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STATE OF ALASKA,)
)
 Petitioner,)
)
 vs.)
)
 PUBLIC EMPLOYEES LOCAL 71,)
)
 Respondent,)
)
 and)
)
 ALASKA PUBLIC EMPLOYEES)
 ASSOCIATION,)
)
 Intervenor.)
)
 _____)
 CASE NO. 91-028-UC)

DECISION AND ORDER NO. 144

Heard before the Alaska Labor Relations Board, James W. Elliott, B. Gil Johnson and Darrell Smith, with Hearing Officer Jean Ward presiding, on March 24, 1992, in Anchorage, Alaska. The record closed on March 24, 1992.

Appearances:

Personnel Manager Phyllis Schmidt, for petitioner State of Alaska; Business Manager Donald Valesko, for respondent Public Employees Local 71; and Regional Manager David R. Kaiser for intervenor Alaska Public Employees Association.

Digest: The food service manager at the Valdez Harborview Developmental Center shares a community of interest with the Labor, Trades and Crafts unit rather than the supervisory unit because the position does not meet the requirements for supervisor in 2 AAC 10.220(b)(3).

DECISION

Findings of Fact

1. Public Employees Local 71 (Local 71) represents a statewide unit of all State of Alaska employees working in the Labor, Trades and Crafts unit under the terms of a collective bargaining agreement.
2. Alaska Public Employees Association (APEA) represents a statewide supervisory unit of all State supervisory employees under the terms of a collective bargaining agreement.
3. On March 4, 1991, the State notified Local 71 that it would move the food service manager at the Harborview Development Center in Valdez (PCN 066140) from the Labor, Trades and Crafts unit to the supervisory unit unless Local 71 objected.

4. Local 71 filed a timely objection.
5. On March 29, 1991, the State filed a unit clarification petition with the Alaska Labor Relations Agency to determine the appropriate bargaining unit for the food service manager.
6. The Agency determined the petition met the requirements for filing under 2 AAC 10.050 and caused a notice of the petition to be posted on December 4, 1991. 2 AAC 10.060 & 2 AAC 10.070.
7. The incumbent in PCN 066140, Michael J. Pecchenino, is responsible for the overall management of the food service program of a large state institution. His major duties include budgeting, purchasing, menu preparation and supervising food service personnel. He has been in this position one and one half years, having worked his way up through the ranks from a pot washer. Pecchenino spends between two and three days a week on the average performing the actual duties of preparing menus, budgeting, purchasing and taking inventory as opposed to supervising other employees performing these duties. Budgeting, purchasing, inventory and menu preparation are not supervisory functions because Pecchenino performs the duties himself. Pecchenino spends most of his time performing job duties as opposed to spending most of it performing the six supervisory functions in 2 AAC 10.22(b)(3) of employ, promote, transfer, suspend, discharge, or adjudication of grievances of other employees; or performing such other supervisory duties as guiding, training, allocating, reviewing and directing the work of others.
8. Pecchenino is responsible for supervising eleven food service positions. He has direct supervisory responsibility for three cook III's and one cook II. He indirectly supervises the food service workers, who receive working instructions from the cook III's. The cook III's write evaluations for the food service workers and approve sick leave. Pecchenino handles appointment, promotion, transfer, discharge, and suspension functions and approves annual leave for the food service workers. Both Pecchenino and the cook III's handle petty grievances of food service workers. The position description questionnaire (PDQ) shows that Pecchenino spends thirty percent of his time supervising dietary personnel.
9. Discharge. The PDQ states and Pecchenino testifies his authority to discharge is limited to recommend. UC Petition (Mar. 29, 1991) (attachment 7, PDQ). He made one recommendation regarding discharge, which his superior followed after independently investigating it.
10. Suspend. The PDQ states and Pecchenino testifies his authority to suspend is limited to recommend. UC Petition (Mar. 29, 1991) (attachment 7, PDQ). The only specific example of Pecchenino exercising any authority to suspend was Pecchenino's response to a hypothetical question. Although Pecchenino testified hypothetically that he has authority to send an intoxicated employee home for the day, he did not testify that he had ever exercised it. The PDQ defines "suspend" as "place an employee in nonpay, nonduty status for one or more hours for disciplinary purposes."
11. Grievances. Pecchenino's authority to settle grievances is limited. Pecchenino's PDQ states he has authority to settle grievances. UC Petition (Mar. 29, 1991)(attachment 7, PDQ). The PDQ defines "authority" as "decide what action is necessary." "Grievances" are defined as "respond to verbal or written employee grievances (1st Level Response)." Pecchenino's actions do not support this level of authority. Pecchenino believes there are two types of grievances: those of a petty nature and formal grievances. He handles petty gripes and grievances. He appears unsure of his authority to handle more formal grievances such as contract matters or safety violations. First, he said he did not know what happens to formal grievances. Later he said they go on a form obtained from and submitted through the shop steward to Local 71. Pecchenino testified that, although the PDQ says he has authority to settle grievances, he did not know that he could settle these more formal grievances. The Labor, Trades and Crafts contract bar prevents Pecchenino from resolving grievances of subordinates so long as he remains in the Labor, Trades and Crafts bargaining unit. Even absent a contract bar he may not have authority to settle grievances. The one formal grievance filed since he became food service manager was not handled by Pecchenino. It was not handled by the first level supervisor outside the bargaining unit. It was handled by the superintendent of Harborview. While Pecchenino testified that he was sure he would be involved in the discussion of any formal grievance filed, there is no evidence that he was involved in the only grievance actually filed. Pecchenino's testimony is more persuasive than the statement on the PDQ.
12. Promote. Pecchenino has limited authority to promote although the PDQ states and Pecchenino testifies that he has authority to promote. UC Petition (Mar. 29, 1991) (attachment 7, PDQ). The PDQ defines "promote" as "move an employee you supervise to another position at a higher range." While Pecchenino moves employees to a higher level,

