

**ALASKA LABOR RELATIONS AGENCY
 3301 EAGLE STREET, ROOM 208
 P.O. BOX 107026
 ANCHORAGE, ALASKA 99510-7026
 (907) 269-4895
 Fax (907) 269-4898**

| | |
|--|---|
| CONFIDENTIAL EMPLOYEES ASSOCIATION, |) |
| |) |
| Petitioner, |) |
| |) |
| vs. |) |
| |) |
| STATE OF ALASKA, |) |
| |) |
| Respondent, |) |
| |) |
| STATE OF ALASKA, |) |
| |) |
| Petitioner, |) |
| |) |
| v. |) |
| |) |
| CONFIDENTIAL EMPLOYEES ASSOCIATION, |) |
| |) |
| Respondent. |) |
| |) |
| CASE NO. 92-095-UC & CASE NO. 93-147-UC (Consol.) | |

DECISION AND ORDER NO. 157

This matter was heard on November 2 and 4, 1992, in Anchorage, Alaska, before the Alaska Labor Relations Board, Chairman Gil Johnson and member James Elliott, participating personally and on the record, and with Hearing Examiner Jan Hart DeYoung presiding. Board member Darrell Smith participated on the basis of a review of the record. The record closed upon receipt of the parties' closing briefs on February 12, 1993.

Appearances:

Paul H. Grant, attorney, for Confidential Employees Association; Art Chance, Labor Relations Analyst, for State of Alaska; Joan Wilkerson, Regional Manager, for amicus curiae Alaska Public Employees Association; and Don Clocksin, Wagstaff, Clocksin and Pope, for amicus curiae Alaska State Employees Association.

Digest:

The labor analyst II and human resource managers exercise significant responsibility on behalf of the State in collective bargaining policy formulation and implementation and therefore are excluded from collective bargaining under PERA as "appointed officials" in 2 AAC 10.220(a) and AS 23.40.250(6). The clerk typist III, who does not exercise significant responsibility in policy formulation and implementation, is not excluded and belongs in the confidential unit as an employee "who assists and acts in a confidential capacity" to the labor relations professionals who do formulate and implement policy under 2 AAC 10.220(b)(1).

DECISION

This case is the result of a reorganization of the State's personnel and labor relations offices. The State reclassified its

senior personnel officers to a new position class, human resource managers, and now seeks to exclude the new class from collective bargaining. The justification for the reclassification and the exclusion is that the new class is intended to play an integral role in collective bargaining on behalf of the State. The State therefore has filed a petition to clarify the unit to exclude these positions from the confidential unit, which included the senior personnel officers represented by the Confidential Employees Association. CEA objects to the transfer of a group of employees who for twenty years of bargaining history have been members of the confidential unit and the leaders and brain trust of CEA.

At issue also is the appropriate unit or exclusion of a labor analyst II and a clerk typist III.

Findings of Fact

1. The Confidential Employees Association, an affiliate of the Marine Engineers Beneficial Association/National Maritime Union,¹ is the recognized bargaining representative for all employees "performing personnel/payroll functions and services and as defined in 2 AAC 10.220(b)(1) for the State of Alaska." Agreement, Art. 2, at 1 (1990-1992), CEA Exh. 1; Tr. 123 (O'Claray).
2. The personnel officer classification predates collective bargaining in the State. Tr. 37 (McMullen). Michael McMullen, who has worked in the State's Division of Personnel in various positions since 1969, described the history of the personnel officer classification. He stated that the number of personnel officers and their responsibilities grew as civil rights expanded in the mid-70s and early 80s. Id, at 34.
3. In 1974, the Confidential Employees Association's bargaining unit was created, and the personnel officers were included. At that time Bruce Cummings was an employee of the Division of Personnel as a personnel analyst in the training section. Tr. 234 (Cummings). He stated that at the time of the unit's formation a number of personnel officials had been concerned about being included in the general government unit because of a "real or perceived conflict of interest with our personnel duties and their relationship to collective bargaining." Id. See also Tr. 259 (McCurry).
4. The community of interest of the confidential unit was described by Greg O'Claray, who serves in a capacity similar to that of a business agent for CEA, as including professionals in the personnel and payroll sections from senior personnel officers to clerk typists. Tr. 119 & 124(O'Claray). Lynda McCurry, human resource manager and former president of CEA, stated that CEA is run as a managerial support organization. Tr. 260 (McCurry). Judy Porter, human resource manager and current CEA president, described the community of interest of the unit members as those performing human resource management work and stated that all members of CEA act in management's behalf in personnel matters. Tr. 402 (Porter).
5. The brain trust of the CEA unit and the writers of the CEA constitution have always been employed in the highest levels of personnel management for the State. Tr. 121 & 122-123 (O'Claray).
6. Dianne Corso is the State's labor relations manager. Her background includes experience as a position classifier in 1978, work as a business agent and regional manager for Alaska Public Employees Association, a term as the State's senior negotiator, and in 1992, work as the State's labor relations manager. The labor relations manager is responsible for supervising labor relations staff. Tr. 60-61 (Corso). Corso stated that the labor relations staff interacted daily with the senior personnel officers to provide them with day-to-day level technical interpretation on contracts and to advise them on disciplinary matters. Id, at 62.
7. CEA members on several occasions over the last 18 years have participated at the bargaining table on behalf of the State. Tr. 238 (Cummings). Personnel officers did not participate in making bargaining policy. Tr. 63 (Corso). The personnel officers' work in collective bargaining was limited to technical support. Corso gave an example of a question that could have been referred to a personnel officer: does the terminal leave provision allow enough time to prepare the paperwork? Tr. 62-63 (Corso). Personnel officers did not routinely participate in contract negotiations unless information was needed about departmental operations. Corso remembered two instances in which personnel officers sat in on negotiations -- in negotiations with the Alaska Marine Highway System and Department of Education bargaining units. Id.

