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BOARD OF PERSONNEL APPEALS
PO BOX 6518
HELENA MT 59604-6518
Telephone: (406) 444-2718
Fax: (406) 444-7071

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNIT CLARIFICATION NO. 9-2005 (1076-2005):

MISSOULA COUNTY,)
Petitioner,)
- vs -)
FEDERATION OF MISSOULA COUNTY EMPLOYEES,)
MEA-MFT, AFT, AFL-CIO,)
Respondent.)

FINAL ORDER

The above-captioned matter came before the Board of Personnel Appeals (Board) on December 8, 2005. The matter was before the Board for consideration of the Federation's Exceptions to Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order filed by Karl J. Englund, Attorney for the Respondent, to the Findings of Fact, Conclusions of Law and Recommended Order issued by Terry Spear, Hearing Officer, dated August 10, 2005.

Karl J. Englund, attorney for the Respondent, and Michael W. Sehestedt, Missoula Deputy County Attorney, appeared in person.

1. IT IS HEREBY ORDERED that the Federation's Exceptions to Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Findings of Fact, Conclusions of Law and Recommended Order are hereby dismissed.

2. IT IS FURTHER ORDERED the Findings of Fact, Conclusions of Law and Recommended Order is affirmed.

DATED this 15~~th~~ day of December, 2005.

BOARD OF PERSONNEL APPEALS

By: 
Jack Holstrom
Presiding Officer

Board members Holstrom and Reardon concur.
Alternate Member Dudley concurs.
Board member Audet abstained.

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NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a petition for Judicial Review with the District Court no later than thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

CERTIFICATE OF MAILING

I, *Jennifer Jackson*, do hereby certify that a true and correct copy of this document was mailed to the following on the 16th day of December, 2005:

KARL J. ENGLUND
ATTORNEY AT LAW
PO BOX 8358
MISSOULA MT 59807-8358

MICHAEL W. SEHESTEDT
DEPUTY COUNTY ATTORNEY
MISSOULA COUNTY COURTHOUSE
200 WEST BROADWAY
MISSOULA MT 59802

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTERS OF UNIT CLARIFICATION NO. 9-2005 AND UNFAIR
LABOR PRACTICE NO. 21-2005:

MISSOULA COUNTY,)	Case No. 1076-2005
)	
Petitioner,)	
)	
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW AND
FEDERATION OF MISSOULA)	RECOMMENDED ORDER
COUNTY EMPLOYEES, MEA-MFT,)	
AFT, AFL-CIO,)	
)	
Respondent.)	

I. INTRODUCTION

On November 12, 2004, the Federation of Missoula County Employees, MEA-MFT, AFT, AFL-CIO filed an unfair labor charge asserting that Missoula County violated Mont. Code Ann. § 39-31-401(1) and (5) by making unilateral changes in terms and conditions of employment for the position of Senior Building Operator. The county denied any unfair labor practice regarding its treatment of the position at issue. On January 14, 2005, the Board completed its investigation and found probable merit, referring the case (ULP No. 21-2005, Case No. 1008-2005) to the Hearings Bureau for a hearing.

On November 26, 2004, the county filed a petition for unit clarification, asserting that employees holding the position of Senior Building Operator were supervisory employees pursuant to Mont. Code Ann. § 39-31-103(11), as amended by House Bill 481 (2005), and therefore should be excluded from the bargaining unit. The federation asserted the position at issue was not that of a supervisory employee and should remain in the unit. On January 20, 2005, Vicki Knudsen, agent for the Board of Personnel Appeals, transferred the case (UC No. 9-2005, Case No. 1076-2005) to the Hearings Bureau for a hearing, because there were questions of fact.

On February 7, 2005, Hearing Officer Terry Spear held prehearing scheduling conferences in both cases, by telephone. He consolidated the two cases for contested case proceedings and stayed contested case proceedings pending mediation (to which both parties agreed). After mediation, the hearing officer set the cases for hearing. The parties settled ULP No. 21-2005, Case No. 1008-2005, and UC No. 9-2005, Case No. 1076-2005, proceeded to hearing.

