to dismiss this petition based on the doctrine of res judicata. ASEA contends that the Agency already decided that the adult probation officers' community of interest lies with the general government unit. (*Public Safety Employees Association v. State of Alaska*, Decision and Order No. 270 (December 21, 2004)).

ACOA argues that the issue here differs significantly from the issue the board panel decided in D&O 270. ACOA contends that res judicata should never apply to agency representation proceedings because AS 23.40.090 provides that the agency must decide "in each case, in order to assure to employees the fullest freedom in exercising the rights guaranteed by AS 23.40.070 – 23.40.260, the unit appropriate for the purposes of collective bargaining" ACOA asserts that because of this statutory mandate, res judicata should be inapplicable to appropriate unit determinations. (ACOA post-hearing brief at 1).

²⁵ The former State Labor Relations Agency revealed the percentage of the proposed bargaining unit that signed interest cards. The percentage was considered evidence supporting, or not, the desires of employees. See, e.g., *Public Safety Employees Association, Inc. v. Alaska Public Employees Association*, Order and Decision No. 106 (May 14, 1987). These decisions were issued by one of our predecessor agencies, prior to creation of this Agency. In retrospect, there would seem to be no prohibition against a party testifying on the number of interest cards it presented to the Agency for the showing of interest investigation. Of course, this number could vary from the actual number of valid cards determined by the showing of interest investigation.

However, the Alaska Supreme Court has consistently held that res judicata applies to adjudications in administrative proceedings. See, e.g., *Holmberg v. State, Division of Risk Management*, 796 P.2d 823 (Alaska 1990). Nevertheless, in applying the doctrine, the court has also ruled that res judicata “is not always applied as rigidly in administrative proceedings as it is in judicial proceedings.” *Robertson v. American Mechanical, Inc.*, 54 P.3d 777, 779-780 (Alaska 2002). Moreover, the Alaska Legislature declared that it is the public policy of this state to promote “harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government.” AS 23.40.070. The legislature declared that these policies are to be effectuated in part by “recognizing the right of public employees to organize for the purpose of collective bargaining.” This Agency has applied the doctrine in decision and orders. See, e.g., *International Brotherhood of Electrical Workers Local Union 1547, AFL-CIO v. Kodiak Island Borough*, Decision and Order No. 213 (January 6, 1997). Although AS 23.40.090 appears to require case-by-case determinations for the appropriate unit, we could not find a supreme court case that concluded res judicata would not be applicable in some administrative scenarios. In determining ASEA’s motion to dismiss, we will apply the Supreme Court’s precedent and the Alaska Legislature’s recognition of public employees’ rights to organize for collective bargaining, and the requirements of AS 23.40.090.

Applying these policies and precedents to this case, we conclude that ASEA’s motion to dismiss, based on res judicata, must be denied. The main thrust of ASEA’s argument is that ACOA was a successor in interest to the Public Safety Employees Association (PSEA), and should therefore be considered in privity with PSEA. Since PSEA’s petition to sever the probation officers was denied in D&O 270, ASEA contends we should likewise deny ACOA’s petition here.

In *Alaska Contracting & Consulting, Inc. v. Alaska Department of Labor*, 8 P.3d 340 (Alaska 2000), the Alaska Supreme Court described the doctrine of res judicata:

After entry of a judgment on the merits of a controversy, res judicata bars subsequent actions between the same parties on the same claim, or on claims that the parties were required to bring in the original action. Res judicata, or claim preclusion, implements ‘the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court.’

8 P.3d 340, 344.

The Court went on to provide that,

Collateral estoppel, or issue preclusion, bars the relitigation of an issue when (1) the party against whom the preclusion is employed was a party to or in privity with a party to the first action; (2) the issue precluded from relitigation is identical to the issue decided in the first action; (3) the issue was resolved by a final judgment on the merits; and (4) the determination of the issue was essential to the final judgment.

Id. at 345.²⁶

In *State v. Combs*, 64 P.3d 135 (Alaska 2003), the Court of Appeals of Alaska described the Alaska Supreme Court's view on privity:

The Alaska Supreme Court has noted that the term "privity" (as used in the context of the collateral estoppel doctrine) has no firm definition. Rather, "it is a shorthand way of expressing assurance that the non-party has had adequate notice and opportunity to be heard, and that its rights and interests have been protected. Generally speaking, officials of the same government are in privity with each other. However, each case must be examined on its own facts. The crucial question is whether, in the earlier litigation, the government's representative had the authority to represent the government's interests in a final adjudication of the issue in controversy.

