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STATE OF ALASKA,	)
(ERIC G. JOHNSON),	)
	)
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. 95-423-UC	)

**DECISION AND ORDER NO. 198**

This matter was considered on the record, including the brief, evidence, and tapes of proceedings on August 28, 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 28, 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 Dennis Geary, business agent, for intervenor Alaska Public Employees Association, AFT/AFL-CIO.

**Digest:**

The technical engineer II/architect II, Eric G. Johnson, located in the Division of Engineering and Operations at the Department of Transportation and Public Facilities in Anchorage, shares a community of interest with the supervisory unit due to his employing responsibilities under 8 AAC 97.990(a)(5).

**DECISION**

The parties dispute the bargaining unit placement of position control number 25-0235, a technical engineer II/architect II position occupied by Eric G. Johnson. DOT&PF requested reassignment of Johnson's position from the general government unit to the supervisory unit because Johnson has been given new supervisory duties. Johnson's current bargaining representative, Alaska State Employees Association, AFSCME Local 52, AFL-CIO claims that Johnson's position should remain in the general government unit. Alaska Public Employees Association, AFT/AFL-CIO maintains that it belongs in the supervisory unit.

A hearing was conducted on August 28, 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 (1990--1992), Exh. 6, at 2; Agreement extension (July 1, 1995--June 30, 1996) Exh. 7, at 3.
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 (July 1, 1994--June 30, 1995) Exh. 8, at 4.
3. Eric G. Johnson occupies the technical engineer II/architect II position, position control number 25-0235, at the Department of Transportation and Public Facilities (DOT&PF). This position is also known as engineer of tests. Position description questionnaire, Exh. 1, at 1; J. Dailey, memorandum to J. Rider, (Sept. 2, 1994) Exh. 2, at 5.
4. 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 Johnson's position. Petition for Unit Clarification, at 2 (June 29, 1995).
5. Johnson supervises the Engineer of Tests/Quality Control and Pavement Management Sections. He has statewide responsibility for materials testing and for all materials used in DOT&PF's construction projects. He also has statewide responsibility for selecting pavement rehabilitation and maintenance projects. He updates manuals to reflect new procedures and materials; contacts numerous federal and State agencies and private firms about testing methods, materials specifications, project requirements, and survey questionnaires; directs the truck Weigh-In-Motion program; prepares the section budget; and fills in for his supervisor, among other duties. Exh. 1, at 2-4.
6. On the position description questionnaire (PDQ) that he signed on January 18, 1995, Johnson stated that he spends approximately 96 percent of his time performing these nonsupervisory duties. Id. However, Johnson testified that he is actually spending 65 to 70 percent of his time performing these duties because supervisory responsibilities are taking a lot more of his time than they were when he filled out the PDQ, in part because the new employee requires a lot of training. Johnson performs nonsupervisory duties approximately 70 percent of the time.
7. Johnson spends the remaining 30 to 35 percent of his time supervising three full-time subordinates and an employee from the DOT&PF construction section who works in Johnson's section six months in the winter. Johnson's supervisory duties include training, directing work, hiring, disciplining, scheduling, setting priorities, evaluating, and signing leave requests. Id., at 4. Not included in this time is Johnson's supervision of a University of Alaska student who is participating in a cooperative education program.
8. Johnson's three full-time subordinates include a pavement management engineer, a quality control assistant, and an engineering assistant III. Previously, Johnson supervised three seasonal Local 71 employees but their positions have been vacant for two years. The positions may be filled again and if they are Johnson will supervise them.
9. The University of Alaska student works under a memorandum of agreement between DOT&PF and the University of Alaska Anchorage for a maximum of 1039 hours. DOT&PF issues a State warrant to the University, which then pays the student. Memorandum of Agreement between the Alaska Department of Transportation and Public Facilities and the University of Alaska Anchorage, Exh. 5, at 1-2 (May 30, 1995).
10. Johnson testified that he did not know whether the University student is a State employee. The record does not contain sufficient information to allow the determination whether the university student is a State employee.
11. Johnson also supervises the work performed by non-State employees: contract workers and consultants. He serves on a committee of three State employees who make hiring recommendations that are approved by the contracting

officer. He is responsible for the work performed by the contract employees and consultants and has the authority to insure that they adhere to the contract.

12. Tony Barter, the State materials engineer, is Johnson's supervisor. Exh. 1, at 9.

13. Employing function. Johnson has authority to hire employees for the three full-time State positions that he supervises. Id., at 8. Barter confirmed Johnson's authority to hire and testified that he would not overturn Johnson's selection of a candidate.

14. To fill a position Johnson must first obtain budget approval from the Commissioner's Office for the expenditure of funds. He must explain to Barter why the position needs to be filled. Barter must also approve the expenditure of funds.

15. After Johnson receives budgetary approval to hire, he develops the job description, calls for a register, conducts interviews, makes a selection, and sends the candidate's name to the Commissioner's office, which approves the hire. Johnson testified that to the best of his knowledge the Commissioner's office has never overturned a supervisor's decision regarding who to hire. Both Barter and Johnson testified that the Commissioner's office would deny permission to hire at the time the request was made if the position needed to remain vacant.