Hearing Officer Terry Spear held the contested case hearing on May 25, 2005. Steve Johnson, Director of Human Resources, participated as the advocate for the county. Karl J. Englund, P.C., represented the federation. The sole witness was Larry J. Farnes, Missoula County Facilities Manager and head of the Facilities Maintenance Department. Exhibits 1 through 3¹ were admitted into evidence by stipulation. The parties submitted the case through simultaneous post hearing filings on June 27, 2005.

II. ISSUE

The issue in this case is whether a unit established for collective bargaining purposes is appropriate pursuant to Mont. Code Ann. § 39-31-202, specifically whether the “Senior Building Operator” position (currently occupied by Wesley Tanner and Robert Dahl) should be removed from the existing unit.

III. FINDINGS OF FACT

1. The Federation of Missoula County Employees, MEA-MFT, AFT, AFL-CIO, is a “labor organization” pursuant to Mont. Code Ann. § 39-31-103(6).

2. Missoula County is a “public employer” pursuant to Mont. Code Ann. § 39-31-103(10).

3. The county employs Senior Building Operators, Building Operators, Building Technical Assistants and Building Operator Assistants, who provide facilities maintenance services, but not janitorial services, to 10 buildings and 5 mountain-top communications sites, as well as back-up services to other county facilities.

4. The federation is the exclusive representative for the bargaining unit at issue in this matter. The current² collective bargaining agreement (CBA) between

¹ Exhibit 3 consists of the county’s exhibits, CC-1 through CC-28.

² This is true as of both hearing date and date of proposed decision. *See*, Exhibits 1-2.

the county and the federation includes Senior Building Operators within the unit, while excluding managerial and supervisory employees.

5. The county's Facilities Maintenance Department currently provides maintenance services (which do not include janitorial services) to 10 county buildings located within 10 miles of the county courthouse, including the courthouse, the courthouse annex, the Health Department building, the county Detention Facility and the Partnership Health Center. The department maintains all of the various facilities' mechanical and electrical systems, *e.g.*, plumbing, heating and cooling systems, HVAC, boilers, fire and security systems, inmate phone systems, video arraignment equipment, sprinkler systems, electronic security systems, automatic door controls, surveillance cameras, carpentry and welding. The department also provides maintains and operates 5 mountain-top communication sites, which are up to 120 miles apart, throughout the county. In addition, the department provides back-up maintenance for several other county facilities, including the public library and the fairgrounds.

6. Until August 2004, the Facilities Maintenance Department had a single work crew, under the direction and control of Larry Farnes, the County Facilities Manager and head of the Facilities Maintenance Department. The work crew consisted of a Senior Building Operator (who was the lead worker), a Building Technical Assistant and a Building Operator Assistant. The crew maintained 9 of the 10 buildings and the 5 mountain-top communications sites, providing back-up as currently provided. The Missoula County Sheriff's Department had its own facilities maintenance staff, consisting of a Senior Building Operator and a Building Operator³, who provided facility maintenance services to the Detention Facility.

7. Until August 2004, the position description for Senior Building Operator (exhibit 3, CC 27-28) defined the job as one that performed "complex technical maintenance work on county facilities" and served as "lead worker for building operators." The typical essential duties in the job description did not include any supervisory duties. Under "supervision exercised," the job description recited, "serves as lead worker for a small staff of building operators providing assignment and oversight of work." Under "required knowledge, skills and abilities," the job description included the ability "to provide direction and oversee work."

³ The 2 workers were in the bargaining unit but not the Facilities Maintenance Department.

