

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-003-10

(PETITION FOR UNIT CLARIFICATION)

AMERICAN FEDERATION OF STATE,)	
COUNTY AND MUNICIPAL)	
EMPLOYEES, LOCAL 1085,)	
)	RULINGS,
Petitioner,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	AND ORDER
v.)	
)	
STATE OF OREGON, DEPARTMENT)	
OF JUSTICE,)	
)	
Respondent.)	

On May 23, 2012, this Board heard oral argument on Petitioner's objections to a Recommended Order issued on April 11, 2012, by Administrative Law Judge (ALJ) B. Carlton Grew, following a hearing held on July 12, August 18, and August 23, 2011, in Salem, Oregon. The record closed on October 4, 2011, following receipt of the parties' post-hearing briefs.

Patrick N. Bryant, McKanna Bishop Joffe & Arms LLP, Portland, Oregon, represented Complainant.

Donna Sandoval Bennett, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent at hearing. Tessa Sugahara, Attorney in Charge, Labor and Employment Section, Department of Justice, represented Respondent at oral argument.

On March 29, 2010, Petitioner American Federation of State, County and Municipal Employees Local 1085 (AFSCME) filed this Petition for unit clarification

regarding employees of the Department of Justice (Department).¹ The petition seeks to determine whether Assistant Attorneys-in-Charge (AAIC) in five Department sections are included in the existing AFSCME bargaining unit based on the express terms of the parties' collective bargaining agreement.

The Department filed timely objections to the petition. It argues that (1) AFSCME waived its right to add these positions under OAR 115-025-0005(3) by failing to previously assert representation of these positions, and (2) the collective bargaining agreement recognition clause and the PECBA bar addition of these employees to the AFSCME unit because they are supervisory employees under that recognition clause and ORS 243.650(23).

The issue is: Are the AAIC positions in the Business Transactions, Child Advocacy, Criminal Appeals, Financial Fraud and Consumer Protection, Civil Recovery, and Natural Resources² sections included within the AFSCME bargaining unit pursuant to the express terms of the contract recognition clause and OAR 115-025-005(3)?

RULINGS

On August 18, 2011, the second day of three days of hearing, AFSCME moved to amend the Petition to include the position of AAIC Transparency Counsel. The Department objected to the amendment. The ALJ acted within his discretion in denying the motion. The proposed amendment was filed 16 months after the original Petition was filed on March 29, 2010, 20 months after the position was filled, and after 1 day of hearing.

The remaining rulings of the ALJ have been reviewed and are correct.

FINDINGS OF FACT

1. The Department is a public employer as defined by ORS 243.650(20). AFSCME is a labor organization as defined by ORS 243.650(13) and the exclusive

¹The scheduling of the hearing in this case was significantly delayed pursuant to the Petitioner's requests; Respondent did not object to the delays.

²The Petition also named the Assistant to Chief Trial Counsel position, but Petitioner AFSCME withdrew this portion of the Petition prior to hearing. Petitioner also named the AAIC Government Services position, which no longer existed at the time of hearing.

representative of a bargaining unit of approximately 230 Assistant Attorneys General (AAGs) employed by the Department.³

2. AFSCME and the Department have been parties to a series of collective bargaining agreements beginning in 1998 through the agreement in effect at the time of hearing. The latter agreement covered the period September 17, 2009 to June 30, 2011. All of those agreements contained the following recognition clause:

“The Employer and the Department recognize the Association as the sole and exclusive bargaining representative for all Assistant Attorneys General below the rank of Attorney In Charge, excluding supervisory employees, confidential employees, employees hired for a term of six (6) months or less, employees in positions which are less than .50 full-time equivalency, honors attorneys, contract attorneys and assistants appointed pursuant to ORS 180.140(3).”

3. The Department is headed by the Attorney General, an elected official. The Department is divided into five Divisions performing legal work: Appellate, Civil Enforcement, Criminal Justice, General Counsel, and Trial.⁴ Each Division is headed by a Division Administrator (DA). Each Division contains several Sections, each headed by an Attorney In Charge (AIC).

4. The Sections within the Appellate Division are Capital Cases, Civil Administrative, Collateral Remedies, Criminal Appeals, and Supreme Court. The Civil Enforcement Division contains the Sections of Charitable Activities, Child Advocacy, Civil Recovery, Civil Rights, Financial Fraud and Consumer Protection, and Medicaid Fraud. The Sections within the General Counsel Division are Business Activities, Natural Resources, Tax and Finance, Labor and Employment, Health and Human Services, Business Transactions, and Government Services. The Trial Division contains the Sections of Special Litigation, Criminal and Collateral Remedies Litigation (CCR), Commercial, Condemnation, and Environmental Litigation (CC&E), and Torts and Employment.⁵

³For purposes of this Recommended Order, we include both Assistant Attorney Generals and Senior Assistant Attorney Generals under the acronym AAG.

⁴The Department also has three Divisions which do not perform legal work. They are the Divisions of Administrative Services, Crime Victims Services, and Child Support.

⁵The Department has undergone some reorganization over the last several years. Those changes are not material to the evaluation of this Petition. For clarity, we use the names of the Divisions, Sections, and offices as they existed at the time of hearing.

Creation of the AAIC Position in 2002

5. Prior to 2002, each Section, some of which included more than 15 attorneys, was supervised by one AIC. In 2002, then-Attorney General Hardy Myers asked the Conference of Attorneys General to review the Department's structure and recommend improvements. Following that review, Myers directed Don Arnold, then-General Counsel Division Administrator, to create a new position to supervise, manage, and assist with attorney development. The first AAIC position was to be located in the Health and Human Services Section of the General Counsel Division, which provided legal services to the Department of Human Services. Arnold developed the position of AAIC and, in May 2002, sent the position description to the Department of Administrative Services (DAS) for classification and compensation ranking. DAS placed the AAIC position into the "PEM-G" management level classification.

6. In 2002, the first AAIC positions were opened to applicants. Terry Meehan was hired as AAIC for the Business Transactions Section, and Linda Guss accepted an AAIC position in the Child Advocacy Section.

7. Additional AAIC positions were created and filled over time: Kamala Shugar (Child Advocacy Section) in 2006, Paul Smith (Appellate/Criminal Appeals) in 2007, Angela Kuhn (Child Advocacy Section) in February 2009, David Hart (Financial Fraud and Consumer Protection) in September 2009, Claudia Groberg (Civil Recovery) in March 2010, Deena Bothello (Business Transactions) in June 2010, Summer Gleason (Child Advocacy Section) in June 2010, and Paul Logan (Natural Resources) in August 2010. The Department also appointed Michael Kron to an AAIC position as Transparency Counsel in December 2009.

Bargaining Over the AAIC Position in 2009

8. In 2009, during the bargaining for the collective bargaining agreement in effect at the time of hearing, the Department proposed that the position of AAIC be explicitly excluded from the bargaining unit. At the time of the proposal, there were five employees holding AAIC positions.

9. After receiving the Department's proposal, AFSCME asked for information about the AAIC positions. In response, Department Labor and Employment Section Senior AAG Frank Connell drafted a position description to be provided to AFSCME. Connell did so because he understood that no position descriptions for the AAIC positions existed at that time. Union officials believed that this position description was inaccurate and was designed simply to exclude the AAIC position from the bargaining

unit. AFSCME did not agree to the Department's proposal. The Department did not propose to modify other sections of the contract to name AAICs as having authority to take actions such as adjust grievances or approve administrative leave. AICs were already identified in the contract as having those types of authority.⁶

10. In 2009 and 2010, the Department presented the AAICs with formal job descriptions. The job descriptions vary in their details. The AAIC Child Advocacy position held by Linda Guss since 2002 is most comparable to the position originally described by Arnold.⁷

The AAIC Child Advocacy position description specifies that the primary purpose of the position is to: "Supervise assigned section attorneys and provide oversight of the day-to-day legal operations of the Portland Child Advocacy Section. This attorney will also be responsible for a caseload of Juvenile Dependency/Termination of Parental Rights cases, and provide services to client agencies, particularly the Department of Human Services."

The position description specifies the following allocation of duties:

Fifty five percent of the time to be spent providing "direct and collaborative legal advice and litigation services to DHS and other assigned clients and supervises output and quality of work." Under this category, the Child Advocacy AAIC:

- Monitors and reviews the performance of attorneys through review and edit of attorney written work product, and attendance at trials, hearings, and meetings with state agency clients;
- Serves as a resource on child welfare law and DHS child welfare policy to clients, attorneys, paralegals, law clerks, DOJ administration and, as requested, legislative and executive branch officials;
- Resolves legal and practice issues involving potentially contradictory legal advice or practices, or refers to DOJ administration, as appropriate;

⁶The parties dispute whether Association president Marc Abrams stated in bargaining that Guss, Shugar, and Smith were supervisory employees. We need not resolve that dispute, because whether or not that occurred does not aid our resolution of this issue.