8. The position description questionnaire (PDQ) for the senior personnel officer II position at the Department of Transportation and Public Facilities lists regular duties in the following categories: classification, labor relations, employment, recruitment, training, assistance in implementing an EEO program, directing payroll, and directing the development and preparation of policies and procedures. The labor relations duties are described as,

Administer the Department's Labor Relations Program to assure protection of the well-being and rights of all employees and maintenance of an efficient government operation. Monitor the handling of disputes, grievances, and disciplinary action according to the personnel rules and labor agreements and deal with related employee complaints. Determine equitable settlements on grievances. Advise the Commissioner in comprehensive and technical formal union proceedings.

St. Exh. B., at 35 (Ignall). The PDQ does not identify any regular duties in collective bargaining. Other departments' personnel officer PDQs are similar. For example, the PDQs for the personnel officer III positions in the Department of Fish and Game and the Department of Labor did not name duties related to collective bargaining. Exh. B, at 13-22 (Ate); St. Exh. R (McCurry).

9. Position audits of the senior personnel officers list the percentage of work time spent participating in collective bargaining negotiations. Of the eleven audits, eight do not provide any time devoted to collective bargaining. According to the audits, three senior personnel officers devoted time to collective bargaining responsibilities: Department of Transportation and Public Facilities (3 percent); Department of Administration (2 percent); and Department of Education (9 percent). St. Exh. C.

10. Lynda McCurry, former senior personnel officer and current human resource manager for the Department of Labor, described her duties as a personnel officer. She was employed by the State, beginning as a clerk I in 1963 in the personnel section of the Department of Public Works, and moved up through the technical ranks until she transferred to the Department of Labor as a senior personnel officer in 1973. Tr. 98 & 257. Her description of her duties follows:

Supervise the personnel section, was responsible for a wide variety of human resource types of functions, including payroll, labor management relations, counseling, EEO affirmative action, classification, employee development, training, processing routine personnel transactions

Tr. 99 (McCurry).

11. David Lonnie Stewart, current human resource manager for the Department of Education and former personnel officer, has participated in collective bargaining in both positions. He stated that he had been participating at the negotiating table in the contract negotiations for the Alaska Vocational Technical Institute bargaining unit for a year. Tr. 325, 327 & 329 (Stewart); St. Exh. C. He examined his personnel officer PDQ, and except for the omission of the collective bargaining work he had done for 13 months, he stated the PDQ was accurate. Tr. 334.

12. Lynn Ate did describe a role in bargaining as a personnel officer for the Department of Fish and Game. She states that she provides information on what she perceives to be the department's best interests in negotiations. She characterizes her work in bargaining as research to make recommendations, collection of data, and analysis of historical trends, but she does not set policy or strategy. Tr. 182, 187 & 188. Usually the unit affected is the general government unit, but she has also made recommendations for changes in the CEA contract. Tr. 182-183.

13. Because of the nature of the responsibilities of confidential unit employees, the confidential unit collective bargaining agreement prohibits the disclosure of confidential information to persons who do not need to know it. Tr. 125 (O'Claray). The parties' agreement provides:

Employees shall not directly or indirectly exploit their connection with the Employer through any outside business activities. No employee shall disclose any confidential information pertaining to the Employer's business. Proven violation of this section will be deemed sufficient cause for appropriate disciplinary action.

Agreement, Art. 18, at 34, CEA Exh. 1.

14. The inclusion of senior personnel managers in a collective bargaining unit does pit them against other managers with whom they need to work, at least during bargaining. Dianne Corso described negotiations with CEA for the last contract as acrimonious. She stated that senior personnel officers ceased communicating with labor relations personnel and that the relationship between labor relations and senior personnel officers was destroyed for about a year and a half. Tr. 85 (Corso). One of the personnel officers, Lynda McCurry, testified that she was astounded at this testimony because she was unaware that there had ever been a breakdown in communications. Tr. 273 (McCurry). However, the nature of negotiations and Corso's role in labor relations for the State make Corso's statement plausible.