8. In August 2004, the county undertook an administrative reorganization. Because of some problems the county perceived in dividing building maintenance work between the Facilities Maintenance Department and the Sheriff's Department, the facility maintenance functions and employees in the Detention Center were transferred into the Facilities Maintenance Department as part of that reorganization. With the expansion of the staff in the Facilities Management Department, the county decided to create two work crews, each to be under the direct supervision of a Senior Building Operator, rather than under the direct supervision of Farnes, the department head.

9. One of the two work crews now provides maintenance at the Detention Facility (and, at the time of hearing, will soon provide building maintenance at the County's animal shelter). That crew consists of Senior Building Operator Wesley Tanner, Building Operator Robert Erickson and Building Operator Assistant James Stanco.

10. The other work crew provides maintenance at the other County buildings. That crew consists of Senior Building Operator Robert Dahl, Building Operator Robert Campbell, Building Operator Jerry Smith and Building Operator Thomas McDonnell.

11. In August 2004, the county published a new job description for the Senior Building Operator (exhibit 3, CC 19-20). The new description expanded the prior typical essential duties (1) to include more detailed descriptions of some previous job duties, (2) to address Detention Center specific job duties involving supervision of inmates and community service workers and (3) to include references to supervisory duties. The new description also revised the "supervision exercised" description. The new "typical essential tasks" supervisory duty description read as follows:

Supervises building operators and assistants as assigned including: training, scheduling, evaluating, taking corrective action and discipline and participating in hiring and termination decisions. May perform duties of the Facilities Manager in his absence.

The new "supervision exercised" description read as follows:

Provides direct supervision to a small staff of building operators and assistants. Provides lead direction for community service and inmate workers.

12. Prior to the August 2004 reorganization, Dahl was lead worker on the Facilities Maintenance Department crew, while Tanner was lead worker on the Sheriff's Department crew.

13. Neither Dahl nor Tanner have ever suspended, laid-off, recalled, promoted, discharged, rewarded or disciplined any employee. Dahl has never been involved in hiring an employee.

14. After the August 2004 reorganization, Tanner was involved in the process that resulted in the hiring of Building Operator Assistant Stanco, in a posted and advertised position. Applicants took a standardized written test. Tanner and Farnes gave structured interviews to those who passed the test. Both Tanner and Farnes gave Stanco the highest scores on the interviews. Based on those results, Tanner and Farnes made a joint recommendation to the county's personnel department to hire Stanco.

15. Dahl regularly assigns all members of his work crew, including himself, to specific buildings (or areas within the buildings). The assignment of crew members to buildings is based on equalizing work and assuring that work priorities are met.

16. Each member of Dahl's crew (including Dahl) does a daily walk-through of his assigned building or area. If the crew member discovers a problem in need of maintenance, that crew member does the maintenance. If the crew member needs assistance, he requests assistance from Dahl. Dahl assigns another crew member to assist and his decision on who to assign is based on who has time to do the work. When Dahl needs assistance, he presumably recruits the most available crew member, based on who has time to do the work.

17. Each member of Dahl's crew, including Dahl, is responsible for identifying and performing regularly scheduled preventive maintenance in his assigned building or area. The schedule and the nature of the preventive

maintenance are identified through the specifications and requirements provided by the manufacturer of the particular equipment being maintained.

18. When a county employee submits a work request for maintenance, such as a request to have a heater or a light fixed, the work requests addressing the buildings Dahl's crew maintains come to Dahl by e-mail. He receives between five and ten such work requests daily. He first determines if the work requested is maintenance (the responsibility of his crew) or janitorial (someone else's job). He uses a ten-page detailed list of tasks developed by Farnes, which differentiates between maintenance and janitorial work.

19. If the work request is for maintenance work, Dahl decides whether his crew or an outside contractor will do the work. If building codes require a licensed worker (electrician, plumber, boiler-maker, etc.), Dahl calls one of the contractors on the list of pre-approved list contractors eligible to work on county buildings. If there is no building code license requirement, Dahl assigns the crew member responsible for the building or area where the work is needed. If the work will require more than one employee, Dahl assigns another crew member to assist, based on who has time to do the work. If the crew member responsible for the building or area where the work is needed has other immediate work to do, Dahl makes a decision about priorities, and assigns the work for immediate or later attention to the appropriate crew member.

