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CITY OF SELDOVIA, (police chief position),)
)
 Petitioner,)
)
 vs.)
)
 INTERNATIONAL BROTHERHOOD OF)
 ELECTRICAL WORKERS, LOCAL 1547,)
 AFL-CIO,)
)
 Respondent.)
)
)
)

Case No. 05-1405-UC

DECISION AND ORDER NO. 280

The ALRA Board (Vice Chair Aaron T. Isaacs, Jr., and Members Dennis Niedermeyer and Matthew McSorley) heard this petition for unit clarification on April 6, 2006, in Anchorage. Attorney Thomas P. Owens, Jr. represented the City of Seldovia (City), and Attorney James K. “Jake” Metcalf represented the International Brotherhood of Electrical Workers, Local 1547, AFL-CIO (IBEW). Hearing Examiner Mark Torgerson presided. The record closed on Friday, May 12, 2006, when the Board next met after the deadline for filing closing arguments.

Digest: The petition to remove the police chief position from the City bargaining unit that the IBEW represents is denied. The police chief is not an “appointed official” under 8 AAC 97.990(b)(2), a “confidential employee” under 8 AAC 97.990(a)(1), or a guard. Although previously the police chief has effectively recommended the hire of subordinates in a manner that could make him a “supervisory employee” under 8 AAC 97.990(a)(5), any supervisory duties he has under 8 AAC 97.990(a)(5) do not require his exclusion from the bargaining unit of City employees. Removing the police chief position from the bargaining unit would reduce the size of the unit, making it not as large as is reasonable. The police chief shares a sufficient community of interest with the other

employees in the bargaining unit for the position to remain where it has resided historically.

DECISION

Statement of the Case

The City filed this unit clarification petition, seeking to remove the police chief position from the unit of City employees represented by the IBEW. The City contends that the police chief position should be removed from the bargaining unit because Police Chief Andy Anderson is (1) an “appointed official,” not a “public employee” under the Public Employment Relations Act (PERA) and therefore must be excluded from collective bargaining under PERA; (2) a supervisory employee who cannot be included in a unit with rank and file employees; (3) a confidential employee who cannot be included in a unit with rank and file employees; and (4) a guard and therefore cannot be included in a unit with non-guard employees. The IBEW maintains that the Board should dismiss this petition and keep the police chief position in the bargaining unit of City employees.

Issues

1. Is the employee in the police chief position an “appointed official” as defined in 8 AAC 97.990(b)(2)?

2. Is the police chief a “supervisory employee” under 8 AAC 97.990(a)(5)? If so, should the police chief position be removed from the bargaining unit of City employees?

3. Is the police chief a “confidential employee” under 8 AAC 97.990(a)(1)? If so, should the police chief position be removed from the bargaining unit of City employees?

4. Is the police chief a guard? If so, should the police chief position be removed from the bargaining unit based on the National Labor Relations Act’s requirement prohibiting guards from being in a unit of rank and file employees?

Findings of Fact

The Panel, by a preponderance of the evidence, finds the facts as follows:

1. The City and the IBEW entered into a collective bargaining agreement, effective July 1, 2003, through December 31, 2004, and “thereafter from year to year, unless notice is given in writing by either party . . . to terminate, modify, or change this Agreement.” (Exh. 25, at 5).

2. The unit the IBEW represents is described in the parties' agreement as "all regular, regular part-time, and seasonal employees of the City." *Id.* There are six employees in the unit. (Tr., p. 108).

3. Positions in the bargaining unit are the police chief, harbormaster, custodian, fire administrator, and two positions in the maintenance department. (Tr., p. 108).

4. The Agency issued a certificate of election on February 7, 1995, approving a unit of "[a]ll permanent full-time, part-time, and seasonal employees of the City of Seldovia." (emphasis added) (Exh. 2). The only positions excluded from the unit at the time the unit was formed were the city manager and city clerk-treasurer. *Id.* The police chief position has been in the bargaining unit since the unit was formed. (Tr., p. 120).

5. Andy Anderson occupies the police chief position. He has been in this position since August 9, 1979, when he was hired by the city manager at that time, Don Caswell. (Tr., pp. 105 & 123; Exh. B, at 8). As part of its investigation, the Agency asked Anderson if his hire for the police chief position had to be approved by the city council. (Exh. B, at 4). Although Anderson responded to this question by stating "[a]s per Municipal Code the Chief of Police is hired by the City Manager and approved by Council action," at the hearing Anderson testified that his placement in the position was not confirmed by the city council when he was hired, nor has it been confirmed at any time subsequently. (Exh. B, at 8; Tr., pp. 124 & 152). Anderson has served as the police chief under twenty-three or twenty-four city managers. (Tr., p. 106). His employment has continued without interruption during the changes in city managers. (Tr., pp. 124-125 & 153). The preponderance of evidence shows that Anderson's position has never been submitted to the city council for approval.

6. The City's ordinance number 2.12.010 states that "[t]he officers of the City shall be the *ex officio* Mayor, the City Treasurer and the City Councilmen. The City Manager may hire the Chief of Police, the City Engineer, the City Clerk, the Harbormaster and any other employees at such salaries and wages as may be required within the budget items authorized by the City Council. (Sec. 1 of Ord. dated 12/30/70: prior code Sec. 2.005)." (Exh. A, at 2).

