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LABORERS LOCAL 341 & OPERATING ENGINEERS 302, AFL-CIO,

Petitioners,

v.

CITY OF WHITTIER,

Respondent.

Case No. 99-911-RC

DECISION AND ORDER NO. 242

Digest: Excluding temporary employees from the bargaining unit of Department of Public Works (DPW) employees at the City of Whittier would cause unnecessary fragmentation. Under AS 23.40.090, the temporary employees share a sufficient community of interest with the permanent DPW employees to form an appropriate unit. The position occupied by Ben Leniz is not a supervisory position under 8 AAC 97.990(a)(5) and is included in the bargaining unit.

DECISION

Statement of the Case

On August 12, 1998 petitioners, Laborers Local 341 and Operating Engineers Local 302, AFL-CIO (unions), filed this petition to get certified as the authorized bargaining representative for all employees in the "Public Works/Sewer and Water Department" (DPW) of the City of Whittier. The City of Whittier (City) filed an objection on October 7, 1998, and requested a hearing. The petition was heard on December 7, 1998, and the record closed at the conclusion of the hearing.

Panel: Alfred L. Tamagni, Sr., Chair, and Robert A. Doyle and Ray Smith, Members.

Appearances: Kevin Dougherty, attorney, for petitioners Laborers Local 341 & Operating Engineers 302; Louisiana Cutler, attorney, for respondent City of Whittier.

Procedure in this case is governed by 8 AAC 97.350. Hearing examiner Mark Torgerson presided.

Issues

1. Are City of Whittier Village Safe Water project employees "public employees" under the Public Employment Relations Act with rights to bargain collectively?

2. Do the City of Whittier's Village Safe Water project employees share a sufficient community of interest with permanent employees of the City's Department of Public Works to be included in the collective bargaining unit with them? Would separating these employees cause unnecessary fragmentation?

3. Is the position occupied by Ben Leniz a supervisory position under 8 ACC 97.990(a)(5)? If so, should it be excluded from the bargaining unit due to the nature of its supervisory responsibilities?

Summary of the Evidence and Arguments

On August 12, 1998, Laborers Local 341 and Operating Engineers Local 302 (unions), as joint petitioners, filed a "Labor Organization Representation Petition" to seek representation of "[a]ll Public Works/Sewer & Water Department employees" of the City. (August 12, 1998 petition). The petition excluded position classifications "excluded by the Public Employment Relations Act (PERA)."

After the Alaska Labor Relations Agency (Agency) reviewed the roster of employees submitted by the City, the Agency notified the parties that the required 30 percent showing of interest was met. AS 23.40.100. (September 15, 1998 letter by Margie Yadlosky). The City had 15 days to file an objection. Previously, the City had asserted the Agency was without jurisdiction because the City opted out of PERA via Whittier Resolution 518-98. (September 4, 1998 letter by attorney Gerald Sharp). However, the City later withdrew this objection. It did, however, maintain its objection to the composition of the proposed bargaining unit. Generally, it contends that temporary or seasonal employees working on the Village Safe Water (VSW) project do not share a sufficient community of interest with other Department of Public Works employees to be included in the same bargaining unit; the petition is inappropriate under 8 AAC 97.025(a)(3) because interest cards from employees who are not permanent or probationary employees may have been used to support the petition; and the position held by Ben Leniz should be excluded from the bargaining unit because Leniz is a supervisor.[1]

The unions presented the testimony of Ken Rhodes, Blake Johnson and Wayne Plumb. The respondent City presented the testimony of Carrie L. Williams and Chuck Eggener.

Ken Rhodes, a Village Safe Water (VSW) project employee, testified that in the summer of 1998, he worked for the City laying sewer pipe and digging ditches. He said this work was the same type as construction work in the private sector. The City paid him $14 per hour. He did not receive any benefits. He said "Ed" (Ed Neuser), the project foreman, told him that he would be hired again during the summer of 1999. He hoped to be rehired as the work was close to home. He estimated that completion of the project would take longer than a month. He heard talk of a couple of other possible projects. On cross examination, he stated Ed Neuser told him that when work on the other projects arose, they would have other employment with the City, if they did a good job.

