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STATE OF ALASKA,	)
(KELLIE LITZEN),	)
	)
Petitioner,	)
	)
vs.	)
	)
ALASKA STATE EMPLOYEES	)
ASSOCIATION, AFSCME LOCAL	)
52, AFL-CIO,	)
	)
Respondent,	)
	)
and	)
	)
ALASKA PUBLIC EMPLOYEES	)
ASSOCIATION, AFT/AFL-CIO,	)
	)
Intervenor.	)
	)

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CASE NO. 95-424-UC

**DECISION AND ORDER NO. 194**

This matter was considered on the record, including the brief, evidence, stipulations, and tapes of proceedings on August 17, 1995, in Anchorage, Alaska, by a panel of the Alaska Labor Relations Board, Chair Alfred L. Tamagni, Sr., and Members James W. Elliott and Raymond P. Smith. Hearing Officer Jean Ward presided. The record closed on August 17, 1995.

**Appearances:**

Art Chance, labor relations analyst, for petitioner State of Alaska; Alison Reardon, business agent III, for respondent Alaska State Employees Association, AFSCME Local 52, AFL-CIO; and Bruce Ludwig, for intervenor Alaska Public Employees Association, AFT/ AFL-CIO.

**Digest:**

The natural resource manager I, Kellie Marie Litzen, located in the Division of Mining and Water Management at the Department of Natural Resources in Anchorage, shares a community of interest with the supervisory unit due to her employing and discipline responsibilities under 8 AAC 97.990(a)(5).

**DECISION**

The parties dispute the bargaining unit placement of position control number 101274, a natural resource manager I position occupied by Kellie Marie Litzen. The State has assigned Litzen's position to the supervisory unit but has not transferred it pending the outcome of this hearing. Litzen's current bargaining representative, Alaska State Employees Association, AFSCME Local 52, AFL-CIO, claims that the natural resource manager I position should remain in the general government unit. Alaska Public Employees Association, AFT/AFL-CIO maintains that Litzen's position belongs in the supervisory unit.

This is a simple, straightforward case concerning whether Litzen's natural resource manager I position should be placed in the supervisory unit or remain in the general government unit. It is the Agency's first opportunity to apply the definition of supervisory employee in 8 AAC 97.990(a)(5) after its amendment effective April 14, 1995.

A hearing was conducted on August 17, 1995, at which the parties presented testimony and other evidence. Upon consideration of the record, the panel finds the facts as follows:

### Findings of Fact

1. Alaska State Employees Association, AFSCME Local 52, AFL-CIO (ASEA) represents a statewide unit of all State permanent, probationary, provisional, and nonpermanent personnel (except those employed in the student, college, and graduate intern job classes) in the general government unit. ASEA/State Agreement, Exh. 101, at 2 (1990--1992, extended July 1, 1995--June 30, 1996).
2. Alaska Public Employees Association, AFT/AFL-CIO (APEA) represents a statewide unit of all State permanent, probationary, provisional, and nonpermanent supervisory employees. APEA/State Agreement, Exh. 102, at 4 (Jan. 1, 1990--Dec. 31, 1992, extended to June 30, 1995).
3. The Division of Mining and Water Management requested reclassification of Litzen's natural resource officer II position, assigned to the general government unit, to a natural resource manager I position. C. Swanson, memorandum to E. Clothier, (Feb. 14, 1995), Exh. 2, at 1.
4. Effective February 16, 1995, the State reclassified Litzen's position, PCN 101274, to a natural resource manager I position. According to Carl Swanson, the classification analyst who reclassified the position, "[T]he bargaining unit of this position will be reviewed for appropriate placement." Id., at 1.
5. To assist with the bargaining unit placement determination, Swanson requested the Department of Natural Resources to submit a supplemental supervisory questionnaire for Litzen's position. Id., at 2.
6. Litzen and her supervisor, Gary Prokosch, signed the completed supervisory responsibilities questionnaire on March 1, 1995. Supervisory responsibilities questionnaire, Exh. 3, at 4.
7. The State determined that the appropriate placement is the supervisory unit. On June 30, 1995, the State filed a unit clarification petition with the Alaska Labor Relations Agency to determine the appropriate bargaining unit for Litzen's natural resource manager I position. Petition for Unit Clarification, at 2 (June 29, 1995).
8. Litzen is responsible for the overall supervision of the southcentral regional office and assists the section chief and the director with central office duties. Her major duties are divided into three categories: program administration and operation, adjudication, and employee supervision. Exh. 1, at 4-7.
  - a. Program administration and operation. Litzen spends approximately 45 percent of her time in program administration and operation, which consists of enforcing statutes and departmental policies within the region; serving as the main contact person for water resource and water law information; purchasing equipment, supplies, and reference materials; providing final review and signing water appropriation actions; handling special projects and statewide programs; administering the water right service fee program; reviewing and commenting on the Alaska Coastal Management Program; maintaining, formatting, updating, and distributing statewide publications; initiating a water education and awareness campaign; and providing assistance to the section chief, director, and general public. Id.
  - b. Adjudication. Litzen spends approximately 30 percent of her time adjudicating complex, controversial, or unique water rights cases, which may require field inspections, conflict resolution, and interagency coordination. Id.
  - c. Employee supervision. Litzen spends the remaining 25 percent of her time performing supervisory