15. The contract for the confidential unit was signed by at least two personnel officers -- Judith Porter, personnel officer at the Department of Law, and Debra English, personnel officer at the Department of Commerce & Economic Development. St. Exh. B; CEA Exh. 1. Judy Porter stated that, while she has negotiated on behalf of the CEA unit, she has not participated on the State's behalf at the bargaining table. Tr. 403. She stated she had not learned any secrets that assisted her in these negotiations. Id. Porter maintains that these duties do not create a conflict of interest for her. Tr. 406.

16. Unit members have crossed picket lines. Tr. 261 (McCurry).

17. Although CEA disputes whether a conflict of interest exists between the human resource managers/personnel officers' duties on behalf of the State and their membership in the confidential unit, the existence of a conflict is clear. For example, McCurry, while a member of the confidential unit, supervises other members of the unit. As a supervisor and personnel officer, she could be called upon to respond or assist in the response of any grievances filed by the workers she supervises. In other departments as an officer of CEA she could be called upon to prosecute a confidential unit member's grievance.

18. CEA believes that these conflicting loyalties, if they exist, do not interfere with the human resource managers' performance of their duties. Tr. 401 (Porter); see Tr. 303-304 (McCurry). Human Resource Manager David Stewart stated that there is a clear responsibility to act with a professionalism that transcends bargaining unit or service designation. One has to recognize the boundaries and act accordingly. You are a member of the management team, representing concerns of employees to the employer and employer concerns to the employee.

Tr. 328 (Stewart). He further stated that, if one adheres to the level of professionalism required, the obligations to management should not conflict with membership in a bargaining unit. Id. For example, McCurry, human resource manager for the Department of Labor, states she would not handle a grievance on behalf of someone in her department. If she handled the matter for the department, she stated the appearance of a fellow CEA officer would not influence her. Tr. 314 (McCurry). As another example, Lynn Ate, human resource manager for the Department of Fish and Game, stated that she recommended a change to the leave provision in the CEA contract, which she thought could be abused by CEA members. Tr. 182-183 (Ate). Ate also described an instance in a recent brainstorming session with personnel officers in which a personnel officer suggested that a leave cap be negotiated if the State were going to negotiate personal leave with GGU. A leave cap, she stated, would be contrary to the personal interests of the personnel officers because the CEA contract does not have one. Tr. 184 (Ate).

19. One of the State's principal concerns with including the human resource managers in the confidential unit is the potential for conflict of interest. As Corso stated,

If I am going to bring people inside the door to make recommendations and determinations with the highest level policy makers about what the objectives and strategies are going to be for collective bargaining with the general government unit or the supervisory unit, whatever unit it may be, it is impossible for me to believe that those discussions do not have relevance to the bargaining of the unit which the human resource managers currently reside. There is a direct relationship.

If I sit down in the biweekly meetings with my staff and human resource managers and discuss the State's assets and liabilities in presenting a particular proposal, it is impossible for me to believe that the human resource managers forget about that when they go in to bargain for -- in their own bargaining unit.

In other words, we cannot have the frank and full discussions with our highest level personnel people today, and we have not had them in the past because of that conflict of interest.

Tr. 81 (Corso).

20. The current administration was dissatisfied with the organization of personnel functions within the State. Tr. 64 (Corso). It consolidated them into the Division of Personnel. Id.; Administrative Order No. 126 (Aug. 26, 1991), St. Exh. 6. A personnel steering committee was formed of cabinet level officials to set policy during the consolidation. Tr. 68 (Corso). In September of 1991 a project team was established to direct the day-to-day operations of the consolidation. Id. Dianne Corso was a member of the team for labor relations. Id. The administrative order anticipated that the senior personnel officers would be moved from the different departments to the Division of Personnel. St. Exh. 6, at 3; Tr. 69 (Corso). The initial plan had been to eliminate the senior personnel officer positions, Tr. 70 (Corso), substituting seven or eight positions in personnel to serve the departments in the same way that labor relations analysts serve them in labor relations matters. A couple of departments would be assigned to each consultant. Id. The project team with the concurrence of the steering committee recommended changes to the plan to maintain the positions in the departments but to centralize some of the authority and functions. Tr. 71 (Corso). As a result, the human resource manager position was developed. Id.; Tr. 35 (McMullen). The goal was to provide the departments advice and consultation on human resource issues. Tr. 35 (McMullen). Although the senior personnel officers already provided some of this service, McMullen characterized the change from personnel officers to human resource managers as a major change in assignment. Id. Another goal was to remove the positions from collective bargaining. Tr. 56 (McMullen). Yet another goal was to involve the positions actively in collective bargaining on the State's behalf. Tr. 72 (Corso).

21. The human resource manager class specification was established on September 1, 1992, and the incumbents of the senior personnel officer positions were immediately appointed to the positions without competition. Tr 74 (Corso).

