

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

ALASKA STATE EMPLOYEES)
ASSOCIATION, AFSCME LOCAL 52,)
AFL-CIO, (PCN 08-0106),)
)
Petitioner,)
v.)
)
STATE OF ALASKA,)
)
Respondent,)
)
_____)
CASE NO. 95-408-UC)

DECISION AND ORDER NO. 200

This case was heard on August 16, 1995, before hearing examiner Jan Hart DeYoung. The panel of the Alaska Labor Relations Board deciding the case on the basis of a review of the record is Vice Chair Stuart H. Bowdoin and Members Robert A. Doyle and Karen J. Mahurin. The record closed on August 16, 1995.

Appearances:

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

Digest:

As an exempt professional employee in the Alaska Oil and Gas Conservation Commission, the natural resource officer II shares a closer community of interest with the other exempt professional employees at the AOGCC than with the clerical and secretarial employees there who are in the general government bargaining unit. The reclassification of the position from a clerical position changed the position sufficiently to make the State's removal of it from the bargaining unit appropriate.

DECISION

In this unit clarification dispute, the ASEA is protesting the removal of a position from the bargaining unit after the position was reclassified. Before the reclassification the position at the Alaska Oil and Gas Conservation Commission was a clerk in the general government unit represented by ASEA. The position was reclassified to a natural resource officer II, made exempt from the personnel rules, and excluded from established bargaining units. ASEA has filed this petition for clarification of the bargaining unit status of the position. ASEA maintains that the position belongs in the general government unit with other natural resource officers II in State service. ASEA does not in this proceeding challenge the reclassification or the exempt status of the position.

A hearing was conducted on August 16, 1995, at which the parties presented testimony and other evidence. The record closed that same day. Upon consideration of the record, the panel finds the facts as follows:

Findings of Fact

1. The Alaska State Employees Association/AFSCME Local 52, AFL-CIO (ASEA), is the certified bargaining representative of the State's general government bargaining unit (GGU). Included in the unit are the nonprofessional, classified employees of the Alaska Oil and Gas Conservation Commission (AGOCC).
2. The collective bargaining agreement provides preferential hiring rights to members of the GGU bargaining unit who have been laid off. Those rights extend only to positions in the GGU.
3. The Alaska Oil and Gas Conservation Commission(AOGCC) is located administratively in the Department of Administration. Admin. Order No. 142 (Feb. 17, 1994), Exh. B. The AOGCC is an independent quasijudicial agency of the State with responsibility to oversee oil and gas development on State land. Its mandate is to prevent waste, protect correlative rights, and insure maximum recovery of the resource. It studies oil industry programs to insure the resource is brought to the surface safely.
4. There are three commissioners at the AOGCC. The present commissioners are David Johnston, Chairman, and Tuckerman Babcock and Russell A. Douglas, Commissioners.
5. Chairman Johnston has been employed by the AOGCC since 1989, when he was appointed to the commission. Johnston first worked for the State in 1981 as a geologist in the GGU in the Division of Minerals and Energy Management, Department of Natural Resources, which is now called the Division of Oil and Gas. At the division Johnston covered leasing of lands for oil and gas exploration and worked with natural resource officers II.
6. Johnston related the history of the position at issue in this case, position control number 08-0106. Initially he had sought to upgrade the position from a clerk IV¹ to a natural resource officer II, but the Office of Management and Budget had denied the request on the basis that funding was inadequate. He then sought to have the position reclassified to a natural resources technician I, for which the AOGCC had funds. D. Johnston, memo. to N. Slagle (Dec. 12, 1994), Exh. 1, at 15. The position had actually been a technician at one point but had been downgraded after a desk audit. He explained the request came back approved as a natural resource officer II.
7. Johnston oversaw the development of the position description. He states the AOGCC's positions do not dovetail precisely with the State classification system, but he finds that the positions in the Department of Natural Resources do come closest because it is also a resource oriented agency. He also has found that the State's personnel professionals are more comfortable working within the existing classifications, although the jobs may have to be "shoehorned" into a particular classification.
8. Johnston requested an eligible list to fill the technician position on February 7, 1995. D. Johnston, memo. to S. Barton (Feb. 7, 1995), Exh. D.
9. On March 15, 1995, the personnel specialist assigned, Tony Haffner, recommended a reclassification to a natural resource officer II. She initially placed the position in the GGU represented by ASEA, unaware at that time of AS 39.25.100(14), which places certain professional employees of the AOGCC in the exempt service. T. Haffner, memo. to D. Reid, (Mar. 15, 1995), Exh 1, at 1, Exh. E.
10. The Department of Administration issued a lay-off list for the natural resource officer II position on or around March 16, 1995. The list included the name of Odin Brudie, a former state employee and GGU member who had lost his job and qualified for lay-off rights under the GGU contract. Exh. F, at 2.
11. Brudie was first employed by the State as a seasonal technician I in the Department of Natural Resources in 1983. When he was laid off he had been a natural resource officer I in the Division of Lands for about three years. He was laid off when the Division of Lands eliminated a number of natural resource officers II in 1994.
12. On March 28, 1995, Brudie was notified of the natural resource officer II position opening.
13. On March 29, 1995, Commissioner Johnston advised the acting classification manager that, because the position as classified was to perform at a professional level, it should be "reclassified as an exempt position" citing AS