Id. at 138. (footnote citations omitted).

In *Martin v. American Bancorporation Retirement Plan*, 407 F.3d 643 (C.A. 4 2005), the Fourth Circuit Court of Appeals, noting that "an exact definition of privity is an elusive concept," stated that privity "is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the *res judicata*." *Id.*, 407 F.3d at 651. See also *Meza v. General Battery Corporation*, 908 F. 2d 1262 (1990).

Thus, ASEA must first show that ACOA was a party to or in privity with a party in D&O 270. The Supreme Court "has adopted the approach of the Second Restatement of Judgments to issues involving privity; it is an approach that "relies on the various specific relationships that justify preclusion." *Powers v. United Services Automobile Association*, 6 P.3d 294, 297 - 298 (Alaska 2000). In *Powers*, the Court outlined the approach provided in the Restatement:

According to the Restatement, a non-party may be bound by a determination in a prior action if the non-party (1) substantially participated in the control of a party's presentation in the adjudication or had an opportunity to do so; (2) agreed to be bound by the adjudication between the parties; or (3) was represented by a party in a capacity such as trustee, agent, or executor.

Id. at 298.

Clearly, ACOA was not a party to the first action, Decision and Order No. 270 (D&O 270). The parties were PSEA, the State, and ASEA. There is no evidence of any communication between PSEA and ACOA in the case that gave rise to D&O 270. There is no evidence that ACOA participated in PSEA's, ASEA's, or the State's presentation at the hearing which resulted in D&O 270. We next look to see if ACOA agreed to be bound by the first action. There is no evidence that ACOA agreed to be bound by the case PSEA, ASEA, and the State presented about severing the

²⁶ In *Holmberg v. State Division of Risk Management*, 796 P.2d 823, 824, the Alaska Supreme Court explained that, "[w]e use the term 'res judicata' to refer to both claim preclusion and issue preclusion. We use the term 'collateral estoppel' to refer specifically to issue preclusion."

adult probation officers from the general government unit. Likewise, there is no evidence that ACOA was represented by a party, such as a trustee, agent, or executor, in the proceeding that led to D&O 270. Therefore, ACOA was not in privity with any of the parties that participated in the case leading to D&O 270.

Even if ACOA were deemed in privity with PSEA in the D&O 270 determination, ASEA must prove that the issue precluded from relitigation is identical to the issue decided in the first action. We conclude that the issue is significantly different in two ways. First, the issue in D&O 270 was whether the probation officers should be severed from the general government unit and placed into their own separate unit of public safety type employees, consisting only of adult probation and parole officers. (D&O 270 at 2). In the present case, the issue is whether the nonsupervisory adult probation officers should be included in a bargaining unit with nonsupervisory correctional officers. While the unit sought by the parties in D&O 270 would have been a new bargaining unit, the addition of the nonsupervisory adult probation officers to ACOA's nonsupervisory correctional officer unit would not create a new bargaining unit. Since a new unit would not be created, the prohibition against unnecessary fragmenting in AS 23.40.090 would not apply. Second, PSEA argued that an increase in adult probation officers' law enforcement duties justified "moving them from the general government unit and creating a third unit of law enforcement type personnel, which in this case would consist only of adult probation officers." (D&O 270 at 9). In contrast, the issue in the present case is whether the nonsupervisory adult probation officers share a greater community of interest with nonsupervisory correctional officers, or with members of the general government unit.

In the present petition, ACOA contends that the adult probation officers have a greater community of interest with the correctional officers and that the appropriate unit for collective bargaining is a unit consisting of the nonsupervisory probation officers and the nonsupervisory correctional officers. In contrast to the issue determined in D&O 270, ACOA does not contend that the appropriate unit is a unit consisting only of the probation officers in a public safety unit. Further, ACOA does not contend that the primary duty of probation officers is law enforcement. We find that not only is the proposed unit different from that proposed in D&O 270, but the issues to be decided here differ significantly from those decided in D&O 270. Furthermore, the board panel did not address or decide the issue whether a unit of nonsupervisory probation officers and nonsupervisory correctional officers was an appropriate unit. Accordingly, we conclude that res judicata does not bar ACOA from pursuing its petition to sever the probation officers in the present case.