7. City Ordinance Number 2.12.020 states that "[a]ll appointments made by the Mayor or City Manager shall be subject to confirmation of the Council. All officers appointed by the Mayor and confirmed by the Council shall hold office at the pleasure of the Council, but not beyond the term of the Mayor by whom they are appointed. (Ord. 75-1 Sec. 2., 1975)." (Exh. A, at 2).

8. The police department has had another officer on staff periodically over years that Anderson has been the chief. However, it has been approximately two years since another police officer has been in the department. Typically, the officers stay between one and three years. Periodically, the position is unfilled due to budgetary or other reasons. (Tr., p. 106).

9. Among other duties, Anderson is responsible for patrol, investigation, traffic control, and animal control matters. (Tr. p. 106). In short, since the department consists only of Anderson at the present, he is responsible for all aspects of running it. On the occasions when one or more additional staff members are employed in the police department, Anderson determines the work schedule for them and supervises their activities. (Tr., p. 88; Exh. F, at 10). He is available to answer any questions that arise, and to provide any needed assistance. (Tr., p. 133).

10. The police department manual, the municipal code, and a job description all address the police chief's duties. (Tr., pp. 139-140). Anderson did not recall seeing the City of Seldovia Job Description that was submitted as Exhibit 4 prior to seeing it at the April 6, 2006, hearing. (Tr., p. 140). Among other duties, the job description states that the police chief "[m]akes recommendations regarding employment of any new Police Department personnel or the termination of any police department employee for cause." (Exh. 4).

11. Even though Anderson does not recall seeing this job description, it is similar to the actual hiring practice that has occurred; i.e., Anderson has recommended the hire of police officers. (Tr., pp. 28 & 82-83). For example, he recommended the hire of Roger Purcel and the temporary hire of a person who had retired from the City of Chicago Police Department. (Tr., pp. 91-92 & 190). Since his recommendations have been accepted, Anderson believes his hiring recommendations are effective. (Tr., pp. 83 & 99). In addition to recommending a candidate for hire, Anderson participates in the hiring process by advertising a position, asking for resumes, interviewing applicants, and doing background checks. (Tr., pp. 28 & 109). Anderson has never hired a person without the city manager approving the hire. (Tr., p. 110).

12. Only the city manager has the authority to hire city employees. (Tr., p. 82; Exh. C, at 1). A City employment policy document that Anderson acknowledges receiving states that "[t]he City Manager is the only municipal official who can hire and terminate Municipal employees. All other managerial personnel (Supervisors, Manager, etc.) may advertise for positions and seek out qualified individuals but they can only recommend to the City Manager the employment or termination of an individual." *Id.*

13. Anderson has not made an independent decision to lay off a police department employee. The decision to lay off a police officer was made by the city council due to budgetary reasons. (Tr., p. 125).

14. Anderson would decide initially if any incident of alleged misconduct by a subordinate officer had enough merit to be referred to the city manager. (Tr., p. 85). Anderson does not believe the provisions of the police department manual that state "[n]o employee shall be suspended without pay, demoted, or discharged without consultation and approval of the chief of police" would be followed in Seldovia. (Exh. K, at 83; Tr., p. 87). Anderson believes that the city manager would decide whether to impose any discipline more severe than a conversation between Anderson and the employee.

Although Anderson expects the city manager to consult him, he does not believe any action he wanted to take would be implemented if the city manager did not agree with what he had proposed. (Tr., pp. 86-87).

15. The greatest level of discipline that Anderson has imposed independently is verbally admonishing an employee. (Tr., p. 127). A verbal warning is the first level of discipline that is listed in most of the documents that apply to the police department. (Tr., p. 141). However, Anderson has advised an employee at the time of hire that certain actions, such as failing to follow the chain of command and undermining his authority, would not be tolerated and would result in termination. (Tr., p. 145; Exh. F, at 10). At most, Anderson has the authority to recommend discipline. (Tr., p. 146). If a need to discipline an employee existed, Anderson would recommend action that was in the best interest of the police department and the City. (Tr., pp. 93-94). Anderson has participated in the discharge of an officer who did not pass a psychological test required by the City. The officer had been told at the time of hire that his continued employment was contingent on passing a psychological examination, background investigation, medical examination, and drug screening procedure. Anderson responded to the Human Rights Commission on behalf of the City after the officer filed a Human Rights complaint. (Exh. F, at 6, 7, 11-16).

16. Anderson would approve outside employment for a member of the police department only if it didn't interfere with the person's work for the police department. If it could harm the department's reputation, or be detrimental to the department, Anderson would take the matter to the city manager for a decision. (Tr., pp. 134-135).

17. In addition to police officers, Anderson has supervised guards and part-time clerical help. A guard is required to be present when there is a prisoner in a jail cell. Anderson has not had a part-time clerical assistant for a year. The city manager hired the person who most recently filled the clerical position. (Tr., pp. 127-128).

18. The current city manager, Kurt Reynertson, had been employed in the position for eleven months in April 2006. (Tr., p. 157). One of Reynertson's duties is to supervise the police chief. Reynertson expects the police chief to perform the duties in the police department policy manual. (Tr., p. 161). Reynertson believes he cannot ask Anderson to assist with negotiations because it is a conflict for Anderson to be the police chief and in the bargaining unit. (Tr., pp. 163-166). The parties are not in collective bargaining negotiations now, nor have they been during the time Reynertson has been the city manager. (Tr., p. 167). Reynertson does not believe he could consult Anderson even about planning for a new collective bargaining agreement because Anderson is in the bargaining unit. (Tr., pp. 164-165).