⁷Guss' position had a prior position description, which had become outdated at least in part because of changes in Department structure. The prior position description does not appear in the record.

- “• Represents clients in meetings, hearings and trials;
- “• Makes case and project assignments to Section attorneys and monitors progress and outcomes;
- “• Informs the AIC and Chief Counsel of significant legal issues or critical matters involving the Section or its attorneys.”

Twenty eight percent of the time to be spent assisting “in the administration of the day to day operations of the Section.” Under this category, the Child Advocacy AAIC:

- “• Reviews and approves leave requests, and requests for equipment;
- “• Reviews and makes recommendations to the AIC on CLE requests;
- “• Coordinates with the Support Staff Supervisors and Support Staff to address workload/workflow issues;
- “• Develops, recommends, implements and monitors compliance with policies and procedures that are consistent with those of clients and DOJ administration to ensure high quality, consistent and cost effective services to clients.
- “• Determines Section priorities, assesses the availability of resources necessary to fulfill the Section’s duties, and redeploys attorneys/staff to carry out the operations of the Section;
- “• Facilitates communication between and among section managers, Section attorneys, staff, the AIC, the Chief Counsel and other divisions and staff in DOJ.”

Fifteen percent of the time to be spent supervising “ChAS [Child Advocacy Section] attorneys and law clerks.” Under this category, the Child Advocacy AAIC:

- “• Provides day to day supervision of attorneys and law clerks in the Portland office;
- “• Participates in recruiting, hiring and training of attorneys and law clerks;
- “• Prepares and signs formal evaluations of Portland ChAS attorneys;
- “• Informs the AIC and Chief Counsel of personnel problems or issues, participates with AIC and Chief Counsel in disciplinary decisions and recommendations involving supervised positions.”

Two percent of the time to be spent assisting “in the development and preparation of the Section’s biennial budget.” Under this category, the Child Advocacy AAIC:

- “• Identifies staffing and resource needs
- “• Determine priorities among request from Section attorneys and staff
- “• Recommends proposed budget requests and policy packages for resources and positions
- “• Assists with the production of initial written drafts of the Section’s budget narrative and policy package requests.”

The position description identifies the “typical decisions” and their “direct effect” as follows: “The position holder will assign work to and evaluate performance of assigned attorneys, provide oversight of the day-to-day legal operations of the section, administer policies, report to and meet regularly with the ChAS Attorney in Charge.”

The position description lists the following “activities” by checking boxes identified as follows:

“Plans work * * * Coordinates schedules * * * Assigns work * * * Approves work * * * Recommends hiring * * * Responds to grievances * * * Gives input for performance evaluations * * * Prepares & signs performance evaluations.”

The position description does not check the boxes identified as “Hires and discharges” or “Disciplines and rewards.”

Common Attributes of AAICs and Formal Evaluation process

11. The potentially supervisory duties of the AAICs at issue vary considerably. There are some elements in common, however. For example, despite the position description quoted above, no AAIC has a role in the grievance process, and no AAIC has been involved in any grievance processing. AAICs are expected to bill at least three quarters of the AAGs’ 1,638 billable hours per year expectation (1,228.5 hours). AICs are expected to bill half of the 1,638 hours (819 hours).

12. Generally, AAGs are entitled to wage step salary increases unless their performance is poor. It is very unusual for an AAG to be denied a scheduled step increase except for those already at the top step or when there is a general freeze for budgetary reasons. AAICs may request that AAGs they oversee receive a double step increase for exceptional performance, or no step increase because of poor performance.

While some of the AAICs have occasionally made such requests, they are routinely denied.⁸

13. Performing formal annual evaluations is part of the job duties of each AAIC position at issue in this case. The evaluation process is the same for most of the AAICs at issue. The process begins with each AAG completing a self-evaluation. The self-evaluation includes a list of goals for the AAG for the coming year. Those self-evaluations are provided to the AAIC, who provides additional comments. The AAICs' comments often focus primarily on suggestions for modifying the AAGs' goals. After review, the AAIC generally forwards the document on to his or her AIC, who adds comments and in turn passes it to the Department Administrator, and ultimately to Solicitor General Williams or another high-level deputy of the Attorney General. After each person in this path has participated, the completed evaluation is returned to the AAG. The AAIC may, or may not, discuss the completed evaluation with the AAG.

For the annual evaluation period ending July 31, 2009, the evaluation included a summary of the AAG's billed hours for the year (and, if the hours fell short of the required 1,638, the AAG's comments regarding why and how that would be corrected in the following year) and sought the comments of AAGs, in part, in the following sections: review of the past year; job satisfaction, career goals, and desired training and development opportunities; attorney goals and objectives for the next year; training or mentoring; contributions to the department in non-billable activities; and annual evaluation process.

The form also included a section entitled "Comments of Attorney in Charge." That section asked for the

"AIC's goals for the attorney during the coming year and plan for the attorney's development during the coming year. These goals should be sufficiently specific so that the attorney and the AIC will have a basis in next year's evaluation to ascertain the extent to which they have been met. The AIC confirms that training and development opportunities have been reviewed with the attorney. Specific training and development planned for the attorney during the coming year includes * * *." (Emphasis in original.)

⁸Only AAIC Meehan specifically recalled recommending double or no step pay increases (some of which were granted and some of which were denied), and did not identify the number of times this took place. Shugar testified that she had "participated in the process" of such recommendations. (Shugar Testimony.) There is no evidence that the remaining AAICs had any involvement in such recommendations.

The form concluded with sections for the comments of the Division Administrator and a statement that it had been reviewed by an Associate Attorney General, and stated that the “Attorney General, Deputy, or Associate Attorney General may offer comments on selected annual evaluations.”

14. The Department revised and expanded the formal annual evaluation form for the period ending July 31, 2011. In a memo to Department employees to explain the new form, Solicitor General Williams explained that it was important that the evaluation process be “an ongoing conversation between attorneys and managers, and not simply an annual look back.” She asked that each attorney meet with his or her AIC or AAIC every four months to discuss what the attorney was doing well, and in what ways the attorney could improve; the manager would follow up these meetings with a written summary. Williams then described the new form that would be used for annual written evaluations.

The new form is substantially more detailed than the previous form. It includes a summary of the AAG’s billed hours, and instructs an attorney who fails to meet the “billed hours expectation” to discuss circumstances to account for the shortfall and describe how the attorney proposes to increase billings. The form then provides several topic sections with multiple competencies under each. After each topic section, the AAG and AIC or AAIC are to supply comments relevant to that topic. The topic sections are: legal knowledge and judgment, advocacy and advice, working with others/interpersonal skills, productivity and workload management, client relations, and professionalism.

The new form includes the same section in which the AIC lists goals and training for the attorney for the coming year as was included in the previous form.

The form contains spaces for the comments and signatures of the attorney, the AIC, and the Division Administrator. The form also requires the attorney to sign the following statement:

“Your annual evaluation will be explained that the evaluation would be read by the Associate Attorney General. This part of the form is an acknowledgment of completion of that step in the annual evaluation process. The Attorney General, Deputy, or Associate Attorney General may offer comments on selected annual evaluations.” (Emphasis in original.)

Individual AAICs

Child Advocacy Section: AAICs Gleason, Guss, Kuhn, and Shugar (AIC Amanda Marshall, Deputy AIC Joanne Southey, DA Fred Boss)

15. The AAICs in the Child Advocacy Section report to AIC Amanda Marshall and Deputy AIC Joanne Southey.⁹

According to the Gleason, Guss, Kuhn, and Shugar 2011 position descriptions, their position is expected to spend 55 percent of its time providing “direct and collaborative legal advice and litigation services to DHS and other assigned clients and supervis[ing] output and quality of work;” 28 percent of its time assisting in “the administration of the day to day operations of the Section;” 15 percent of its time supervising section “attorneys and law clerks;” and 2 percent of its time assisting in “the development and preparation” of the Section’s budget.

16. All Child Advocacy AAICs except Guss spend close to half their time on their own caseload, providing direct services to clients or client agencies. Guss spends less than ten percent of her time on such activities.