3. Is the unit proposed by ACOA -- to sever the nonsupervisory adult probation and parole officers from ASEA and add them to the nonsupervisory correctional officers' unit-- appropriate under AS 23.40.090?

Appropriate bargaining units are determined under PERA primarily by applying AS 23.40.090, which provides:

The labor relations agency shall decide in each case, in order to assure to employees the fullest freedom in exercising the rights guaranteed by AS 23.40.070—23.40.260, 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.

Under this statute, the appropriate unit is to be based on “such factors” as community of interest, wages, hours, and other working conditions of the employees, history of collective bargaining, and employee desires. Moreover, units must be “as large as is reasonable” and avoid unnecessary fragmenting. This latter phrase of the statute does not prohibit fragmenting outright. It prohibits only the type of fragmenting that is determined “unnecessary.” We construe this language to mean that fragmenting of units may sometimes be necessary when such fragmenting is outweighed by application of the other factors in determining appropriate units under AS 23.40.090.

In this case, the unit that ACOA seeks to create will not create unnecessary fragmenting because the adult probation officers will be added to the existing correctional officers’ unit. This action will not create an additional unit. This unit will be as large as is reasonable, and will not require the State to bargain with an additional bargaining unit. Moreover, any fragmenting of the general government unit that will occur is necessary because of the strong community of interest shared by the correctional officers and probation officers. The general government unit initially consisted of those positions that were not included in other bargaining units, and as experience has been gained under PERA and additional bargaining units have been formed, a different community of interest may exist than that which existed in 1973 when the general government unit was formed.

ACOA must establish by a preponderance of the evidence that combining the nonsupervisory adult probation officers with the nonsupervisory correctional officers would be the “unit appropriate” for collective bargaining under AS 23.40.090. This statute does not require that we give more weight to any one factor over other factors. Our responsibility is to insure that employees are placed in a unit that results in a community of interest based on the case’s particular facts, and the factors outlined in AS 23.40.090. In outlining the factors listed in AS 23.40.090, the Alaska Legislature did not choose to stress one particular factor as more important than others. As stated by the National Labor Relations Board in *Airco, Inc. and Chauffeurs & Sales Drivers, Local Union No. 402*, 273 NLRB No. 348, 118 L.R.R.M. (BNA) 1052 (1984):

There are no per se rules to include or exclude any classification of employees in any unit. Rather, we examine the community of interest of the particular employees involved, considering their skills, duties, and working conditions, the Employer’s organization and supervision, and bargaining history, if any, but no one factor has controlling weight. See *E.H. Koester Baking Co.*, 136 NLRB 1006, 1009-11 (1962); *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 136-138 (1962) (severance petition).

Airco, Inc., 273 NLRB at 348.

In other words, the weight to be given each factor is determined on a case-by-case basis. Therefore, we conclude that the particular facts of each case dictate the outcome. In this case-by-

case analysis, we may find reason to give more weight to one factor over other factors because of the uniqueness of the particular facts of the case. We must also keep in mind the statutory prerogative that, in determining the appropriate unit in each case, we must “assure to employees the fullest freedom in exercising the rights guaranteed by AS 23.40.070 – 23.40.260[.]”

a. Community of interest and working conditions.

The National Labor Relations Board (NLRB) and federal courts²⁷ determine community of interest on a case-by-case basis, with no single factor controlling the outcome:

In designating an appropriate bargaining unit, the Board [NLRB] . . . has wide discretion in these matters and reviewing courts must generally defer to its judgment that a particular unit is appropriate. (citations omitted). The central test is whether the workers share a “community of interest,” that is, “substantial mutual interests in wages, hours, and other conditions of employment.” (citations omitted). The Board considers several factors, but “there are no per se rules” to resolve unit determinations: “we examine the community of interest of the particular employees involved, considering their skills, duties, and working conditions, the Employer’s organization and supervision, and bargaining history, if any, but no one factor has controlling weight.” *Airco, Inc.*, 273 N.L.R.B. 348 (1984).

Bentson Contracting Company v. National Labor Relations Board, 941 F.2d 1262, 1265 (C.A.D.C., 1991).

In *N.L.R.B. v. Catalytic Industrial Maintenance Co.*, 964 F.2d 513, 518 (5th Cir. 1992), the U.S. Court of Appeals stated that, “[t]he community of interests test recognizes that ‘[t]he most reliable indicium of common interest among employees is similarity of their work, skills, qualifications, duties and working conditions.’ *DMR Corp.*, 699 F.2d at 792. . . ‘the crucial consideration is the weight or significance, not the number, of factors relevant to a particular case.’ *Purnell’s Pride*, 609 F.2d at 1156.”