19. Former City Manager Kenneth Weaver did not consider Anderson's position to be part of the confidential staff that made personnel decisions. Weaver did not find a conflict between Anderson's role of shop steward and police chief while Weaver was the city manager. (Tr., p. 192).

20. If the City were to ask Anderson to give it advice about what labor relations policies should be for the police department, Anderson would have to ask the IBEW if he could advise the City. (Tr., pp. 143-144).

21. Anderson was not asked by the City to attend meetings that pertained to management, budgeting, administrative, and contracting issues for the police department prior to the employees voting to be represented by the IBEW. He has not been consulted about policy decisions after the unit was certified. He does not believe that he will be consulted in the future. (Exh. B, at 9 & 15).

22. Anderson does not assist and act in a confidential capacity to a person who formulates, determines, and effectuates management policies in labor relations matters currently, nor has he in the past. For example, when Anderson worked for City Manager Weaver from September 2000 to October 15, 2002, Weaver did not ask Anderson to assist him in a confidential capacity. The contract was not being negotiated when Weaver worked for the City, and Weaver did not seek Anderson's assistance with contract administration. Any confidential matters pertained to Anderson's police work, not labor relations policies. (Tr., pp. 185-187). At most, Anderson makes a list of items, training, and staff he would like to have for the police department. The city manager and the city clerk draft the budget for the police department. (Tr., p. 126). Due to budget constraints, Anderson only gets what the City can afford. (Tr., p. 122). He must fill out a purchase order and get approval from the city manager or the treasurer before he can purchase equipment. (Tr., p. 122). Although Anderson has estimated the cost of having two vehicles for the police department for a year, he never has estimated the cost for personnel in the police department. (Tr., p. 132). The wages for the police chief and police officers are contained in the collective bargaining agreement. The cost of the positions can be determined by looking at the parties' agreement and calculating the number of hours each employee worked yearly. (Tr., p. 172).

23. Anderson assisted the city manager with an extension to the special services contract between the Department of Public Safety and the City. He was involved in the meetings to arrange the extension, and he signed the contract at the direction of the city manager, who was out of town. (Tr., pp. 89-90; Exh. C, at 9). He would not have signed it had the city manager been available. (Tr., p. 112).

24. As part of his police officer duties, Anderson checks doors to city property to insure that they are locked. However, he does not specifically watch city employees with any greater scrutiny than he does other citizens to make sure that they are complying with the law, nor does he guard city buildings. Anderson does not have a key to the city manager's office or the clerk/treasurer's office. (Tr., pp. 128-129 & 151). Reynertson expects Anderson to protect all property in the City, including that which is privately owned and that which is owned by the City. (Tr., p. 166). Reynertson testified that Anderson did not have a key to the city office due to an oversight, which would be corrected. (Tr., pp. 170-171). Reynertson expects Anderson and any of Anderson's subordinates to observe the conduct of people in the City, including members of the bargaining unit. (Tr., p. 166). Former City Manager, Weaver stated that Anderson "has a

general duty to look at all the property in the city, including the City's." (Tr., pp. 191-192).

25. In approximately 1996, because a police department policy and procedures manual was needed for insurance purposes, Anderson contacted the Homer Police Department and asked to borrow a copy of its police department manual. (Tr., pp. 41 & 70 & 78). Anderson adapted the manual for the City. (Tr., pp. 70-71). The manual serves as a basic guideline for police department operations. Anderson refers to it occasionally, but he does not follow it strictly. (Tr., pp. 71-72). When faced with a disciplinary matter, Anderson would follow the contract instead of the manual because the manual is only a guideline. (Tr., p. 152). To the best of Anderson's knowledge, the city council has never adopted this manual. (Tr., p. 77). He does not know if there is any requirement that the city council adopt the manual. (Tr., p. 136). Anderson does not believe he can independently develop policies for the police department for vacation or leave, for example, because there are personnel rules, the municipal code, and a collective bargaining agreement that would need to be considered. If he wanted to develop a policy for these matters, he would need to consult the IBEW and the city manager. (Tr., pp. 130-131).

26. For the past three years, Anderson has served as a shop steward. Anderson has not had to handle a grievance filed by another police officer because none have been filed. If a grievance were to be filed that presented a conflict for him in his dual roles of shop steward and police chief, Anderson would ask someone from IBEW to represent the other person. If a complaint was made against Anderson, Anderson would involve the city manager. (Tr., pp. 55-57). Anderson would not investigate or respond to a complaint filed against him. (Tr., p. 56). Anderson believes he would be able to handle any conflicts that could occur in his dual role of shop steward and police chief by calling in resources that would help with the matter, such as the union hall, the Alaska State Troopers, and the city manager. (Tr., pp. 58-62). Anderson's primary duties as shop steward have been to inform the IBEW of employee concerns and participate in negotiations with the City on behalf of the IBEW and the bargaining unit members. (Tr., pp. 63-64, 107-108 & 119). Anderson is willing to cease being a shop steward if those duties interfere with his police chief duties. (Tr., p. 147).

27. Although Anderson has not experienced any conflicts of interest in handling grievances in his dual role as a shop steward and the police chief, he could experience a conflict if a subordinate in the police department filed a grievance. Under the collective bargaining agreement, a step one grievant "may either discuss his or her grievance with the immediate supervisor responsible or use the Shop Steward who will in turn seek to settle the grievance with the aggrieved employee's immediate supervisor." (Exh. 24, at 6). Anderson would resolve any actual conflicts by asking someone from IBEW to handle the grievance for the union and the city manager to handle it for the City. (Tr., pp. 61-62 & 137-139).

