

On March 30, 2006, the second setting for the scheduling conference, the parties conferred with the Hearing Officer and agreed to a new schedule pursuant to which the hearing would take place in Fairfield, Montana, on June 20-21, 2006.

On June 19, 2006, the union requested another continuance, representing that one of its witnesses, Jim Carrier, would not be available during the hearing time and that counsel for the union had only discovered this fact on June 19. Over the objections of the district, the Hearing Officer granted the continuance. The parties eventually agreed, after telephone conferences on June 20 and 21, 2006, to a new schedule, pursuant to which the hearing would convene on October 2-3, 2006, in Fairfield.

The contested case hearing convened and concluded on October 2, 2006, at the premises of the district in Fairfield, Montana. Wanda Sand, Dennis Barnett, Glenn Gregor and Warren Smeltzer testified. The Hearing Officer admitted into evidence Exhibits 1 and 2, Exhibits A through EE and Exhibits HH through PP.¹ The parties filed their post-hearing submissions and the Hearing Officer deemed the case submitted for a proposed decision.

II. ISSUE

The issue is whether the existing bargaining unit established for collective bargaining purposes, pursuant to Mont. Code Ann. § 39-31-202, appropriately includes the positions Head Custodian and Head Cook. The final pre-hearing order contains a full statement of the issues presented by the parties. At the hearing, the union asserted that BOPA had no jurisdiction over the issue of exclusion of the two positions from the bargaining unit, pursuant to Mont. Code Ann. § 39-31-207, and moved to dismiss on that basis.

III. FINDINGS OF FACT

1. Fairfield School District No. 21, the district, is a “public employer.” Mont. Code Ann. § 39-31-103(10).

¹ The parties filed a joint motion to seal Exhibits F, G, H, I, N and PP, due to personal privacy concerns involving a former employee. No non-party objected. The Hearing Officer finds that the former employee identified in these exhibits has an expectation of privacy that society would find reasonable, which clearly exceeds the merits of public disclosure, and those exhibits are therefore sealed. *In re Information Request by Lee Newspapers State Bureau* (11/2/2006), Case No. 288-2006.

2. Laborers International Union of North America, Local 1686, the union, is a "labor organization." Mont. Code Ann. § 39-31-103(6).

3. The district and the union are parties to a collective bargaining agreement ("CBA") pursuant to Title 39, chapter 31, Mont. Code Ann. They had previously entered into a series of such agreements. At the time of hearing they were engaged in negotiations for a new agreement.

4. Pursuant to the CBA, the district has recognized the union as the exclusive representative for those district employees included in the bargaining unit identified and defined by the terms of the CBA, which included the Head Custodian and Head Cook positions. Until this petition, the unit has not been changed or challenged since its inception. The positions of Head Custodian and Head Cook have not changed during the years the CBAs regarding this unit have been in place. The district has historically negotiated individually with applicants for employment as Head Custodian or Head Cook regarding starting salary.

5. Jim Carrier held the position of Head Custodian and Dennis Barnett currently holds the position of Head Custodian. Wanda Sand holds the position of Head Cook.

6. During the employment of Carrier and Sand, pursuant to the contract's union security clause, each gave the district written authorization to deduct the union's monthly dues from their wages. In accord with those authorizations, the district sent the dues to the union on a monthly basis, as mandated by the written authorizations and the terms of the CBA. Before the effective date of Mont. Code Ann. § 39-31-103(11)(2005), the union appointed Sand, as a member of the appropriate unit, to serve, and she did serve, on the labor-management longevity committee.

7. The primary duties of the Head Custodian can only be determined from custom and practice, since there is no written job description and there are no written policies or procedures addressing those duties in evidence in this case. As already noted, these duties are now essentially the same as they were before Barnett assumed them, after Carrier's discharge.

8. The Head Custodian supervises other employees of the district involved in maintenance and custodial duties, although he does not work the same hours as they do. Because one of the Head Custodian's primary duties is to maintain the school district's boiler system, he must be licensed by the State of Montana. For purposes

of boiler operation as well as other maintenance and custodial duties, he customarily works from 6:00 a.m. to 2:00 p.m. The other custodians start their shifts in the early afternoon, at 1:00 p.m., 2:00 p.m. and 3:00 p.m.