We have previously concluded that each of the following job classes more closely shared a community of interest similar to that of other job classes in the general government unit than to members of a public safety unit. We denied petitions to move these positions out of the general government unit and into the public safety unit. *Public Safety Employees Association (Park Rangers) vs. State of Alaska*, Decision and Order No. 209, (November 13, 1996); *Public Safety Employees Association (aircraft rescue and fire fighting specialists) vs. State of Alaska*, Decision and Order No. 187 (May 25, 1995); *Public Safety Employees Ass’n (F.W.E.O.) v. State of Alaska*, Decision and Order No. 186 (May 25, 1995) (fish and wildlife enforcement officers), and *Public Safety Employees Ass’n v. Alaska State Employees Ass’n and State of Alaska*, SLRA Order and Decision No. 120 (Aug. 28, 1989) (fish and wildlife enforcement officers and fish and wildlife aides). In each of these cases, the analysis was based on whether the affected employees shared a greater community of interest with members of the general government unit or members of the public safety unit. The absence of full law enforcement duties was a significant factor in

²⁷ “Relevant decisions of the National Labor Relations Board and federal courts will be given great weight” in the Agency’s decisions and orders. 8 AAC 97.440(b).

determining that each affected group of employees shared a greater community of interest with the members of the general government unit. In *Public Safety Employees Association (correctional officers) v. State of Alaska*, Decision and Order No. 211 (January 16, 1997), we concluded that a strong community of interest and national tradition of separate representation, among other things, justified severing the non-supervisory correctional officers from the general government unit.

Additionally, in Decision and Order No. 270, we denied the Public Safety Employees Association's petition to sever the adult probation officers from the general government unit and place them into their own separate unit within PSEA. A primary reason for denying the petition was the law enforcement factor:

In Decision and Order No. 209, we reiterated that the public safety unit should include all classifications that have "primary responsibility" to enforce the law. Decision and Order No. 209, at 11, citing *Pertaining to a unit authorization petition by Public Safety Employees Ass'n*, SLRA Order & Decision No. 28 (1977). We again stress that the core factor for determining a community of interest in the public safety unit lies in a primary responsibility for law enforcement.

(Decision and Order No. 270 at 9.) Another factor in denying the petition was that an additional unit would be created, causing unnecessary fragmenting. (D&O 270 at 11 & 15). However, in the present case, unnecessary fragmenting would not occur because the probation officers would be added to the correctional officers' unit, and we conclude that the issue regarding law enforcement duties is not significant here.

Nonetheless, ASEA contends that probation officers do not belong in a unit with correctional officers because the probation officers' primary duty is not law enforcement and this factor "distinguishes them in role and responsibility from Correctional Officers represented by ACOA . . ." (ASEA Prehearing Brief at 7). ACOA disagrees that law enforcement is a significant factor in this case.

ASEA's emphasis on law enforcement is misapplied here. Admittedly, we have weighed a law enforcement factor in determining community of interest in appropriate cases. However, we find law enforcement is not a primary or significant factor to be weighed in this case. We find that both correctional officers and probation officers are charged with aspects of enforcing the law. However, their day-to-day work is focused on the safety, security, and rehabilitation of offenders. We therefore give little weight to any differences between the two positions' law enforcement duties.

The record supports a finding of a strong community of interest shared between correctional officers and adult probation officers. A factor to which we give significant weight is that both correctional officers and probation officers work with the same type of client (offenders) and they work toward the same goals -- insuring offenders' safety, security, and rehabilitation. They often work together to coordinate and put these goals into action. They both mentor offenders, counsel offenders, transport offenders, arrest offenders when necessary, manage offenders' cases, and coordinate offender activities and rehabilitation. They are both supervised by and within the Department of Corrections. They are both paid an hourly rate, are eligible for 20-year retirements,

and are ineligible to strike. Correctional officers assist institutional probation officers if difficulties arise in the institution that would impact a probation officer's safety. Additionally, both probation officers and correctional officers must abide by the same code of ethics. Both must undergo a substantial number of hours of training and then be certified by the Alaska Police Standards Council. They must then each complete 40 hours of training each year. The evidence shows they often train together. There is a career path from the correctional officer job series to the probation officer job series.