28. Anderson prefers to remain in the bargaining unit of City employees. (Exh. B, at 9).

29. Ronda Haynes occupies the city clerk/treasurer position. She has been employed with the City for nine years. She was first employed as a treasurer, and in 2003, the position was combined into a clerk/treasurer position. (Tr., pp. 18-19; Exh. A, at 4). Haynes was appointed to her position by the city manager, and the city council confirmed the appointment. Her position has not been in the bargaining unit during the time that she has worked in the position. (Tr., pp. 32 & 38-39). Even though she has worked for four city managers and numerous acting city managers, her position has not been submitted for confirmation after a city manager leaves office. She has an expectation of continued employment even though the person occupying the city manager position changes. (Tr., pp. 20 & 35-36).

30. City Ordinance Number 2.18.030., which concerns the city clerk-treasurer position, requires that “[a]ppointment shall be by the City Manager and confirmed by the Council. (Ord. 04-01).” (Exh. A, at 4).

31. Through her work as the clerk/treasurer, Haynes is familiar with Anderson’s input into the budgeting process. Anderson supplies a list of equipment and positions needed for the police department. Because City finances are slim, the list is short and positions requested are not always filled. (Tr., pp. 29-30 & 38). According to Haynes, Anderson is the sole police department employee. (Tr., pp. 37-38). Other than Anderson, John Holly was the last police officer employed. Holly was last employed approximately two years ago. (Tr., p. 40).

32. During negotiations in 2000, when IBEW Assistant Business Manager Robert Zehnder negotiated for the IBEW, and Dave Chouquette was the city manager, Chouquette raised the issue of removing the police chief position from the bargaining unit. According to Zehnder, Chouquette was interested in removing the police chief position because it was Chouquette’s understanding that Anderson’s position was the only police chief position in the State that was in a bargaining unit, and also because there was some pressure from the city council to remove it. (Tr., pp. 194, 196 & 199). When negotiations concluded, the position remained in the unit. (Tr., p. 201).

33. The harbormaster supervises employees when additional people are hired during the summer to assist the harbormaster. (Tr., pp. 108-109). The City does not seek to remove the harbormaster position from the bargaining unit based on its supervisory duties.

34. The police chief position shares a community of interest with the other positions in the bargaining unit. The police chief is a regular, full-time employee. While there are some differences in the amount of benefits earned by regular full-time employees and regular part-time employees based on the number of hours they work, they are covered by the same leave accrual system, holiday schedule and holiday pay provisions, discipline and grievance procedures, leave use policies, pension and health insurance plans, and they have the same payday. (Exh. 25, at 8-17). On the 2003 wage scale, at \$20.42 per hour, the police chief is the highest paid employee. The facilities

maintenance person is the next best paid, earning \$19.07 per hour. The custodian earns the least, at \$8.71 per hour. (*Id.*, at 18). All unit employees are eligible for overtime. (*Id.*, at 13). However, there are some differences in the police officer positions and other positions in the bargaining unit. The parties have agreed to allow the police department employees to take compensatory time off in lieu of payment for overtime. (*Id.*, at 13). Police officer positions have a probationary period that is specified by law. (Exh. 24, at 9). Additionally, police officer candidates have to meet certain additional requirements, such as passing a psychological examination, background investigation, medical examination, and drug screening. (Exh. F, at 11). The City does not seek to remove police officer positions from the bargaining unit due to these differences. It seeks only to remove the police chief position.

35. If the police chief position were to be removed from the bargaining unit, the unit of City employees would not be as large as is reasonable. Removing the police chief position would reduce the unit size to five.

ANALYSIS

The City must prove each element of its petition by a preponderance of the evidence. 8 AAC 97.350(f). The issues in this case concern the City's petition to remove the police chief from the bargaining unit of City employees. First, is Anderson an "appointed official" as defined in 8 AAC 97.990(b)(2)? Second, is the police chief a "supervisory employee" under 8 AAC 97.990(a)(5)? If so, should the police chief position be removed from the unit of City employees? Third, is the police chief a "confidential employee" under 8 AAC 97.990(a)(1)? If so, should the police chief position be removed from the bargaining unit of City employees? Fourth, is the police chief a guard? If so, should the police chief position be removed from the bargaining unit based on the National Labor Relations Act's requirement prohibiting guards from being in a unit of rank and file employees?

1. Is Anderson an "appointed official" as defined in 8 AAC 97.990(b)(2)?

The City contends that we should remove the police chief position from the bargaining unit of City employees because Anderson is an "appointed official" under 8 AAC 97.990(b)(2). The IBEW disputes the City's claim that Anderson is an "appointed official," and argues instead that Anderson is a "public employee" under AS 23.40.250(6). It also argues that Anderson's position should remain in the bargaining unit of City employees, where it has resided since the unit was formed.

AS 23.40.250(6) defines "public employee" as "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). Under 8AAC 97.990(b)(2), "appointed officials includes at the political subdivision level, only those persons appointed directly by the highest ranking executive officer of an organized borough or other political subdivision."