Child Advocacy Section: Summer Gleason

17. Summer Gleason became an AAIC in July 2010. Prior to that, beginning in 2007, she was an AAG in the bargaining unit and an AFSCME member. Located in the same Salem office as AIC Amanda Marshall, Gleason leads a team of ten AAGs who appear in court in Benton, Deschutes, Linn, Marion, and Yamhill counties. The eight law clerks in her section are supervised by an AAG whom Gleason oversees.

While an AAG, Gleason was an AFSCME representative on the parties’ labor-management committee, the Attorney Relations Committee. That committee has seven members divided between AFSCME AAG representatives and Department managerial representatives. Gleason accepted her AAIC position after this Unit Clarification action was filed. Upon becoming an AAIC, Gleason resigned her AFSCME position on the Attorney Relations Committee because she understood that her AAIC position was supervisory and outside of the bargaining unit. The Department then appointed Gleason to be one of the management representatives on the committee.

⁹Marshall left the Section after the date of hearing to take a position as the U.S. Attorney General for Oregon.

18. Gleason testified that she sets policy and procedure regarding matters unique to the Salem office, but did not identify what those matters were. Gleason meets with the ten AAGs collectively once per month. She also meets with each AAG individually once per month for approximately an hour. At these meetings, Gleason and the AAGs discuss the AAGs' cases.¹⁰

19. Gleason has not been involved in any Department **hiring** process except by providing input to AIC Marshall and DA Fred Boss. She has not been involved in any **transfers**, layoffs, or recalls.

20. Gleason has performed the annual formal **evaluation** process as described above. Gleason also evaluates the work of each AAG more informally on an ongoing basis. The metrics for evaluating the AAGs Gleason oversees were developed in conjunction with DHS, Marion County, AIC Marshall, Solicitor General Williams, and the Attorney General.

21. Gleason's involvement in **discipline**¹¹ concerned one AAG's performance problems. Gleason and AIC Marshall learned of the problems from other AAGs. Gleason found other AAGs to act as mentors for the struggling AAG, and then, along with AIC Marshall, developed a **work plan** which included performance measures and weekly meetings between the AAG and Gleason. When that approach failed, Gleason consulted DA Fred Boss and HR's Rebecca Stutzman. Boss eventually decided that the AAG should be terminated, but the AAG ultimately resigned before any formal discharge process began.

22. Most of the case **assignments** to the AAGs are initially made automatically through various procedures used in each County. An AAG will appear in Marion County Circuit Court on a particular "docket day" and take all the Child Advocacy cases that arise.¹² In other counties, an AAG may simply be assigned to take all the Child Advocacy

¹⁰There was little testimony regarding what was discussed at meetings in which Gleason and the other AAGs participated, and how these meetings differed from case review meetings in which only AAGs participated. AAGs also can bill clients for time spent collaborating or advising one another on cases. Because they were generally billed to the client, we infer that AAG/AAG case meetings typically covered past events in the case and strategy for the future. The record does not contain much evidence of specific supervisory actions taken at such meetings, such as directing the AAG to take a specific step or steps in a case.

¹¹AAGs are employees at will, subject to the pleasure of the Attorney General, and there is no formal Department program of progressive discipline in lieu of, or prior to, discharge.

¹²The "docket day" system for assigning cases was created and presented to the Attorney General (who approved it) by Amanda Marshall when she was an AAG.

cases that arise in that county. Gleason initially decides which attorneys are assigned to which counties and runs her choices by Marshall. Gleason transfers termination of parental rights cases from one AAG to another based on workload at staff meetings, but AAGs may also transfer cases to each other for the same reason. Gleason does not assign office space to the AAGs.

23. Gleason approves **vacation leave, sick leave, and flexible work schedules** for the AAGs, who travel extensively, but consults with AIC Marshall regarding any requests that are out of the ordinary. Gleason has initially approved two **telework**¹³ arrangements, but they were ultimately approved by DA Boss.

24. AAGs in Gleason's section often go directly to AIC Marshall, who is located in the same office, to consult on issues. Gleason takes an issue to AIC Marshall every other week, on average. When considering leave requests, she considers the needs of the office and clients to ensure the office has sufficient coverage.

25. Gleason believes that she spends two-thirds of her time supervising attorneys and approximately 25 percent of her time on her own caseload. Gleason is expected to bill at least three quarters of the 1,638 billable hours expected of AAGs each year.¹⁴

Child Advocacy Section: Linda Guss

26. Guss became an AAIC in August 2002, after working as an AAG since 1988. Guss supervises seven AAGs in the Department's Portland office who provide advice and litigation assistance to the Department of Human Services. Guss also shares supervision of the Portland office's Honors Attorneys and law clerks.

27. Guss meets once a month with each AAG to review the AAGs' new cases, and provides advice on legal strategy and client relations. If an attorney is not on track to meet his or her billable hour expectations, she will discuss this issue with the attorney.

¹³There are two types of teleworking arrangements used by the Department. One is a formal telecommuting schedule, defining certain regular days on which the Department AAG will work from home. See ORS 240.855. The other is a temporary arrangement based on a temporary need of the AAG, such as to supervise home repair work. Department witnesses did not always distinguish between the two types of teleworking. We conclude, in any event, that Department AAICs have the authority to authorize both arrangements, subject to the approval of their superiors as described in these Findings of Fact.

¹⁴AAICs are expected to bill half of the 1,638 hours required from AAGs each year.

She expects the AAGs to use their independent judgment in working on their cases. Guss also meets or speaks regularly with representatives of the Section's clients regarding the work of Section attorneys. She also attends hearings to observe AAGs.

28. Guss' involvement in **hiring** has been as part of an interview panel which included the AIC and DA. Guss has not participated in every AAG hiring, especially more recently. She has not been involved in any **transfers, layoffs, or recalls**.

29. Guss has performed the annual formal **evaluation** process as described above. Her evaluations of employees are reviewed by AIC Marshall, DA Boss, and Deputy AIC Southey. Guss reviews management's comments with the AAG once the evaluation is complete. Guss also conducts less formal mid-year evaluations of each AAG. Guss also meets with attorneys about concerns or complaints about their performance, and discusses how the issues can be resolved, including discussions of training needs. She also monitors the AAGs' progress in meeting their billable time expectations.

30. Guss has not been involved in imposing **discipline** on any AAG. Guss, with AIC Marshall, developed **work plans** for two attorneys in her Section. At the end of the term of one of the work plans, Guss met with the AAG and signed off on the plan as having been completed.

31. Guss approves **vacation leave, sick leave, and flexible work schedules** for the AAGs based on the criteria that the Section has sufficient legal staff at all times.

32. The AAGs overseen by Guss are assigned to different DHS branches or counties, and their cases and other work comes from their assigned entity. Guss does not **assign work** initially, but may reassign cases to equalize the AAGs' workloads. Each AAG is assigned to a branch of the Department of Human Services and handles all litigation involving that branch. AAGs may also exchange cases to equalize workloads, but are unlikely to do so without talking with Guss.

33. In Guss' view, AIC Marshall, the Division Administrator, and the Attorney General set expectations for the Child Advocacy attorneys, and it is Guss' job to see that those expectations are met. Guss is, in turn, evaluated by the AIC and part of that evaluation is regarding her oversight of the AAGs. Guss may add suggestions about training and meeting billable hours expectations. Guss approves time sheets and vacation requests, but has no authority to deny or alter them if the requests are otherwise consistent with Department policy and the collective bargaining agreement. The offices in her Section are assigned to AAGs by seniority.

34. Guss believes that she spends less than ten percent of her time on direct services to Department clients, and has few actual cases of her own. She spends the remaining 90 percent of her time overseeing the AAGs, although much of that time is billed to clients because it is case specific.

Child Advocacy Section: Angela Kuhn

35. Kuhn became an AAIC in February 2009. She supervises four AAGs and two law clerks in the Department's Medford office. Kuhn attends a weekly managers' meeting and implements the meeting decisions in her role as AAIC in the Medford office. AIC Marshall or Deputy AIC Southey set some expectations for the Medford AAGs, which Kuhn implements. AIC Marshall or Deputy AIC Southey rarely visit the Medford office, and had not done so in 2011 as of the date of the hearing. Kuhn does not often contact the AIC outside of the weekly meeting. Kuhn conducts individual meetings with each AAG at least once each month to review their cases, performance, and quality of work. Kuhn meets with individual AAGs frequently in addition to those meetings.

36. Kuhn's sole involvement in **hiring** was to provide information about one candidate to the hiring panel. Kuhn did not participate in the interview or the decision to hire the person, who was a former law clerk in Kuhn's office. Kuhn conveyed the office staff's support for the candidate. She has not been involved in any **transfers, layoffs, or recalls**.