Blake Johnson testified he has been a business agent for Laborers Local 341 for nine years. He said Local 341 represents both full-time and part-time employees. He testified many projects in the private sector last less than two years. He said seasonal employees have an expectation of getting some kind of work each summer, not necessarily with the same company. However, if a contractor has used an employee in the last five years, the contractor can ask to have that employee back to work. Johnson also said foremen are included in Local 341 bargaining units on some jobs such as those with Wilder Construction.

Wayne Plumb has been a field agent for Operating Engineers Local 302 during the past four years. Prior to that job, he was a heavy equipment operator. He testified his union has numerous contracts in the private and public sector where seasonal and full-time employees are in the same unit. Plumb said Whittier is going to grow. He asserted that if seasonal employees are laid off, there are other projects in the design and proposal stage in Whittier, including enlarging the harbor or even building a new harbor, along with other roadwork there. On cross examination, he said he was not aware of any specific projects at this time, but he believes that with the opening of the road to Whittier, the City will grow.

Carrie Williams testified she has been city manager of Whittier since February 1, 1997. She said she has responsibility for not only budgetary matters but also supervision of all City departments, and "ultimately" handles all hiring and firing. She signs every time sheet and time card. She said the City has 17 or 18 permanent full-time employees, and 2 or 3 temporary employees, who, for example, shovel docks in the winter.

Williams discussed future work projects in Whittier. She testified the City has put out bids for a steel, free-stand construction building. Certified steelworkers instead of city employees will build this structure. The 180-foot by 80-

foot building would not be a force account project. However, she testified there are no other projects planned at this time because the City does not have funding. Regarding road construction, funding is being sought for a project to connect the new tunnel with the marine highway. Williams said the project is "100 percent DOT" (Department of Transportation) and no city employees would be involved.

Williams stated the Department of Public Works (DPW) is responsible for all of the support and maintenance of buildings, roads, sewer and water, harbor areas, leases and the boating community. At this time, there are four employees in the DPW: Chris Bender, James Bowman, Ben Leniz and Cecil Talton.

Another employee listed on the city's Exhibit A, Ronald Graham, no longer works for the City. Graham, who is also listed as a temporary employee in Exhibit A, worked initially on the VSW project but was retained by the City on a temporary basis, according to Williams, to assist with "leftover dressing out of the surfaces of the streets after safe water." Williams said Graham was not employed as of December 1, 1998, and there are no plans to fill the position.

Chris Bender is a recently hired permanent part-time employee who will be a certified operator of the city's sewer-water system. The other three are full-time employees. Williams testified that VSW funds would be used to provide the required training for Bender. Ben Leniz is the only trained certified operator at present. Williams said Leniz is a supervisor. Jim Bowman maintains and repairs all city equipment and vehicles, including police vehicles. Cecil Talton is an operator "or anything he need be."

Williams testified that in a city the size of Whittier, "we all do anything which we are called upon to do." She said that to define Talton as an operator is "about 60 percent true." He also does water and sewer work and whatever else is required. With the possible exception of Bowman (who is kept busy with equipment), all the employees could be required to help with building maintenance. Williams said that with the small staff, the City doesn't have the luxury of "staying within absolute job description." They all do what is required to keep the City operating.

Williams described the VSW project as a "rebuild" of the outdated and depreciated sewer and water system. The project is estimated to last two years, during the 1998 and 1999 construction seasons, depending on approval of funding by the Alaska Legislature. The City received $850,000 in 1998, and it has applied for approval of the amount (more than $1 million) it believes is needed to complete the project in 1999. Williams said the project is scheduled for completion in September 1999. Williams said she is ultimately the boss of not only everyone who works at the DPW but also those who work on the sewer project.

Chuck Eggener, a construction manager and design engineer, was retained by the City to work on the VSW project. Eggener, who has completed 30 such projects for Alaska communities who choose to "self build" their sewer systems, provided technical and procurement expertise. One of his employees, Ed Neuser, provided onsite supervision.[2]

Eggener testified the work force consisted of city employees. Neuser "short-listed" the applicants, and the City then decided whom to hire. According to Williams, all project employees, except one, were Whittier residents. The City hired operators, laborers, pipelayers, a "top man" and a truck driver to work on the project.