The first question that must be addressed is whether Anderson is an “appointed official.” If he is, he cannot be a “public employee” subject to coverage under PERA, and the remaining issues need not be addressed. The evidence shows that Anderson was hired into his police chief position, and his hiring has never been confirmed by the city council. He has enjoyed continuous employment while he has worked for approximately twenty-four city managers. No city manager has deemed it necessary to terminate his employment and have the new city manager determine whether Anderson should be rehired, nor has any city manager submitted Anderson’s position for confirmation by the city council. In contrast, Ronda Haynes, who occupies the clerk/treasurer position, had her appointment submitted for confirmation by the city council when she was appointed to the treasurer position. In 2003, the position was combined into a clerk/treasurer position.

The fact that Haynes’ treasurer position was submitted to the city council for confirmation is consistent with the provision in the City’s ordinance that requires city council confirmation for appointed positions that are considered to be officers. Under the City’s ordinance numbers 2.12.010 and 2.12.020, **officers** are listed as the ex officio mayor, the **city treasurer** and the city councilmen. (Emphasis added). “All officers appointed by the Mayor and confirmed by the Council shall hold office at the pleasure of the Council, but not beyond the term of the Mayor by whom they are appointed.” (Exh. A, at 4). Significantly, the police chief position is not listed as an officer. Instead, Ordinance No. 2.12.010 provides that “[t]he City Manager may hire the Chief of Police, the City Engineer, the City Clerk, the Harbormaster and any other employees at such salaries and wages as may be required within the budget items authorized by the City Council.” (*Id.*, at 2).

We do not find that the person in police chief position is an “appointed official” as defined in 8 AAC 97.990(b)(2). The police chief is not considered an officer under the City’s Ordinance No. 2.12.010; his position was not confirmed by the city council; and he was hired, not appointed. We conclude that Anderson was not appointed to his position by the City’s highest ranking executive officer; instead, he was hired into it. Because Anderson is not an “appointed official” under 8 AAC 97.990(b)(2), he is a “public employee” as defined in AS 23.40.250(6). As such, he is entitled to be represented for collective bargaining purposes under PERA. We deny the City’s request to remove the police chief position from the bargaining unit on the basis that the person in it is an “appointed official.”

2. Is the police chief a “supervisory employee” under 8 AAC 97.990(a)(5). If so, should the police chief position be removed from the bargaining unit of City employees?

The City claims that Anderson is a “supervisory employee” under 8 AAC 97.990(a)(5), and therefore cannot be included in a bargaining unit of rank-and-file employees. The IBEW contends that Anderson is not a “supervisory employee” because he has been the sole employee of the police department a great deal of the time he has

been employed as the police chief. The IBEW also contends that Anderson functions as a lead person when there have been other officers in the department, he can only recommend hiring actions, his authority to discipline is limited to giving a warning, and he can only be involved in the first stage of any grievance. (Respondent IBEW's Brief, at 3-4).

Under Agency regulation 8 AAC 97.990(a)(5), "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) disciplining, including suspending, discharging, demoting, or issuing written warnings; or

(C) grievance adjudication, including responding to a first level grievance under a collective bargaining agreement[.]

In a bench order issued on May 19, 2006, we stated that "[t]he City failed to show that the Chief is a supervisor. Even if he was deemed a supervisor, we have previously concluded that supervisors may be included in bargaining units with rank and file employees at the city level." (Bench Order, at 2). Primarily, we find that Anderson is not a supervisor because he has not supervised anyone for approximately two years. From 1979, when he was hired as the police chief, to the present, there have been times when there has been another employee in the police department, and there have also been times when Anderson is the sole employee.

However, since the evidence does show that periodically, Anderson has performed employing actions that could make him a supervisor under 8 AAC 97.990(a)(5), we will address the supervisory issue in greater detail.¹ Anderson has recommended the hire of police officers. Because his recommendations have been accepted, they are effective. Anderson has participated in hiring by advertising a

¹ Previously, we determined in a case involving a political subdivision that performing supervisory duties on an intermittent basis when an individual's supervisor was absent due to vacation or another temporary reason was insufficient to make the employee a supervisor under 8 AAC 97.990(a)(5). *Laborers Local 341 & Operating Engineers 302, AFL-CIO v. City of Whittier*, Decision & Order No. 242, at 12-13 (March 3, 1999). The facts in the present case support a finding that Anderson has at times been a "supervisory employee" under the regulation. The nature of Anderson's intermittent supervision is distinguished from that performed in the Whittier case because Anderson supervises for substantially longer periods of time when there is another police department employee for him to supervise. Moreover, unlike in the Whittier case, the evidence here shows that Anderson does have sufficient authority to recommend action in at least the employing function to make him a "supervisory employee" under the regulation.

vacancy, soliciting resumes, interviewing applicants, conducting background checks, and deciding which applicant to recommend. These actions require the exercise of independent judgment. See *State of Alaska v. Alaska State Employees Ass'n, AFSCME Local 52, AFL-CIO*, Decision and Order No. 219, at 47-52 (May 27, 1997, *aff'd* No. 3-AN-95-9083 (July 7, 1998), *aff'd* No. S-08756 (Oct. 15, 1999)). An employee is not required to have complete discretion in determining whom to hire, for example, to be a "supervisory employee" under the regulation. The regulation requires only that the employee at least effectively recommend action in any one of the three supervisory functions in a manner demonstrating the exercise of independent judgment. (Emphasis added). Anderson has met this test in the employing function.

