

STATE OF ALASKA  
DEPARTMENT OF LABOR  
LABOR RELATIONS AGENCY

BEFORE THE ALASKA STATE LABOR RELATIONS AGENCY

ALASKA STATE EMPLOYEES )  
ASSOCIATION, )  
 )  
Objecting party, )  
 )  
vs. )  
 )  
STATE OF ALASKA AND )  
CONFIDENTIAL EMPLOYEES )  
ASSOCIATION, )  
 )  
Respondents, )  
UC 89-1(partial)

ORDER AND DECISION NO. 122

SUBJECT: INTERPRETATION OF "CONFIDENTIAL EMPLOYEE"; UNIT CLARIFICATION

The Alaska State Labor Relations Agency (the "Agency") convened a hearing on August 3, 1989, in Anchorage to consider the matter of the unit placement of a Personnel Assistant I in the Marine Highways System. The Personnel Assistant I is presently in the general government unit represented by Alaska State Employees Association ("ASEA"), but her duties are arguably those of an employee in the confidential unit represented by the Confidential Employees Association ("CEA"). All members of the Agency were present at the hearing and so constituted a quorum. ASEA was represented by counsel Fred Dichter, CEA was represented by Kimberly Geariety. The parties presented oral arguments and witnesses. The Agency having considered the arguments and evidence, renders the following order and decision placing the position of Personnel Assistant I in the confidential unit represented by CEA.

### Findings of Fact

1. Della Oldaker is the incumbent Personnel Assistant I (PCN 253338) in the Alaska Marine Highway System of the Department of Transportation and Public Facilities. Her position is presently in the general government unit.

2. The State petitioned the Agency to transfer the position held by Della Oldaker into the confidential unit on the grounds of changed circumstances and reporting responsibilities due to a reorganization within the Alaska Marine Highway System. ASEA, representing the general government unit, initially opposed that motion, and CEA supported the effort.

3. The position held by Ms. Oldaker is involved in analysis, computation and advice respecting two marine union contracts with the State and Marine Engineers Beneficial Association ("MEBA") and Master Mates and Pilots ("MM&P"). She is not involved in any analysis, research, or other activities respecting collective bargaining between the State and the general government unit.

4. While integrity is presumed on the part of all employees, there is an expectation of very specific confidentiality regarding employees entrusted with collective bargaining information. Having a secure source of information of a very specific confidential nature is critical to the negotiating and bargaining process and to the State's ability to effectively negotiate collective bargaining contracts and administer grievances thereunder.

5. At the hearing, ASEA conceded that the position held by Ms. Oldaker should appropriately be in the confidential unit if the Agency concludes that the fact that Ms. Oldaker deals with maritime unions rather than the union representing her current unit placement is an irrelevant distinction.

### Conclusions of Law

1. The Agency has jurisdiction to hear and consider requests for unit clarification pursuant to AS 23.40.090 and AS 23.40.160.

2. 2 AAC 10.220(b)(1) defines a "confidential employee" as:

An employee who assists and acts in a confidential capacity to a person who formulates, determines, and effectuates management policies in the area of collective bargaining. The term "confidential employee" shall be narrowly construed.

This regulation makes no distinction between which union relationships are necessarily involved respecting "the area of collective bargaining" referenced. ASEA maintains that this regulation should be read such that a position should not be transferred into the confidential unit unless that position is factually involved with collective bargaining with the same bargaining unit as that held by the incumbent. ASEA suggests NLRB precedent stands for this proposition, although such precedent was not cited.

3. The literal language of 2 AAC 10.220(b)(1) does not distinguish between collective bargaining entities. The lack of distinction is appropriate because the State of Alaska is the sole employer of members of a variety of bargaining units and the State often maintains constant themes and directions in its collective bargaining relationships with disparate unions. Thus, confidential information respecting the discussions with maritime unions could be just as sensitive respecting negotiations with the general government unit representative or an MEBA or an MM&P representative.

#### Order and Decision

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

1. The personnel Assistant I position held by Della Oldaker, PCN 253338, is appropriately placed in the confidential unit represented by CEA, and the transfer from the general government unit to that unit is authorized.

2. ASEA's objections are denied.

3. This written decision sets forth the rationale for the decision reached by the Agency following the August 3, 1989 hearing.

DATED this 28th day of August, 1989.