37. Kuhn evaluates each AAG she oversees three times a year, once through the formal **evaluation** process and two additional informal evaluations. She meets with the AAGs for one to one and one-half hours for each evaluation process. Those AAGs set their own goals for the next year during the annual evaluation process, but Kuhn may make changes in those goals. She has conducted only one series of written evaluations, which were then sent to the AIC. In addition, Kuhn performs two informal evaluations for each AAG each year. She consults with the AIC about once a week and calls more frequently as needed.

38. Kuhn has never **disciplined** an employee and believes that, because she is a newer AAIC, she should consult with the AIC before doing so. Kuhn has never imposed a work plan on an AAG.

39. The AAGs overseen by Kuhn are each **assigned** to a county and, individually or in groups, handle nearly all of the cases that arise in that county. Kuhn frequently redistributes cases to equalize the workload in the office.

40. Kuhn approves **vacation leave, sick leave, temporary work from home, flexible work schedules, and furlough days** for the AAGs subject to making sure the office has sufficient legal staff at all times. None of the Section's AAGs have a regular **telecommuting** schedule. Kuhn approves travel expenses if they are related to the AAGs work. As a result of the salary freeze, she has never been involved in pay increases. Her understanding of the process is that the AAICs would be asked if they support the grant of a step increase for each employee, and if not, why. Kuhn approves and forwards AAG requests to attend particular **CLE trainings**, some of which have been denied by her superiors.

41. Kuhn believes she spends between 55 and 60 percent of her time on management issues. Much of that time is billed to clients as it takes the form of discussions with AAGs about their cases. Kuhn and an AAG cover cases arising from Jackson County, and Kuhn spends about 45 percent of her time on her own cases, which she handles in the same way as an AAG.

Child Advocacy Section: Kamala Shugar

42. Shugar was hired by the Department as an AAIC in February 2006. This is her first position with the Department. She oversees approximately ten AAGs and ten law clerks in the Department's Eugene office. Shugar understands that the Section management team, which she defined as the AIC, Deputy AIC, and AAICs, sets policies for the Child Advocacy Section, including the Department offices in Portland, Salem, and Medford. Shugar has a regular meeting with AIC Marshall once per week and usually speaks with her an additional one to two times per week. The AICs and AAICs in the Section created policies regarding whether an AAG should proceed to trial in certain cases, and Shugar monitors AAG compliance with those policies.

43. Shugar meets weekly with a group of Department managers in her Section, in part to develop policies and procedures for the Section. Shugar attends separate meetings for the General Counsel Division and Civil Enforcement Division each month, at which management issues are discussed. Once a year the Chief Counsel holds a meeting attended by Shugar, other AAICs, AICs, other attorney managers, and support staff managers to receive training on management issues. AAICs also attend quarterly meetings with AICs and the Attorney General or Solicitor General Mary Williams.

44. Shugar, in conjunction with a panel of AICs and AAICs that makes most of its decisions by consensus, makes recommendations regarding AAG **hiring** decisions that have always been followed. Shugar performed reference checks for all but one of the AAGs hired into her office since she became an AAIC. She has not been responsible for

any layoffs or recalls. Then-Counsel to the Attorney General Arnold decided to transfer an AAG who had inspired some client complaints out of her Section.

45. Shugar spends most of her time meeting with AAGs about their cases or other legal issues, and when doing so, bills that time to clients. Those meetings also may concern the AAGs' compliance with Section policies and their progress towards the expectations and goals of the Attorney General.

46. Shugar monitors and counsels attorneys about their performance in court and treatment of the office support staff, watching each AAG in court once or twice each year. Shugar meets with each AAG for at least 45 to 60 minutes each month. Shugar's door is open to the AAGs, and she talks with one or another of them during every working hour. In addition to the formal **evaluation** process, Shugar conducts a less formal midyear evaluation of each attorney she oversees.

47. As AAIC, Shugar has addressed **discipline** or performance problems with two AAGs. In one case, she responded to client complaints and worked with Counsel to the Attorney General Arnold and AIC Larry Young on corrective steps before Arnold decided to transfer the employee to another Department office. In the other case, an AAG was inappropriately using support staff outside of normal working hours. After consulting with Human Resources staff, Shugar wrote a formal letter of expectations to the AAG. In a case where the performance or conduct of an employee required prompt action, Shugar believes that she would brief her AIC and get permission to involve Human Resource officials, although she believes she has the authority to contact Human Resources on her own. That is the procedure she would follow if an employee needed a **work plan**, but she has not had occasion to do so as of the date of hearing.

48. Cases are generally **assigned** by county or branch, but Shugar assigns the AAGs to the particular counties, sometimes over the AAG's objection. Shugar's decisions on this issue have never been reversed by upper level managers. She reassigns ten to twenty percent of the cases. Shugar assigns herself higher profile cases, such as international adoption disputes or cases under the Indian Child Welfare Act.

49. Shugar approves **vacation leave, sick leave, telecommuting, and flexible work schedules** for the AAGs subject to Department policies, making sure the office has sufficient legal staff at all times. While Shugar must sign the request, Human Resources officials approve or deny FMLA or OFLA leave requests for AAGs overseen by Shugar.

50. Shugar believes that she spends 75 percent or more of her time on management activities.

Business Transactions Section: AAICs Bothello and Meehan (AIC Stephanie Smythe, DA David Leith)

Business Transactions Section: Deena Bothello

51. Bothello was hired in the summer of 2010 as AAIC in the Department's Business Transactions Section (BTS). She worked as an AAG in that Section from 2008 until her 2010 promotion. Bothello oversees three attorney positions and one law clerk who are divided between the Department's Salem and Portland offices. One of the attorneys is a Senior Assistant Attorney General who practices exclusively in design and construction law, a different practice area than Bothello. Another attorney position has been vacant for some time. Bothello views her management role as reviewing the performance and work product of the two attorneys she oversees. As part of this work, she reviews draft agreements and bills before they are sent to the Department's clients. She also revises transaction agreement forms. The basis for Bothello's review are the expectations set by AIC Smythe.

52. Bothello's involvement in the **hiring** process has been through participation in a panel of five that included AIC Smythe, another AAIC, and other management officials, which reviewed resumes, recommended interviewees, and recommended that a candidate be hired. AIC Smythe, DA David Leigh, and Solicitor General Williams made the ultimate decision.

53. Bothello has not been involved in any **transfers, layoffs, or recalls**.

54. Bothello has conducted one year of **evaluations**. Most of her evaluative work thus far has been in interacting with attorneys through comments on their written work. She also reviews form agreement templates created by her Section's AAGs before they are sent to clients.

55. Bothello has not been involved in **disciplining** any employee, and has not had occasion to consider implementing a **work plan**.

56. Bothello does not **assign** cases to AAGs. Cases are assigned by two Department Practice Group Chairs, at least one of whom is a Senior AAG. Because the attorneys are in different practice areas, it does not appear that Bothello has occasion to reassign cases based on AAG workload.

57. Bothello approves **vacation leave, sick leave, and flexible work schedules**.

58. Bothello spends 25 percent of her time on supervisory responsibilities and 75 percent of her time on her own caseload. She billed an average of 27 hours per month between July 2010 to May 2011 exclusively to management work, although she will bill clients for her time supervising an attorney in his or her work on a specific matter. According to Bothello's November 2010 position description, she is to spend 55 percent of her time directing "the administration of the Division's contract form, contract process, exemption and consistency in contract advice program;" 25 percent of her time providing "advice and contract review services in assigned subject matter areas on complex transactions;" and 20 percent of her time meeting obligations to "[s]upervise assigned attorneys and law clerk in BTS;" "[a]ssign and reassign work to positions reporting to this position;" "[m]onitor work performance of section attorneys and paralegals – observe in meetings with clients, vendors, and other counsel; periodically review written work product;" "[c]onduct formal and informal performance evaluations of positions reporting to this position; and "[p]articipate in preparation and review of BTS's biennial and interim budget and position requests."

Business Transactions Section: Terry Meehan

59. Meehan, the first AAIC, was hired in November 2002 as AAIC in the Department's Business Transactions Section (BTS). He oversees seven AAGs. His Section works on complex commercial transactions for the State. Most of the work is in the areas of intellectual property and information technology. Smythe delegates most management functions regarding Meehan's seven AAGs to Meehan. Meehan does training, and is responsible for software implementation, client relations, and billing disputes; and reviews the legal advice given by Section AAGs and the documents they produce, depending on the level of experience of the AAG. He reviews approximately 20 percent of the work sent to clients. AIC Smythe sets goals for the Business Transactions Section, but he exercises some joint supervision in his area and sometimes takes oversight lead regarding a particular policy. Meehan set up the section's split of offices in Portland and Salem.