20. Other maintenance work arises when the county commissioners decide upon significant repairs or improvements. The county contracts for design and work, but maintenance employees move offices and do other preparatory work for such major projects. Farnes provides the information to Dahl, who assigns the work to crew members (including himself) as dictated by the needs of and the schedule for the project.

21. Tanner assigns all members of his crew, including himself, to specific areas within the Detention Facility, based on equalizing work and assuring that work priorities are met.

22. Tanner, Erickson and Stanco spend about an hour each day performing a walk-through of the detention facility. If any crew member discovers a maintenance problem, that crew member does the work. If the crew member needs assistance, Tanner assigns another crew member to assist.

23. Each member of Tanner's crew, including Tanner, is responsible to identify and perform regularly scheduled preventive maintenance in his area, in the same fashion as Dahl's crew. When the Facilities Management Department assumed responsibility for maintenance at the Detention Facility, there was a great deal of routine maintenance that had not been done. As a result, a significant part of the work of Tanner's crew since August 2004 has been to catch up on overdue routine preventive maintenance ignored or deferred for years.

24. When a county employee submits a work request for maintenance at the Detention Center (similar to such a request at other facilities), the work requests come to Tanner by e-mail. Tanner must determine if the work is maintenance or janitorial, based on the ten-page detailed list of tasks developed by Farnes.

25. If the work request is for maintenance work, Tanner decides whether his crew or an outside contractor will do the work. If building codes require a licensed worker (electrician, plumber, boiler-maker, etc.), Tanner calls one of the contractors on the list of pre-approved list contractors eligible to work on county buildings. If there is no building code license requirement, he assigns the crew member responsible for the area where the work is needed. If the work will require more than one employee, he assigns another crew member to assist, based on who has time to do the work. If the crew member responsible for the area where the work is needed has other immediate work to do, Dahl makes a decision about priorities, and assigns the work for immediate or later attention to the appropriate crew member.

26. Tanner, like Dahl, works as a member of the crew. However, Tanner performs less maintenance work than Dahl because Tanner coordinates the maintenance work in a secure facility. Scheduling work around the jail schedule and the myriad of security requirements is more complicated than scheduling work in the other county facilities.

27. Tanner and Dahl coordinate maintenance activities with all of the other business taking place within the various facilities. That requires that Tanner work with the detention staff and management and identify and respect law enforcement needs in the sheriff's department. Dahl must often work directly with department heads and elected officials (including judges and the sheriff). Dahl and Tanner rely upon the members of their respective crews to perform their regular duties without the need for extensive direct supervision.

IV. DISCUSSION

Mont. Code Ann. § 39-31-202(1), governing collective bargaining for public employees provides:

In order to ensure employees the fullest freedom in exercising the rights guaranteed by this chapter, the [Board] shall decide the unit appropriate for collective bargaining and shall consider such factors as community of interest, wages, hours, fringe benefits, and other working conditions of the employees involved, the history of collective bargaining, common supervision, common personnel policies, extent of integration of work functions and interchange among employees affected, and the desires of the employees.

The Board's implementing rule, Admin. R. Mont. 24.26.610, provides:

A unit may consist of all of the employees of the employer or any department, division, bureau, section, or combination thereof if found to be appropriate by the board.

Public employees have the right to bargain collectively; supervisory and management employees are not "public employees" and do not share this right. *M.P.E.A. v. Dept. of Admin.* (1985), 217 Mont. 230, 703 P.2d 862, 864, *citing* Mont. Code Ann. § 39-31-201 *and City of Billings v. Billings Firefighters Loc. No. 521* (1982), 200 Mont. 421, 651 P.2d 627, 629. "Public employee" is construed broadly. *Local 2390 v. Billings* (1976), 171 Mont. 20, 555 P.2d 507. Any exceptions from bargaining units are construed narrowly. *NLRB v. Hendricks Cty R.El. Memb. Corp.* (1981), 454 U.S. 170, 180-81, *citing with approval Ford Motor Company* (1946), 66 NLRB 1317, 1322.