STATE OF ALASKA  
LABOR RELATIONS AGENCY

By: \_\_\_\_\_  
C. R. "Steve" Hafling  
Chairman

ORDER AND DECISION NO. 122  
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STATE OF ALASKA  
DEPARTMENT OF LABOR  
LABOR RELATIONS AGENCY

BEFORE THE ALASKA STATE LABOR RELATIONS AGENCY

IN THE MATTER OF SUPERVISORY )  
UNIT CLARIFICATION: )  
  
ALASKA STATE EMPLOYEES )  
ASSOCIATION, )  
  
Objecting Party, )  
  
vs. )  
  
ALASKA PUBLIC EMPLOYEES )  
ASSOCIATION and STATE OF )  
ALASKA, )  
  
Respondents. )  
  
\_\_\_\_\_)  
UC 89-1 (partial)

HEARING OFFICER'S PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND RECOMMENDED ORDER AND DECISION

The Alaska State Labor Relations Agency ("Agency") appointed Robert M. Johnson to act as hearing officer in hearings to consider the unit placement of certain employees with apparent supervisory criteria. Alaska State Employees Association ("ASEA"), as representative of the general government unit ("GGU"), opposed placement of the positions in the supervisory unit represented by Alaska Public Employees Association ("APEA"). Hearings were held before Mr. Johnson on July 24-25 in Fairbanks, July 26-28 in Anchorage, and August 1-3 in Juneau, Alaska. ASEA presented its case through counsel Fred Dichter and staff members Kathy Dietrich (Fairbanks); Penny Palmquist, Eric Simpson and Randy Melanson (Anchorage); and Buddy Maupin and Michelle Castanado (Juneau). APEA presented its case through Jim Johnsen. The State presented its case through Kimberly Geariety. Each side called witnesses and presented arguments. After having considered the arguments and evidence presented, the hearing

officer enters the following proposed findings of fact and conclusions of law, and recommended decision.

#### PROCEDURES

1. The State initially filed UC 89-1 on January 6, 1989 to seek the proper placement of a number of employees presently or previously in the GGU. ASEA as representative of the GGU opposed transfers from the GGU, and APEA and the Confidential Employees Association each argued in favor of transfers which would necessarily increase the size of their respective units. The parties agreed to separate various issues and as a consequence Order and Decision No. 117 was issued regarding the appropriateness of the personnel description questionnaires (PDQ's) and Order and Decision Nos. 118, 118-A and 122 were issued considering movements from GGU to the confidential unit.

2. The parties agreed to submit the issues respecting movement from GGU into the supervisory unit to a hearing officer in hearings in Fairbanks, Anchorage, and Juneau. Certain substantive arguments and themes common to resolution of determinations were presented in Fairbanks and subsequently in closing arguments in Juneau.

#### FINDINGS OF FACT

1. ASEA is the certified collective bargaining representative of the State's GGU. There is no collective bargaining agreement in place between ASEA and the State, although at the time of these hearings ASEA and the State are operating under terms and conditions generally similar to the last GGU collective bargaining agreement. APEA represents the supervisory unit of State employees pursuant to a binding and effective collective bargaining agreement.

2. Prior to the commencement of the hearings, the parties reviewed the applicable PDQ's and in most cases informally interviewed the incumbents in those positions. A PDQ' is a form to be filled out by the incumbent and reviewed by a supervisor responding to questions intended to ascertain consistency with job specifications, scope of duties, and proper unit placement. In many instances, the PDQ's were prepared more unit placement. In many instances, the PDQ'S were prepared more than a year prior to the hearing, and the responses in the PDQ'S evidence misunderstandings by the person filling out the PDQ as to the meaning of "supervisory" as that term was used in determining proper unit placement. References to supervision in many respects went to issues other than bargaining unit placement. As a consequence inconsistencies existed between the statements in the PDQ's and the testimony of the incumbents or their supervisors.

3. The parties sought 40 determinations, but during the course of the hearings agreed to withdraw or delete 19 matters. As a consequence a total of 21 determinations were required to be made by the hearing officer. In each of the determinations, the incumbent or a supervisor appeared and in all instances the PDQ, the allocation memorandum, and the class specification form were presented.

3. The basis for the State's petition to the Agency arose as employees were reclassified through reorganizations. The PDQ's were filled out at the time of a reorganization.

4. In a number of instances, the incumbent at the time of hearing had already been moved from the GGU to the supervisory unit as a consequence of a position having been vacant at the time of the reorganization. Of the 21 determinations, 6 incumbents were in the supervisory unit at the time of the hearing and the issue became the appropriateness of their placement in the supervisory unit. All other employees were in the GGU and the issue was whether their positions would be transferred to the supervisory unit.

5. The attached review sheet and table is incorporated herein. The categories set forth on the attached review sheet and table are as follows:

Column 1: Name of the incumbent and position control number (PCN).