Williams testified she did not tell anyone they would have a job the summer of 1999 because the project "is so contingent on funding" by the legislature. She also indicated that she did not promise anyone they would have a job with the City after the sewer project is completed. She did not instruct Eggener to do so either, and he would not be authorized make such a promise. Moreover, Neuser supervised but did not hire, fire or promote. However, he did make recommendations for hiring. Williams said "temporary gives you no automatic" chance for additional employment with the City. If employees are credible, do a good job and are local, they are welcome to apply. Experience is always taken into account.

Eggener testified it is a difficult question to determine how much work remains to complete the project because its completion depends on the availability of funding. His rough estimate is three to four months. If no money becomes available in 1999, he estimated two operators and a couple of laborers would be needed for a period to clean up rights-of-way and make tie-ins.

Williams asserted that the wages, hours and working conditions of the permanent employees in the DPW differ from

those of the sewer project employees. The permanent employees generally work 40-hour weeks, with some overtime. The project employees worked 11-hour days, 6 days a week, with substantial overtime. The permanent employees receive vacation and medical benefits, with paid holidays. The project employees receive no benefits other than holiday pay if they work a minimum required period of time. Both the permanent and project employees are paid by the hour, with the exception of Daniel Sayen, the public works supervisor.[3]

Williams said the project employees did not perform other, non-project work for the City. However, some of the VSW project monies were used to pay city employees who did VSW-related work. For example, if project equipment needed repair, Mr. Bowman would repair it. Some project funds are currently spent for maintenance.

Williams admitted that Ronald Graham is listed on Exhibit A as both a DPW and a VSW employee. She explained that he initially worked on the VSW project. Then, at the end of the summer, he stayed on with the City to "dress out the roads . . . ." Jim Bowman also was paid with some VSW project money because he serviced project equipment. According to Williams, the City leased machinery to the VSW project.

In addition, Williams testified that Cecil Talton's pay history (detailed on Exhibit B) shows he was paid under the VSW project and as a DPW employee. She explained that he was initially hired to work on the sewer project. When that work ended after the 1998 season, he applied for a job opening with the City, and was hired as a full-time permanent employee.

Williams said Ben Leniz, one of the permanent full-time employees, is the backup public works director when Daniel Sayen is on vacation or other leave. She said Leniz has the authority, when Sayen is gone, to recommend whom to hire, transfer, lay off or fire. Williams said that "within his realm," Leniz has authority to participate in a grievance. She presumes he would sit as any supervisor would sit in a grievance. She said he would have to give her justification for an action. His authority includes giving her recommendations after independently deciding hiring and firing issues. He has the ability to terminate, with the city manager's support. Williams also acknowledged Leniz worked with tools. If there is a line break, Leniz will work on it.

Exhibit B shows the wages and benefits paid to city employees. The payroll date on the exhibit is October 22, 1998. It lists 12 employees, including Daniel Sayen, the only salaried employee. Except for Sayen, all employees were paid with some VSW funds. This included permanent, full-time employees Leniz, Bowman and Talton.

The City objects to the proposed election and the composition of the proposed bargaining unit. It also objects to the showing of interest that may have been used to support the petition because it may have included interest cards from employees who are not permanent or probationary employees. Finally, the City objects to inclusion of Ben Leniz in the unit based on his supervisory duties. The City argues temporary employees like those working on the VSW project should not be included in the proposed bargaining unit. The City argues that "[s]uch nonrecurring, temporary work renders an election including the VSW workers inappropriate. Temporary workers must be sufficiently concerned with the terms and conditions of employment in a unit to merit participation in the selection of a collective bargaining agent." (City November 13, 1998, prehearing brief at 3). (*Citation omitted*). It contends they do not share a sufficient community of interest with the full-time employees in the Department of Public Works (DPW). The City asserts that Leniz is a supervisor as defined in the agency's regulations, and therefore should be excluded from the bargaining unit.