60. Meehan participates on a three-person **hiring** committee, involving the DA, AIC, and himself. The hiring recommendations have been made by consensus, although Meehan believes he has veto authority over the hiring in his practice area. Meehan has extended the hire date of a prospective new AAG. When Meehan does a background check of a prospective hire, he makes a written recommendation regarding the person.

61. Meehan has not been involved in any **transfers, layoffs, or recalls** of AAGs.

62. Goals and expectations for **evaluations** are set in collaboration with the AIC. Meehan conducts bi-weekly evaluations for newer attorneys and formal reviews of all attorneys three times a year, including the formal evaluation. After the AAG and Meehan complete their sections of the formal evaluations, they are sent to DA Leith and to the Solicitor General. He generally does not review the work of Senior AAGs.

63. While he has no authority to unilaterally impose **discipline**, such as discharge or suspension, Meehan recommended that one AAG be discharged, and his recommendation was accepted. An AAG has resigned in lieu of termination pursuant to an agreement negotiated by a DOJ negotiator who consulted with Meehan. Meehan described the procedure he follows as talking with AIC Smythe and DA Leith, making a recommendation to them, and then turning the matter over to Human Resources.

64. Meehan has been involved in implementing/monitoring three work plans. The work plans were developed after discussions with AIC Smythe and DA Leith and were in conjunction with representatives from DOJ Human Resources and the Labor and Employment Section. Meehan would not implement a work plan on his own and does not know if he has the authority to do so. Meehan circulated drafts of the work plans to his superiors prior to their implementation and incorporated their comments. Meehan has also had discussions with affected attorneys as to whether their position was a good fit for them. Meehan has also held a "closed door" meeting with an attorney regarding his or her relationships with other attorneys and support staff.

The work plans Meehan has implemented were based upon a template provided to him. The objectives set out in the work plans were specific versions of expectations for all AAGs, such as conforming to DOJ billing policy, fulfilling professional responsibilities, efficiently performing duties, and accurately entering time into the billing system. Meehan may involve a Reviewing Attorney in this process. A Reviewing Attorney is a bargaining unit AAG who reviews the work of new or underperforming AAGs. The Reviewing Attorney monitors the work and makes recommendations for improvement. The work plans stated that the Practice Chair or AIC may assign the Reviewing Attorney.

65. Cases in Meehan's Section are generally **assigned** by a Practice Group Chair, who may be a bargaining unit member, or by Section support staff. Meehan also can be involved in assigning specific cases, particularly in intellectual property and information technology. AAGs can receive specific case assignments from the agencies. AAGs can exchange cases amongst each other, but must involve Meehan in the transfer. Meehan approves CLE and other **training** subject to the approval of Meehan's superiors, who sometimes overrule Meehan's decisions.

66. Meehan approves vacation and sick leave requests and flexible work schedules.

67. Meehan spends 650 hours per year in non-billable management capacity. However, much of his management is billed to clients because it involves discussions with AAGs regarding particular cases or legal issues. Meehan attends one to two meetings per month with all AICs and DA Leith. Meehan is expected to bill 1,229 hours per year, 75 percent of the AAGs' 1,638 hour expectation. While Meehan is the primary attorney on only two or three cases and otherwise carries a caseload, he finds it difficult to handle larger cases because it prevents him from being available to attorneys he oversees.

68. According to Meehan's December 2009 position description, Meehan's position is to spend 55 percent of its time directing "the administration of the Division's contract form, contract process, exemption and consistency in contract advice program;" 25 percent of its time providing "advice and contract review services in assigned subject matter areas on complex transactions;" and 20 percent of its time performing a laundry list of duties including "[s]upervis[ing] assigned attorneys and law clerk in BTS," "[a]ssign[ing] and reassign[ing] work to positions reporting to this position," "[m]onitor[ing] work performance of section attorneys and paralegals – observ[ing] in meetings with clients, vendors, and other counsel; periodically review[ing] written work product," "[c]onduct[ing] formal and informal performance evaluations of positions reporting to this position," and "[p]articipat[ing] in preparation and review of BTS's biennial and interim budget and position requests."

Financial Fraud and Consumer Protection Section: David Hart (AIC Drew Lianopoulos)

69. Hart became an AAIC in September 2009. He is a specialist and leading attorney in the very specialized and technical legal practice area of consumer health care fraud. Hart (a) initiates investigations in that subject matter; (b) monitors, initiates, and participates in multistate and national investigations and litigation on consumer health care fraud issues; and (c) reviews requests for amicus curiae briefs. He has the authority to settle consumer health fraud cases, subject to the approval of the Attorney General.

70. Hart oversees three AAG positions in the Financial Fraud and Consumer Protection Section at the Department's Portland office, two of which were being filled at the time of the hearing; some visiting AAGs; and a paralegal. Hart reports to AIC Drew Lianopoulos. When AIC Lianopoulos is out of the office, Hart is the office supervisor, and when Hart is out of the office, Lianopoulos takes on Hart's role. The AIC, not Hart, calls staff meetings.

71. The AAGs Hart oversees are highly skilled and generally autonomous as to their legal practice. Much of Hart's supervision involves answering questions from attorneys about settlement goals in specific cases. The office has a generally collaborative work style. Attorneys working on Hart's health care fraud cases are given discrete tasks to do by Hart, however, and do not exercise discretion in those cases. Health care fraud cases comprise approximately half of the work of the office, and financial fraud cases in other areas comprise the other half. The AAGs always consult Hart about voluntary assurance compliance settlements (where the defendant pays no money). AAGs also consult with Hart regarding whether settlement in a given case should include money or only injunctive relief. While it is very rare for Hart to reject a settlement negotiated by an AAG, he has the power to do so. His decisions regarding acceptance of a settlement are usually accepted by the Attorney General.

72. Hart has not been involved in **hiring** AAGs. AAG Novick, who is generally overseen by Hart, hires and supervises law clerks for the section, but AIC Lianopoulos, not Hart, supervises this part of Novick's work. Hart has not been involved in any **transfers, layoffs, or recalls**.

73. Hart has not been involved in any suspensions, discharge, or other **discipline** of any Department employees, and has not developed or implemented a **work plan**.

74. Hart has conducted two annual **evaluation** cycles, writing four evaluation documents that did not go to the AIC but went directly to Department Chief Deputy Williams. Hart views his role in the evaluation process as assisting in goal-setting for the AAGs and specifying steps to reach those goals. For example, Hart may recommend that an AAG take a class in conducting depositions. In practice, Hart makes small changes to the AAGs goals rather than revising them. Hart monitors attorney work on health care fraud cases and occasionally observes the AAGs in the courtroom. Hart does not evaluate the visiting AAGs.

75. Hart **assigns** AAGs to assist in his health care fraud cases. AIC Drew Lianopoulos assigns non-health care fraud cases to those AAGs, and much of the AAGs non-health care fraud work is generated from their own investigations or from reports on the Department consumer complaints hotline.

76. Hart reviews and approves AAG **vacation and furlough leave requests** subject to staffing needs, although he has never had to deny a leave request. There is no evidence that Hart has been involved in any AAG requests for telecommuting or flexible work schedules.

77. Hart spends 50 percent of his time on management and supervision, including his direction to attorneys working on health fraud cases. Hart spends the rest of his time on his own cases and related work. Hart bills 90 percent of his time to clients, although that includes case-specific supervision. According to Hart's March 2010 position description, Hart is to spend 30 percent of his time assisting "in the day to day operations of the Section;" 30 percent of his time assisting "in supervising Section attorneys and paralegals;" 10 percent of his time directing "the investigation of allegations of unlawful conduct," analyzing "evidence and pertinent laws," and determining "whether a sufficient basis exists upon which to initiate formal civil enforcement proceedings;" 10 percent of his time participating in "multistate and multijurisdictional investigations of alleged violations of consumer protection laws;" 10 percent of his time preparing "recommendations for the Attorney General regarding sign on opportunities on amicus briefs, letters, comments in state and federal rulemaking proceedings;" 5 percent of his time supervising "Special Assistant Attorneys General who are appointed to prosecute select cases or to undertake projects assigned by the Attorney in Charge;" and 5 percent of his time assisting with the Department budget.