Column 2: Title and department.

Column 3: Bargaining unit at the time of hearing.

Column 4: Number of employees supervised ("D" represents direct supervision and "I" represents indirect supervision).

Columns 5, 6, 7, 8, 9 and 10:

Six supervisory criteria of appoint, promote, transfer, suspended, discharge and settle grievances. A check denotes the incumbent performed or was authorized to perform that criterion. Notes are self explanatory.

Column 11: Percentage of supervisory time evidenced in the PDQ.

Column 12: Percentage of supervisory time pursuant to the testimony of the incumbent or

supervisor.

Column 13:Existence of "substantial supervision" regardless of the percentage of supervisory time otherwise indicated.

Column 14:Existence of substantial individual ("functional") duties of the incumbent.

Column 15:Whether the incumbent heads a discrete office.

Column 16:Recommended placement of incumbent.

6. A number of common themes regarding the determinations set forth in the attached review sheet and table were important, and are analyzed below.

7. Appoint. In all but three instances, the incumbent carried independent appointment authority. Incumbent Allen Cooper, however, participated on a committee co-equal with other committee members in selecting and appointing candidates. Incumbent William Aversion had independent authority but selected employees only from a roll of available candidates. Incumbent Tom Chappie had his decision reviewed by the Department Commissioner

8. Promote. Most candidates had the authority to promote candidates. However promotion carried two connotations. First, promotion could typically comprise a literal "upgrade" in range and duties such as the promotion of an Accounting Tech II to an Accounting Tech III. The parties agree such a move was a promotion. Second, promotions allegedly occurred when an employee was upgraded within a "flex staff" position. A flex staff position exists when a position is denominated in the alternative, as for example "Accounting Tech II/III",' such that the position could filled at either grade with the higher number reflecting a more senior position. The ability to "upgrade" (from a II to III in the example cited) within this flex staff position was based upon a supervisor's determination that the person was qualified. Eligibility for flex-staff upgrade occurred generally after a set period of time, but the upgrade was apparently not automatic. ASEA contends that the upgrade within such a flex-staff position did not constitute a promotion.

9. Transfer. The parties agreed that a transfer of a position from one PCN to another PCN was indeed a transfer. In controversy was whether "transfer" encompassed action such as

movement of the same incumbent (same PCN) from one job or job site to another.

10. Suspend. The PDQ defined suspension authority as authority to suspend for less than five days. Some incumbents had suspension authority limited by the number of days. Other incumbents has authority to suspend without limitation.

11. Discharge. The authority to discharge was self evident but varied among incumbents.

12. Formal Grievances. With the exception of incumbent Allen Cooper, all incumbents had the authority to settle at least some form of grievances brought before them. Two types of grievances could be brought before an incumbent: informal day-to-day "office complaints" not put in writing, and matters recognized as grievances under appropriate collective bargaining agreements. Collective bargaining agreement grievances comprised the first level of the grievance process, and such grievances could be verbal or in writing pursuant to either the last GGU contract or the current supervisory unit contract. Even if authority to settle grievances was granted, the incumbents and their supervisors recognized the existence of a contract bar if and to the extent the last GGU contract was still applicable. That collective bargaining agreement provided that "when a grievance arises from an action or inaction, the employee has the option to within (30) working days lodge a verbal complaint with the first level supervisor outside the bargaining unit", Article 10, section 1, step 1, GGU Agreement 1984-1986. As such, a person in the GGU could not respond to grievances brought by another GGU member. The next level of supervisor outside the GGU was, in all matters presented to the hearing officer in this matter, a supervisor in the supervisory unit. Incumbent Tom Chappie, as a GGU member could however act respecting grievances brought from Local 71 members under his apparent direction as could other incumbents in DOT/PF who would from time to time be supervising Local 71 blue collar unit employees. ASEA contended that all incumbents in this hearing who were in the GGU (other than those such as Chappie) could not satisfy the "settle grievances" criterion because of the terms of the 1984-1986 GGU agreement.

13. A number of employees performed substantial individual functions. This was exemplified by incumbents such as James Whittington who had specific responsibility in preparation of budgets for the Department of Corrections, Project Manager I employee positions in DOT/PF who exercised responsibilities as engineers, and Environmental Engineer IV positions in the Department of Environmental Conservation who utilized their expertise as trained scientists or engineers.



14. A number of incumbents supervised geographically discrete offices. The obligation to manage and administer such disparate offices constituted a significant indicator of supervisorial responsibilities.