22. The class specification for human resources manager defines the human resources manager, in part, as follows:

Serves as the department's human resources representative designated to act in the interest of the employer in dealing with employees. Participates as a member of the department's management team in setting overall agency goals, objectives and plans as related to human resources management. May or may not have responsibility for supervision of a subordinate personnel or payroll staff in one or more departments.

State's Exh. 1. The class specification provides a number of examples of the kind of work performed by the human resources manager. Id. at 1 - 2. Included are duties related to department compliance with personnel rules and the State's Personnel Act, investigation for potential disciplinary actions, recommending responses to grievances, distributing and facilitating use of the supervisory manual, implementing affirmative action programs, mediating and conciliating EEO issues, participating in classification studies, and advising managers with special recruitment needs. In addition, the human resource managers have a role in collective bargaining. The class specification provides, in part:

On behalf of the operating department(s) formulates collective bargaining policy, goals and objectives. Develops proposed management positions in furtherance of departmental goals and objectives on specific negotiable subjects and analyzes the union position as it affects the department(s), including cost analysis, in preparation for and during collective bargaining. Exercises significant responsibility in the implementation of collective bargaining policy.

....

May be required to participate at the bargaining table as a member of the employer's collective bargaining team and as such may serve as primary assistant to and substitute for the spokesperson for a team.

Id. at 2.

23. A position description questionnaire is prepared for each position in the State. If the position is filled, the PDQ is prepared by the incumbent. If the position is vacant, it is prepared by management. If there are new duties, management

prepares the PDQ, which in that case is used also as a tool to explain the new duties to the incumbent. Tr. 41 (McMullen). In the case of the human resource manager PDQs, a prototype PDQ was prepared and formed the basis for the class specification. Tr. 54 (McMullen). These documents were prepared without examining the employees' actual duties because the State was creating a new set of assignments. Id.

24. The PDQs for the new human resource manager positions were prepared with an effective date of September 1, 1992. The State provided the PDQs and allocation memoranda, reclassifying a personnel officer to a human resource manager, for all of the human resource manager positions created. Tr. 43 (McMullen). For example, the PDQ for position number 250045 in the Department of Transportation and Public Facilities includes duties related to collective bargaining:

On behalf of the operating department formulates collective bargaining policy, goals and objectives. Develops proposed management positions in furtherance of department goals and objectives on specific negotiable subjects and analyzes the union position as it effects the department including cost analysis, in preparation for and during collective bargaining. Exercises significant responsibility in the implementation of collective bargaining policy.

Participates at the bargaining table as a member of the employer's collective bargaining team and as such may serve as primary assistant to and substitute for the spokesperson for a team.

An estimate of the amount of time spent on collective bargaining duties cannot be determined from this PDQ because the duties are linked with other nonbargaining duties and an estimate is assigned to the aggregated duties. St. Exh. 2, at 172 (Ignall). The PDQ for position 057167 in the Department of Education, marked vacant but occupied by David Stewart, is substantially the same.² St. Exh. 2, at 42. See also the PDQ for the human resources manager in the Department of Administration, St. Exh.2, at 7 (PCN 021008, Diana J. Reid).

25. Collective bargaining duties are described slightly differently in the PDQ for position number 071601 in the Department of Labor:

In preparation for and during collective bargaining, formulates collective bargaining policy, goals and objectives on behalf of the department. Develops proposed management positions on specific negotiable issues and analyzes union proposals for overall effect on the department. Is responsible for implementation of collective bargaining policy within the department. May participate at the bargaining table as a member of the employer's collective bargaining team.

Exh. 2, at 71.

26. Because of the similarity of the description of duties, it is likely that the personnel officers did not participate to any great extent in the preparation of the job description. In none of the descriptions quoted did the incumbent sign the PDQ as an incumbent. According to the PDQ form, the purpose of the signature is to certify the accuracy and completeness of the information. See e.g., St. Exh. 2 (paragraph 25 of the PDQs). McMullen states that the purpose of an employee's signature on the PDQ is not to show the employee agrees with the duties as represented but, instead, understands the duties. Tr. 52.

27. Stewart explained that the human resource manager position description questionnaire (PDQ) was prepared for a vacant position. He did not sign his as an incumbent, certifying its contents. Tr. 340. He signed it as the reviewing personnel officer. Tr. 343. He reviewed the PDQ at length, testifying that it was accurate with only one minor omission. Tr. 344-347 & 351.

28. Carolyn DeBerry, a classification specialist in the Department of Health and Social Services, testified. Tr. 355. She compared the class specifications for the human resource managers and the personnel officer position classes and expressed her opinion that the duties were the same in all significant respects save one -- the collective bargaining responsibilities. Tr. 382.

29. The State provided notice to CEA that the positions of personnel officer II and personnel officer III were reclassified

to the new human resource manager position, on September 1, 1992, effective September 1, 1992. The positions were to be excluded from collective bargaining and exempt from overtime. The salary range assigned was range 20. This is the same range as that assigned to the personnel officer II class but a change for the personnel officer III class, which was paid at range 22. R. King, letters to J. Porter (Sept. 1, 1992), St. Exh. 2. The salary was to be maintained for former personnel officers III at the higher pay level for a period of two years. D. Corso, letter to J. Porter (Aug. 11, 1992), St. Exh. 8; D. Corso, Memorandum (Aug. 10, 1992), St. Exh. H.