functions, such as approving leave, setting work priorities, writing evaluations, developing guidelines for work product, training subordinates, reviewing and approving work, setting yearly goals and objectives, hiring, reprimanding, and approving time sheets. Position description questionnaire. Id.

9. Litzen is responsible for supervising four positions, consisting of one natural resource officer II, one natural resource officer I, and two natural resource technicians. One of the technician positions is vacant currently due to budgetary constraints. Litzen and a Division of Land supervisor share supervisory responsibilities for the other technician because the technician is jointly funded by the Division of Mining and Water Management and the Division of Land. Litzen prepares the evaluations for this technician.

10. Employing function. The position description questionnaire (PDQ) states and Litzen testified that she has full authority to appoint or hire employees for the four positions that she supervises. Exh. 1, at 10. Litzen did indicate that she would probably conduct a joint interview with the Division of Land supervisor when hiring an individual for the jointly funded technician position. Prokosch also testified that Litzen has full authority to hire employees and that his involvement would consist solely of insuring that there was money in the budget for the position.

11. The unit Litzen supervises is small and there is a great deal of stability in the workforce. Two of the employees have been in their positions for 15 and 29 years. Thus, Litzen has had limited opportunity to engage in employing functions. In the one opportunity that has arisen, Litzen hired Buz Kuby for the natural resource officer II position. Kuby was listed as a layoff on the hiring register.

12. The ASEA/State collective bargaining agreement specifies that the first name on the layoff register must be selected. Litzen exercised independent judgment when hiring for this position because she could have chosen to leave the position vacant instead of accepting the first name on the layoff register.

13. Litzen has not had the occasion to transfer, layoff, or promote an employee.

14. Discipline function. The PDQ and supervisory responsibilities questionnaire state and Litzen testified that her authority in two discipline functions, discharge and suspend, is limited to the authority to recommend. Exh. 1, at 10; supervisory responsibilities questionnaire, Exh. 3, at 2. Prokosch testified that he expects all of his supervisors, including Litzen, to handle discipline situations. He expects to be informed if the unions are involved and would review the actions taken by the supervisors to insure all steps had been followed. Prokosch stated that he would more than likely follow Litzen's recommendation to discharge an employee.

15. Litzen has not had occasion to discharge, suspend, or demote an employee and she has not needed to issue a written warning.

16. She handled the one discipline problem which arose by checking with the human resource office and discussing the matter with the employee and a staff member from the human resource office. The matter was resolved based on the discussion that occurred. As a courtesy, Litzen informed Prokosch of her actions.

17. Grievance adjudication. Litzen has never responded to a grievance because no one has filed one. The PDQ states and Litzen testified that she has authority to handle grievances. Exh. 1, at 10. Prokosch expects Litzen to handle grievances filed by her subordinates as long as they are not filed against her personally. She does not need to consult him before taking action.

18. The parties stipulated that the ASEA/State collective bargaining agreement requires that a grievance be submitted to the first level supervisor outside of the bargaining unit.

19. Prior to the hearing, Litzen was unaware that this provision of the agreement prevented her from handling grievances involving the four general government positions that she supervises as long as her position is also in the general government unit. Absent any contract prohibition, Litzen has authority to respond to grievances that do not involve her personally.