The unions argue that the City's attempt to block the election is contrary to the Public Employment Relations Act (PERA), fundamental labor relations principles, and is unsupported by the facts. (Unions' November 13, 1998, prehearing brief at 1). The unions further argue that the City's attempt to divide the bargaining unit into two smaller units is "contrary to the PERA rule against undue fragmentation." *Id.* at 3.

Discussion and Findings of Fact

The petitioning unions must prove each element of their case by a preponderance of the evidence. 8 AAC 97.350(f). We make the following findings based on a preponderance of the evidence.

1. Are City of Whittier Village Safe Water project employees "public employees" under the Public Employment Relations Act with rights to bargain collectively?

One basis for the city's objection is its argument that the unions' petition included "employees in the determination of the showing of interest who are not properly included in the proposed bargaining unit or an appropriate bargaining unit and because the petition does not meet the requirements of 8 AAC 97.025(a)(3)." (G. Sharp, Objections to Representation Petition, Bargaining Unit and Conduct of Election (Oct. 7, 1998)). This objection appears to be based in the language of 8 AAC 97.025(a)(3) dealing with permanent and probationary employees. This regulation provides:

> (a) A petition for certification of public employee representative filed by a labor or employee organization must contain the following information:
>
> (1) the name, title, address, and telephone and facsimile machine numbers of the public employer's contact person;
>
> (2) a description of the bargaining unit claimed to be appropriate for purposes of exclusive representation by the petitioner that generally identifies the work location and the classifications of employees to be included or excluded and the approximate number of employees in the unit;
>
> (3) a statement that 30 percent of the **permanent and probationary** employees in the proposed bargaining unit want to be represented by the petitioner for collective bargaining purposes;. . .

(emphasis added).

The Agency has previously addressed this regulation's "permanent and probationary" language in *United Academic Adjuncts-AAUP/AFT/APEA, AFL-CIO*, Decision and Order No. 218 (April 15, 1997), *aff'd*. 3-AN-97-03432 CI (Jan. 6, 1998). In Decision and Order 218, we concluded that the "permanent and probationary" language in 8 AAC 97.025(a)(3) did not preclude University of Alaska adjunct professors from coming within the statutory definition of "public employee" in AS 23.40.250(6). Decision and Order No. 218 at 7-8 . We rely on the discussion of "permanent and probationary" in that case and do not repeat it here. Similarly, we conclude here that the VSW project employees are public employees under AS 23.40.250(6). As such, we conclude the showing of interest submitted in support of the petition is adequate under AS 23.40.100(a).

2. Do the City of Whittier's Village Safe Water (VSW) project employees share a sufficient community of interest with permanent employees of the City's Department of Public Works (DPW) employees to be included in the collective bargaining unit with them?

AS 23.40.090 contains the factors we must consider in determining the appropriate bargaining unit. It states:

> 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.

Thus, affording employees the "fullest freedom" in exercising their collective bargaining rights under the Public Employment Relations Act (PERA) and avoiding unnecessary fragmenting are factors we must consider, as well as the other section 90 factors. In *UA Classified Employee Ass'n v. University of Alaska*, Decision and Order No. 148, at 8 (Nov. 18, 1992), we stated: "The question is whether the employees in the proposed unit share enough of these [section 90] factors to be represented together without causing unnecessary fragmenting." We will now consider each of these factors.

Wages. We find the method of wages is similar for both the permanent employees and the temporary employees. All are paid by the hour except Director Daniel Sayen, who is salaried. All are eligible for overtime. All the permanent employees, except Sayen, were paid with at least some sewer project funds. In fact, in the pay period shown in Exhibit B, permanent employees Bowman and Leniz were paid for 39 and 10 hours, respectively, from sewer project funds.[4]

Hours. We find the hours of work are more similar than they are different. With the exception of one permanent part-time employee (Chris Bender), both the permanent and temporary employees generally work at least a full 40-hour workweek. Except for Bender, the permanent employees work a 5-day, 40-hour week with occasional overtime hours, but the project employees work 6-day, 66-hour weeks, including overtime.