31.05.023(b). D. Johnston, memo. to K. Larson (Mar. 29, 1995), Exh. G.

14. At some later date, the position was reclassified as exempt under AS 39.25.110(14) and removed from the unit. Affidavit of T. Haffner (July 27, 1995).

15. On April 3, 1995, Sharon Barton, Director of Administrative Services for the Department of Administration, sent notice to the Director of Division of Budget and Review, that the position should be moved from the classified to the exempt service pursuant to AS 31.05.023(b) and 39.25.110. S. Barton, memo. to N. Slagle (April 3, 1995), Exh. H. The exempt status was made effective as of March 16, 1995. T. Haffner, memo. to D. Reid (June 5, 1995), Exh. K.

16. On April 18, 1995, Johnston notified Brudie in writing that the position had been reclassified to the exempt service. Brudie was told he would remain in layoff status, but he was invited to interview for the exempt position. D. Johnston, letter to O. Brudie (April 18, 1995), Exh. 4, at 2.

17. Brudie interviewed for the position on May 1, 1995.

18. ASEA filed a grievance on behalf of Odin Brudie, which is being held in abeyance pending this action. J. Casto, letter to A. Reardon (Aug. 1, 1995), Exh. 4, at 6.

19. On May 12, 1995, Commissioner Babcock offered another candidate, Wendy Mahan, the position, which she accepted. T. Babcock, letter to W. Mahan (May 12, 1995), Exh. J; Personnel Action Memo. (June 20, 1995), Exh. L.

20. On May 15, 1995, Brudie was notified he was not selected.

21. The State classified service contains the class series of natural resource manager. The natural resource manager series has three job classes -- technicians, officers, and managers. Exh. E, at 3. The natural resource officer II position is described generally as follows:

Natural Resource Officer II is the full professional level class in the areas of resource planning, adjudicating resource use, abstracting title and professional research related to the management of natural resources. While positions normally do not have substantial supervisory responsibilities, they do participate in the overall administration of programs by assisting with program planning and implementation, writing policies and procedures and recommending changes in policy and program operations as requested. Positions may in some cases be working leaders over technician work, or may occasionally supervise a few nonpermanent or permanent assistants. The primary focus of their jobs, however, is on accomplishing the professional assignments critical to carrying out these programs.

Exh. E, at 7.

