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STATE OF ALASKA,)
(NATHAN P. JOHNSON),)
)
Petitioner,)
)
vs.)
)
ALASKA STATE EMPLOYEES)
ASSOCIATION, AFSCME LOCAL)
52, AFL-CIO,)
)
Respondent,)
)
and)
)
ALASKA PUBLIC EMPLOYEES)
ASSOCIATION, AFT/AFL-CIO,)
)
Intervenor.)
)
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CASE NO. 95-422-UC)

DECISION AND ORDER NO. 196

This matter was considered on the record, including the brief, evidence, stipulations, and tapes of proceedings on August 18, 1995, in Anchorage, Alaska, by a panel of the Alaska Labor Relations Board, Chair Alfred L. Tamagni, Sr., and Members James W. Elliott and Raymond P. Smith. Hearing Officer Jean Ward presided. The record closed on August 18, 1995.

Appearances:

Art Chance, labor relations analyst, for petitioner State of Alaska; Alison Reardon, business agent III, for respondent Alaska State Employees Association, AFSCME Local 52, AFL-CIO; and Joan Wilkerson, southeast regional manager, for intervenor Alaska Public Employees Association, AFT/AFL-CIO.

Digest:

The statewide environmental coordinator located in the Division of Engineering and Operations at the Department of Transportation and Public Facilities in Juneau, shares a community of interest with the supervisory unit due to his employing and discipline responsibilities under 8 AAC 97.990(a)(5).

DECISION

The parties dispute the bargaining unit placement of position control number 25-0180, a statewide environmental coordinator position occupied by Nathan P. Johnson. The State has assigned Johnson's position to the supervisory unit but has not transferred it pending the outcome of this hearing. Johnson's current bargaining representative, Alaska State Employees Association, AFSCME Local 52, AFL-CIO claims that the statewide environmental coordinator position should remain in the general government unit. Alaska Public Employees Association, AFT/AFL-CIO maintains that it belongs in the supervisory unit.

A hearing was conducted on August 18, 1995, at which the parties presented testimony and other evidence. Upon consideration of the record, the panel finds the facts as follows:

Findings of Fact

1. Alaska State Employees Association, AFSCME Local 52, AFL-CIO (ASEA) represents a statewide unit of all State permanent, probationary, provisional, and nonpermanent personnel (except those employed in the student, college, and graduate intern job classes) in the general government unit. ASEA/State Agreement, Exh. A, at 2 (1990--1992, extended July 1, 1995--June 30, 1996).
2. Alaska Public Employees Association, AFT/ AFL-CIO (APEA) represents a statewide unit of all State permanent, probationary, provisional, and nonpermanent supervisory employees. APEA/State Agreement, Exh. 102, at 4 (Jan. 1, 1990--Dec. 31, 1992, extended to June 30, 1995).
3. Nathan P. Johnson occupies the statewide environmental coordinator position, position control number 25-0180, at the Department of Transportation and Public Facilities (DOT&PF). DOT&PF requested reassignment of Johnson's position from the general government unit to the supervisory unit because Johnson has supervisory responsibility for two positions. Position description questionnaire, Exh. 1, at 1 & 6.
4. On June 30, 1995, the State filed a unit clarification petition with the Alaska Labor Relations Agency to determine the appropriate bargaining unit for Johnson's position. Petition for Unit Clarification, at 2 (June 29, 1995).
5. Johnson has been the statewide environmental coordinator for a little over a year. This position was vacant for a number of years before Johnson was placed in it.
6. The need for a statewide environmental policy prompted the State to fill the statewide environmental coordinator position. Johnson testified that DOT&PF performs much of its work on a regional basis without statewide coordination. Promulgation of numerous complex environmental laws affecting the entire State caused DOT&PF to change the way it had been doing business on environmental issues.
7. Johnson is responsible for formulating and implementing policies and procedures necessary for administering DOT&PF's environmental programs, which he coordinates on a statewide basis. Johnson's principal program responsibilities include analyzing numerous federal aviation and highway policies, such as the Clean Water Act and the Clean Air Act, to determine the effect on DOT&PF's operations; developing and implementing environmental standards manuals, codes, and specifications; performing compliance reviews; acting as environmental consultant for DOT&PF; providing outside agency and public coordination at the managerial level; and preparing implementation procedures for new State and federal environmental laws. Exh. 1, at 2-3. Johnson's duties are still evolving to meet the State's needs in formulating and implementing environmental laws on a statewide basis. He spends 85 percent of his time performing these and other managerial activities. Id.
8. Johnson spends the remaining portion of his time performing supervisory duties. At the time Johnson completed the position description questionnaire (PDQ) on November 7, 1994, he stated that he spent 15 percent of his time performing supervisory duties. He testified that he spends a little less time now because the environmental engineering associate does not require as much supervision as he did previously. He estimates that he spends one to one and one-half hours daily performing supervisory tasks. This includes planning time to determine how his subordinate will complete a project. The other position that he supervises, the environmental analyst III, is vacant currently due to budgetary constraints. Johnson is seeking funding for the vacant position and he has obtained some grant money that he intends to use for that purpose. The grant money is insufficient, however, to allow Johnson to fill the position at this time.
9. Johnson reports to Rodney A. Wilson, who has been the acting director for the past three and one-half months. Before becoming acting director, Wilson worked for DOT&PF for 11 years as an architect II in the Division of Engineering and Operations.