#### CONCLUSIONS OF LAW

1. The Agency has jurisdiction to hear and consider requests for unit clarification pursuant to AS 23.40.090 and AS 23.40.160. The parties agreed that these proceedings could be held before a hearing officer with the hearing officer reporting a recommended decision to the Agency.

2. The role of the hearing officer, where possible, is limited to review of facts and presented and conclusions of laws premised upon prior agency decisions. Machinists, District 9, 68 LRRM 1051 (NLRB 1968).

3. 2 AAC 10.220 (b) (3) defines a "supervisory employee" as:

An individual having substantial responsibility on behalf of public employer regularly to participate in the performance of all or most of the following functions: employee, promote, transfer, suspend, discharge, 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.

This regulation has been applied by the Agency in a number of cases, particularly Order and Decision Nos. 15, 26, and 63. These cases set forth a number of guidelines including the following:

- a: Transfers must be reviewed on a case by case basis for factual determination such that all employees with the same job classification do not automatically fall within the same bargaining unit;
- b: The supervisor must "supervise" at least two subordinates;
- c: A majority of the 6 criteria identified in 2 AAC 10.220 (b) (3) (i.e., 4) must be demonstrated;

c:An employee must dedicate "most" of his or her day-to-day responsibilities to supervisory tasks;

d:The incumbent must demonstrate independent authority to engage in the majority of criteria described such that mere recommendations do not constitute independent authority.

The matters presented to the hearing officer in this case included a number of common themes requiring further adjudication by the Agency.

4. Hypothetical performance of supervisory criteria.

In a substantial number of instances in this hearing, the performance of the supervisory criteria identified by regulation was hypothetical in the sense that the incumbent had not yet had the opportunity, for example, to suspend or promote because circumstances requiring such action had not yet taken place. The Agency has not required that examples of the specific criteria in fact be demonstrated, but rather that the authority exist to carry out those criteria. 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 time spent in supervision.

Id. at 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).



5. Appointments by committee.

The Agency has determined that the supervisor must have independent authority to appoint. Participation as a co-equal on a committee manifests a conclusion by management that the incumbent does not have independence to engage in that appointment. If management desires an employee to be a supervisor then it needs to delegate that authority; if management concludes that it wishes to withhold or maintain in a committee setting authority to appoint, then it has withheld supervisorial status to the incumbent as to that criterion.

6. Independent Authority.

In theory no supervisor has total independent authority to do anything, because all supervisors (with the possible exception of the Governor) have the prospect of their decisions being vetoed or overruled by a senior employee. The test with respect to authority to independently act must therefore consider whether the supervisor must obtain approval prior to making a putative decision or whether the senior employee is merely advised. 'If a supervisor must obtain prior permission, he is without independent authority. If an employee may make decisions without prior permission, that employee acts as a supervisor even if that employee's decisions are subject to later veto.

7. Flex-staff movements as promotions.

The Agency inclusion of "promotion" as an element of supervisorial status has never been limited to consideration of but one type of promotion. The evidence presented justifies a conclusion that a supervisor's determination whether a person in flex staff position can move from the lower grade to the higher grade is itself a determination constituting a promotion. Through the upgrade, the employee receives a salary increase and falls into a different level of responsibility as described in the class specification. There is not a realistic analogy to apprenticeship within a same job slot, and in any event movement from an apprenticeship to journeyman status is itself a promotion. The evidence did not suggest that flex staff positions produced an automatic upgrade through simply the passage of time. Rather an affirmative decision by a supervisor is required, and such a decision fairly constitutes a promotion.

8. The nature of transfers.

As in the case of promotions, "transfer" is not limited to one particular type of transfer. A transfer between job locations or a transfer to a substantially different job responsibilities is as much a transfer as a transfer between PCNs. The effect on the employee is potentially just as

significant. A mere transfer of duties from one desk to another or a shifting of responsibilities in order to accomplish a single task would however typically not constitute a transfer within the meaning of 2 AAC 10.220(b)(3). Rather the test must be whether the transfer constitutes a significant factual change in the responsibilities of the transferred employee. If such a significant change occurs based upon a decision by the supervisor, the supervisor has satisfied the transfer criterion.

9. Suspensions limited by time.

A suspension must be of some duration but there is no merit to an argument that a suspension must be unlimited to fall within the concept of a suspension under 2 AAC 10.220(b)(3).