he exercises no discretion in doing so. Pecchenino must promote the most senior qualified employee. Determination of "most senior qualified" is made by Local 71, not by Pecchenino. Local 71 furnishes a list that contains one name and Pecchenino must promote from that list.

13. Transfer. Pecchenino may have authority to transfer but he has never exercised it. The PDQ states and Pecchenino testifies he has authority to transfer, UC Petition (Mar. 29, 1991) (attachment 7, PDQ), although he did testify he would go through his supervisor to effect a transfer. However, he has not chosen to exercise any authority to transfer in the one and one half years he has been in the position because he prefers to promote employees already working at Harborview.

14. Employ. Pecchenino has some employing authority. He testifies and the PDQ provides he has authority to employ. UC Petition (Mar. 29, 1991) (attachment 7, PDQ). He exercises that authority by making appointments from a list furnished by Local 71 that contains three names. No evidence was presented about how often he exercises his authority.

16. Pecchenino occupies an office in the kitchen area where other food service employees work.

17. Pecchenino testified that he performs the same duties as his predecessor in the position. He testified that the duties have not changed since the position was reclassified from cook IV to food service manager, which occurred on May 21, 1990. UC Petition (Mar. 29, 1991) (attachment 6, classification update memo). He further testified that the duties have not changed since he assumed the position in November, 1990.

Discussion

History

The State files this petition to move a position to the supervisory unit. The position, now occupied by Pecchenino, was reclassified from cook IV to food service manager because, the State claims, the duties changed substantially while Pecchenino's predecessor was in the position. Since Local 71 objected to the transfer of the position to the supervisory unit, the State asks the Agency to determine whether Pecchenino belongs in the supervisory unit or in the Labor, Trades and Crafts unit. The Public Employment Relations Act requires at the state level that supervisors be in a separate bargaining unit from nonsupervisory personnel. 2 AAC 10.110(a)(1). "Supervisory employee" is defined by 2 AAC 10.220(b)(3) as

an individual having substantial responsibility on behalf of the public employer regularly to participate in the performance of all or most of the following functions: employ, promote, transfer, suspend, discharge, or adjudicate grievances of other employees, if in connection with the foregoing, the exercise of such responsibility is not of a merely routine nature but requires the exercise of independent judgment.

To be a supervisor under 2 AAC 10.220(b)(3), an individual must participate in the performance of "all" or "most" of the following functions: employ, promote, transfer, suspend, discharge, or adjudication of grievances of other employees. The former State Labor Relations Agency construed "most" to mean at least four.¹ In 1975 the previous agency relied upon a definition of "supervisory employee" from the State of Washington. It stated that Washington had determined that "most" meant a majority, that is, four of the six supervisory functions. In re Petitions for Clarification Of Supervisory Status, SLRA Order & Decision No. 15, at 2 & 5. (1975). Since 1975 Washington's law changed. It now relies upon the NLRB's definition of supervisor. E.g., In re City of Tacoma, Case No. 135-DRW-047, Decision No. 2154-A (Wash. Pub. Employment Relations Comm'n April 8, 1977).