Other working conditions. We find the working conditions are more similar than they are different. Both the permanent and temporary employees are blue collar workers. Differences in job functions vary widely among both permanent and temporary employees, but the work relates to construction, maintenance and repair. The temporary employees spend all their time working in the project area performing various duties related to laying pipe. Except for permanent employee Bowman, who repaired sewer project machinery as needed, most of the permanent employees did not work on the sewer project. However, permanent employees maintain the water and sewer system.

Community of interest. We find the qualifications, training, and skills vary widely among permanent and temporary employees. Permanent employee Leniz has special qualifications and training, as he is currently the City's only certified sewer-water system operator. Permanent part-time employee Bender will soon be the other certified operator and will also have this special training. Jim Bowman has experience repairing and maintaining vehicles and equipment, while Cecil Talton is a 'jack-of-all trades' who helps wherever needed. It is unclear whether he has or is required to have special skills or qualifications for his job, listed as "operator." In any event, we find some of his job functions, such as pushing snow and mechanic's assistant, require no special training. Finally, Ronald Graham, who was listed as both a DPW employee and a project employee in Exhibit A, worked as a laborer, with no special qualifications required. In addition to Graham, sewer project employees included operators, laborers, pipelayers, a "top man" and a truck driver. We find no special qualifications are required for laborers or pipelayers, but there was no evidence submitted on skills needed to perform the other jobs. The two or three employees hired on a temporary basis to shovel docks in the winter do not need special skills to perform their work. All employees, whether designated DPW or VSW, are subject to supervision by city manager Carrie Williams. Sayen supervises the DPW, but Williams acknowledged she signs all time cards and time sheets and has ultimate hiring and firing authority over all employees. Permanent employee Bowman has contact with the temporary employees when performing repair work. We find there are more differences than similarities in benefits. Permanent employees for the most part enjoy a generous benefit package, but the project employees receive no benefits except paid holidays after working for a minimal required period of time.

History. We find the City of Whittier DPW employees are not represented currently for collective bargaining. In 1992, Teamsters Local 959 proposed to represent employees of the City, with several exceptions. The Alaska Labor Relations Agency Board set the bargaining unit in *Teamsters Local 959 v. City of Whittier*, Decision and Order No. 151 (November 25, 1992). The Teamsters were certified as the representative of the unit. In that decision, we did not address whether temporary employees, such as those in this case, should be included in that bargaining unit. We did exclude seasonal employees because they did not meet the definition of "employee" as defined in former regulation 2 AAC 10.220(b)(2)(A). That regulation is no longer in effect. Accordingly, we give minimal weight to bargaining history in this case.

Desires of the employees. We find no evidence presented on the desires of the employees to form a conclusion on this factor. Therefore, we will not consider this factor in our determination.

Considering all the above factors, we find it is a close question whether the permanent and temporary employees share a sufficient community of interest to be placed in the same bargaining unit. On balance, however, we find that the similarities in wages, hours, working conditions, training, and supervision outweigh the differences in benefits and the temporary versus permanent nature of the work. Moreover, we find an additional important factor here is AS 23.40.090's mandate against unnecessary fragmenting. Finding two separate bargaining units of Public Works employees appropriate in a city the size of Whittier would create unnecessary fragmentation. Thus, we find the permanent and temporary employees should be included in the same bargaining unit.[5]

The City argues the permanent and temporary employees do not share a sufficient community of interest to be included in the same bargaining unit. It cites various National Labor Relations Board cases in support of its position. We note, however, that there is a key difference between the National Labor Relations Act (NLRA) and the Public Employment Relations Act (PERA). While the NLRA has no specific prohibition against fragmenting, the PERA mandates that "

[b]argaining units shall be as large as is reasonable, and unnecessary fragmenting shall be avoided." AS 23.40.090. We are concerned about unnecessary fragmentation of this small unit of workers. We believe that to create one bargaining unit of three or four permanent employees, and then provide for another small unit of temporary employees, all in the City of Whittier's Department of Public Works, would give rise to the unnecessary fragmenting we are mandated to avoid. Under the facts in this case, we find it would not be reasonable to fragment the permanent and temporary employees in the City's Department of Public Works.