Appellate/Criminal Appeals Section: Paul Smith (AIC Jennifer Lloyd, Deputy Solicitor General Anna Joyce, Solicitor General Williams)

78. In 2007, Smith became an AAIC in the Department's Appellate Division, handling direct criminal appeals.¹⁵ As an AAIC, his line supervisor was Jennifer Lloyd, but he interacted frequently with Solicitor General Williams and Deputy Solicitor General Anna Joyce. The Department's expectation was that Smith would keep Williams and Joyce "in the loop" regarding significant issues. Smith supervised an average of eight AAGs, four located in Salem and four in Portland. Based in Salem, Smith talked with the Salem attorneys several times a week. He met with the Portland attorneys once a month, but spoke with them on the telephone as well. Part of his job was to improve the legal writing and oral advocacy of the AAGs. His position also had general goals, such as to reduce the amount of time attorneys spent writing briefs. Smith used his skill and judgment to work with AAGs to reduce the number of hours spent on briefs.

79. The Appellate Division generally operates by management consensus, with the management team comprised of the AIC, AAICs, Solicitor General Williams, and Deputy Solicitor General Joyce. When the team fails to reach consensus on an issue, Williams and Joyce prevail.

¹⁵At the time of hearing, Smith had been promoted to an AIC position in the Department's Appellate Division, and the Department was in the process of filling Smith's AAIC position.

80. Smith participated in **hiring** decisions through participation on an interview panel which made a recommendation to the DA, but Smith was not involved in every hiring decision. The panel decisions were made as a management team. Smith was not involved in hiring clerks. Smith was involved in the **layoff** of two attorneys, one of which reported to him. Smith made a recommendation to his Section's management team, which made the decisions, but the layoffs were implemented only after the approval of Solicitor General Williams. Smith was part of a joint management decision to **transfer** an AAG to another division. He has not been involved in any **recalls** of AAGs.

81. Smith was not involved in formal **discipline** such as the termination of an AAG. Smith does not have authority to suspend. Smith never counseled an employee about his or her workplace behavior, but counseled at least one employee about quality of work. In personnel matters, Smith quickly acted to involve Joyce and Williams.

82. The management team sets Appellate AAGs' goals. Smith monitored AAGs' progress toward those goals by reviewing briefs before and after filing, observing occasional oral arguments, participating in strategy discussions, and providing formal and informal evaluations. Smith sought to read one post-filing brief per month per AAG, but was not always able to do so or always able to provide substantive feedback for the briefs he read. Some of the feedback was simply a short e-mail or a verbal comment. Smith believes that he reviewed 75 percent of the briefs submitted by AAGs he oversaw. All Section briefs to the Supreme Court, including Smith's, were reviewed and approved by others, including Solicitor General Williams. Smith has conducted formal annual **evaluations**, meeting with each attorney to discuss that evaluation.

83. Appellate cases came to Smith or AIC Lloyd, both of whom assigned them to AAGs based on attorney workload and fluency with the particular area of law.

84. Smith reviewed and approved AAG **vacation leave, sick leave, and telecommuting** requests subject to making sure that the office had sufficient staff; he did not recall denying a leave request.

85. Smith believes that he billed 90 percent or more of his time to clients. Between September 2010 and May 2011, he billed an average of 15.5 hours a month to general management responsibilities. If Smith discussed a particular case with an AAG, he would bill that time to the client. If Smith discusses an attorney's general performance, such as the attorneys performance in oral argument, he billed that time to his management duties. According to Smith's November 2010 position description, Smith's position is to spend 50 percent of its time "[c]arrying and managing the AAIC's

own docket of cases, and other duties as assigned;" 25 percent of its time "[a]s a personnel manager * * * [d]irectly supervising a team of 8 to 10 Appellate Division attorneys who work in Salem and Portland; Handle all routine administrative matters related to supervision of team of attorneys (e.g., approve leave requests, docket-management issues); [p]rovide regular feedback to attorneys the AAIC supervises—reviewing written work and oral arguments on a regular basis; [c]onduct regular formal and informal evaluations of work performance of attorneys the AAIC supervises; [w]ork with the other members of the Appellate Division management team to develop and implement administrative policies to ensure the smooth daily operation of the division. Keep the Solicitor General and the Deputy Solicitor General appropriately apprised of personnel issues as they arise;" and 25 percent of its time on, among other things,

"[a]s a caseload manager, the AAIC will work closely with the AIC for the direct criminal appeals caseload to manage the flow of approximately 1200 direct criminal appeals into and out of the Appellate Division every year. The AAIC is the primary backup to the AIC for criminal appeals. The other specific duties of the AAIC as a caseload manager will be determined—in part—by the AAIC's particular skills and background. However, the AAIC should expect to handle many, or all, of the following duties: Share with the AIC précis drafting and case-assignment duties. Serve as a resource for other attorneys on criminal appeals issues. Share with the AIC responsibility for attending pre-briefing conferences, moot courts, and other case-specific meetings."

Natural Resources Section: Paul Logan (AIC Jas Adams, DA David Leith)

86. Logan was hired as an AAG in April 2006, and became AAIC in August 2010. AAIC Logan works in the General Counsel Division, Natural Resources Section (NRS). He oversees eight AAGs and three law clerks, some in Portland and some in Salem. Logan also provides legal advice to the Oregon Department of Environmental Quality. Logan reports to AIC Jas Adams. The Division Administrator is David Leith. Logan's main job responsibilities are to manage the amount and type of the Section AAGs' work, and oversee AAGs' work on legal issues that are complex, contentious, high profile, or involve more than one agency.

87. Logan has never participated in **hiring** an attorney, although he does hire law clerks. He has not been involved in any **transfers, layoffs, or recalls**.

88. At the time of hearing, Logan had not been involved in the formal **evaluation** process. AIC Adams sets goals and expectations for AAGs. Logan reviews

monthly reports but cannot alter billing entries. He has no authority to assign AAGs to different office space. He does not know if he can grant overtime or compensatory time. Any travel expenses by AAGs must be approved by the Division Administrator.

89. Logan consults with the AIC about potential **disciplinary** issues, but provides minor feedback to AAGs routinely on his own. In one disciplinary matter, he consulted with the AIC about how to handle it. He has resolved personality issues among AAGs that resulted in providing a written document to one AAG. Logan told AIC Logan of the problem and Logan's plans to address it, the AIC supported that approach, and Logan reported the results of the plan to the AIC.

Logan has talked with AAGs about goals for billable hours. He has also addressed a personality issue where AAGs complained that another AAG was unprofessional and abrasive. In that situation, Logan consulted with the AIC, recommended a plan of action (which the AIC supported), and then met with the AAG several times and sent him written communications about unacceptable conduct. Logan updated the AIC about the AAG's progress. Logan has never been involved in a suspension or discharge but would expect to play a significant role if the situation arose. Logan has not been involved in any **work plans**.

90. Much of the work **assigned** to the AAGs comes directly to them from their clients. Logan or AIC Adams will reassign work to equalize work load. AAGs assign work to law clerks, but Logan monitors clerk workload to make sure it is a manageable amount. AAGs in Logan's Section generally set their own working hours, but where it is clear that an attorney cannot accomplish needed work in the time he or she wants to work, Logan believes he has the authority to direct them to work extra hours.

91. The AIC usually signs off on **vacation leave, sick leave, and flexible work**, but Logan will approve such requests when the AIC is on leave. The issue of **telecommuting** has not arisen under his watch. Logan does not approve travel expenses.

92. Logan estimates that he spends about 50 percent of his time on management duties; the rest of his time is spent working on his own cases. His management activities are billed to clients where they involve management of complex litigation. Logan bills approximately 30 to 45 hours in the category of general management each month. Other time he spends in management duties are billed to clients because it is case-specific.

93. According to Logan's June 2011 position description, Logan's position is to spend 50 percent of its time providing "direct legal services to state agencies and

elected officials in the environment and natural resources area.” The position is also to spend 25 percent of its time to “[m]anage and supervise attorney, paralegal, and law clerk resources to state environmental and natural resource agencies, coordinate legal services, and ensure consistency and quality of legal services;” including “[d]irect assignment of attorney * * * resources and assign and review work to meet state agency legal needs and priorities for particular assigned state agencies; [e]stablish and administer methods and procedures to ensure that legal services and advice are consistent and of a high quality and cost effective.” Finally, the position is to spend 25 percent of its time to “[s]upervise assigned Salem-area NRS Attorneys and Law Clerks,” including supervising “NRS attorneys in Salem DOJ office for particular assigned state agencies to ensure knowledge of and compliance with Department, Division and section policies; [m]onitor and review performance of assigned attorneys, paralegal and law clerks through review of written work product, attendance at legal proceedings and through meetings with client agencies * * *; [h]elp arrange for and provide adequate training and career development opportunities for section attorneys and law clerks; [r]eview applications for hiring attorneys and law clerks; recommend hiring decisions * * *; [a]ssist in the preparation of budget and policy package materials; [p]repare and sign formal evaluations for attorneys supervised by this position and [r]ecommend disciplinary action in consultation with AIC and division administrator.”