The positions of Senior Building Operator, as lead workers, were properly within the unit until the August 2004 reorganization. The county has the burden of establishing the propriety of their exclusion from the unit now.

Mont. Code Ann. § 39-31-103(11), as amended effective April 25, 2005, defines "supervisory employee:"

(11) (a) "Supervisory employee" means an individual having the authority on a regular, recurring basis while acting in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign,

reward, or discipline other employees or to effectively recommend the above actions if, in connection with the foregoing, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment.

(b) The authority described in subsection (11)(a) is the only criteria that may be used to determine if an employee is a supervisory employee. The use of any other criteria, including any secondary test developed or applied by the National Labor Relations Board or the Montana Board of Personnel Appeals, may not be used to determine if an employee is a supervisory employee under this section.

Tanner and Dahl now do have and exercise the authority “on a regular, recurring basis” to assign the work the men on their work crews perform. That authority includes the exercise of independent judgment about work priorities. Tanner and Dahl also have the authority, under their current job descriptions, to perform other supervisory duties listed in Mont. Code Ann. § 39-31-103(11). For the most part, the circumstances in which they would exercise those other powers have not arisen since the reorganization. The list of matters as to which there must be authority in order to satisfy the “supervisory employee” definition is clearly in the disjunctive. Thus, having the authority to assign work on a regular, recurring basis, exercising independent judgment, coupled with the formal authority to perform other specific supervisory duties as the need may arise, renders the positions of Senior Building Operator supervisory.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction to decide this dispute. Mont. Code Ann. § 39-31-207.
2. The two Senior Building Operator positions in the Facilities Maintenance Division of Missoula County, currently held by Robert Dahl and Wesley Tanner, are supervisory positions pursuant to Mont. Code Ann. § 39-31-103(11), and therefore are not properly included in the bargaining unit of public employees represented by the Federation of Missoula County Employees, MEA-MFT, AFT, AFL-CIO, pursuant to Mont. Code Ann. § 39-31-201 *et seq.*
3. The parties have settled the unfair labor practice claim, which should be (if it has not already been) dismissed by separate Board order.

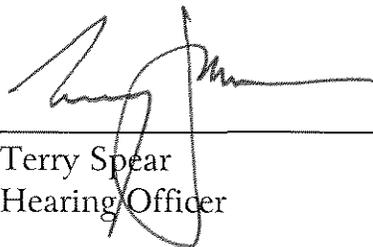
VI. RECOMMENDED ORDER

The Senior Building Operator positions in the Facilities Maintenance Division of Missoula County, held by Robert Dahl and Wesley Tanner, are supervisory positions, and are excluded from the Federation of Missoula County Employees, MEA-MFT, AFT, AFL-CIO, collective bargaining unit for county employees.

DATED this 10th day of August, 2005.

BOARD OF PERSONNEL APPEALS

By:



Terry Spear
Hearing Officer

NOTICE OF APPEAL RIGHTS

Pursuant to Admin. R. Mont. 24.26.215, this RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than September 2, 2005, which includes the 20 days in Admin. R. Mont. 24.26.215, and the additional 3 days mandated by Mont. R. Civ. P., Rule 6(e), as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

Steve Johnson
Missoula County
200 West Broadway
Missoula MT 59801

Karl J Englund
Attorney at Law
PO Box 8358
Missoula MT 59807

DATED this 10th day of August, 2005.

Sandy Duncan
Legal Secretary, Montana Department of Labor and Industry
Centralized and Legal Services Division
Hearings Bureau