10. Both Wilson and Johnson are specialists but they specialize in different areas. Wilson specializes in buildings and Johnson specializes in environmental issues. Wilson testified that he does not question Johnson's judgment on environmental issues. Wilson has knowledge of Johnson's capabilities and judgment because he and Johnson have worked together on projects for the past year. Before that, Wilson worked with Johnson on regional environmental issues pertaining to buildings.

11. Employing function. The PDQ states and Johnson testified that he has full authority to hire employees for the two positions that he supervises. Exh. 1, at 6. Johnson's supervisor, Wilson, also testified that Johnson has full authority to hire employees.

12. The unit Johnson supervises is small. Thus, his opportunity to engage in employing functions is limited. Johnson has not had the occasion to hire, transfer, layoff, or promote an employee since he became the statewide environmental coordinator.

13. Even though money in the budget is inadequate to fill the vacant position, Johnson is planning for the time when he has funds by assessing DOT&PF's needs and requesting that the position be upgraded and reclassified from an environmental specialist III to an environmental analyst III. Reclassification of this position will give him flexibility to promote or transfer employees, as well as hire from the open competitive register. Johnson believes the reclassification has been approved.

14. Discipline function. Johnson expressed some confusion about his authority in the discipline function, stemming in part from the fact that he was hired by one person and is now being supervised by another one. The PDQ states that Johnson has full authority to perform discipline functions. Id. However, he testified that he was not sure if he could discharge or suspend an employee without first checking with Wilson. Johnson testified that he can recommend that an employee be discharged, suspended, or demoted. He believes that his recommendation would be given serious consideration. Johnson has never had a recommendation overturned on this or any other job.

15. Wilson clarified Johnson's authority regarding discipline functions. Wilson expects Johnson to act without delay when working in the field if Johnson believes it is necessary to discharge a subordinate. Wilson would not question Johnson's actions. Wilson testified that he has equal respect for Johnson's expertise in personnel and environmental matters. On the other hand, if the discharge did not need to occur immediately, he would expect Johnson to discuss the matter with him. If Johnson wanted to demote an employee, he expects Johnson to discuss the matter with him first, depending upon the circumstances surrounding the case. Johnson has full authority to suspend an employee or issue a written warning. He does not need to discuss these actions with Wilson prior to taking them.

16. Wilson has given his subordinates a great deal of authority since he became acting director. He has issued only one management directive, which concerned performance evaluations. He requires subordinates who wish to award double merit increases, demote an employee, or take probation actions to consult with him before notifying the employee of the proposed action because these issues require action above his level. He wants to know about his subordinates' proposals in advance so he can brief his superiors if required.

17. Johnson has not had occasion to discharge, suspend, or demote an employee and he has not needed to issue a written warning.

18. Johnson has had an opportunity to handle a less formal discipline matter. Upon accepting his current position, Johnson was informed that a problem existed with a subordinate that needed to be corrected. Johnson handled this situation by talking to his former director, the employee's former supervisor, reading the employee's evaluation, and discussing the matter with the employee. Johnson and the employee decided how to resolve the matter and it was corrected without formal action.