10. Settling of grievances.

The parties are free to enter into collective bargaining agreements and set terms consistent with the Public Employment Relations Act. To the extent that the terms of 1984-1986 GGU Agreement govern, a person still in the GGU cannot resolve other GGU member grievances. However, given Order and Decision No. 26, the authority of the incumbent to undertake such dispute resolution, if proven, is satisfied despite a contract bar rendering that authority hypothetical. If the contract bar were to preclude consideration, prior to a unit transfer, of the authority of an employee whose position has been reclassified, the criterion of "settling grievances" could never be met. However, there must be proof that the authority exists and could exist but for the contract bar.

11. Formal v. informal disputes.

2 AAC 10.220 (b)(3) includes settling grievances as a criterion. The term "grievance" indicates more than mere resolution of ordinary office problems or situations. The regulation refers to matters which are of a step-one grievance nature. There is not an apparent obligation that such grievances be in writing, although it must be demonstrated that the grievances considered are those which could give rise to the beginning of a grievance process under a collective bargaining agreement.

12. Percentage of time as supervisor.

The Agency has determined that a supervisor must demonstrate regular performance of supervisory duties of a substantial nature, and that such a showing requires that the supervisor dedicate "most" of his or her time to supervisory responsibilities. See for example, Order and Decision No. 15. To the extent that time can be identified on a percentage basis,

it follows that an employee must demonstrate that over fifty percent of his or her time must be spent on supervisory responsibilities. If it is impossible to identify a percentage of time or other quantitative measure, then more subjective standards regarding regular and substantial performance would apply on a case by case basis.

13. Substantial individual duties.

The Agency has determined that performance of an employee's "function," e.g. as an engineer, scientist, right-of-way officer or the like, is not supervisory. Order and Decision No. 63. Such duties may be supervisory, but consideration of their professional nature or even the degree of importance are not automatic indicators of supervisory status. By the same token, it does not follow that performance of some such functions precludes supervisory status consideration. Geriatrics, Inc., 99 LRRM 1606 (NLRB 1978); Bradford College, 110 LRRM 1053 (NLRB 1982).

14. The cumulative weight of the evidence on a case by case basis and the application of the analyses set forth above justify the conclusions of placement set forth on the attached review sheet and table.

RECOMMENDED DECISION

For the reasons set forth in the foregoing proposed findings of fact and proposed conclusions of law, the hearing officer recommends that the Agency issue an Order and Decision finding that:

1. The following incumbents (and positions) should be placed (or remain placed) in the supervisory unit represented by APEA:

- a: Diane Lyon, Admin. Asst. I, PCN 063115.
- b: Mike Short, Unit Leader, PCN 063115.
- c: Greg Laird, Pub. Spec., III, PCN 102061.
- d: James Whittington, Prob. Off. III, PCN 204412.
- e: James Weed, Project Mgr. II, PCN 251707.
- f: Jo Andrew, Pub. Health Nurse IV, PCN 061115.
- g: Robert Walsh, Corn. Dev. Spec., PCN 213082.
- h: Doris Giusti, Emp. Sec. Mgr. I, PCN 075115.
- i. Duane Wise, Loan Ex. III, PCN 213014
- j: Stephan Ryan, Project Mgr. I, PCN 250577.
- k: William Aversion, Project Mgr. I, PCN 250678.
- l: Eckart Haas, Env. Eng. IV, PCN 187037.
- m: Jon Sandstedt, Env. Eng. IV, PCN 187160.
- n: Norma Snyder, Data Proc. Mgr. I, PCN 041139.
- o: Janice Lapinski, Acct. Supervisor, PCN 071216.

- p. Laurie Richardson, Social Worker IV, PCN 063465.
- q. Tom Chappie, Env. Eng. IV, PCN 187076. 2.
- 2. The following incumbents (and positions) should be placed (or remain placed) in the GGU represented by ASEA:
  - a. Allen Cooper, Dep. Dir., PCN 206003.
  - b. Ronald Wurtz, Com. Der. Spec., PCN 075272.
  - c. Peggy Bray, Admin. Asst. II, PCN 114058.
  - d. Martyn McDowell, ROW Agent, IV, PCN 252294.

3. In order to clarify and simplify the transfer issues representing GGU and supervisory employees, the hearing officer recommends that unit clarification hearings before the Agency occur only after:

a. A PDQ is completed for the incumbent's position no more than 90 days before the hearing date, and that all affected parties have had an opportunity to review that PDQ; and

b. The interested parties including the State, briefly examine the incumbent respecting supervisory status prior to the hearing, or demonstrate justification for not contacting that employee.

DATED this \_\_\_\_\_ day of August, 1989.

FOR THE ALASKA STATE  
LABOR RELATIONS AGENCY

By \_\_\_\_\_  
Robert M. Johnson  
Hearing Officer