Civil Recovery Section: Claudia Groberg (AIC Fred Ruby, DA Fred Boss)

94. Groberg was appointed in March 2010 as AAIC in the Department’s Civil Recovery Section. She oversees six AAG positions (four of them Senior AAGs) handling Division of Child Support cases, which is specialized work. At the time of hearing, from her office in Eugene she oversaw two attorneys in Portland, two in Salem, and one in Eugene. Those attorneys handle cases in all 36 Oregon counties. She meets with each attorney once a month to review the law and their cases, and communicates with them by telephone two or three times each week. Groberg sets specific goals for her Section, while AIC Ruby sets goals for other Division attorneys who do not report to Groberg. She also conducts trainings two or three times each year to update attorneys on case law. AAGs may also conduct a portion of that training on a topic assigned by Groberg. AIC Ruby provides Groberg with discretion to handle many issues. If an attorney approaches Ruby about an issue without consulting Groberg first, the attorney is sent to Groberg. Groberg has consulted with Division Administrator Boss and Solicitor General Williams about the Section’s budget.

95. Groberg has participated in one hiring process, but that effort did not result in filling a position.

96. Groberg has not been involved in any **layoffs, recalls, or promotions**. She can request **transfers** of AAGs, but does not have authority to transfer.

97. Groberg observes AAGs in court once a year and provides e-mailed feedback. Her concerns are how they present themselves, their knowledge of the cases, how they answer questions from judges and clients, and how they treat *pro se* parties. She has conducted one set of annual **evaluations** thus far. Her AIC does not sign those evaluations, and they go directly from Groberg to the Division Administrator. The Division Administrator may add comments but does not revise Groberg's comments. Because child support work tends to generate complaints about AAGs, Groberg spends a significant amount of time investigating and responding to complaints about Section attorneys.

98. Groberg has developed one **work plan**, based on the audio of a hearing brought to her attention by a complaint from a local district attorney. She has not been involved in formal **discipline or suspensions**.

99. Section attorneys are **assigned** cases automatically based upon the counties they cover. Groberg may revise an attorney's caseload based on workload and availability. She creates a chart to track collection work by AAGs to aid in meeting an Attorney General goal of increasing collections. She sets goals for her AAGs and notifies the DA about them.

100. Groberg has approved **vacation and sick leave** requests and **telecommuting** for employees so long as they comply with Department guidelines and the Section has sufficient staff to perform necessary work. She has not had occasion to consider a **flexible work schedule** for an AAG. Groberg also approves travel expenses.

101. Groberg is expected to bill clients for 1,228 hours per year, 75 percent of the AAG 1,638 hour standard. She spends 5 to 25 hours a week on supervisory responsibilities, and estimates that she spends an average of one hour per day advising AAGs on legal strategy. She has her own caseload and estimates that she spends about 75 percent of her time on clients. According to Groberg's June 2011 position description, which was revised with input from AIC Ruby, Groberg is to spend 55 percent of her time on providing "direct and collaborative legal advice and litigation services to DCS and supervis[ing] output and quality of work;" 28 percent of her time assisting in "the administration of the day to day operations of the Section;" 15 percent of her time supervising "assigned Civil Recovery attorneys and law clerks;" and 2 percent of her time assisting in "the development and preparation" of the Section's budget.

Transparency Counsel: Michael Kron (Joe McNaught, Assistant Division Administrator)

102. Kron's position, created in December 2009 after the filing of this Petition, reports not to an AIC but to Joe McNaught, Assistant Division Administrator of the General Counsel Division. Kron supervises one AAG.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.

AFSCME has petitioned to include Assistant Attorneys-In-Charge (AAIC) positions in five Department sections in its bargaining unit, asserting that these positions are part of the unit under the express terms of the parties' contract recognition clause. OAR 115-025-0005(3). The Department objects to the petition on the basis that (1) AFSCME waived its right to seek to add these positions under OAR 115-025-0005(3) by failing to previously assert representation of these positions, and (2) the recognition clause and the Public Employee Collective Bargaining Act (PECBA) bar addition of these employees to the AFSCME unit because they are supervisory employees under that bargaining unit description and ORS 243.650(23).

OAR 115-025-0005(3) provides:

“When the issue raised by the clarification petition is whether certain positions are or are not included in a bargaining unit under the express terms of a certification description or collective bargaining agreement, a petition may be filed at any time; except that the petitioning party shall be required to exhaust any grievance in process that may resolve the issue before such a petition shall be deemed timely by the Board.”

The purpose of a subsection (3) petition is very narrow. A subsection (3) petition is a vehicle for parties to resolve an honest disagreement over whether certain positions are or are not already included in an existing bargaining unit based on the certification description or the contract recognition language. A subsection (3) petition does not add positions to a bargaining unit;¹⁶ and we will dismiss a subsection (3) petition if we find

¹⁶A union may petition to add unrepresented positions to a bargaining unit under OAR 115-025-0005(4). Such petitions require a 30 percent showing of interest, must be filed during the contract open period (in most cases), are subject to the election and certification bars, and require an election. An employer may also object to such a petition on the basis that the positions the union seeks are not appropriately included in the bargaining unit under the factors listed in ORS 243.682(1)(a).

it is an attempt to expand the unit by adding positions that are not already covered by the parties' agreement. *Oregon Public Employees Union, SEIU, Local 503 v. State of Oregon, Oregon State Hospital*, Case No. UC-37-96, 17 PECBR 434, 440 (1997); *Oregon AFSCME Council No. 75 v. Housing Authority of Portland*, Case No. UC-19-92, 13 PECBR 730, 735 (1992); *Oregon AFSCME Council No. 75 v. Clatsop County*, Case No. UC-72-91, 13 PECBR 619, 622 (1992).

To decide if positions are included in a bargaining unit under subsection (3), this Board interprets the language of the certification description or recognition clause. We address contract interpretation issues under a subsection (3) petition in the same manner that we address other contract interpretation issues. *Oregon AFSCME Council 75, Local 2831 v. Lane County*, Case No. UC-04-09, 23 PECBR 416, 425 (2009). Our goal is to discern the parties' intent. To determine that intent, we apply the three-part analysis described in *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005) (citing *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)). We begin by analyzing the text and context of the contract provision at issue. If we conclude the language is unambiguous, we enforce the clear terms of the contract. If the language is ambiguous, we proceed to the second step of our analysis and consider extrinsic evidence of the parties' intent. If the language remains unclear after completing this second step, we apply appropriate maxims of contract interpretation. 325 Or at 361-65.

Here, the recognition clause in the applicable collective bargaining agreement includes all AAGs below the rank of AIC and excludes "supervisory employees" from the bargaining unit. The parties agree that the AAIC position is an Assistant Attorney General below the rank of Attorney in Charge. The parties also agree that the definition of the contractual term "supervisory employees" is identical to the statutory definition of the term in ORS 243.650(23). Accordingly, we must determine whether the AAICs in the petition are supervisors under the PECBA. Before addressing this issue, however, we consider the Department's defense that the Union waived its right to seek inclusion of these positions in the bargaining unit.

2. The Union's Petition is not barred by a waiver.

The Department contends that AFSCME waived its right to include these positions in its bargaining unit because it failed to previously assert representation of these positions, and historically treated them as excluded from the bargaining unit.¹⁷ The Department argues that this Board will not consider a Petition under subsection (3)

¹⁷The Union did not address this issue in its post-hearing brief.

when the position at issue has historically been excluded from the bargaining unit. In support of its position, the Department cites *Oregon AFSCME Council No. 75 v. Housing Authority of Portland*, Case No. UC-19-92, 13 PECBR 730, 735 (1992).

In *Oregon Public Employees Union, SEIU, Local 503 v. State of Oregon, Oregon State Hospital*, Case No. UC-37-96, 17 PECBR 434, 435-36 (1997), we described our analysis of a subsection (3) case as follows:

“Our review in [a subsection (3) case] is narrow. It is based on the express language of the certification description or collective bargaining agreement and *on the historical conduct of the parties concerning the employees or positions at issue.*” (Footnote omitted; emphasis added.)