9. The Head Custodian assigns duties to the other custodians daily, as needed. The custodial work shifts are normally fixed and routine, but the Head Custodian has authority to reassign the other custodians to other tasks as required by circumstances, or to reschedule them in the event of special circumstances, or employee absences. He approves their time cards. The Head Custodian also has the authority to approve or deny sick leave and vacation requests of the other custodians.

10. The Head Custodian is the immediate supervisor of the other custodians for purposes of the grievance procedure set forth in the CBA.

11. The Head Custodian assigns or approves overtime work up to five hours per week. Overtime of more than five hours per week requires the Superintendent's approval.

12. The Head Custodian does not wear any uniform, clothing or name tag designating him as a supervisor. The shirt Barnett, the current Head Custodian, wears at work was provided by the district, and is the same as the shirts worn by the other custodians. All of the custodians, including Barnett, must punch in on the time clock. Like the other custodians, Barnett is an hourly wage employee.

13. Barnett has never been involved in the termination of an employee under his supervision, but reasonably believes that he has authority as a supervisor both to impose initial levels of discipline and to make termination recommendations to the Board of Trustees.

14. Barnett also expects to participate in the process of selecting new hires to work as custodians (there has been no new hiring since he became Head Custodian).

15. The primary duties of the Head Cook also can only be determined from custom and practice, since there is no written job description and there are no written policies or procedures addressing those duties in evidence in this case.

16. The Head Cook supervises the other kitchen employees. The present Head Cook, Sand, has been in the position for a number of years. Her shift is from 4:00 a.m. to 1:00 p.m. She is involved in the daily operations of planning, preparing and cooking meals for the students, in a routine developed over the years.

17. Sand's job as Head Cook also involves working with standardized menus and working on the computer doing such things as calculating the calories of each particular food. She performs other clerical work.

18. Sand does not wear a uniform, clothing or name tag designating her as a supervisor.

19. Sand assigns duties to the other kitchen employees daily, as needed. The kitchen work shifts are normally fixed and routine, but Sand has authority to reassign the kitchen staff to other tasks as required by circumstances, or to reschedule them in the event of special circumstances, or employee absences. Although she is not authorized to approve FMLA leaves of absence, Sand expects and relies upon her staff to keep her informed in advance of their planned absences, and believes she has the authority to deny permission for a planned absence, based upon kitchen requirements (she has not had occasion to do so).

20. The Head Cook is the immediate supervisor of the other kitchen employees for purposes of the grievance procedure set forth in the CBA.

21. Overtime pay does not appear to be an issue in the kitchen.

22. The work of both the Head Custodian and the Head Cook positions includes work done by bargaining unit members (cleaning, cooking, etc.) as a substantial part of their daily duties.

23. Both Sand and Barnett have the authority on a regular, recurring basis while acting in the interest of the Fairfield School District, to make hiring and termination recommendations, to assign employees under their supervision, including the assignment of daily tasks and the scheduling of employees on a daily basis (including granting or denying sick leave and vacation), to impose initial levels of discipline and recommend imposition of higher levels of discipline, and to adjust the grievances of the employees they supervise, pursuant to the CBA.

24. On December 21, 2004, the union filed an unfair labor practice charge with BOPA alleging in pertinent part that the district had failed and refused to process Carrier's grievance over his termination. ULP No. 28-2005. In its response to the charge, the district alleged that Carrier was a supervisory employee and therefore was not and could not at any time be or have been a member of the union.

25. On February 8, 2005, the union filed another unfair labor practice charge with the BOPA, alleging that the district was attempting unilaterally to remove Sand and Barnett (Carrier's successor) from the bargaining unit, including an allegation that the district was denying that union dues should be withheld from the wages of the two positions. ULP No. 32-2005.

26. The Hearing Officer herein was responsible for hearing ULP No. 28-2005 and ULP No. 32-2005, and consolidated them. During the pendency of these proceedings, the district ceased paying the "dues" it disputed to the union, holding the deductions pending the decision in this case.