### Conclusions of Law

1. The Alaska Labor Relations Agency has jurisdiction to consider petitions for unit clarification under AS 23.40.090.
2. Petitioner State has the burden of proof under 8 AAC 97.350(f).
3. The Public Employment Relations Act requires at the State level that supervisors be in a separate bargaining unit from nonsupervisory personnel. 8 AAC 97.090(a)(1). The reason for this distinction concerns community of interest. Those employees who are charged with acting on behalf of the employer's interest in hiring, disciplining, and adjudicating grievances of other employees have interests that may conflict with the interests of nonsupervisory employees and therefore they do not share a community of interest.
4. 8 AAC 97.990(a)(5), which defines supervisory employee, provides:

"[S]upervisory employee" means an individual, regardless of job description or title, who has authority to act or to effectively recommend action in the interest of the public employer in any one of the following supervisory functions, if the exercise of that authority is not merely routine but requires the exercise of independent judgement:

  - (A) employing, including hiring, transferring, laying off, or recalling;
  - (B) discipline, including suspending, discharging, demoting, or issuing written warnings; or
  - (C) grievance adjudication, including responding to a first level grievance under a collective bargaining agreement;
5. To be a supervisor under 8 AAC 97.990(a)(5), two standards must be met. First, the employer must have conferred on an employee the authority to act or effectively recommend action in any one of the three following supervisory functions: employing, discipline, or grievance adjudication. Second, the employee must exercise independent judgment in performing the function when the opportunity arises. We therefore need to address both grants of authority and how that authority is exercised.
6. Employing function. The State clearly has vested in Litzen the authority to hire employees. The only limitation on that authority is that Prokosch must verify that money exists in the budget for the position. She easily meets the grant of authority standard.
7. Next we examine how that authority is exercised. ASEA argues that the authority must be exercised in one of the three supervisory functions before a position can be placed in the supervisory unit and that the grant of authority alone is not sufficient.
8. The State and APEA disagree with ASEA's position. They maintain that conferral of appropriate authority should be sufficient to place a position in the supervisory unit. The State argues that a trial period should not be required while supervisors await an opportunity to exercise the authority granted to them. Keeping supervisors in the general government unit until an opportunity to perform one of the three supervisory functions arises would place these employees in a position of potential conflict the first time an opportunity arose.
9. We find the State and APEA's argument more persuasive. Lack of opportunity to exercise conferred authority does not preclude placing a position in the supervisory unit. The language of the regulation does not require that the authority be exercised before placement in the supervisory unit. To require exercise of authority first would exclude from the supervisory unit those supervisors who, but for lack of opportunity, share a community of interest with other supervisors. We also agree with the State that it would place supervisors in a potential conflict by retaining them in a unit with the employees over whom they have supervisory authority.
10. In a diverse, statewide workforce there may be a large range in numbers of employees supervised by individual supervisors. Vacancies may occur more frequently in some units than others. Certain employees may require discipline while others never do. Some work environments may lead to large numbers of grievances and no grievances may be filed in others. These many variables may result in many, few, or no opportunities to perform one or more of the three

supervisory functions. Despite these possible differences, the common thread uniting supervisory employees is the conferred authority to act in the employer's interest in performing hiring, discipline, or grievance adjudication functions when the need arises.

11. We might consider the issue differently, on the other hand, if the employee did not exercise the authority when the occasion or opportunity did arise. This could indicate that the employee does not have genuine authority.

12. In this case Litzen did have some opportunity to exercise her authority to employ. The number of hiring decisions that Litzen has had the opportunity to make, however, is limited due to the size of the group that she supervises and the stability of the workforce within the group.

13. ASEA argues that Litzen did not exercise independent judgment in the one employing opportunity that arose because Litzen hired from a layoff list and did not choose between a number of candidates. While she did not exercise discretion in choosing between candidates, she still exercised independent judgment by deciding to fill the position rather than leave it vacant. The existence of contractual layoff provisions during an employing opportunity does not necessarily preclude the exercise of independent judgment.

14. We conclude that Litzen exercises independent judgment in performing the employing function.

15. ASEA also attempts to impose a third requirement to 8 AAC 97.990(a)(5). ASEA argues that Litzen cannot be a supervisor because she does not spend a majority of her time performing supervisory duties as required by the case, Pertaining to Petitions for Classification of Supervisory Status, SLRA Order & Decision No. 15 (Feb 3, 1975).<sup>1</sup> The State and APEA maintain that 8 AAC 97.990(a)(5), the regulation defining supervisory employee, does not contain a time standard and the Agency should not impose one.

16. We decline to determine supervisory status by measuring the percentage of time spent performing supervisory duties. We rejected this test in State of Alaska v. Public Employees Local 71 and Alaska Public Employees Ass'n, Decision & Order No. 144, at 12-14 (Oct. 1, 1992). Under 2 AAC 10.220(b)(3), the former definition of supervisory employee, supervisory status was determined by measuring the amount of time spent performing supervisory duties and the number of employees supervised. In Order and Decision No. 26, the State Labor Relations Agency<sup>2</sup> determined that a supervisory employee who had limited opportunity to participate regularly in a majority of the six supervisory functions in 2 AAC 10.220(b)(3) would nonetheless be considered a supervisor if the employee spent a majority of time supervising work and the employee's authority to participate in a majority of the six functions was established. In re Unit Allocation of Individuals, SLRA Order & Decision No. 26, at 5-6 (July 23, 1976).