Under decisions construing the NLRA, "[e]ligibility to vote in a union organizing election 'depends on whether an employee is sufficiently concerned with the terms and conditions of employment in a unit to warrant his participation in the selection of a collective bargaining agent.'" *Kinney Drugs Inc. v. NLRB*, 151 LRRM 2379, 2390; 74 F. 3d 1419, 1434 (2d Cir. 1996) (*Kinney)*; *citing to Shoreline Enterprises of America, Inc. v. NLRB*, 262 F.2d 933, 944 [43 LRRM 2407] (5th Cir. 1959). In addition, "persons employed in a bargaining unit during the eligibility period and on the date of the election are eligible to vote." *Kinney*, 151 LRRM at 2391, *citing to NLRB v. S.R.D.C., Inc.,* 45 F.3d 328, 331 [148 LRRM 2257] (9th Cir. 1995). Workers "whose anticipated tenure is short and definite [are] unlikely to share a community of interests with regular permanent workers[;] [therefore], courts generally deem these temporary employees 'ineligible to be included in the bargaining unit.'" *Kinney,* 151 LRRM at 2391 (*citations omitted*).

However, the National Labor Relations Board (NLRB) and the federal courts "have had difficulty designing a consistent test to be used for this purpose." *Id.* at 2391. [6] Two tests have been applied, the "date certain" test and the "reasonable expectations" test. Under the date certain test, temporary employees are ineligible to vote "only if a definite termination date has been established." *United States Aluminum Corp.*, 305 NLRB 719, 719 [138 LRRM 1420] (1991). This date may be fixed by a calendar date or reference to completion of a task or project. *Caribbean Communications Corp.*, 309 NLRB 712, 713 [142 LRRM 1130] (1992). Under the reasonable expectations test, "an employee whose term of employment remains uncertain is eligible to vote." *NLRB v. S.R.D.C., Inc.,* 45 F.3d 328, 331 [148 LRRM 2257] (9th Cir. 1995).

The City contends that because the sewer project will end at a definite time, and the temporary employees will then be terminated, no useful purpose would be served by including them in the bargaining unit. (City prehearing brief at 4). However, we find there is no definite ending date to temporary employees' work. This finding is supported by the fact that Graham continued to work for the City after the primary work of the sewer project ended in September 1998. Further, Williams stated there was no definite ending date to the 1998 sewer work. She said there was a "wind down" of the project; everyone did not quit at the same time. Moreover, Williams acknowledged the total project completion is contingent on further funding. That is why she didn't even tell last summer's employees they would have work this summer. Eggener testified that even if funding was not received, there would be some temporary work to do this coming summer. Some temporary employees continued working for the City for indefinite periods of time, and at least one, Talton, was given permanent full-time work, apparently as a result of doing a good job while working on the sewer project. We surmise Graham was also 'rewarded' with continued employment for the quality of work he did as a sewer project employee. Thus, while there is no direct promise of obtaining further work for the City, employees have the opportunity to show what they can do, with the possibility that their hard work may get them further employment with the City. Based on Williams' and Eggener's testimony, and the fact that some employees continued to work for the City on an as needed basis, we find there is no definite end to work for temporary employees.

Based on the above findings and analysis, we conclude the temporary sewer project (VSW) employees should be included in the proposed bargaining unit with the permanent employees in the Department of Public Works.

3. Is the position occupied by Ben Leniz a supervisory position under 8 ACC 97.990(a)(5)?

The City argues that the position occupied by Ben Leniz is a supervisory position and therefore should be excluded from the bargaining unit. The City contends Leniz meets the definition of supervisor in 8 AAC 97.990(a)(5) because he has authority to recommend that employees be hired, fired, transferred or laid off, or to respond to grievances when the Director of Public Works, Daniel Sayen, is on vacation or other leave.

Our regulation 8 AAC 97.990(a)(5) states:

> "supervisory 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[.]