16. The unit Johnson supervises is small. Thus, his opportunity to engage in employing functions is limited. In the one opportunity that arose in November of 1994, Johnson independently worked the register and hired the PMS engineer from a variety of candidates. He consulted a staff person from the personnel office to insure that he knew all of the procedures before he started the hiring process.

17. Johnson has not had the occasion to transfer, layoff, or promote an employee.

18. Discipline function. Barter testified that Johnson has full authority to perform discipline functions, including discharge. Johnson does not need to consult Barter before disciplining employees. Barter believes that Johnson would suspend an employee, conduct an investigation, and consult the personnel office prior to discharging an employee.

19. Johnson testified that he has the authority to perform discipline functions for his three employees and the employee from the construction section. As a courtesy to the construction supervisor, however, he would consult with that individual before discharging the employee from the construction section.

20. Johnson has not had occasion to discharge, suspend, or demote an employee and he has not needed to issue a written warning. Johnson has resolved some performance problems with subordinates through discussion.

21. The first time there is a need to discharge, suspend, or demote an employee Johnson intends to check with the personnel office and talk to Barter to make sure he understands the procedures correctly. He does not intend to consult anyone after he has performed the function once.

22. Grievance adjudication. Johnson has never responded to a grievance because no one has filed one. The PDQ states that Johnson has authority to handle grievances. Id. Johnson testified that he has authority to handle grievances if his position is transferred to the supervisory unit. The first time Johnson responds to a grievance, he would check with personnel to make sure he understood all of the steps.

23. Barter expects Johnson to handle first level grievances.

24. Prior to the hearing, both Johnson and Barter were unaware that the parties' agreement prevented Johnson from handling grievances involving the general government positions that he supervises as long as his position is also in the general government unit. Absent any contract prohibition, Johnson has authority to respond to grievances.

### 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); State of Alaska v. Alaska State Employees Ass'n/AFSCME Local 52, AFL-CIO, Decision & Order No. 194, at 3 (Sept. 26, 1995).

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 judgment:

(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. We have found that

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.

Id., at 6; see also State of Alaska v. Alaska State Employees Ass'n/AFSCME Local 52, AFL-CIO, Decision & Order No. 196, at 6 (Oct. 19, 1995).

6. Employing function. First, we will apply the conferral of authority standard. The State plainly has vested in Johnson the authority to perform the employing function for State employees. Although Johnson must obtain budgetary approval to fill a position, he is responsible for making the selection. The Commissioner's office accepts the name that he submits. Johnson satisfies the grant of authority standard.

7. Second, we look at how that authority is exercised. In this case, Johnson has exercised his authority to hire and he used independent judgment in working the register and selecting a candidate for the PMS engineer vacancy.

8. Johnson has authority to perform employing functions and he exercised independent judgment in filling the vacancy that arose. Therefore, his position meets the minimum requirements for placement in the supervisory unit.

9. The State and APEA ask the Agency to decide Johnson's bargaining unit placement in part based on his responsibility to supervise contract workers, consultants, and the University of Alaska student. APEA maintains that under 8 AAC 97.990(a)(5) a supervisor does not have to supervise State employees to be placed in the supervisory unit because the language of the regulation does not require it.

10. ASEA maintains that the Agency should not expand the definition of supervisory employee in 8 AAC 97.990(a)(5) to cover those individuals who are not public employees as defined in AS 23.40.250(6).

11. We agree with ASEA. We will not place an employee in the supervisory bargaining unit based on the employee's supervisory responsibility for non-State employees. We have found that

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.

State of Alaska v. Alaska State Employees Ass'n/AFSCME Local 52, AFL-CIO, Decision & Order No. 194, at 5.

12. The reason for excluding supervisors from the employees they supervise is the conflict of interest inherent in that relationship. When the supervisor and the person supervised are not both employees of the State, there is no conflict. This conflict is essential to the exclusion of supervisors from the unit in 8 AAC 97.090(a)(1).

13. A supervisor, for example, will not perform the three supervisory functions as he or she would for State employees. A supervisor will not adjudicate non-State employee grievances under a State bargaining agreement because non-State workers are not eligible to file grievances under these agreements. Similarly, the supervisor will not be performing hiring or discipline functions for non-State employees. While this supervisor participates on a panel which recommends the approval of contracts for independent contractors, he does not participate in their hire or discipline as employees. Therefore, a supervisor's responsibilities for non-State employees does not require exclusion from a particular bargaining unit.

14. There is insufficient information in the record to determine whether the University student is a State employee. However, it is unnecessary to determine the student's employment status in deciding Johnson's unit placement because Johnson has already met the minimum requirements for placement in the supervisory unit.

15. Johnson'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 technical engineer II/architect II, PCN 25-0235, at the Division of Engineering and Operations in the Department of Transportation and Public Facilities 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.

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 vs. ALASKA STATE EMPLOYEES ASSOCIATION, AFSCME LOCAL 52, AFL-CIO and ALASKA PUBLIC EMPLOYEES ASSOCIATION, AFT/AFL-CIO, CASE NO. 95-423-UC, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 15th day of November, 1995.

Victoria D.J. Scates

Administrative Clerk III

This is to certify that on the 15th day of November, 1995, a true and correct copy of the foregoing was mailed, postage prepaid to

Art Chance, State

John Marton, ASEA

Dennis Geary, APEA

Signature