The American Heritage Dictionary 816 (2d college ed. 1982) defines "most" as

adj. 1. Greatest in number, quantity, size or degree. 2. The greatest part of: *most people*. *-n.* The greatest amount: *had the most to say but did the least*. *-pron.* (used with a sing. or pl. verb). The greatest part: *Most of the children were absent. Most of the house was cold.*

Applying this definition, "most" would mean the greatest number that is not "all," i.e., five of the six supervisory

functions. Because we believe that bona fide supervisors will usually participate in most if not all supervisory functions, we depart from SLRA precedent and require participation in five of the six supervisory functions.

To "participate in the performance of" a function under the regulation, the supervisor must (1) have substantial responsibility on behalf of the employer and exercise it in a manner demonstrating independent judgment and (2) regularly participate in the function. Thus, it is important to examine the employee's performance to determine whether the employee meets these two tests in at least five of the six supervisory functions.

I. Substantial Responsibility Involving Independent Judgment.

In order to meet the first test, an employee must exercise responsibility in a manner that demonstrates independent judgment rather than the exercise of responsibility of a routine nature. The exercise of responsibility of a routine nature requires little or no independent decision making. The responsibility can be characterized as standard and customary and often involves adherence to established standards or rules. NLRB v. City Yellow Cab Co., 344 F. 2d 575, 59 L.R.R.M.(BNA) 2001. (6th Cir. 1965) For example, a dispatcher who quotes a trip rate from a rate book and authorizes a driver to accept a check from a customer who has a credit rating preapproved by management is exercising responsibility of a routine nature. See id. at 2004. In contrast, independent judgment involves acting on one's own initiative and without assistance from superiors to reach an independent decision. See e.g., West Virginia Pulp & Paper Co. and United Papermakers & Paperworkers Union, AFL-CIO. 140 N.L.R.B. No. 81, 52 L.R.R.M.(BNA) 1174 (1953).

Inherent in the exercise of independent judgment is the authority to act on that judgment. If an employee makes decisions without obtaining prior approval from a higher level supervisor and merely informs the supervisor of the decision, the employee has authority to act as a supervisor in the performance of that function even though the employee's decisions are subject to later veto. Mere recommendations do not constitute independent authority to act. E.g., Alaska State Employees Ass'n v. Alaska Public Employees Ass'n, SLRA Order & Decision No. 123, at 7-9. (1989).

The State Labor Relations Agency determined that, so long as an employee had independent authority to act in one of the six supervisory functions, such as transfer or promote, the employee had supervisory authority for that function. For example, an employee might exercise little or no discretion in the selection of an individual to be promoted or transferred due to limitations imposed by the collective bargaining agreement, but the State Labor Relations Agency would find the individual to have supervisory authority for those functions if the individual retained the authority to act. E.g., In re Petition for Unit Clarification 80-14, SLRA Order & Decision No. 63, at 3-4, 6. (1981).

We agree with the State Labor Relations Agency that to be a supervisor an employee must exercise independent authority. Alaska State Employees Ass'n v. Alaska Public Employees Ass'n, SLRA Order & Decision No. 123, at 7-8. However, we also believe that the language of the regulation, which specifies independent judgment, requires something more than independent authority. We therefore depart from the precedent establishing independent authority as the only test for supervisory authority for a function and include the exercise of discretion as part of the independent judgment test. In re Petition for Unit Clarification 80-14, SLRA Order & Decision No. 63, at 3-4, 6.

We find that independent judgment requires an examination of the level of discretion and independent decision making exercised by an employee in performing the six functions. If the individual has independent authority to promote, but does not use independent judgment in exercising that authority, he would not satisfy the first test. For example, in this case Pecchenino's authority to promote is restricted by the collective bargaining agreement to the most senior qualified employee. Local 71, rather than Pecchenino, determines the most senior qualified employee. Because he does not independently decide who to promote, Pecchenino does not exercise independent judgment. Since he does not exercise independent judgment, Pecchenino does not meet an essential requirement in the regulation defining "supervisory employee." Therefore, he does not have supervisory status for the promote function.

In instances where the individual has not had the opportunity to exercise discretion in five of the six supervisory functions named in 2 AAC 10.220(b)(3) because the span of supervision is small or because there have been no personnel changes or grievances, determining whether the individual exercises independent judgment is more difficult.

