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Transfer of AEA employees to DCRA

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You have asked for an opinion on the status of those employees of the Alaska Energy Authority (AEA) who will be transferred to the Department of Community and Regional Affairs (DCRA) as a result of HCS CSSB 106(FIN), ch. 18, SLA 1993, an Act that, among other things, transfers some programs formerly administered by AEA to DCRA. Specifically, you have asked whether AEA employees who are transferred to DCRA, and who apparently will constitute a new division at DCRA, can remain exempt state employees rather than becoming classified state employees. You note that employees of AEA are in the exempt service[1] while most of DCRA's employees are in the classified service. The question, then, is whether these transferred employees can retain their exempt status after they become DCRA employees.[2]

The answer to your question is that, absent specific legislation placing these new DCRA positions in the exempt service, the employees holding these positions become classified employees upon the effectuation of the transfer to DCRA and the completion of the transition period provided for in 2 AAC 07.215. This result, the movement of these positions into the classified service, cannot be changed by executive order or other executive

[1] Your memorandum of July 21, 1993, and the background material submitted with it assume that AEA employees are in the exempt service. This assumption appears to be valid but there is a confused legislative history on this point going back to AEA's predecessor (the Alaska Power Authority) and the many statutory changes to the agency and its programs that have been made over the years. In any event, AEA employees, we are informed, have consistently been treated as exempt employees and have never been administratively integrated into the classified service. The issue is, therefore, moot as to those positions that will be transferred to DCRA.

[2] There may be temporarily assigned professionals at DCRA who are also exempt employees. See AS 39.25.110(9) and n.3 infra.

action.

The legal analysis of the question you pose begins with the longstanding legislative determination that all state employees in positions not "included in the exempt service or in the partially exempt service" are in the classified service. AS 39.25.100. Positions in the exempt and partially exempt service are designated in AS 39.25.110 (exempt service) and AS 39.25.120 (partially exempt service). Additionally, the enabling statute specific to a public entity will often designate whether the employees of the entity are in the classified, exempt, or partially exempt service. E.g., AS 44.82.050 (employees of the Alaska Gas Pipeline Financing Authority). No positions in DCRA, other than the Commissioner (AS 39.25.110(4)), deputy or assistant commissioners (AS 39.25.120(c)(1)), division directors (AS 39.25.120(e)(2)), the Commissioner's secretary (AS 39.25.120(c)(4)), and special assistants to the Commissioner (AS 39.25.120(8)), are "included" in the exempt or partially exempt service. All DCRA employees, other than those enumerated above, are, therefore, members of the classified service.

The legislative purpose in dividing public employees into these categories (the classified, exempt, and partially exempt services) is to clarify which positions in state service are fully covered by the State Personnel Act (AS 39.25 et seq.), only partially covered by the Act, or excluded from the provisions of the Act entirely. In not excluding most employees of DCRA from the classified service, the legislature has expressed its intention clearly: Employees of the department are fully covered by the State Personnel Act. Consequently, DCRA employees are subject to and protected by "the merit principle of employment" as it is defined in AS 39.25.010 and to the rights elsewhere delineated in the Act and the regulations adopted by the Personnel Board under the Act.

The legislation in question, HCS CSSB 106(FIN), does nothing to amend or alter the classified status of positions within DCRA. Section 35 of HCS CSSB 106 (FIN) authorizes DCRA to "continue the employment" of AEA employees where DCRA "determines that continued employment of certain [AEA] employees . . . is necessary to continue uninterrupted service to programs, facilities and projects formerly owned by the Alaska Energy Authority that have been transferred to the department under the Act." The specific provisions of the legislation that transfer programs, facilities and projects from AEA to DCRA are not temporary in nature. As a matter of statutory interpretation these provisions must be viewed as permanent. The AEA employees necessary to continue the uninterrupted service of the programs,

facilities, and projects that, by this legislation, are now the responsibility of DCRA must necessarily be or become DCRA employees.