Additionally, strike class can be a consideration in determining community of interest. Correctional officers and probation officers are both are class 1 employees under PERA, AS 23.40.200(b), and therefore are prohibited from striking. The general government unit that ASEA represents is a mixed strike class unit. *Alaska Public Employees Ass'n v. State*, Decision and Order No. 143 at 3 (Sept. 16, 1992), *affirmed* case no. 1JU-92-1882 CI (Super. Ct., filed May 28, 1993). Placing the probation officers in the correctional officers' unit would result in a unit of class I employees only. Having only class I employees in a bargaining unit can result in a stronger community of interest for multiple reasons. For example, if the parties' negotiations do not result in a collective bargaining agreement, then the unresolved issues involving mandatory subjects of bargaining, for all of the unit's members, must be submitted to arbitration under AS 09.43.030 or 09.43.480. Having the outstanding issues determined for all members of the bargaining unit, as opposed to only class I employees in a mixed class bargaining unit, can provide consistency in wages, hours, and working conditions among all the bargaining unit members. Otherwise, there can be different wages, hours, and working conditions for class II and III employees than class I employees, since one set of wages and working conditions is determined through negotiations, and the other set may be arrived at through interest arbitration.

Moreover, if class I employees are in a bargaining unit with class II and III employees, and a strike occurs, the class I employees could be required to cross picket lines manned by their fellow bargaining unit members, and supported by their bargaining representative. Yet another problem that is avoided with a single class bargaining unit concerns contract ratification. In mixed class bargaining units, all union members can generally vote whether to ratify the proposed contract. In cases where there are substantially greater numbers of class II and III employees than class I employees, it is possible that the greater number of employees can vote to ratify a contract that may be more favorable to their interests than to the smaller group of class I employees. Since a bargaining unit of only class I employees avoids these types of problems, it supports a greater community of interest and the petitioned for unit combining the nonsupervisory probation officers with the nonsupervisory correctional officers.

Overall, we give significant weight to the community of interest factor. This factor offers strong support for granting the petition to sever the nonsupervisory adult probation officers from the general government unit and placing them in the in unit of nonsupervisory correctional officers.

b. Wages.

The wages of the adult probation officers are similar to those of other members of the general government unit as well as to those of the correctional officers. All of these employees are paid at an hourly rate, based on the range established by the state Division of Personnel, and based

on the pay schedule in their collective bargaining agreement. By statute, most state employees participate in the Public Employees' Retirement System (PERS). See generally AS 39.35.300. However, probation officers and correctional officers participate in the 20-year retirement system along with troopers and firefighters, while the vast majority of general government unit employees participate in a 30-year retirement program.²⁸ This factor weighs slightly in favor of severance.

c. Unnecessary fragmentation.

The State does not oppose ACOA's petition. ASEA argues that granting severance would result in unnecessary fragmenting "if this Agency determines that Adult Probation Officers cannot be merged with the Correctional officers Unit then ACOA seeks creation of a separate unit." (ASEA Prehearing Brief at 10). This premise does not address ACOA's petition, which requests, unlike the petition that resulted in Decision and Order No. 270, that the probation officers be severed and included in the already-existing correctional officers' unit. No additional unit is being created that would increase the employer's collective bargaining burden. Granting severance would merely shift 120 employees from one existing bargaining unit to another existing unit. This shifting, moreover, could reduce negotiating efforts because the employees consequently would be grouped with other employees with whom they share a greater community of interest.

In D&O 270, we expressed concern about the effects of carving out smaller units from a larger unit and setting a precedent that could destabilize labor relations.

Nonetheless, the probation officers unit would increase the number of bargaining units. The petition would create a new and separate unit. Carving out a group of employees from a large bargaining unit could lead to future chipping away of that unit by other groups of employees. We are concerned that we would set a precedent that starts similar future carve-out attempts. Such attempts could cause instability in labor relations. For these reasons, the requirement to avoid unnecessary fragmentation in AS 23.40.090 makes the probation officers unit an inappropriate unit.

(Decision and Order No. 270 at 11). Since the number of bargaining units would not be increased, and we find the probation officers and correctional officers share a substantial community of interest, the concerns expressed in D& O270 are not present here.