In those cases where there has been no opportunity to exercise discretion in the six named supervisory functions, we will examine other supervisory duties, such as reviewing, training, evaluating, directing and assigning the work of subordinates, to determine if the individual exercises independent judgment. Absent a collective bargaining agreement that severely limits discretion, an individual who has not had an opportunity to exercise independent judgment in the six named functions will nonetheless be considered a supervisor if the individual exercises independent judgment when performing other supervisory duties. We apply this additional factor to avoid excluding from the supervisory unit those individuals who, but for lack of opportunity, share a community of interest with other supervisors under AS 23.40.090.

II. Regular Participation.

The second test that must be met in the regulation defining "supervisory employee" is that the employee's participation in five of the six functions must be regular. If an individual regularly participates in five of the six supervisory functions in a manner demonstrating exercise of independent judgment and authority, the individual is a supervisor.

Measuring regular participation is generally a matter of determining frequency of performance. Early in the implementation of the Public Employment Relations Act, the State Labor Relations Agency recognized that individuals could nominally have substantial responsibility for a supervisory function, but yet not have the opportunity to exercise it. Earlier in this decision we considered the same problem when examining independent judgment. The SLRA addressed this issue when it examined regularity of performance.

When the SLRA could not judge regularity of performance because the employee had had limited opportunities because, for example, there were no personnel changes, it devised an additional test. In re Unit Allocation of Individuals, SLRA Order & Decision No. 26, at 5 & 6. (1976). The SLRA determined that individuals who nominally have substantial responsibility but do not exercise it due to limited opportunity are supervisors if they spend a substantial part, or most, of their time performing such other supervisory tasks as guiding, training, allocating, reviewing and directing the work of others. Id. at 6. If, instead of supervising the work, individuals spend most of their time performing the work, the State Labor Relations Agency determined they were not supervisors. Id. at 5.

Over the years, the "most of the time" test, which was originally applied only to those supervisors who did not regularly participate in the six supervisory functions due to limited opportunity, was applied to all supervisors. For example, in Order and Decision 117, the SLRA required that an employee spend "most of the time" performing supervisory duties. Alaska State Employees Ass'n v. State of Alaska and Alaska Public Employees Ass'n, SLRA Order & Decision No. 117, at 4. (1989). Also, in Order and Decision 123, the SLRA held that an employee had to spend over fifty percent of the time performing supervisory duties to be considered a supervisor. Alaska State Employees Ass'n v. Alaska Public Employees Ass'n & State of Alaska, SLRA Order & Decision No. 123, at 9-10. (1989).

However, we do not find in the regulation defining "supervisory employee" language that requires a supervisor to spend a certain percentage of time performing supervisory duties. 2 AAC 10.220(b)(3). Measuring regular performance by this artificially precise method could exclude genuine supervisors who have a community of interest with other supervisors under AS 23.40.090. We therefore reject the "most of the time" rule or the "over fifty percent rule," as it has been applied by the former agency. See id at 9-10.

Instead of assigning a quantitative test to examine regular participation, we will consider an individual's participation in five of the six supervisory functions to be regular if the individual acts in a manner demonstrating independent judgment and authority each time the opportunity arises, with limited exceptions.²

Thus, an individual who exercises independent judgment in at least five of the six supervisory functions each time the opportunity arises is a supervisor.

Conclusions of Law

1. The Alaska Labor Relations Agency has jurisdiction to consider and hear requests for unit clarification under AS 23.40.090 and AS 23.40.160.

2. Petitioner State has the burden of proof under 2 AAC 10.430.

3. 2 AAC 10.220(b)(3), which defines supervisory employee, applies. To be a supervisor under 2 AAC 10.220(b)(3) an individual must in five of the six functions (1) demonstrate independent judgment, involving both the exercise of discretion and the authority to act on that discretion, and (2) participate regularly. Where independent judgment cannot be evaluated because the individual lacked any opportunity to exercise it, the individual can demonstrate supervisory status by exercising independent judgment in other supervisory activities, such as directing the work of subordinates.

4. Discharge. Pecchenino does not have supervisory status in the discharge function. Since Pecchenino's authority to discharge is limited to recommend, he cannot act on his own to terminate an employee. While he may exercise discretion in making the recommendation, he does not have independent authority to act on it. Since authority to act is essential to demonstrate independent judgment, Pecchenino does not meet the first part of the test for discharge and lacks even nominal authority. Because he does not meet the first part of the test, we need not examine the second part of the test.