In the discipline function, Anderson has verbally warned an employee without consulting a superior. Anderson also would determine if an allegation of officer misconduct was sufficiently serious to merit referring the matter to the city manager. The evidence shows that Anderson believes the city manager would consult Anderson before determining whether to impose discipline on a subordinate in the police department, but Anderson does not believe his opinion would prevail if the city manager disagreed.

Due to Anderson's dual roles of police chief and shop steward, it is difficult to determine if he has sufficient authority in the grievance adjudication function to resolve a level one grievance, if the police department had an officer and the officer filed a grievance. As shop steward, he would be expected to advance a meritorious grievance on the IBEW's behalf. This could conflict with the provision in the parties' agreement, which provides that the immediate supervisor will respond to a step one grievance. No grievances have been filed that require Anderson to decide how he will handle them. However, because we have already determined that Anderson has sufficient authority in the employing function to be a "supervisory employee" under 8 AAC 97.990(a)(5) when there are police department employees to supervise, we need not determine whether Anderson has sufficient authority in the discipline function to at least effectively recommend action in a manner demonstrating independent judgment, nor do we need to determine if he has sufficient authority to settle grievances.

We next consider whether Anderson's authority to effectively recommend employing actions under 8 AAC 97.990(a)(5) requires the removal of his position from the unit of rank and file City employees. First, we note that 8 AAC 97.090, the regulation requiring that supervisory employees be in a separate unit from nonsupervisory employees, pertains only to bargaining units at the state level. Since the regulation does not apply to political subdivisions, it does not require Anderson's position to be removed from the bargaining unit.

Even though the regulation does not require separation of supervisory employees from nonsupervisory employees at the political subdivision level, under AS 23.40.090, we will examine the facts in this case to see if Anderson's position should be removed from the unit based on his supervisory duties. AS 23.40.090 grants this Agency authority to "decide in each case, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [PERA], 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."

1. Community of Interest.

In weighing all the evidence on this issue, we find it favors supporting a community of interest with employees in the current bargaining unit. The police chief's community of interest is not so distinct or dissimilar from that of the other bargaining unit employees that it warrants granting the City's petition. According to Patrick Hardin and John E. Higgins, Jr.,

Community of interest is the fundamental factor in bargaining unit determinations involving not only previously unrepresented employees but also attempts to sever a group of already represented employees from a larger bargaining unit. In *Kalamazoo Paper Box Corp.*, a unit-severance case, the Board enumerated the factors used in determining whether community of interest sets a group of employees apart from other employees:

[A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs . . .; the infrequency or lack of contact with other employees or interchange with them; and the history of collective bargaining.

1 Patrick Hardin and John E. Higgins, Jr., *The Developing Labor Law*, at 592 (4th Ed. 2001).

The City argues that the police chief position does not share a community of interest with members of the rank and file unit due to its supervisory duties. Moreover, the City believes Anderson's shop steward duties are in conflict with his supervisory duties. The City is concerned particularly with the conflict in grievance adjudication responsibilities.

In addressing these arguments, it is relevant to note that Anderson only supervises other employees in the police department periodically. During Anderson's career, there have been times when he has not had any subordinate employees to supervise. For example, there has not been another employee in the police department for the last two years.

We would be reluctant to disturb the boundaries of a small, six-person unit by removing one-sixth of it based on supervisory duties which are not exercised for substantial periods of time due to lack of employees to supervise. Also, removing the position from the unit only when Anderson has employees to supervise would be unjust, and it would not be in the best interest of either party, the other bargaining unit members, or Anderson. For example, moving the police chief position in and out of the unit could affect Anderson's benefits, such as his retirement pension; it would impact his ability to hold positions that assist the union as a member of the bargaining unit; it would affect the unit's numerical strength; and it could impact the amount of responsibility that the City might confer on Anderson depending on whether his position was in or out of the unit. The parties, the bargaining unit members, and Anderson should be able to rely on stability regarding where the position is placed.

We do not find that any supervisory responsibility Anderson has had under 8 AAC 97.990(a)(5), or has currently, if the City decides to add other employees to the police department, justifies removing the police chief position from the bargaining unit. Any potential conflicts of interest are not so great as to outweigh the substantial community of interest that Anderson has with the other members of the bargaining unit based on shared employment conditions and supervision by the city manager.

Admittedly, a potential conflict of interest exists if Anderson has a subordinate, and that subordinate files a grievance while Anderson is still acting as a shop steward. However, we do not find that any potential of a conflict of interest is so compelling that it requires removing Anderson's position from a six-person unit. First, during the eleven years that the unit has been represented by the IBEW, no grievances have been filed that have placed Anderson in the position of an actual conflict. Second, if an actual conflict were to arise, Anderson has stated that he will manage it by having someone else handle the grievance for the union and a different individual handle it for the City. Anderson also has stated a willingness to resign his shop steward duties should it become necessary to do so.

2. Wages.

The wages of the police chief support the status quo. The evidence in the record indicates that the police chief is paid under the same wage scale as are other employees in the unit. Since the unit consists of a variety of positions from custodian to police chief, the wages are different for the different types of positions. On the July 1, 2003, wage scale, the police chief earned the highest hourly amount, 20.42 per hour. The facilities maintenance person receives the second highest amount, 19.07 per hour, and the custodian receives the lowest amount, 8.71 per hour. (Exh. 25, at 18). All bargaining unit members are eligible for overtime. Instead of receiving time and one-half for overtime hours, Anderson and other police department employees receive compensatory time off, or payment the first working day of each April if the employee is unable to take enough compensatory time off to make up for the overtime hours worked. (Exh. 25, at 13).