In expressing those concerns in D&O 270 , we did not intend to create the impression, or set a legal precedent, that would preclude carving smaller units out of a larger bargaining unit *solely* because granting a carve-out petition may affect stability in a labor relations environment. In this case, the important factor or factors we must determine are whether the probation officers and correctional officers share a community of interest in wages, hours, and other working conditions. And while unnecessary fragmenting must be avoided, it should not be avoided at the expense of

²⁸"Peace officers" are entitled to 20-year retirement. AS 39.35.370(a)(2). AS 39.35.680(28) defines "peace officer" to include employees occupying positions as a peace officer, chief of police, correctional officer, or correctional superintendent.

employee freedom of choice; in some cases, fragmentation is necessary. At any rate, a unit of probation officers and correctional officers will not result in unnecessary fragmentation.²⁹

d. Hours.

Adult probation officers are scheduled to work a 37 1/2-hour week, like other members of the general government unit. Field probation officers work substantial overtime hours.³⁰ Institutional probation officers generally work the 37 1/2-hour schedule, like other members of the general government unit. Correctional officers work a different schedule that includes 7 days on and then 7 days off. Both correctional officers and probation officers may work flexible work schedules. General government unit employees may work flexible schedules, too. This factor weighs slightly in favor of placement in the general government unit.

e. History of collective bargaining.

In *United Academics-AAUP/AFT, AFL-CIO vs. University of Alaska*, Decision and Order No. 202, we expressed reluctance to disrupt longstanding bargaining units: "We note that the National Labor Relations Board is reluctant to disturb longstanding bargaining units. 1 Patrick Hardin, *supra* 455; see e.g., *Buffalo Broadcasting Co. and National Ass'n of Broadcast Employees & Technicians*, 242 N.L.R.B. No. 152, 101 L.R.R.M. (BNA) 1306 (1979)."³¹ This Agency gives great weight to relevant decisions of the National Labor Relations Board and federal courts. 8 AAC 97.450.

The general government unit, which is the current bargaining unit of the adult probation officers, was established and described in *Decision And Order Concerning Petitions Number 1-72, 2-72, 3-72,4-72, 5-72, And Relevant Interventions And Objections*, Order and Decision No. 1, at 10-11 (Feb. 2, 1973):

Employees covered by Petition No. 2-72 have a community of interest with all other state employees. They provide services to the people of Alaska at the direction of the elected representatives of the people. They all come under a common civil service merit system and their compensation is set by the legislature. There is a uniform grievance procedure and a uniform system of progressive discipline. Recruitment, examination, transfer, promotion, orientation and training are conducted on a uniform, system-wide basis. . . . Approximately 90 percent of the employees in question are professional, technical or clerical. The interests of these groups are intertwined and the distinctions between them are often blurred. This establishes the fact that there is a substantial community of interest among state employees in general.

²⁹ Fragmentation is a factor in determining the appropriate unit but it does not have veto power over other factors in AS 23.40.090.

³⁰ Dwayne Hanson testified he does not always receive compensation for time worked.

³¹ "The [National Labor Relations Board (NLRB)] is reluctant to disturb longstanding bargaining units, whether established by agreement or by certification, when bargaining in those units has been successful. Bargaining history is therefore an important factor in unit determinations." 1 Hardin and Higgins, *The Developing Labor Law* 507 (Fourth Ed. 2001).

The adult probation officer classifications have resided in the general government unit since 1973. Based on their longstanding history in the general government unit and the bargaining history since then, we find the history of collective bargaining favors probation officers remaining in the general government unit.

However, we note that since the issuance of O&D 1 34 years ago, there have been changes to the composition of the collective bargaining units that were created at that time, and changes to the duties of job positions within those units. While some distinctions in wages, hours, and working conditions of state employee positions were “often blurred,” as O&D 1 asserts, other distinctions have become more focused as state administration of departmental operations has evolved, organized, and reorganized in those 34 years. Consequently, while maintaining units as originally established may “promote stability and consistency in the unit and in the work place[.]”³² we cannot ignore the recognized statutory policy of employees’ right to organize and the evolution of state governmental organization. Therefore, while we give some weight to this factor, we do not give it significant weight.

f. Desires of employees.

During the hearing, there were adult probation officers who expressed a desire to support ACOA, and others who supported ASEA.³³ There is no clear favorite. This factor is neutral and does not support placement in either bargaining unit.