30. The reclassification was justified, in part, as follows:

During the past several months, the State has worked towards a consolidation of various human resources functions. Departmental personnel/payroll offices were audited to define work performed and what functions and positions were to be consolidated. The results of this project returned delegated functions to the Division of Personnel/OEEO, and standardized many functions.

As a result of the consolidation, departmental human resource functions have changed significantly. Departments now have a Human Resources Manager position which will serve as a department or multi-department representative. This position will serve under administrative direction of the Commissioner(s) and under technical administrative direction of the Director of Personnel/OEEO. The Human Resources Manager will participate in the oversight and management of human resource programs. They will be involved in a variety of human resources issues with a consulting role and will act in the interest of the department and the Division of Personnel/OEEO in assuring compliance with rules, procedures, and contracts. The HRM will make recommendations on disciplinary situations, facilitate use of the supervisory manual, develop and implement affirmative action programs, investigate and attempt to resolve grievances, discrimination and other concerns, and will participate at the bargaining table as a member of the employer's collective bargaining team. The HRM will participate in a variety of human resources functions and a member of the management team, following guidelines developed and administered by the Division of Personnel/OEEO.

K. Larson, Memorandum (Sept. 1, 1992) (regarding reclassification of vacant position, PCN 212003, PO II at Dep't of Community & Reg'l Affairs), Exh. 2, at 1a-1b.

31. Dianne Corso described the human resource managers' role in collective bargaining. Tr. 73 (Corso). She stated that the labor relations steering committee would decide the big questions and determine ultimate bargaining strategies. *Id.* Corso and her chief spokesperson would meet with this committee. Bargaining teams would be assigned and the team would meet with the labor relations steering committee to establish specific strategies. Corso intends human resource managers to sit on the bargaining teams. Tr. 74. At the time of the hearing Corso stated that the State was prepared to go forward with its plan to involve the human resource managers actively in collective bargaining. Tr. 75.

32. The State has taken steps towards incorporating the human resource managers into collective bargaining. It sent notice of an orientation meeting on September 9, 1992. On the agenda was the collective bargaining schedule, HRM bargaining team preferences, and suggestions for bargaining. St. Exh. P. It notified human resource managers of a training and bargaining brainstorming session on October 26, 1992. Agenda items included why collective bargaining, bargaining unit history and interests, management interests, collective bargaining process, and preparation, including goals, objectives, and priorities and bargaining strategies. St. Exh. 5.

33. The human resource managers attend biweekly meetings to discuss labor relations matters, including developments in collective bargaining. Tr. 75 (Corso). Included in discussions are the State's assets and liabilities with respect to particular positions, and materials on collective bargaining are provided. The human resource managers have been assigned to specific bargaining teams.

34. Lynda McCurry stated that there were no significant changes to her duties after the reclassification to human resource manager. Tr. 268 & 272. She did state that there had been a change to more formal discussions of labor relations but she claimed nothing of significance had been shared in those meetings that she did not already know or would pick up elsewhere. Tr. 269.

35. Lynn Ate, human resource manager assigned to the Department of Fish and Game and senior personnel officer since 1986, Tr. 176, described her duties as

Professionally, as a personnel officer, I feel that it is my responsibility to represent the Commissioner of Fish and Game -- in developing -- recommending policies in personnel to help him carry out personnel policies in the Department of Fish and Game, and to develop procedures for implementing his policies.

Tr. 178. Ate testified that her duties would not change and that she would not be participating in bargaining at the request of the commissioner of her department. Tr. 179. She testified that her job had not changed since her reclassification to human resource manager. Tr. 180. The commissioner noted on her PDQ that "essentially the same functions as the previous Personnel Officer III position" and commented further "this position should be allocated to range 22." St. Exh. 2, at 121.

36. Judy Porter testified that the PDQ for the human resources management position she occupies is accurate except that she has not participated in formulating or recommending collective bargaining goals and objectives on behalf of the department. Tr. 422. She has been assigned to the supervisory unit negotiating team, but she had not yet engaged in these duties. Tr. 423.

37. Twelve human resource managers stated by affidavit a desire to remain in the confidential bargaining unit. CEA Exh. 10.

38. The State also seeks to exclude PCN 250044 from the confidential unit. The position previously had been a personnel officer I in the Department of Transportation and Public Facilities assigned to the confidential unit. In 1990 the position was reclassified to a labor analyst II position but maintained in the confidential unit. Allocation Memorandum (Nov. 21, 1990), St. Exh. 102. This position's duties cover collective bargaining, contract enforcement, grievances and classification, and salary studies.

39. The class specifications for labor analyst II provide for a role in contract negotiations:

Prepares for and participates in contract negotiations; may serve as a chief spokesperson in less complex negotiations; may serve as management advocate in less complex interest arbitration.