19. Grievance adjudication. Johnson testified that he has full authority to handle grievances if his position were to be placed in the supervisory unit. The PDQ and supervisory responsibilities questionnaire state that Johnson has authority to handle grievances. Id.; Exh. 3, at 2.

20. The ASEA/State collective bargaining agreement requires that a grievance be submitted to the first level supervisor

outside of the bargaining unit. Exh. A, at 6-7. Absent any contract prohibition, Johnson has authority to respond to grievances.

21. Johnson has not had the opportunity to handle any grievances.

Conclusions of Law

1. The Alaska Labor Relations Agency has jurisdiction to consider petitions for unit clarification under AS 23.40.090.
2. Petitioner State has the burden of proof under 8 AAC 97.350(f).
3. The Public Employment Relations Act requires at the State level that supervisors be in a separate bargaining unit from nonsupervisory personnel. 8 AAC 97.090(a)(1); State of Alaska v. Alaska State Employees Ass'n/AFSCME Local 52, AFL-CIO, Decision & Order No. 194, at 3 (Sept. 26, 1995).
4. 8 AAC 97.990(a)(5), which defines supervisory employee, provides:

"[S]upervisory employee" means an individual, regardless of job description or title, who has authority to act or to effectively recommend action in the interest of the public employer in any one of the following supervisory functions, if the exercise of that authority is not merely routine but requires the exercise of independent judgment:

(A) employing, including hiring, transferring, laying off, or recalling;

(B) discipline, including suspending, discharging, demoting, or issuing written warnings; or

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

5. We have found that

To be a supervisor under 8 AAC 97.990(a)(5), two standards must be met. First, the employer must have conferred on an employee the authority to act or effectively recommend action in any one of the three following supervisory functions: employing, discipline, or grievance adjudication. Second, the employee must exercise independent judgment in performing the function when the opportunity arises. We therefore need to address both grants of authority and how that authority is exercised.

Id., at 6.

6. Employing function. First, we will apply the conferral of authority standard. The State plainly has vested in Johnson the authority to hire employees. He satisfies the grant of authority standard.

7. Second, we look at how that authority is exercised. ASEA argues that a grant of authority alone in one of the three supervisory functions is insufficient to place a position in the supervisory unit. Instead, ASEA maintains that the authority must be exercised before a position can be moved.

8. We have already considered and rejected this argument in a decision that was issued on September 26, 1995. Id., at 6-7. In that decision, we found that a grant of authority in at least one of the three supervisory functions is sufficient to place a position in the supervisory unit if the employee exercises the granted authority when the opportunity arises.

9. In this case, Johnson has not had an opportunity to exercise his authority to hire. The number of hiring decisions that Johnson has had the opportunity to make is limited due to the size of the group that he supervises.

10. Although Johnson has not filled a vacant position, we find that he has exercised independent judgment in the employing function. Johnson decided that the vacant position would better meet DOT&PF's needs if it were upgraded

and reclassified to an environmental analyst III. Johnson also exercised discretion in obtaining grant money and determining how that money would be used. He plans to use it to partially fund the position. We therefore conclude that Johnson exercises independent judgment in the employing function.

11. ASEA attempts to impose a third requirement to 8 AAC 97.990(a)(5). ASEA argues that Johnson cannot be a supervisor because he does not spend a majority of his time performing supervisory duties. We have already rejected this argument. *Id.*, at 8-9.

12. ASEA also attempts to impose a fourth requirement to 8 AAC 97.990(a)(5). ASEA argues that Johnson cannot be a supervisor because he only supervises one subordinate. ASEA is concerned about the number of positions that could be transferred from the general government unit to the supervisory unit if supervisors who supervise one employee are placed in the supervisory unit.

13. The State and APEA maintain that supervision of one employee is sufficient to place Johnson's position in the supervisory unit. APEA correctly notes that the regulation defining supervisory employee does not specify the number of employees who must be supervised to qualify for supervisory status. The State maintains that some supervisor to employee ratios will be high due to special staffing needs. The State maintains that supervisory employees share a community of interest with other supervisors regardless of the number of employees supervised.