22. The position description questionnaire for the natural resource officer II at the AOGCC describes the essential functions of that position. Exh. 1, at 6. The principal responsibility is gas disposition. The position audits producer reports of flare incidents, creates a database of flare incidents, determines if producers are taking appropriate steps to reduce flare volumes, acts as a liaison between the AOGCC and operators, and participates at hearings relating to gas disposition. The position also audits records to determine compliance with permitting, operating, and reporting requirements. The position also assists the MEO II and reservoir engineer in their responsibilities. Id.

23. The AOGCC natural resource officer II is responsible for the gas disposition program. The position, according to Johnston, principally will investigate flaring. The flaring or burning of natural gas is considered waste unless there is adequate justification. The natural resource officer II investigates flaring to determine whether flaring is legitimate or wasteful and, if wasteful, recommends action. The position is supervised by an AOGCC commissioner. The position may do some field work to investigate a flare after it has occurred.

24. The incumbent in the position did not testify.

25. The ASEA does represent natural resource officers in the classified service in the general government unit.

26. For example, Brudie formerly worked in the GGU as a natural resource officer II for the Division of Lands at the Department of Natural Resources. In that position he was a planner in resource assessment and development. He reported to the project manager on easement access issues. Brudie negotiated access across private land and reviewed projects that might compromise access to State land. Brudie's typical work day in this position might involve checking the work schedule, meeting with graphics staff on an easement project, advising his supervisor of progress, preparing correspondence on behalf of officials, and working with professionals on projects. Brudie's work group included three or four other natural resource officers II. He had considerable contact with his division director. Brudie had regular but infrequent contact with members of the public.

27. Brudie states the work of natural resource officers requires technical expertise in computers, maps, surveying, and geography. Brudie believes that the work he performed at the Department of Natural Resources is similar to that described in the position description questionnaire for the AOGCC position.

28. At the time of the hearing Brudie was again working as a natural resource officer II for the State. He was recalled from layoff status and is working at the Division of Oil and Gas in lease administration. In that position he prepares legal descriptions, executes leases, prepares correspondence, manages the leases through the term of the lease, and audits lease payments. He commonly interacts with leaseholders, petroleum land managers, and owners. He has some interaction with the AOGCC. His work group currently includes his supervisor, a natural resource officer I, and a clerk IV. Brudie has very little contact with the division director.

29. In both jobs Brudie worked a 37.5 hour work week and had his own office.

30. Brudie's supervisor at the time of his layoff was James E. Culbertson. Culbertson is a natural resource manager. He began work for the State in 1978 as a natural resource technician in the GGU. He also worked as a natural resource officer II for seven or eight years. He became a member of the supervisory bargaining unit when he was promoted to a natural resource manager position. As a natural resource manager he has supervised about a dozen natural resource officers II. Culbertson described Brudie's position. In the position there was limited authority to act independently or make decisions. The position required technical expertise and strong technical writing skills. In that position Brudie would answer questions from the public and interact with the public and private and native corporations. He was required to examine facts and make reasonable recommendations to resolve conflicts. Brudie could be required to assess the highest and best use of State land if there were an interest in either acquiring or disposing of it.

31. Culbertson is familiar with and has interacted with the AOGCC to reconcile the competing interests of Native claims and oil and gas producers. He stated that a natural resource officer II from his office would do the actual work with the AOGCC staff.

32. Johnston compared the work of the division with the work of the AOGCC. The common element is oil and gas. The AOGCC's concern is to prevent loss of the resource and insure safety. It insures that the operator engages in enhanced recovery. It protects the rights of adjacent land owners. It insures the operator has proper blowout prevention and gas detection equipment. The AOGCC is more nuts and bolts oriented. It actually checks the rig and looks at the casings.² The division of oil and gas, on the other hand, is the surface manager. Its concern is the surface environment and it oversees royalty interests. The two agencies do occasionally interact.

33. Johnston described the organization of the AOGCC. He named the professional employees, reservoir engineer, petroleum engineer, and petroleum geologist, "a cadre of support staff," and the clerical support staff as making up the commission. AOGCC also employs five petroleum field inspectors. The professional employees, including the field inspectors, and the executive secretary have exempt status. AOGCC Organization Chart, Exh. E, at 12. The GGU bargaining unit members at the AOGCC are the clerical staff and the two statistical technicians.