Overall, the community of interest factor provides strong support for placing the nonsupervisory probation officers in the same unit as the nonsupervisory correctional officers. Since there is no unnecessary fragmentation, this factor also supports severance. The factor wages provides weak support for severance, and the hours and history of collective bargaining factors favor the probation officers remaining in the general government unit. The preponderance of the evidence establishes that the probation officers share a greater community of interest with the correctional officers than the members of the general government unit. We find that ACOA’s proposal to add the nonsupervisory probation officers to the nonsupervisory correctional officers’ unit makes the unit appropriate under AS 23.40.090.

³² See *Millard v. International Brotherhood of Electrical Workers, Local Union 1547*, at 13 (December 21, 1994).

³³ The submitted showing of interest cards are not part of this record. The showing of interest is considered confidential and is not disclosed. 8 AAC 97.060(d) provides: “The employee petition or interest cards in support of a showing of interest are confidential records that may not be disclosed and are not part of the public record.” However, a party must obtain signatures of at least 30 percent of the employees in the proposed unit.

4. Has ACOA satisfied the requirements in 8 AAC 97.025(b)?³⁴

Because ACOA seeks to sever a group of employees from an existing unit, 8 AAC 97.025(b) provides that ACOA must also “state” in its petition the following:

- (1) why the probation officers are not receiving adequate representation in the existing unit;
- (2) whether the probation officers are employed in jobs that have traditionally been represented in the same unit;
- (3) why the probation officers unit have a community of interest that is not identical with that of the employees in the existing unit;
- (4) how long the probation officers have been represented as part of the existing unit; and
- (5) why the grant of the petition will not result in excessive fragmentation of the existing bargaining unit.

We have reviewed the petition and find that ACOA did state in its petition and satisfy the above factors, as discussed below.

a. Adequacy of representation.

We must consider the adequacy of ASEA's representation of the adult probation and parole officers. The system favors stability and continuation of existing bargaining units, but evidence of a bargaining representative's inadequate representation would support disruption of the status quo. For example, the existing unit structure might interfere with the ability of the group seeking severance to be heard on issues of concern. Conflicts between the interests of the other members of the unit and this group could also interfere with a group's receiving adequate representation. See *Public Safety Employees Ass'n (Weigh station operators) v. State of Alaska*, Decision and Order No. 201, at 12; *In re Fraternal Order of Police*, 12 Ohio Pub. Employee Rep. 1546 (Ohio State Employment Relations Board 1995) (applying similar criteria to a severance petition).

While ASEA's representation of the adult probation officers has not been perfect, it has been adequate. In the first hearing that resulted in Decision and Order No. 270, some adult probation

³⁴ In some prior decisions, we have also applied the analysis in *Mallinckrodt Chemical Works*, 162 N.L.R.B. No. 48, 64 L.R.R.M. 1011 (BNA) (1966); see e.g., *International Board of Electrical Workers v. Fairbanks North Star Borough School District*, Decision and Order No. 153, at 3-4 (Mar. 24, 1993). We believe that if *Mallinckrodt* applies to an agency decision, the analysis in *Mallinckrodt* is best applied only in true craft cases, and we do not find this is a true craft case. See also *Public Safety Employees Ass'n v. State*, No. 3AN-96-09448 CI, slip op., at 6 (Super. Ct., Oct. 5, 1997), where the Alaska Superior Court disapproved of the Agency's application of *Mallinckrodt*.

officers expressed concerns about ASEA's lack of advocacy for safety. We found that the ASEA/State collective bargaining agreement included provisions for safety and safety equipment.

Further, we noted that ASEA filed a grievance and petition to overturn a Department of Corrections policy decision requiring adult probation officers to undergo a psychological examination prior to their being authorized to carry handguns. *Alaska State Employees Association, AFSCME Local 52, AFL-CIO, vs. State of Alaska*, Decision and Order No. 254 (April 1, 2001). In this regard, ASEA did what it is required to do: represent bargaining unit members in grievances and arbitrations. The record shows that ASEA has represented the adult probation officers adequately in the area of contract enforcement.

However, the probation officers raised a concern with ASEA's representation that cannot be ignored. ASEA's loyalty to an employee may have clouded its ability to consider the potential ramifications for probation officers. While hiring someone on probation with the courts may seem innocuous when the employee has shown model behavior in meeting conditions of probation, it nevertheless raises the risk that probation officers, unaware that the employee is on probation, may violate the prohibition against undue familiarity. Moreover, it raises the risk of disclosure of probation officers' personal information. That risk apparently existed prior to ASEA's becoming aware of the probation officers' concerns, and prior to a change in security procedures. Finally, the hire of someone on probation militates against a sharing of community of interest between the probation officers and other ASEA members. It appears that ASEA does allow hiring of individuals who may be on probation with the courts.³⁵ This policy appeared to raise personal risk and undue familiarity concerns, and also to alienate many probation officers.

b. Tradition of representation.