As discussed above, however, we do not consider extrinsic evidence of the parties’ intent if the contract language at issue is unambiguous:

“[W]e will examine the parties’ prior actions or practice as an aid to contract interpretation *only if* the contract language is ambiguous. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005) (citing *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)).” *Oregon AFSCME Council 75, Local 2831 v. Lane County*, Case No. UC-04-09, 23 PECBR 416, 425 (2009) (emphasis in original).

In the face of a clear contract provision, it is unnecessary to consider extrinsic evidence of the parties’ intent, such as their past conduct. Accordingly, we reject the Department’s argument that AFSCME’s waived its right to seek the addition of these positions to its bargaining unit by never previously asserting that the positions belonged in the bargaining unit.

3. The unrepresented AAIC positions in the Business Transactions, Child Advocacy, Criminal Appeals, Financial Fraud and Consumer Protection, Civil Recovery, and Natural Resources sections are included in the AFSCME bargaining unit under the contract recognition clause.

Standards for Decision

ORS 243.650(23) defines a supervisory employee as:

“any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their

grievances, or effectively to recommend such action, if in connection therewith, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment.”

Applying that definition, this Board has held that an employee’s supervisory status is established not by demonstrating the employee’s level of expertise or degree of responsibility, but by showing that the employee exercises “independent judgment” or “independent authority” in critical personnel matters. *The Dalles Police Association v. City of the Dalles*, Case No. UC-7-08, 22 PECBR 995 (2009); *IAFF Local 851 v. Lane Rural Fire/Rescue*, Case No. RC-7-03, 20 PECBR 512, 519 (2003).

On the one hand, where the record contains no history of prior recommendations concerning the statutory indicia, and no clear evidence that an alleged supervisor knew he or she had been given authority and responsibility to recommend in such areas, then the Board will not find effective recommendations. On the other hand, if there is clear evidence of knowledge by the alleged supervisor that he or she had been delegated authority to recommend, but no track record of actual recommendations, there would have to be some clear evidence that higher authority would give substantial weight to such recommendation in ultimate decisions in such matters. *City of Union v. Laborers' International Union of North America, Local 121*, Case No. UC-9-08, 22 PECBR 872 (2008) (citing *Oregon School Employees Association v. Baker School District 5J*, Case No. C-184-79, 5 PECBR 2927, 2934 (1980)).

We have contrasted supervisory employees with lead workers who perform work alongside of bargaining unit members, carry out management's instructions, and whose role in assigning and directing employees is limited to routine situations. These lead workers do not exercise substantial independent judgment in areas of supervisory authority in the interest of the employer. *Sisters Police Association v. City of Sisters*, Case No. RC-46-96, 17 PECBR 212, 221 (1997). In that case, we held that a sergeant, who worked alongside bargaining unit members, patrolled an assigned area most of the day and followed his superior’s orders and the department manual, was a lead worker and not a supervisor. We concluded that he did not “exercise significant authority” in the area of assigning and directing employees.

AFSCME argues that the AAICs fail to meet any statutory criteria for supervisors under the PECBA, but are simply lead workers. We consider the AAICs authority in each of the areas listed in ORS 243.650(23).

The record shows that the AAIC have no independent authority to hire, discharge, reward, or discipline employees, or the authority to effectively recommend these actions. AAICs either have no role in the hiring process, or participate only as members of a hiring panel or committee. Participation as a member of a hiring panel does not

constitute an effective exercise of independent judgment and does not demonstrate an individual's authority to hire. *City of Union*, 22 PECBR at 887. Meehan is the only AAIC who has had any involvement in discharging an employee: his recommendation to discharge an AAG was accepted by his supervisor. This single example is insufficient to demonstrate that AAICs have independent authority in this area. AAICs appear to have no role in rewarding employees. AAGs routinely receive annual step increases; recommendations by an AAIC to grant an extra step or deny a step increase are not routinely followed. (Finding of Fact 12.) The record contains no evidence of any formal discipline administered by an AAIC without approval and review of an AIC.

AAICs have a significant role in the evaluation process, but evaluation is not a statutory criteria. Although we have considered an individual's role in evaluation where relevant to discipline, hiring, and discharge of employees, the record in this case does not demonstrate that the AAIC role in evaluations is sufficient to demonstrate independent judgment or independent authority in these areas. Nor are we persuaded that the AAICs' role in administering work plans is reflective of independent judgment or independent authority regarding the statutory criteria. All work plans implemented by the AAICs were done under the direction and oversight of AICs.

Finally, we consider the AAICs authority in the area of assignment. Many of the assignment decisions made by the AAICs are based on workload. Although Gleason, Guss, Kuhn, Bothello, Logan, and Groberg do not make initial case assignments, they may reassign cases to equalize the attorneys' workload. Assignment decisions made by the other AAICs are guided by expertise: Meehan and Hart assign a portion of their cases based on the AAGs' competency in particular areas of the law. Smith and his supervising AIC share authority for assigning cases; their decisions are based on both attorney expertise and workload.¹⁸

To determine the nature and extent of the AAICs' authority to assign work, we look to relevant precedent under the National Labor Relations Act (NLRA). The current definition of a supervisor, adopted by the legislature in 1995, is virtually identical to the definition of a supervisor in the NLRA. Accordingly, we have held that the legislature intended for us to "interpret and apply that definition in a manner consistent with the practices and decisions of the National Labor Relations board (NLRB) and the federal

¹⁸The record contains no evidence regarding the basis for AAIC Shugar's case assignments. The party asserting an individual's supervisory status has the burden of proving it. *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995). The Department failed to meet this burden and presented no evidence that Shugar exercises independent authority in assigning employees.

courts.” *Deschutes County Sheriff’s Association v. Deschutes County*, Case No. UC-62-94, 16 PECBR 328, 337 (1996).¹⁹

Under the NLRA, an individual does not exercise the independent judgment expected of a supervisor if the individual bases assignment decisions on factors such as the employees’ skill and expertise, compatibility, and need to get particular projects accomplished. *See Quadrex Environmental Company, Inc.*, 308 NLRB 101 (1992) (individuals are not supervisors where the assignment of work “demonstrates nothing more than the knowledge expected of experienced persons regarding which employees can perform particular tasks.”); *Hexacomb Corporation and Western Temporary Services, Inc.*, 313 NLRB 983, 984 (1994) (foremen did not exercise independent judgment indicative of supervisory status “when they shift employees around within their respective lines to get projects accomplished.”); and *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994) (an individual who makes assignments based on compatibility of employees and the skills needed to do particular jobs does not exercise independent judgment required of a supervisor).

Here, any assignment of work by the AAICs is based solely on the need to equalize work among the AAGs or the AAGs’ expertise, or on both of these criteria. We agree with the NLRB that an individual who assigns work based on employees’ skills and experience does not exercise independent judgment characteristic of a supervisor. The other factor upon which AAICs based their assignment decisions—equalization of work load—is comparable to a factor in assignment decisions the NLRB rejects as indicative of supervisory status—the need to complete a particular job. In addition, AAGs in Gleason’s, Guss’ and Meehan’s section sometimes exchange cases among themselves to more equitably balance the workload. The AAGs’ ability to trade cases shows that equalizing case assignments is not a supervisory function. Accordingly, we conclude that those AAICs that assign work do not exercise independent judgment in performing this function.

Summary

The AAICs do not exercise independent authority in performing any of the statutory functions of a supervisor under ORS 243.650(23). We include the positions named in the petition in the AFSCME bargaining unit.

¹⁹Because the PECBA was largely modeled on the NLRA, we normally interpret the PECBA by looking at how the NLRA was interpreted prior to 1973, the year in which the PECBA was enacted. *Elvin v. OPEU*, 313 Or 165, 177-178, 179, 832 P2d 36 (1992). As discussed above, the current definition of a supervisor in ORS 243.650(23) was adopted in 1995, however. Accordingly, it is appropriate to look at how the NLRA was interpreted prior to 1995 to interpret this PECBA provision.

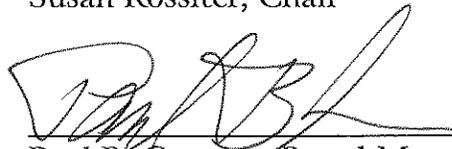
ORDER

The AAIC positions in the Business Transactions, Child Advocacy, Criminal Appeals, Consumer Protection and Financial Fraud, Civil Recovery, and Natural Resources units are included in the AFSCME bargaining unit.

DATED this 21 day of June 2012.



Susan Rossiter, Chair



Paul B. Gamsott, Board Member

*Kathryn A. Logan, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Member Logan did not participate in the deliberations and decision in this case.