14. We find that supervision of one employee can be sufficient to place a supervisor in the supervisory unit. We decline to quantify the number of employees who must be under an individual supervisor's span of control. The community of interest that supervisors share with each other under 8 AAC 97.990(a)(5) and the potential conflict of interest that would occur by placing supervisors in the same unit as the employees they supervise is the same whether the supervisor has responsibility for one employee or for fifty employees.

15. In this case, Johnson has authority to perform employing functions and he exercised independent judgment in obtaining a reclassification of the vacant position and partial funding. Therefore, his position meets the minimum requirements for placement in the supervisory unit.

16. Discipline function. Applying the rule we developed for supervisory employee to the discipline function, we must determine whether Johnson has been granted authority and then exercised it where there has been opportunity. In the case of discipline we find that Johnson has the authority to act directly in suspending employees and issuing written warnings. He can act directly to discharge an employee when he is in the field. He has authority to effectively recommend that an employee be discharged or demoted when he is working in the office. This is sufficient under the clear language of the regulation.

17. Again, Johnson has had limited opportunity to exercise this authority when performing discipline function. Although Johnson has not issued a formal directive, he has had the occasion to exercise discretion in the one less formal discipline situation that arose. We have found that this is sufficient to establish independent judgment. *Id.*, at 9.

18. Because Johnson has the authority both to act independently and to effectively recommend discipline, depending on the circumstances, and he exercised it in a manner requiring independent judgment when the opportunity arose, his responsibilities in the discipline function require placement of his position in the supervisory unit.

19. The State asks the Agency to decide Johnson's bargaining unit placement in part based on his managerial responsibilities. Although Johnson supervises two positions, he is primarily a managerial employee who has statewide responsibility for environmental policy for DOT&PF. The State claims that Johnson's managerial responsibilities support placement of his position in the supervisory unit because he develops programs and work standards that affect how other employees must perform work. The State believes that employees who decide what work is to be done share a greater community of interest with supervisory employees than with rank and file employees who perform the work. Managerial employees do not have a separate bargaining unit and are located in different bargaining units throughout State government.

20. However, managerial employees are not defined in the Public Employment Relations Act. The supervisory employee definition in 8 AAC 97.990(a)(5) does not address managerial duties and we therefore may not consider them

in deciding whether Johnson's position should be placed in the supervisory unit.

21. ASEA suspects that the State might be using transfers to the supervisory unit to avoid the payment of overtime under the Fair Labor Standards Act, 29 U.S.C.A. §§ 201-219 (West 1995). It asks the Agency to consider this possible motive when determining Johnson's unit placement. However, overtime eligibility is not an issue under the supervisory definition in 8 AAC 97.990(a)(5); we decline to consider this factor.

22. Johnson's position is properly placed in the supervisory unit because it meets the criteria under 8 AAC 97.990(a)(5) for placement in the supervisory unit.

ORDER

1. We **grant** the State of Alaska's petition and **order** that the statewide environmental coordinator, PCN 25-0180, at the Division of Engineering and Operations in the Department of Transportation and Public Facilities be placed in the supervisory bargaining unit.

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

ALASKA LABOR RELATIONS AGENCY

Alfred L. Tamagni, Sr., Chair

James W. Elliott, Board Member

Raymond P. Smith, Board Member

APPEAL PROCEDURES

An Agency decision and order may be appealed through proceedings in superior court as provided in the Alaska Rules of Appellate Procedure and the Administrative Procedures Act.

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

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of STATE OF ALASKA, (NATHAN P. JOHNSON) vs. ALASKA STATE EMPLOYEES ASSOCIATION, AFSCME LOCAL 52, AFL-CIO and ALASKA PUBLIC EMPLOYEES ASSOCIATION, AFT/AFL-CIO, CASE NO. 95-422-UC, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 19th day of October, 1995.

Margie Yadlosky

Administrative Assistant I

This is to certify that on the 19th day of October, 1995, a true and correct copy of the foregoing was mailed, postage prepaid to

Art Chance, State

Alison Reardon, ASEA

Dennis Geary, APEA

Signature