27. On August 29, 2005, the district filed the current petition for clarification of the unit. At that time, there was no question regarding representation of the unit, no petition for unit clarification had been filed concerning the same unit during the 12 months before the filing of the petition and no election had been held within the same unit during the 12 months before the filing of the petition. The parties had not engaged in negotiations within 120 days before the filing of the petition nor was the existing CBA within 120 days of expiration as of the filing of the petition.

28. On August 29, 2005, the district filed a motion in the consolidated unfair labor practice cases to suspend proceedings therein while this present case proceeded. At that time, the two unfair labor practice claims were active and pending, with at least four contested motions pending and being briefed.

29. Thereafter, the parties reported to the Hearings Bureau that the unfair labor practices were, or might be, or should be, settling. Eventually, the district moved to dismiss the unfair labor practice cases as settled. The union objected. The parties fully briefed the issues involved, which included references to the present case, which had by then been filed and was under investigation. The Hearing Officer deferred any ruling on the motion until the proposed decision in the present case.

IV. DISCUSSION²

The Union's Motion to Dismiss Is Denied

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

²Statements of fact are incorporated by reference as fact findings. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

In order to ensure employees the fullest freedom in exercising the rights guaranteed by this chapter, [BOPA] 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.

BOPA has an implementing unit determination rule regarding the composition of a bargaining unit, Admin. R. Mont. 24.26.610:

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.

BOPA also has an implementing unit clarification rule, which defines what power it exercises regarding unit clarification petitions, Admin. R. Mont. 24.26.610, which addresses what BOPA can do after a hearing to determine the facts at issue in a unit clarification petition:

(6) If the parties are unable to mediate the dispute, [BOPA] shall set the matter for hearing. Upon completion of the hearing [BOPA] may:

- (a) grant the petitioned for clarification in whole or in part, or
- (b) deny the petitioned for clarification in whole or in part.

Admin. R. Mont. 24.26.610(3)(c) through (f) also require, in the clarification petition itself, identification and description of the bargaining unit, description of the proposed clarification of the unit, statement of the job classification(s) of employees as to whom the clarification issue is raised and a statement of the reason why the petitioner desires the clarification.

Mont. Code Ann. § 39-31-207 addresses petitions on representation questions, and is the statute cited following Admin. R. Mont. 24.26.610. However, the rule clearly contemplates that BOPA can and will decide, when asked by a clarification petition, whether the existing bargaining unit established for collective bargaining purposes, pursuant to Mont. Code Ann. § 39-31-202, appropriately includes particular positions. Acting on behalf of BOPA, with the authority delegated by

BOPA, the Hearing Officer will not and cannot decide that BOPA's rule is improper or void. Therefore, the union's motion to dismiss for lack of jurisdiction is denied.

The Head Custodian and Head Cook Are Supervisory Employees

Public employees have the right to bargain collectively, however, supervisory employees are not "public employees" and therefore 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 Fire. 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, 1322.³

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

(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. [Emphasis added.]

³ Because of the similarity between the National Labor Relations Act (NLRA) and Montana's public employees' collective bargaining law, federal administrative and judicial construction of the NLRA is instructive and often persuasive regarding the meaning of Montana's labor relations law. *Great Falls v. Young* (1984), 211 Mont. 13, 686 P.2d 185 (*Young III*); *State ex rel. BOPA v. Dist. Ct.* (1979), 183 Mont. 223, 598 P.2d 1117. The Montana Supreme Court and BOPA, absent Montana precedent or statutes providing otherwise, look to federal NLRA interpretations to illuminate the meaning of the Montana Public Employees Collective Bargaining Act. *Small v. McRae* (1982), 200 Mont. 497, 651 P.2d 982; *followed in Brinkman v. State* (1986), 224 Mont. 238, 729 P.2d 1301.

This controversy arose under Montana collective bargaining law as it existed pursuant to the 2005 amendment to the definition of “supervisory employee.” The related unfair labor practice charges arose under the prior law, but for the present case, the controlling law is the law in effect when BOPA decides whether the employee at issue is properly included in the unit established for collective bargaining purposes. *Wallace v. Mont. Dept. Fish, Wildlife & Parks* (1995), 269 Mont. 364, 889 P.2d 817. Therefore, the amended definition of “supervisory employee” applies to this proceeding.