34. The work schedule of the AOGCC is the standard State 37.5 hour work week but the hours of the employees "flex" to accommodate the hours of the oil and gas industry. An exception to the regular schedule is the schedule worked by the field inspectors, who work seven-twelve hour days when they are in the field.

35. On May 26, 1995, the ASEA filed this petition for unit clarification. On July 17, 1995, the AOGCC posted this

petition at the work site of the affected employee.

36. On July 27, 1995, respondent State of Alaska filed an objection to hearing and motion to dismiss this action. ASEA did not oppose the motion. On August 11, 1995, the hearing officer denied the motion and the case proceeded to hearing on August 16, 1995, as scheduled.

37. On August 16, 1995, the parties presented testimony and other evidence and the record closed that same day.

Conclusions of Law

1. The State of Alaska is a public employer under AS 23.40.250(7) and the Alaska State Employees Association/AFSCME Local 52 AFL-CIO is a labor organization under AS 23.40.250(5). This Agency has jurisdiction under AS 23.40.090 to consider this matter.

2. Petitioner has the burden to prove each element of its claim by a preponderance of the evidence. 8 AAC 97.350(f).

3. Professional employees of the Alaska Oil and Gas Conservation Commission are exempt from the personnel rules under AS 31.05.023 and 39.25.110(14). AS 31.05.023 provides, in part:

(a) The commission shall employ such staff as it considers necessary to carry out its responsibilities.

(b) The professional staff of the commission and the personal secretary of each commissioner are in the exempt service under AS 39.25.110.

(c) The secretarial and clerical staff of the commission, except the personal secretary of each commissioner, are in the classified service.

4. AS 39.25.110 provides, in part:

Exempt Service. Unless otherwise provided by law, the following positions in the state service constitute the exempt service and are exempt from the provisions of this chapter and the rules adopted under it:

...

(14) petroleum engineers and petroleum geologists employed in a professional capacity by the Department of Natural Resources and by the Oil and Gas Conservation Commission, except for those employed in the division of geological and geophysical surveys in the Department of Natural Resources

5. These two statutes have been interpreted together broadly to exempt all AOGCC professional employees from the State Personnel Act. See Alaska Inf. Op. Att'y Gen. (Feb. 19, 1985) (engineering assistant), Exh. A.

6. This Agency has no jurisdiction over the application of the personnel rules to employees. Movement of positions between exempt and classified status is under the jurisdiction of the personnel board. See AS 39.25.070 and 39.25.130; Alaska Public Employees Ass'n/AFT AFL-CIO v. State, 831 P.2d 1245 (1992). Thus, the exempt status of this natural resource officer II position is a given in this case.

7. However, the Public Employment Relations Act, AS 23.40.070--23.40.260 applies to employees without regard to application of the personnel rules. AS 23.40.250(6) defines "public employee" to include all employees, with only a very few named exceptions, regardless of status as classified or exempt:

"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. [Emphasis added.]

Thus, status as an exempt employee does not exclude a position from bargaining rights or placement in a bargaining unit.

8. Exempt status, however, may affect community of interest and placement in a particular bargaining unit.

9. AS 23.40.090 sets out the Agency's responsibility to determine the appropriate unit:

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.

10. The general government unit now represented by the Alaska State Employees Association was first defined as "all classified employees." SLRA Order and Decision No. 1, at 12-13 (Feb. 2, 1973). That decision describes the community of interest shared by State classified employees:

The general community of interest among all State of Alaska employees is too obvious to be belabored. They all derive their livelihood from the performance of services for the people of the State of Alaska and their direction from the elected representatives of the people. The classified employees 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.

Id., at 2.