17. Creating artificial barriers, such as establishing a minimum amount of time performing supervisory duties or quantifying the number of times an employee must act in one of the three supervisory functions within a specific time period, could exclude from the supervisory unit those individuals who, but for lack of opportunity, share a community of interest with other supervisors under 8 AAC 97.990(a)(5). We therefore reject ASEA's invitation to return to this test.

18. In summary, to be a supervisor under 8 AAC 97.990(a)(5), an employee must have the authority to act or to effectively recommend action in the interest of the public employer in any one of the three supervisory functions -- employing, disciplining, or adjudicating grievances -- and must exercise independent judgment when the opportunity arises to perform at least one of the supervisory functions.

19. In this case, Litzen has authority to perform employing functions and she exercised independent judgment when the opportunity arose. Therefore, her position meets the minimum requirements for placement in the supervisory unit.

20. Discipline function. Applying the rule we developed examining the employing function, we must answer the question whether Litzen has been granted authority and then exercised it where there has been opportunity in the case of discipline. We find that Litzen has not been granted the authority to act directly but rather she recommends. This is sufficient under the plain language of the regulation.

21. Again, Litzen has had limited opportunity to exercise this authority when performing discipline functions. Although Litzen has not issued a formal directive, she has had the occasion to exercise discretion in the one discipline situation that did arise. She acted independently in deciding to consult the human resource office and in discussing the matter with the employee and a representative from the human resource office. She only informed her supervisor of her actions. We therefore conclude that she exercised independent judgment.

22. Because Litzen has the authority to effectively recommend discipline and she exercised it in a manner requiring independent judgment when the opportunity arose, her responsibilities in the discipline function require placement of her position in the supervisory unit.

23. Grievance adjudication. The third supervisory function is more troublesome. Litzen has been given clear authority to handle grievances. The only limitation is a contract prohibition that is the product of her current unit placement. This limitation would be removed if she moves to the supervisory unit.

24. There have been no grievances filed and Litzen has had no opportunity to exercise her authority. Establishing independent judgment under these circumstances is difficult. However, authority to act or effectively recommend action in a manner establishing independent judgment when the opportunity arises is required in only one of the three supervisory functions in 8 AAC 97.990(a)(5). Because we have already found that Litzen has two of the three functions, we do not need to address this question. Litzen must be placed in the supervisory unit by virtue of her responsibilities in the hiring and discipline functions.

25. Litzen's position is properly placed in the supervisory unit because it meets the criteria under 8 AAC 97.990(a)(5) for placement in the supervisory unit.

## **ORDER**

1. We **grant** the State of Alaska's petition and **order** that the natural resource manager I, PCN 101274, at the Division of Mining and Water Management in the Department of Natural Resources be placed in the supervisory bargaining unit.

2. The State of Alaska is ordered to 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

Alfred L. Tamagni, Sr., Chair

James W. Elliott, Board Member

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Raymond P. Smith, Board Member

## **APPEAL PROCEDURES**

An Agency decision and order may be appealed through proceedings in superior court 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 STATE OF ALASKA, (KELLIE LITZEN) v. ALASKA STATE EMPLOYEES ASSOCIATION, AFSCME LOCAL 52, AFL-CIO

and ALASKA PUBLIC EMPLOYEES ASSOCIATION, AFT/AFL-CIO, CASE NO. 95-424-UC, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 26th day of September, 1995.

Victoria D.J. Scates

Administrative Clerk III

This is to certify that on the 26th day of September, 1995, a true and correct copy of the foregoing was mailed, postage prepaid to

Signature

<sup>1</sup>Although ASEA cites SLRA Order & Decision No. 15 as the source of the time test to examine supervisory duties, this test actually appears later in In re Unit Allocation of Individuals, SLRA Order & Decision No. 26, at 5-6 (July 23, 1976).

<sup>2</sup>Before the reorganization of public sector labor relations in Executive Order 77, which created the Alaska Labor Relations Agency, the State Labor Relations Agency served as the labor relations agency for the State and State employees under the Public Employment Relations Act. Executive Order 77 (eff. July 1, 1990).