There is substantial evidence of record supporting the findings that both the Head Custodian and the Head Cook have the authority, on more than an irregular basis, to act in the interest of the district “to hire . . . or discipline other employees.” The evidence establishes that these two positions can and do “effectively recommend [at least some of] the above actions.” Since the conjunction between the list of verbs is “or” this is sufficient. Therefore, without reference to secondary tests applicable prior to the effective date of the 2005 amendment, both positions, as of the date of this petition, were those of supervisory employees. The evidence adduced at this hearing does not permit any broad reading of “public employee” or narrow reading of “supervisory employee” to avoid the plain meaning of the amendment.

The Statutory Exclusion of “Supervisory Employees” from Collective Bargaining Rights Was Not Waived by the District

Since the collective bargaining rights of “public employees” do not extend to persons who are not public employees, “supervisory employees” do not and never have had such rights. It seems legally unlikely that the district could have the power to waive the statutory exclusion of “supervisory employees” from the definition of “public employees.” However, it does not matter whether the district could have waived the exclusion. Until the 2005 amendment, the law was different regarding the definition of “supervisory employees.” Only after the effective date of the amendment could any party assert or waive rights conferred by the amendment. *Cf. Wallace, supra.*

By the effective date of the 2005 amendment, the district was asserting the “supervisory employee” exclusion in both pending unfair labor practice claims. ULP 32-2005 specifically charged that the district was unilaterally changing the terms and conditions of the CBA by denying that union dues should be withheld from the wages of the two positions. The district did not waive the exclusion, once the 2005 amendment changed the definition of “supervisory employee.”

The Union Is Not Entitled, in this Proceeding, to an Order Directing that the Two Positions Do No Bargaining Unit Work

Mont. Code Ann. § 39-31-103(11)(2005) does not require that “supervisory employees” do no bargaining unit work. If employees fit within the definition, it is irrelevant whether they are also doing bargaining unit work, they are “supervisory employees.” The union has not provided any authority for the proposition that when positions designated as being in the unit are removed from the unit as now being supervisory employees, the law requires that they cease doing any bargaining unit work. The Hearing Officer takes administrative notice that supervisors often also have job duties that include bargaining unit work. This case does not involve assigning work currently done by legitimate members of the unit to employees who are not in the unit, which would be a very different situation. Instead, this case involves recognizing that two employees designated by the CBA as unit members are supervisory employees and not unit members, pursuant to an amended statute, from the effective date of that amendment. Whether in the future the amount of work that they still do, which otherwise would be done by members of the unit, should remain the same or be eliminated or reduced is a matter for future negotiations.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this matter pursuant to Montana Code Annotated §§ 39-31-202 and 39-31-207.
2. The positions of Head Custodian and Head Cook are supervisory positions excluded from the bargaining unit, effective April 25, 2005, despite inclusion under the CBAs prior to the amendment to Mont. Code Ann. § 39-31-103(11)(2005).⁴

VI. RECOMMENDED ORDER

The Hearing Officer recommends that the Board of Personnel Appeals enter its order finding that the positions of Head Custodian and Head Cook in the Fairfield School District No. 21 are properly excluded from the existing bargaining unit for which the Laborers International Union of North America, Local 1686, is the

⁴ This may not resolve the questions regarding the two prior unfair labor practice claims. The Hearing Officer will set a time for any additional briefing to be filed hereafter in those cases after which either recommended dismissals will issue or the cases will be scheduled for hearing.

exclusive bargaining representative, effective April 25, 2005, because the positions are supervisory positions under Mont. Code Annotated § 39-31-103(11)(a)(2005).

DATED this 30th day of March, 2007.

BOARD OF PERSONNEL APPEALS

By: 

Terry Spear, Hearing Officer
Hearings Bureau
Department of Labor and Industry

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than April 23, 2007. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., 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:

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DATED this 30th day of March, 2007.

Sandy Duncan