5. Suspend. Pecchenino does not have supervisory status in the suspend function. Since Pecchenino's authority to suspend is limited to recommend, he cannot act on his own to discipline an employee. While he could exercise discretion in making the recommendation, he does not have independent authority to act on it. Absent this authority, he does not have independent judgment. The State attempted to show that Pecchenino had authority to send an employee home for the day. However, the sole evidence on this issue was speculative. The testimony established only that hypothetically Pecchenino could remove an employee from duty for the day but not whether he had ever even had the opportunity. The State did not meet its burden of proof to show that Pecchenino exercised independent judgment in imposing disciplinary action, such as leave without pay, or that Pecchenino regularly participated in this function.

6. Settling grievances. Pecchenino does not have supervisory status in the grievance function. Because Pecchenino is uncertain of his authority to settle grievances, even absent a contract bar to the exercise of any authority, and he did not participate in settling the only grievance filed since he has been in the position, we conclude that his participation in this function does not demonstrate the exercise of independent judgment, nor does it establish regular participation.

7. Promote. Pecchenino does not have supervisory status in the promote function. Although he has authority to promote, he does not exercise discretion and therefore lacks independent judgment in this function. Since the union determines the most senior qualified employee for promotion and Pecchenino is required to promote that person, he does not independently decide who to promote. Because he fails the first part of the test, we need not examine the regularity of his participation in this function. However, we note that the regularity of Pecchenino's participation in the promote function cannot be determined from the record because no evidence was introduced on this subject.

8. Transfer. Pecchenino does not have supervisory status in the transfer function. Although he has independent authority to transfer, Pecchenino chooses to promote employees at Harborview rather than transfer them. The record is inadequate to determine whether Pecchenino would exercise discretion in performing this function if he chose to transfer rather than promote an employee. There is no evidence in the record that establishes how candidates are selected for promotion. A former decision suggests that the Local 71 contract controls transfer in the same manner as promotion. In re Petition for Unit Clarification 80-14, SLRA Order & Decision No. 63, at 3-4. (1981). If Pecchenino can only transfer the most senior qualified employee, with determination of that employee made by the union and not by Pecchenino, he would not exercise independent judgment in selecting the employee to transfer. Since the record is inadequate to determine whether Pecchenino would exercise discretion in this function, we cannot determine if he has independent judgment.

9. Employ. Pecchenino does not have supervisory status in the employ function. Applying the first part of the test, we find Pecchenino does exercise independent judgment in employing because he selects from a list containing three candidates and he has independent authority to implement the decision to hire. However, the State did not meet its burden to prove the second part of the test because it did not present evidence that Pecchenino ever exercised this authority. The regularity of Pecchenino's participation in this function cannot be judged.

10. Pecchenino is properly placed in the Labor, Trades and Crafts unit because he does not meet the criteria for placement in the supervisory unit.

ORDER

We deny the State of Alaska's petition and order that the food service manager at Harborview, PCN 066140, remain in the Labor, Trades and Crafts bargaining unit.

Date: September 22, 1992.

THE ALASKA LABOR RELATIONS AGENCY

B. Gil Johnson, Board Chairman

James W. Elliott, Board Member

Darrell Smith, Board Member

APPEAL PROCEDURES

An Agency decision and order may be appealed through proceedings in superior court brought by a party in interest against the Agency and all other parties to the proceedings before the Agency, as provided in the Alaska Rules of Appellate Procedure and the Administrative Procedures Act.

The decision and order becomes effective when filed in the office of the Agency, and unless proceedings to appeal it are instituted, it becomes final on the 31st day after it is filed.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of State of Alaska v. Public Employees Local 71, Case No. 91-028-UC, dated and filed in the office of the Labor Relations Agency in Anchorage, Alaska, this 1st day of October, 1992.

Norma Wren

Clerk Typist IV

This is to certify that on the 1st day of October, 1992, a true and correct copy of the foregoing was mailed, postage prepaid to

Phillis Schmidt, State

Don Valesko, Public Employees Local 71

Dennis Geary, APEA

Signature

1Before July 1, 1990, the Department of Administration, State Labor Relations Agency, administered the Public Employment Relations Act for the State. On July 1, 1990, the Alaska Labor Relations Agency assumed administration of the Act for the State, municipalities and school districts. Executive Order 77 (eff. July 1, 1990).

2An example of an exception to the rule requiring participation each time the opportunity arises would be in the case of an individual who is on leave when an opportunity to act in a supervisory function occurs and a decision must be made before the individual returns to duty.