The evidence in the record did not establish a general tradition of representation for adult probation officers in any particular unit. The evidence showed that adult probation officers in Alaska have been represented in the general government unit since its inception in 1972. The evidence also indicates that there are a variety of structures in various states. We do not give the bargaining unit structures of other states great weight in determining the outcome here. We do give this evidence some weight but find in this specific case it does not weigh in either party's favor.

c. Community of interest.

The record establishes that the adult probation officers' community of interest is with the unit of correctional officers. (See analysis at pages 23 – 25).

d. Time in existing unit.

As noted above, the adult probation officers have been in the general government unit since it was first established. This longstanding period in the general government unit favors the adult probation officers remaining in the unit.

³⁵ As stated earlier, the particular employee hired by ASEA exhibited model behavior according to documents filed into the record. However, hiring of an individual on probation puts the probation officers at undue risk.

e. Unnecessary fragmenting.

For the same reasons addressed at pages 26 – 27, granting this petition would not result in unnecessary fragmenting.

We believe that in weighing all of the factors in AS 23.40.090 and the above regulation, and applying the law stated in this decision, the preponderance of evidence favors the unit structure petitioned for by ACOA. We give significant weight to the strong community of interest shared by the probation officers and correctional officers, and the fact that there will not be any unnecessary fragmenting caused by the severance.

Conclusions of Law

1. The Alaska Correctional Officers Association and Alaska State Employees Association are employee organizations under AS 23.40.250(5). The State of Alaska is a public employer under AS 23.40.250(7). This Agency has jurisdiction under AS 23.40.090 and AS 23.40.100 to consider this case.

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

3. The Agency's showing of interest is confidential under 8 AAC 97.060(d).

4. The doctrine of res judicata does not bar ACOA from proceeding with this petition. ACOA was not a party to the case that resulted in D&O 270, nor was it in privity with a party in that case. Decision and Order No. 270 does not preclude the Agency from granting ACOA's petition to sever the Department of Corrections nonsupervisory adult probation officers from the general government unit and placing them in the unit of nonsupervisory correctional officers. The issue decided in this case differs from that decided in D&O 270 in two important ways. First, ACOA's petition will not result in a separate unit being formed; thus, unnecessary fragmenting is avoided. Second, there is no issue of establishing a separate unit of law enforcement type personnel, consisting only of adult probation officers.

5. Based on the factors community of interest and wages, and because unnecessary fragmentation would not occur, combining the Department of Corrections' nonsupervisory probation officers with the nonsupervisory correctional officers is the unit appropriate under AS 23.40.090. The community of interest that the probation officers share with the correctional officers provides strong support for granting ACOA's petition to sever the probation officers from the general government unit and include them in the correctional officers' unit.

6. The factors hours and history of collective bargaining provide some support for maintaining the status quo. However, these factors are not sufficient to overcome the strong community of interest the probation officers share with the correctional officers.

7. The desires of employees factor does not favor supporting either the status quo or permitting the severance. The employees' desires are best demonstrated by having an opportunity to vote in a secret ballot election.

8. ACOA has satisfied the requirements in 8 AAC 97.025(b) to sever the adult probation officers from the general government unit.

ORDER

1. The petition of the Alaska Correctional Officers Association is granted. The Agency will contact the parties for the purpose of proceeding to election in accordance with this decision.

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

ALASKA LABOR RELATIONS AGENCY

Gary P. Bader, 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 mailing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the order in the matter of *Alaska Correctional Officers Association vs. State of Alaska* and *Alaska State Employees Association, AFSCME Local 52, AFL-CIO*, Case No. 07-1495-RC/RD, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 28th day of February, 2008.

Margie Yadlosky
Human Resource Specialist I

This is to certify that on the 28th day of February, 2008,
A true and correct copy of the foregoing was mailed,
postage prepaid, to:

Art Chance and Brad Wilson, ACOA
Annette Kreitzer and Dianne Kiesel, State of Alaska
Douglas Carson and Charles Dunnagan, ASEA

Signature