11. The application of the personnel rules does affect the terms and conditions of employment. The State claims that the key difference is scope of bargaining. The State Personnel Act is Alaska's merit system. Hiring is more restrictive under the Act. Employees must be recruited, selected, and advanced on the basis of their relative "ability, knowledge, and skills." The Act requires a regular, integrated salary system. It requires equal treatment of applicants and insulates selection and retention from political influence. AS 39.25.010. It provides for hearings in the event of dismissal, demotion, or suspension for more than 30 working days. AS 39.25.170. The scope of bargaining is more restricted for classified employees because these conditions of employment may not be negotiated. The exempt status of the natural resource officer II is a significant factor distinguishing the position from most of the members of the GGU.

12. Currently there are some exempt employees in the unit. In 1992 a work group of GGU members in the Department of Community and Regional Affairs was consolidated with the Alaska Housing Finance Corporation, whose employees were not represented in bargaining. After consolidation the employees continued to perform the same duties and continued to work as a unit. This Agency concluded that the employees retained their GGU status after the move. See State and Alaska Housing Finance Corp. v. Alaska State Employees Ass'n, AFSCME Local 52, AFL-CIO, Decision & Order No. 164, at 11 & 20 (1993), aff'd, Nos. 3AN-93-10311 & 3AN-93-11539 CI (consol.) (super. ct., Aug. 9, 1994), appeal pending No. S-6600 & S-6630 (filed Sept. 9, 1994). With the exception of this group of employees in the Alaska Housing Finance Corporation, all GGU members are classified employees.

13. In the Alaska Housing Finance Corp. case, the work, interaction, and bargaining history of the positions supported maintaining them in the GGU. In contrast, in this case the work group for the AOGCC natural resource officer II is a group of exempt professionals who are not GGU members. The AOGCC natural resource officer II interacts regularly with these other AOGCC exempt professionals. While the position also interacts with clerical workers in the AOGCC who are GGU members, we believe that between the two groups, this position performs work more like the other exempt professionals. While the GGU includes many professional positions in the unit, it does not include the AOGCC professionals.

14. When this position was a clerical position, it was in the GGU. The job duties have changed so significantly, however, that this history does not support maintaining the position in the unit. We recognize that other natural resource officers II are in the GGU and these jobs are similar enough to share the same class specification. However, the natural resource officer position in the AOGCC, because of its exempt status, will be hired, promoted, and treated differently

than the classified natural resource officers II. In other words, while the positions share similar job duties and qualifications, the terms of employment differ significantly.

15. The incumbent in the position did not testify and her preference is unknown.

16. We conclude on balance that the exempt status of the position, the employer's organization, and community of interest all more closely align this position with the nonrepresented exempt professionals in the AOGCC.

17. The natural resource officer II position in the AOGCC is appropriately outside of the GGU represented by ASEA.

ORDER

1. After reclassification to the exempt position of natural resource officer II, position control number 08-0106 at the Alaska Oil and Gas Conservation Commission was appropriately placed outside of the general government unit;

2. The petition filed by Alaska State Employees Association/AFSCME Local 52, AFL-CIO in this case is DISMISSED; and

3. 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

Stuart H. Bowdoin, Vice Chair

Robert A. Doyle, Board Member

Karen J. Mahurin, 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 Alaska State Employees Association, AFSCME Local 52, AFL-CIO, (PCN 08-0106) v. State of Alaska, Case No. 95-408-UC, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 9th day of February, 1996.

Margie Yadlosky

Administrative Assistant

This is to certify that on the 9th day of February, 1996, a true and correct copy of the foregoing was mailed, postage prepaid to

Alison Reardon c/o John Marton, ASEA

Art Chance, State

Signature

1The position had recently been reclassified along with all other clerk positions to the new administrative clerk series. The position had gone from a clerk IV to an administrative clerk II.

2The casing is the pipe in the ground, which insures that the hole to extract the resource remains open. The casing is the line of defense that insures that the resource is recovered and properly handled and does not result in a loss of the resource. For example, it protects the aquifer.