As previously explained, positions within DCRA, except for the top-level management positions specifically excepted in AS 39.25.110 -- 39.25.120 and enumerated above, are classified and fully covered by the provisions of the Personnel Act. This is the pattern for all the principal executive departments. Moreover, the Personnel Act was adopted for the express purpose of implementing the state constitutional mandate that the legislature "establish a system under which the merit principle will govern the employment of persons by the State." Alaska Const. art. XII, • 6. Alaska Public Employees Ass'n v. State, 831 P.2d 1245, 1249 (Alaska 1992). This merit principle has been described by the Alaska Supreme Court as "the weightiest [policy concern] in the State employer's trust." Id. at 1251.

As far as the major executive departments of state government are concerned, the legislature has excluded or partially excluded only certain types of positions from the classified service and thus, the protection of the merit system. Generally, these positions are high-level management positions, positions that are temporary in nature, and certain professional positions. See AS 39.25.110 -- 39.25.120. With the possible exception of the division director (if a new division is created within DCRA to continue programs formerly administered by AEA), none of the exclusions apply to the positions in question. And, particularly given the strong policy favoring the merit principle for public employment, it is not possible to read into this legisialtion any intention by the legislature to create specially exempt positions in DCRA that are not governed by the merit principle as implemented in the Personnel Act.[3]

Some questions have arisen as to the implementation of the transfer of AEA employees to DCRA and the mechanics of integrating these positions into the classified service. Existing regulations do provide a method for accomplishing the transfer/integration of the positions determined to be necessary

[3] The governor may authorize the employment of persons by a Department "in a professional capacity to make a temporary or special inquiry, study or examination" and persons in these positions are exempt employees. AS 39.25.110(9). We do not understand the positions you ask about to be "professional," or to be "temporary or special" in nature, or to involve an "inquiry, study or examination."

by DCRA and the employees in these positions without interruption in the employment of these persons. The pertinent regulation is 2 AAC 07.215, which provides as follows:

> An employer [sic] in the exempt or partially exempt service whose position is moved to the classified service may retain the position as an exempt or partially exempt employee for up to 12 months in order to establish entitlement to appointment in the classified service. Upon successful completion of competition for the classified service position, the individual may be appointed and serve a probation period. Range and step placement will be governed by 2 AAC 07.315--2 AAC 07.390. Notwithstanding other provisions of this chapter, the director may authorize limited recruitment in order to facilitate the transition of employees under this section.

Under this regulation, once the positions in question are moved to DCRA (or the decision is made as to which positions will be moved), the employee who occupied the position at AEA may stay in the position at DCRA as an exempt employee for up to twelve months. During this period the position is integrated into the classified service. Once that is accomplished an appointment to the new classified position can be made. The director of personnel is authorized to restrict recruitment under this regulation in order to "facilitate the transition of employees." Thus, the director can limit recruitment to the employee who held the position before it was transferred and while it was being integrated into the classified service.

No other statutory or regulatory mechanism is presently available to effectuate the movement of these exempt positions into the classified service. See AS 39.25.130 (provides a procedure for movement of classified to partially exempt and vice versa but not exempt to classified); 2 AAC 07.220 (allows direct appointment to the classified service but is limited to transferred merit system employees of the federal government or the legislative or judicial branches of state government). We express no opinion as to whether regulatory[4] or statutory

[4] For instance, as has been mentioned, 2 AAC 07.220 could be amended by the Personnel Board, pursuant to AS 39.25.140, to specifically encompass direct appointment of transferred AEA employees to the classified service.

amendments[5] should be pursued in order to provide an alternative, and arguably swifter, mechanism for integration of these positions into the classified service.

We hope this answers the questions you raised in your memo of July 21, 1993.

PJG:pch

cc: Kevin C. Ritchie

[5] The House of Representatives did adopt a letter of intent to the effect that the transferred positions not be subject to normal classification/integration procedures. Letter of Intent HCS CSSB 106(FIN) May 9, 1993. This instruction is not, however, incorporated in the statute and does not effectively amend existing statutes or regulations.