Even if Leniz had authority to act or effectively recommend employing or discipline actions to Williams, or sit in on a grievance while Sayen is absent on leave, this alone does not support a finding that Leniz is a supervisor under 8 AAC 97.990(a)(5). The supervisor definition does not quantify the period of time during a year that an employee must have authority to act or effectively recommend action in the interest of the employer. However, we believe the regulation should not be interpreted to find an employee is a supervisor merely because the employee has intermittent authority to act or effectively recommend action, such as while the employee's supervisor is on leave. We find the intermittent nature of Leniz's authority does not support a finding that he meets the definition of "supervisory employee."

Moreover, our regulation requires the "exercise of independent judgment." In *Public Safety Employees Ass'n v. State of Alaska*, Decision and Order No. 233 (November 24, 1997), we discussed this factor as it related to the role of correctional officers III:

> To perform a supervisory function, the employee must have the authority to act or to effectively recommend action. The definition also requires the exercise of independent judgment or discretion. These requirements should cover as supervisors those employees who are the *genuine decision makers* even though final authority may reside at a higher level.

Id. at 30 (emphasis added).

We went on to find that the "role of correctional officers III is quite limited and generally restricted to shift supervisors who function as lead workers." *Id.* at 31. We find any decision-making role Leniz's position plays is similarly "quite limited." Furthermore, we believe that during the periods Sayen is absent, city manager Williams --and not Leniz-- is the "genuine decision maker." Accordingly, we conclude that Leniz is not a supervisor under 8 AAC 97.990(a)(5).

In its prehearing brief, the City asserts: "Alaska Superior Court Judge Rene Gonzales explained that the intent of 8 AAC 97.090(a)(1) is to prevent conflicts of interest between supervisors and non supervisors, and that the mere possession of supervisory authority, even if never exercised, is enough for an employee to qualify as a supervisor under 8 AAC 97.990(a)(5). *Id.* at 8-9. Mr. Leniz qualifies as a supervisor under this test, and therefore is not appropriately included in the same unit with non supervisors." (City of Whittier prehearing brief at 8, *citing to Alaska State Employees Ass'n AFSCME Local 52, AFL-CIO v. State*, Decision & Order No. 219, (May 27, 1997), *aff'd* No 3-AN-95-9083 (July 7, 1998), appeal docketed, S-08756. However, we have already concluded Leniz is not a supervisory employee. But even assuming Leniz was a supervisory employee, his supervisory responsibilities differ significantly from those of the employees analyzed by Judge Gonzalez. Unlike those employees, Leniz's supervisory functions are intermittent in nature. Whatever responsibility Leniz has is limited to periods when the Public Works Director is absent. We conclude this intermittent supervision would not qualify Leniz to meet the definition of "supervisory employee" in 8 AAC 97.990(a)(5).

Regardless of Leniz's supervisory status, we conclude he should be included in the proposed bargaining unit. The regulation cited by the City, 8 AAC 97.090(a)(1), applies only at the state level. We disagree with the City that we should be guided by this regulation and apply it in this case. On the contrary, we find there is no regulatory prohibition against including supervisory employees with nonsupervisory employees in political subdivision bargaining units. Combining supervisory employees with nonsupervisory employees in political subdivision issues is decided on a case-by-case basis. *See* Alaska *Public Employees Ass'n v. Cordova*, Decision & Order No. 137, at 10 (Dec. 31, 1991); Alaska

State Employees Ass'n AFSCME Local 52, AFL-CIO v. State, Decision & Order No. 219, at 38 (May 27, 1997), *aff'd* No 3-AN-95-9083 (July 7, 1998), appeal docketed, S-08756.

The City points out that in *State of Alaska v. Alaska State Employees Ass'n,* Decision and Order No. 219, the Agency discussed the conflict that can occur when management's representatives are mixed with rank and file employees. *Id.* at 35. However, even if Leniz was a supervisor, we find it would still be appropriate to include him in the unit with the other employees. Decision and Order 219 also stated that small political subdivisions "could be an exception [to the separation principle] because the prohibition against fragmenting could outweigh the factors that support a different unit for supervisors." *Id*. at 35. *See also Alaska Public Employees Ass'n v. City of Cordova,* Decision & Order No. 137, at 9-10 (Dec. 31, 1991). We find that is the very situation here. The City of Whittier is a small political subdivision employer. We find the petitioned-for unit is a small unit, consisting of approximately 16 permanent and temporary employees. Based on the prohibition against unnecessary fragmenting, Leniz should not be separated from the unit, even if he were deemed a supervisory employee. Accordingly, Leniz should be included in the proposed bargaining unit.