3. Hours.

The parties' collective bargaining agreement shows that the normal work day "shall be consecutive hours of work scheduled between 7:00 A.M. and 6:00 P.M., with one (1) hour lunch periods. The employee's normal work week shall be a forty (40) hour work week, consisting of consecutive work days." (Exh. 25, at 13). If there is an additional police officer working in the police department, the police chief works different hours than the officer, and they have different days off, thus providing expanded hours of coverage where an officer is on duty. (Exh. F, at 1). The fact that regular, full-time employees in the bargaining unit are expected to work 40 hours a week supports the status quo. There was no contrary evidence presented.

4. Other working conditions.

All employees in the unit share certain working conditions based on the contractual provisions in the parties' agreement. For example, they are subject to the same discipline and grievance procedures, and the same holidays and paydays. (Exh. 25, at 4-6 & 8- 9). They are all supervised by the city manager. These factors favor the status quo. However, there are some differences. For example, the police officer positions have a different probationary period than other regular, full-time positions due to a difference in the law, and police officers must undergo testing that other employees are not required to complete. (Exh. 25, at 10; Exh. H, at 1; Exh. D, at 2). On balance, however, the similarities in working conditions outweigh the differences, and this factor supports keeping the police chief position in the bargaining unit.

5. History of collective bargaining.

The history of collective bargaining supports keeping the police chief position in the bargaining unit, where it has been since the unit was certified in 1995. The Agency approved the unit and conducted an election. The City did not seek to have the police chief position removed from the unit at the time the unit was formed. Even though the City addressed removing the position from the unit during the 2000 negotiations, the position remained in the bargaining unit when negotiations concluded. The history of collective bargaining supports keeping the police chief position in the bargaining unit.

6. Desires of the employee.

Anderson wishes to remain in the bargaining unit. This factor supports the status quo.

7. Unit size and fragmentation.

AS 23.40.090 provides in pertinent part: "Bargaining units shall be as large as is reasonable, and unnecessary fragmenting shall be avoided." If the police chief position were removed from the bargaining unit, the unit size would be affected because the unit of City employees would not be as large as is reasonable. Unnecessary fragmentation could occur if Anderson and other employees, such as the harbormaster, who

occasionally supervises other employees, sought to be represented in a unit of supervisory employees.

Combining supervisory employees with nonsupervisory employees in political subdivision cases is decided on a case-by-case basis. See *Alaska Public Employees Ass'n v. City of Cordova*, Decision & Order No. 137, at 10 (Dec. 31, 1991); *Alaska State Employees Association, AFSCME Local 52, AFL-CIO v. State*, Decision and Order No. 219, at 38 (May 27, 1997), *aff'd* No. 3-AN-95-9083 (July 7, 1998), *aff'd*, No. S-08756 (Oct. 15, 1999); and *Laborers Local 341 & Operating Engineers 302, AFL-CIO v. City of Whittier*, at 13 (Mar. 3, 1999). The question is whether the members of the bargaining unit share enough of the factors in AS 23.40.090 to be represented together appropriately.

Although there are some differences between the police officer and police chief positions and other positions in the bargaining unit, such as eligibility for comp time instead of overtime, a different probationary period, and different examinations that must be passed by police officer applicants, these differences do not outweigh the similarities and shared employment conditions. See *The State System of Higher Education v. Pennsylvania Labor Relations*, 757 A. 2d 442, 447-48 (2000) (an identifiable community of interest does not require perfect uniformity in employment conditions and can exist despite differences in wages, hours, working conditions or other factors).

We have considered the evidence presented by the parties in this petition. Because the regulation does not prohibit combining supervisory employees with nonsupervisory employees at the political subdivision level, and because Anderson shares a significant community of interest with other members of the bargaining unit, we conclude that Anderson's position should remain in the bargaining unit of City employees. The factors community of interest, wages, hours, working conditions, history of collective bargaining, and desires of the employee, support leaving the police chief position in the bargaining unit. We deny the City's petition to remove Anderson's position from the bargaining unit based on any supervisory duties or authority Anderson has been given.

3. Is the police chief a "confidential employee" under 8 AAC 97.990(a)(1)? If so, should the police chief position be removed from the bargaining unit of City employees?

Agency regulation 8 AAC 97.990(a)(1) defines "confidential employee" as "an employee who assists and acts in a confidential capacity to a person who formulates, determines, and effectuates management policies in labor relations matters[.]" The City argues that Anderson is a "confidential employee." It also argues that the police chief position must be removed from the bargaining unit of City employees because 8 AAC 97.090(a)(2) requires confidential employees to be in a separate unit. (Petitioner's Posthearing Brief, at 8). The IBEW contends that the police chief is not a confidential employee and the position should remain in the bargaining unit. (Respondent IBEW's Brief, at 4-5).

The evidence does not establish that Anderson is a “confidential employee” under 8 AAC 97.990(a)(1). Anderson does not assist and act in a confidential capacity to a person who formulates, determines, and effectuates management policies in labor relations matters. At most, he makes the city manager and clerk/treasurer aware of the staffing, training, and equipment needs for the police department. Anderson testified that he has never been asked to provide confidential assistance to the city manager or any other person who is responsible for labor relations policy at any time since he became the police chief in 1979.

