

STATE OF ALASKA
DEPARTMENT OF LABOR
RELATIONS AGENCY

IN THE MATTER OF THE UNIT)
CLARIFICATION OF DEPUTY FIRE)
MARSHALL II)
)
PUBLIC SAFETY EMPLOYEES)
ASSOCIATION,)
)
Objecting Party,)
)
vs.)
)
ALASKA STATE EMPLOYEES)
ASSOCIATION and STATE OF)
ALASKA)
)
Respondents.)
)
)
) UC 89-2

ORDER AND DECISION NO. 121

SUBJECT:UNIT CLARIFICATION CONCERNING PLACEMENT OF DEPUTY FIRE
MARSHALL.

The Alaska State Labor Relations Agency (the "Agency") convened a hearing on June 10, 1989 to consider the matter of unit placement for the State job classification of Deputy Fire Marshall II ("DFM II"). DFM IIs are presently in the supervisory unit represented by Alaska Public Employees Association ("APEA"), but the duties are arguably those of employees represented by a unit represented by Public Safety Employees Association ("PSEA"). All members of the Agency were present at the hearing and so constituted a quorum. PSEA was represented by counsel Jim Gasper, APEA was represented by Bruce Ludwig, and the State was represented by Bruce Cummings. The parties presented arguments, evidence and post-hearing briefs. The Agency, having considered the arguments and

evidence, renders the following order and decision maintaining the position of DFM II in the supervisory unit.

Findings of Fact

1. During 1988, as a consequence primarily of interest arbitration, PSEA and the State disputed placement of the DFM II classification. The State assigned this classification, occupied by incumbents, to the supervisory unit represented by APEA. The State on April 15, 1989, requested the Agency to ratify its placement of the DFM IIs, and PSEA objected contending that DFM IIs belonged in the Regularly Commissioned Public Safety Officers Unit ("RCPSOU").

APEA opposed the arguments raised by PSEA. Without resolving whether the issue was subject to grievance resolution or Agency action; the parties agreed to place the question before the Agency.

2. The current PSEA-State collective bargaining agreement provides a specific list of job titles to be placed in the RCPSOU. "DFM I" and "DFM II" are according to the agreement, to be placed in RCPSOU. DFM IIIs had been placed in APEA's supervisory unit.

3. The record indicates that no "DFM II" position was ever filled during the period when DFM I, DFM II and DFM III positions existed. In 1979 the "DFM II" position was implicitly abolished even through the title "DFM II" had been incorporated into the listing of classes in the wage article of the State-PSEA collective bargaining agreement. In late 1982 the State revised the Fire Marshall class series to provide a numerically consecutive hierarchy such that "DFM III" (salary range 20) was renumbered and redesignated as "DFM II" with the same salary range and no change in duties. The DFM I (Salary Range 76) remained in the PSEA unit. The DFM II position as renumbered remained, according to the State, in the supervisory unit.

4. PSEA maintains that it was not aware of the placement of the DFM II in the supervisory unit until salary positions were renegotiated in 1988.

5. Roy Isenberg, one of the two present incumbent DFM IIs, was only recently promoted from a DFM I to that position. He was and is a board member of PSEA, and as an accommodation to him, APEA did not insist upon his membership in APEA. As such, there was an acquiescence to Isenberg's continued placement in PSEA despite his reclassification as a DFM II. APEA maintains that Isenberg's motivation to be placed in PSEA is premised upon his membership in PSEA rather than an intent to prove proper unit placement.

6. Discrepancies exist between the testimony of Mr. Isenberg respecting his duties as DFM II and the personnel description questionnaire (PDQ) prepared for his position. State officials testified as to the obligations of DFM IIs, maintaining that the position qualified as a supervisor.

7. DFM IIs supervise DFM Is, and in Isenberg's case, he supervises three to four DFM Is. PSEA maintains the DFM II position as presently constituted is but a "lead position" rather than a supervisory one. APEA and the State assert otherwise.

8. Of the six criteria required to demonstrate supervisory status, the evidence and PDQ information support a finding that the DFM II has the authority to regularly participate in at least four of the criteria, although in Isenberg's case he had not yet had an opportunity in which to actively participate in those criteria. According to the PDQ, for example, Isenberg has the authority to appoint, promote, suspend, transfer, and discharge. Isenberg claims to interview candidates with appointments made through an assessment center. He claims that the Deputy Director, and not he, retains the authority to promote or transfer. While his decisions on grievance procedures are subject to further review, he is at the first level of grievance adjustment. The DFM II regularly participates in supervisory responsibilities and, on balance, spends more than half of the time in supervisory tasks including guidance, training, review, and the like.