Conclusions of Law

1. The City of Whittier is a public employer under AS 23.40.250(7); the Laborers Local 341 and Operating Engineers 302, AFL-CIO (unions) are labor organizations under AS 23.40.250(5); and this Agency has jurisdiction under AS 23.40.090 and AS 23.40.100 to consider this case.

2. The unions as petitioners have the burden to prove each element of their claims by a preponderance of the evidence. 8 AAC 97.350(f).

3. The unions' showing of interest under AS 23.40.110(a)(1) is sufficient to proceed with the petition.

4. The Village Safe Water project employees are public employees, as defined in AS 23.40.250(6).

5. The phrase "permanent and probationary" in 8 AAC 97.025(a)(3) does not have the effect of limiting the rights of the Village Safe Water project employees to seek representation in collective bargaining.

6. Assuring the fullest freedom to exercise rights under PERA requires finding the proposed unit of City of Whittier Department of Public Works Water and Sewer employees an appropriate unit.

7. The wages, hours, other working conditions, and community of interest support the conclusion that the unions' proposed unit of Department of Public Works/Sewer and Water employees is an appropriate unit.

8. Creating a separate unit of Village Safe Water project, or temporary, employees would result in unnecessary fragmentation. The prohibition against unnecessary fragmentation in AS 23.40.090 strongly supports the proposed unit of City of Whittier Department of Public Works/Sewer and Water employees.

9. Ben Leniz is not a supervisor under 8 AAC 97.990(a)(5).

ORDER

1. The objections of the City of Whittier to the petition of Laborers Local 341 and Operating Engineers 302, AFL-CIO, for a representation election among a unit of all public works/ sewer and water department employees are hereby denied.

2. The unit petitioned for is the appropriate bargaining unit, with the exception of the public works director's position, which the parties have stipulated is excluded from the unit.

3. An election is directed among the employees in the bargaining unit found appropriate under procedures set out in the

regulations, including 8 AAC 97.130, addressing eligibility to vote.

4. The City of Whittier 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

Robert A. Doyle, Board Member

Raymond P. Smith, Board Member

APPEAL PROCEDURES

This order is the final decision of this Agency. Judicial review may be obtained by filing an appeal under Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of filing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the order in the matter of LABORERS LOCAL 341 & OPERATING ENGINEERS 302, AFL-CIO, v. CITY OF WHITTIER, Case No. 99-911-RC, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 3rd day of March, 1999.

Donna Bodkin
Administrative Clerk III

This is to certify that on the 3rd day of March, 1999, a true and correct copy of the foregoing was mailed, postage prepaid to

Kevin Dougherty, Laborers Local 341 & Operating Engineers 302, AFL-CIO

Louisiana Cutler, City of Whittier

Signature

1 The parties stipulated that Department of Public Works employee Dan Sayen, originally included in the proposed unit, is appropriately excluded from the unit.

2 Neuser eventually transferred to another project and was replaced by Monte Jones.

3 As noted, the parties stipulated that Sayen would be excluded from the proposed bargaining unit.

4 The status of Cecil Talton is confusing. Testimony indicated he was a sewer project employee until the end of the 1998 season and then became a permanent full-time employee of the DPW. His payroll for the payroll run on October 22, 1998 is shown as VSW hours. (Exhibit B). However, on the August 27, 1998 list of included employees for the City of Whittier, provided by Williams, Talton is listed as a "PW," or public works employee.

5 The National Labor Relations Act does not contain a prohibition against unnecessary fragmenting.

6 This Agency gives great weight to relevant decisions of the NLRB and federal courts. 8 AAC 97.450(b).