City Manager Rynertson, Seldovia’s current city manager, testified that he would like to be able to utilize the police chief for advice on formulating and effectuating management policies in labor relations matters for the police department, but believes he is unable to do so because Anderson is a member of the bargaining unit. Former City Manager Kenneth Weaver testified that he did not ask Anderson to assist him in a confidential capacity, and he did not seek Anderson’s assistance with contract administration. Any confidential information pertained to Anderson’s police work, not labor relations policies.

Because Anderson does not act or assist in a confidential capacity to the city manager or another individual who formulates, determines, and effectuates management policies in labor relations matters, he is not a “confidential employee” under 8 AAC 97.990(a)(1). Even if we were to find that he is a “confidential employee” under the regulation, 8 AAC 97.090(a)(2) only requires that confidential employees be in a separate unit at the state level.

We conclude that the police chief is not a “confidential employee,” and we deny the City’s petition to remove the position from the bargaining unit on this basis. Because we conclude that the police chief is not a “confidential employee” under the regulation, we do not address the factors in AS 23.40.090 pertaining to a community of interest based on being a “confidential employee.”

4. Is the police chief a guard? If so, should the police chief position be removed from the bargaining unit based on the National Labor Relations Act’s requirement prohibiting guards from being in a unit of rank and file employees?

The City argues that Anderson is a guard, and asks the Agency to remove him from the unit based on the provision in federal law preventing guards from being in units with non-guards, and from being represented by an organization that admits employees other than guards into membership. The IBEW contends that Anderson is not a guard. Moreover, The IBEW claims that even if Anderson is a guard, the Agency should not apply the federal law because the Public Employment Relations Act does not contain a similar provision.

Section 9(b)(3) of the Labor Management Relations Act, 29 U.S.C. § 159(b)(3) provides:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against other employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

The evidence shows that Anderson is the police chief. He is employed to run the police department. For considerable periods of time, Anderson is the only police officer in the City. Among his duties are traffic control, investigation, patrol, and animal control. Anderson is not a guard. He was not hired for the purpose of protecting the employer's property or to protect the safety of others on the employer's premises. While Anderson does check the City office doors to make sure they are locked, this is but one duty he performs as a police officer. At the time of the hearing, Anderson did not even have a key to all of the City's offices. He does not monitor the activities of City employees with any greater vigilance than he does the activities of other individuals who are in the City. We are not persuaded by the City's argument that it has employed him to serve as a guard, hired for the purpose of monitoring the behavior of other employees or persons on the City's property.

Even if we were to determine that Anderson is a guard, we note that AS 23.40.090 lists the factors the Agency must consider in determining whether positions share a sufficient community of interest to be grouped together in a bargaining unit. Employment as a guard is not a factor that we must consider.

CONCLUSIONS OF LAW

1. This Agency has jurisdiction under AS 23.40.090 to consider petitions for unit clarification.
2. The City of Seldovia is a public employer under AS 23.40.250(7).
3. The International Brotherhood of Electrical Workers, Local 1547, AFL-CIO is an organization under AS 23.40.250(5).
4. As the petitioner, the City has the burden to prove each element of its claim by a preponderance of the evidence. 8 AAC 97.350(f).

5. Based on the factors in AS 23.40.090, we conclude that the police chief shares a sufficient community of interest with other employees to remain in the City's bargaining unit of rank and file employees despite any supervisory authority he has under 8 AAC 97.990(a)(5). The existing bargaining unit is appropriate under AS 23.40.090. Removing the police chief position from the unit would reduce the unit's size, resulting in a unit that is not as large as is reasonable under AS 23.40.090.

6. Regulation 8 AAC 97.090 pertains only to bargaining units at the state level. The regulation does not require supervisory employees to be separated from nonsupervisory employees and confidential employees to be separated from other employees at the city level. At the political subdivision level, the Agency decides on a case-by-case basis whether to combine supervisory employees with nonsupervisory employees.

7. The police chief is a public employee under AS 23.40.250(6). He has bargaining rights under the Public Employment Relations Act. The police chief is not an "appointed official" as defined in 8 AAC 97.990(b)(2).

8. The police chief is not a "confidential employee" under 8 AAC 97.990(a)(1), nor is he a guard as that term is used in the Labor Management Relations Act.

9. The City has not proven, by a preponderance of the evidence, the requirements needed to remove the police chief position from the existing bargaining unit of City employees.

ORDER

1. The petition of the City of Seldovia to remove the police chief position from the bargaining unit of City employees is DENIED and DISMISSED.

2. The City is ordered to post a notice of this decision and order at all work sites where members of this bargaining unit affected by the decision and order are employed, or, alternatively, personally serve each employee affected. 8 AAC 97.460.

Dated: August 22, 2006.

ALASKA LABOR RELATIONS AGENCY

Aaron Isaacs, Jr., Vice-Chair

Dennis Niedermeyer, Board Member

Matthew R. McSorley, 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 Decision and Order No. 280, in the matter of *City of Seldovia v. International Brotherhood of Electrical Workers Local Union 1547, AFL-CIO*, Case No. 05-1405-UC, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 22nd day of August, 2006.

Sherry Ruiz
Administrative Clerk III

This is to certify that on the 22nd day of August, 2006, a true and correct copy of the foregoing was mailed, postage prepaid to:
Thomas P. Owens, Jr., City of Seldovia
James Metcalf, IBEW

Signature