St. Exh. 101.

40. The PDQ for this labor analyst position provides, "Prepares for and participates in contract negotiations and interest arbitrations. This involves research into departmental needs and representation of the department in negotiations." St. Exh. 102, at 6.

41. This is the only labor analyst position located outside of the Department of Administration. Tr. 52 (McMullen). The other labor analyst positions are excluded from bargaining. The labor analyst positions formerly were located in the confidential unit and represented by CEA. By letter of agreement in 1980 the State and CEA agreed to their exclusion from the unit. Tr. 58 (McMullen). State Exh. A. The reason was that affected employees expressed a lack of community of interest with the rest of the bargaining unit. Tr. 248 (Cummings). This occurred approximately in 1980. Id. The State Labor Relations Agency was not asked to and did not rule on the propriety of the exclusion. Tr. 250 (Cummings). On at least one other occasion this method was used to move positions from a bargaining unit to the excluded class. In 1990 the staff members of the Alaska Labor Relations Agency were moved from the general government unit, represented by the Alaska State Employees Association, to the excluded class. St. Exh. 3; St. Exh. 4.

42. The position labor analyst II at DOT/PF is supervised by Janet Ignall, former senior personnel officer and current human resource manager. Tr. 106 (Ignall). Ignall described the labor analyst II duties as preparation of responses for commissioner level grievances, advising management, helping supervisors with grievances, and recommending discipline. Tr. 107 (Ignall). She stated the position plays a role in collective bargaining by serving on technical committees within the department, helping with strategies, and devising contract changes to implement management desires. Tr. 108 (Ignall).

43. The incumbent of the labor analyst II position is Bruce Cummings. Cummings has worked since 1974 in various capacities in the divisions of personnel and labor relations, including the positions of director. Tr. 239 (Cummings). Cummings stated that in his current position he has participated in the formulation of policy and in developing strategies for implementing policy affecting labor relations. Tr. 254.

44. Also at issue is the bargaining unit assignment of a secretary I, which has been reclassified to clerk typist III. The unit assignment was changed to the excluded class from the confidential unit. The State's justification for the change is that the position is assigned to the labor relations unit where other employees are excluded. The analysis in support of reclassification describes the duties of the position, in part, as follows:

PCN 022116 is assigned to the Labor Relations Section and reports to the Clerk IV, PCN 029012. Work assignments are varied requiring knowledge of several mainframe and personal computer programs. Subject position maintains a statewide system for tracking all grievance activity through data entry; produces and distributes various reports used by department executives and section staff; and interpret a variety of documents to correctly enter transactions and update information. Uses personnel computer to compose, draft, of finalize sensitive documents. Enters time and attendance information onto AKPAY.

St. Exh. 103, at 2.

45. The description of the clerk typist III duties in the PDQ is similar and describes clerical support for labor relations professional staff. The emphasis is on support related to contract grievances, and support related specifically to collective bargaining is not described. St. Exh. 103, at 13.

46. The duties of the clerk typist III were described by Corso as including various duties related to the most sensitive of labor relations matters, including grievances. The labor relations section is an open office and anything done or said is readily available to all. Tr. 111. All of the other positions in the section are excluded. Tr. 114 (Corso). Corso claims that, if these positions were not excluded, the labor relations professionals could not have clerical support because of the nature of the information that would be handled. Tr. 114.

47. The clerical positions in the labor relations section were not included in the letter of agreement removing the labor relations staff from the confidential unit in 1980. Tr. 252 (Cummings); St. Exh. A. However, when Cummings returned to the Division of Labor Relations from the Division of Personnel in 1981, the secretary and clerk typist in the section were no longer included in the confidential unit. Tr. 252 (Cummings).

48. On March 13, 1992, CEA filed a petition with this Agency to clarify the confidential unit to include in the unit the labor analyst II position in the Department of Transportation and Public Facilities and the clerk typist III position in the Division of Personnel labor relations section.

49. On July 9 and 10, 1992, copies of a notice of the CEA petition were posted in the workplaces of the two affected positions and the petition was scheduled for hearing on August 3, 1992. On July 31, 1992, the State with the concurrence of CEA requested that the hearing be postponed until the next scheduled round of hearings.

50. On September 25, 1992, the State filed a petition for clarification of the confidential unit to exclude from the unit the human resource managers, previously classified as senior personnel officers assigned to all departments except those assigned to Revenue and Community and Regional Affairs.

51. On or about October 12 and 13, 1992, notices of the State's petition were posted in all departments except the Departments of Revenue and Community and Regional Affairs.

52. The Agency ordered the two petitions consolidated on October 2, 1992.

53. On October 27, 1992, ASEA filed a request to participate in the briefing in this matter, which was granted on the record on November 2, and on November 2, 1992, APEA filed a request to participate in the briefing, which was granted on the record on November 4, 1992.