9. The Deputy Director position supervises the DFM II, but does not usurp the supervisory functions of the DFM II.

Conclusions of Law

1. Placement of particular positions within any bargaining unit presumes the authority of the State to make such adjustments as an element of its inherent authority as employer. The placement however must be consistent with placement within units previously ascertained as appropriate based on factors such as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desire of the employees. Within the authority of the employer is the authority to renumber and redesignate positions such as has been done here.

2. The parties are permitted to agree in collective bargaining agreement to a variety of terms and conditions, however the collective bargaining agreements cannot be written contrary to the Public Employees Relations Act at AS 23.40. Thus placement of employees cannot be definitively resolved

contractually, if the placement within particular units flies in the face of Agency determinations respecting the scope of bargaining units.

3. The cumulative weight of the evidence in this matter indicates that the redesignation of DFM IIIs and DFM IIs positions was based upon considerations independent of the literal listing DMF IIs in the collective bargaining agreement between the State and PSEA. "DFM II" as listed in the collective bargaining agreement between PSEA and the State must be ascertained as it was intended at the time of entry into that collective bargaining agreement. The weight of the evidence compels the conclusion that the DFM II at issue in this hearing is not one and the same as the DFM II described in the collective bargaining agreement, because the DFM II as referenced in the agreement described was premised on a three-step, not a two-step series.

4. The Public Employment Relations Act precludes the mix of supervisory personnel with other personnel. 2 AAC 10.220(b)(3) defines "supervisory employee" 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.

The Agency has issued several orders and decisions addressing this regulation and has concluded that demonstration of supervisory status must entail "most" of the employees time in order to be "substantial" within the meaning of the regulation defining supervisory employee. Further, the Agency has concluded that as a threshold minimum, supervisory employees must supervise more than two subordinates, must perform or be authorized to perform at least four of the six listed criteria, and exercise substantial independent judgment. Order and Decision Nos. 15, 26, and 63.

5. In Order and Decision No. 26, the Agency held that:

A person who has substantial responsibility regularly to participate in a majority of the six functions concerned, and who also spends the great majority of time in supervising work (training, guiding, allocating,

reviewing, etc.), as opposed to performing a function, but who because of a situation where there is little or no turnover, few or no grievances, little or no occasion for transfers or promotions, does not actually participate regularly in a responsible capacity in a majority of the six functions concerned, would nevertheless be considered a supervisor provided that the authority can be clearly established as well as the amount of the time spent in supervision.

Id. p. 6. This conclusion imputes a sliding scale type of standard such that hypothetical authority requires a greater showing of supervisory status as a general matter, whereas demonstrable actual performance of a majority of the supervisory criteria requires a somewhat lower showing of supervisory authority. Thus the fact that someone has not yet performed a duty, including the opportunity to settle grievances, does not in and of itself eliminate consideration of that criterion under 2 AAC 10.220 (b)(3).

6. The cumulative weight of the evidence in this matter supports the conclusion that the DFM II as presently described is supervisory in that the DFM II is regularly in a supervisory capacity over more than two DFM Is, exercises most if not all of the identified supervisory criteria, and exercises independent judgment in the context of a police-type environment and despite the supervision of his own responsibilities by a deputy director. The DFM II is not the ultimate supervisor but is in an intermediate level supervisory class.

7. In this case, the classification described in the PDQ as presented, and the written evidence of the duties of the DFM II series as those documents are on file, were more credible evidence than was the testimony of Mr. Isenberg to the extent that his testimony contradicted the class specification in PDQ. Mr. Isenberg had a vested and personal interest in supporting PSEA's position.

Order and Decision

Based on the foregoing findings of fact and conclusions of law, the Agency unanimously orders and decides that:

1. The Deputy Fire Marshall II position shall remain in the supervisory unit.

2. The State's request for affirmation of its placement is granted, and PSEA's objections to continued placement in the supervisory unit are rejected,

3. This order and decision sets forth the determination of the Agency following a review of the briefs and evidence presented at the hearing on June 10, 1989 and thereafter.

DATED this 28th day of August, 1989.

STATE OF ALASKA
LABOR RELATIONS AGENCY

By: _____
C.R. "Steve " Hafling

Chairman