54. A hearing was held on November 2 and 4, 1992, at which the parties presented testimony and other evidence. The record remained open to permit the filing of briefs by APEA and ASEA and closing briefs of the parties, and the record closed on February 12, 1993, with the receipt of the last brief.

Conclusions of Law

1. The State of Alaska is a public employer under AS 23.40.250(7), and the Alaska Labor Relations Agency has jurisdiction to consider unit clarification petitions under AS 23.40.090.

2. A petitioner has the burden to prove each element necessary to its cause by a preponderance of the evidence under 2 AAC 10.430. For the two positions at issue in 92-095-UC, the Confidential Employees Association has the burden of proof. For

the human resource manager positions at issue in 92-147-UC, the State has the burden.

3. AS 23.40.090 lists the factors considered to determine whether a job class should be included in a unit. The statute 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.

4. The confidential unit is described in the collective bargaining agreement as "employees, engaged in performing personnel/payroll functions and services and as defined in 2 AAC 10.220(b)(1)." CEA Exh. 1. 2 AAC 10.220(b)(1) provides:

"confidential employee" means an employee who assists and acts in a confidential capacity to a person who formulates, determines, and effectuates management policies in the area of collective bargaining. The term "confidential employee" shall be narrowly construed.

5. The State Labor Relations Agency³ considered the appropriateness of the confidential unit in the context of a hearing on election challenges in SLRA Order & Decision No. 13 (May 4, 1974), as reconsidered in Order and Decision No. 13A (July 29, 1974). That decision concludes that,

1. The Alaska Employment Relations Act clearly intends all state employees, except elected and appointed officials, to have the right to organize for collective bargaining purposes.

2. The Administration makes a compelling case that certain conflicts of interest are inherent in a situation where the administration is compelled to bargain with its own bargainers. Where the potential for a conflict of interest exists the community of interest which is one of the criteria for judging the appropriateness of bargaining units is seriously in question.

3. The crucial question is this: Is any collective bargaining unit appropriate if it contains employees who are collective bargainers on behalf of the State as employer? Because of the conflicts of interest potential to such a situation the conclusion is that such a unit is not appropriate.

Id. at 8. See also SLRA Order & Decision No. 9, at 2 (Jan. 17, 1974). Thus, to determine whether the positions at issue in these consolidated cases belong in the confidential unit, two issues must be examined: first, are the persons employees under PERA or are they excluded as appointed or elected officials; and second, if the persons are covered employees, is the confidential unit the appropriate unit.

6. AS 23.40.080, sets forth the basic rights afforded in PERA:

Public employees may self-organize and form, join, or assist an organization to bargain collectively through representatives of their own choosing, and engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection.

The rights are granted to "public employees." PERA defines "public employees" in AS 23.40.250 and that definition is the key to determining who is covered under AS 23.40.080. See State Labor Relations Agency Order & Decision No. 13, quoted paragraph no. 5, *supra*.

7. However, for the basis of its argument that the positions are not covered, the State relies upon the definition of public employer in AS 23.40.250. AS 23.40.250(7) provides (emphasis added):

"public employer" means the state or a political subdivision of the state, including without limitation, a town, city, borough, district, board of regents, public and quasi-public corporation, housing authority, or other authority established by law, and a person designated by the public employer to act in its interest in dealing with public employees.

The State argues that key employees acting on its behalf in dealing with public employees should be excluded from bargaining because the employees are not actually public employees at all but instead are "public employers."

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

9. This construction is also inconsistent with the interpretation of similar language in the federal act. The Labor Management Relations Act defines "employer" in part in section 2(2) as "any person acting as an agent of an employer, directly or indirectly." 29 U.S.C. § 152(2). Instead of being interpreted to exclude all such persons from bargaining, the language has been construed to extend employers' liability to the acts of its agents. 2 Patrick Hardin, *The Developing Labor Law* 1600-1601 (3d ed. 1992), citing *Aladdin Industries Inc.*, 147 NLRB 1392, 56 L.R.R.M.(BNA) 1388 (1964).

10. We therefore turn to the definition of public employee to determine who is covered under PERA. AS 23.40.250(6) defines "public employee" to include any employee except elected or appointed officials in AS 23.40.250(6) (emphasis added):

"public employee" means any employee of a public employer, whether or not in the classified service of the public employer, except elected or appointed officials or superintendents of schools.

11. "Appointed official" is defined in 2 AAC 10.220(a) as "a person who exercises significant responsibilities for the public employer in the area of collective bargaining policy formulation and implementation." Thus employees who bargain on behalf of the State are excluded from rights under PERA in the definition of "public employee."

12. We conclude that employees with significant responsibilities in bargaining are excluded from PERA. By excluding these employees from PERA, we recognize the need for a cadre of labor relations officials that represent first the interests of the State and its management in labor relations matters.

13. The human resource managers are appointed officials. The class specifications, PDQs, and the managers' brief work history support the conclusion that the human resource managers exercise significant responsibility in formulating and implementing collective bargaining policy. While the time each human resource manager spends in these duties will vary among the positions and depend in part on the department assignment and whether the State is in bargaining with a unit, all of the 12 positions examined in this case participate in setting collective bargaining strategy.

14. The State's concerns about a conflict of interest when it bargains with key employees who themselves have a role in the development of State bargaining policy are well taken.
15. CEA has maintained that including the human resource managers in the confidential unit poses no risk to the State because the professionalism of the managers requires that they put the State's interests before their own. See facts 14 -- 19, supra. While this professionalism may allay the State's concerns about its interest, it does not remove the conflicting interest of the confidential bargaining unit. Certainly the other members of the unit are entitled to have the unit's interests vigorously represented. Inclusion of the human resource managers with other employees does not give those other employees "the fullest freedom in exercising the rights guaranteed by AS 23.40.070 -- 23.40.260." AS 23.40.090. This conflict between the interests of the human resource managers on behalf of the State and of the other unit members means that these two groups do not share a community of interest.
16. CEA complains about the State's motivation for reclassifying the human resource managers. These issues are not relevant under AS 23.40.090 and 2 AAC 10.220(a). Moreover, the State's classification plan and the assignment of salary ranges are outside of the jurisdiction of this Agency. Disputes over classification or pay are raised with the Personnel Board. Alaska Public Employees Ass'n v. State of Alaska, 831 P.2d 1245 (1992). AS 39.25.010 -- 39.25.220. Unless there is a charge that the change in classification or pay was in retaliation for the exercise of rights protected under AS 23.40.070 or another practice in violation of AS 23.40.110, the Agency will not review the State's motivation in reclassifying the personnel officers to human resource managers.
17. CEA also complains that the positions may not be excluded if they are classified employees. The categories of exempt, partially exempt, and classified employees are determined by the Personnel Board upon recommendation from the Commissioner of Administration, AS 39.25.070(2) and 39.25.130, and are not under the jurisdiction of this Agency. Moreover, the categories have no relevance to a decision whether an employee is covered under PERA, because PERA applies whether or not the employee is in the classified service. AS 23.40.250(6).
18. The labor relations analyst II is an appointed official. The only difference between this position and the other labor relations analyst position apparent from the record is its location. The position does fully participate in labor relations on behalf of management, including devising policy and strategies to implement it. The position therefore should be excluded as an "appointed official."
19. The labor analyst II does not share a community of interest with the confidential unit because, as a participant in bargaining and in setting bargaining policy, the interests of the labor analyst II conflict with the interests of other confidential bargaining unit members.
20. The clerk typist III is not an appointed official. The position does not participate in policy making or devise strategies in collective bargaining.
21. The clerk typist III does assist or act in a confidential capacity to the labor relations professionals in the labor relations section. Although the work principally involves the handling of grievances rather than bargaining support, it is likely that the position would provide clerical support for the collective bargaining responsibilities handled in the section as well. Since the position does not fit within any of the exclusions to bargaining rights under PERA and the community of interest is closely aligned with the confidential unit, the position is appropriately within that unit.

ORDER

1. The State's petition to clarify the confidential unit to exclude the human resources manager positions is GRANTED;
2. The Confidential Employees Association's petition to clarify the confidential unit to include the labor analyst II position is DENIED.
3. The Confidential Employees Association's petition to clarify the confidential unit to include the labor relations section clerk typist III position is GRANTED.
4. The State is ordered to post copies of this decision in places reasonably calculated to give affected employees notice

of the decision for a period of 14 days from the effective date of the decision.

THE ALASKA LABOR RELATIONS AGENCY

B. Gil Johnson, Board Chairman

James W. Elliott, Board Member

Darrell Smith, Board Member

APPEAL PROCEDURES

An Agency decision and order may be appealed through proceedings in superior court brought by a party in interest against the Agency and all other parties to the proceedings before the Agency, as provided in the Alaska Rules of Appellate Procedure and the Administrative Procedures Act.

The decision and order becomes effective when filed in the office of the Agency, and unless proceedings to appeal it are instituted, it becomes final on the 31st day after it is filed.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of Confidential Employees Ass'n v. State of Alaska, case no. 92-095-UC, and State of Alaska v. Confidential Employees Ass'n, case no. 93-147-UC (Con), dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 7th day of April, 1993.

Norma Wren

Clerk IV

This is to certify that on the 7th day of April, 1993, a true and correct copy of the foregoing was mailed, postage prepaid to

Paul Grant/CEA

Art Chance/State

Joan Wilkerson/APEA

Don Clocksin/ASEA

Signature

1CEA affiliated with MEBA/NMU in 1980. Tr. 121 (O'Claray).

2The similarity of the PDQs is highlighted by the misuse in each of the word "effect" for "affect."

3Before July of 1990 the State Personnel Board served as the labor relations agency, administering the Public Employment Relations Act for the State and its bargaining units. That responsibility transferred to this Agency under Executive Order 77 (Jan. 8, 1990)(effective July 1, 1990).