

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 2-2006:

JEFFERSON COUNTY,)	Case No. 726-2006
)	
Petitioner,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
JEFFERSON COUNTY PUBLIC)	AND RECOMMENDED ORDER
EMPLOYEES LOCAL 4538,)	
MEA-MFT, AFT, AFL-CIO,)	
)	
Respondent.)	

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I. INTRODUCTION

Petitioner Jefferson County, Montana, a Montana public employer, filed a petition for unit clarification on October 13, 2005, seeking to remove the position of Jefferson County public health nurse supervisor from the collective bargaining unit. Jefferson County contends that the position is a management position and should not be part of the bargaining unit. Respondent Montana Federation of State Employees, MEA-MFT, AFL-CIO (MEA/MFT) has resisted the petition asserting that the public health nurse supervisor is properly part of the bargaining unit.

Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on May 18, August 21 and 31, 2006. Matt Johnson, Jefferson County Attorney, represented Jefferson County. Stephen Bullock, Attorney at Law, represented MEA/MFT. Kellie Doherty, Jefferson County Human Resources Officer, Nicole Todorovich, Jefferson County Public Health Nurse, Carla Matlock, Jefferson County Deputy Clerk and Recorder, Roy Barnicoat, Chairman of the Jefferson County Board of Health, Kay Bills-Kazimi, board member of the Jefferson County Board of Health, Gretchen George, Jefferson County Health Clinic Coordinator, Francine Janik, board member of the Jefferson County Board of Health, Betty Handel, board member of the Jefferson County Board of Health, Tish Fortier, Jefferson County Public Health Nurse Supervisor, Tom Lythgoe, Jefferson County

Commissioner, Ken Weber, Jefferson County Commissioner, Chuck Nothbohm, Jefferson County Commissioner, Cathy DuBois, part-time Jefferson County Deputy Clerk, Marilyn Greely, former Jefferson County Public Health Nurse Supervisor, Tom Burgess, MEA/MFT, and Cynthia Kreizwald, local MEA/MFT Secretary/Treasurer, all testified under oath. The parties stipulated to the admission of Jefferson County Exhibits 1 through 38 and MEA/MFT Exhibits G-1 through G-14, G-A, G-C, G-D, G-H, G-I, G-M, G-N, G-Q, G-R, G-X, G-Y, G-BB, G-II, G-JJ, and G-QQ.

The parties graciously agreed to provide the hearing officer with post-hearing briefs elucidating certain issues raised during the hearing. The briefing concluded on October 12, 2006 and the matter was deemed submitted for decision at that time. Having considered fully the testimony of the witnesses, the parties' exhibits, and the arguments and briefing of counsel, it is abundantly clear that the public health nurse supervisor position is a management position that should not be included in the bargaining unit. Accordingly, the hearing officer recommends to the Board that the public health nurse supervisor position be removed from the bargaining unit. The facts and rationale that support this recommended decision follow.

II. ISSUE

Should the Jefferson County public health nurse supervisor who exercises supervisory powers over a clinical director and a part-time public health nurse and whose supervision includes the ability to independently initiate and carry out discipline of subordinates be included in the bargaining unit?¹

¹At the time of the hearing, the hearing officer expressed his concern to the parties as to whether there could be, as urged by Jefferson County, a retroactive application of a petition for clarification under Administrative Rule of Montana 24.26.630. That rule gives the Board the authority to "grant the petitioned for clarification in whole or in part," Admin. R. Mont. 24.26.630(6)(a), but does not address whether there can be a retroactive application of the petition. The petition in this case seeks clarification of whether the public health nurse supervisor position is supervisory and should or should not be a part of the bargaining unit. Thus, while the determination in this case necessarily rests on the adjudication of historical facts (including whether Marilyn Greely exercised supervisory authority while holding the public health nurse supervisor position), the ultimate issue to be decided is whether the public health supervisor position should or should not be a part of the bargaining unit and not whether or not the decision has retroactive application.

III. FINDINGS OF FACT

1. On December 31, 1986, the Montana Board of Personnel Appeals certified MEA-MFT as the exclusive bargaining representative of all non-exempt Jefferson County employees. Included within the bargaining unit was the position of nurse. At that time, there was no public health nurse supervisor position in Jefferson County government.

2. By January, 1996, Jefferson County had created two positions related to nursing: (1) a public health nurse supervisor position which was rated at a Grade 13 pay scale and (2) a public health nurse position which was rated at a Grade 11 pay scale. The February, 1996, position description for the public health nurse supervisor notes, among other things, the position is "self-directed" and that one of the essential functions of the job requires the "ability to supervise" (Exhibit 7, page 1).

3. On April 4, 2004, Jefferson County revised the public health nurse supervisor position description. Among other things, the position required the incumbent to (1) supervise staff at the Jefferson County public health clinics (which includes a non-supervisory public health nurse), (2) to develop budgets for the clinics (3) to train staff at the clinics, (4) to develop policies and procedures at the clinics and (5) to discipline staff. The public health nurse supervisor also helps to revise job descriptions of staff.

4. Paula Anders, who held the position of public health nurse supervisor until February, 2005, never joined the MEA/MFT union during the entire time that she held the position.

5. After Anders left the position of public health nurse supervisor, Jefferson County advertised to fill the position. Marilyn Greely was hired for the position on February 26, 2005 and started working in her capacity as public health nurse supervisor on February 28, 2005. As a new county employee, Greely faced a six month probationary period. On February 26, 2005, Greely signed a Jefferson County Public Health Nurse Employment Agreement that set forth very nonrestrictive limits on Greely's conduct in the position of public health nurse supervisor. The document implicitly recognized Greely's authority to implement and carry out discipline, but required that she report such discipline before carrying it out.

6. As public health nurse supervisor, Greely, consistent with her job description, supervised both the clinic coordinator and the public health nurse. Gretchen George had been clinic coordinator since April 2004. Greely assigned

George duties, disciplined George for perceived misconduct, and approved George's time cards. In her position, Greely signed time sheets of staff and supervised the day to day management of the staff. Greely participated in interviewing and hiring Nicole Todorovich into the public health nurse position. Greely could also authorize herself and subordinates to expend county funds in attending seminars and training sessions.

7. Greely's working relationship with George was, to say the least, strained. One of George's duties involved running errands to the county courthouse. Greely felt George was taking too much time and prohibited her from going to the courthouse. On another occasion, Greely felt that George had claimed on her time card to have worked an additional half hour which George had not worked. Greely, in her supervisory capacity, removed the half hour from George's time sheet. Eventually, things got so heated between the two that on one occasion, Greely ordered George not to come back into the clinic for the rest of the week. On another occasion, Greely ordered George to log the kind of work that George was doing every 15 minutes. Ultimately, the Jefferson County human resources division, in an effort to bring harmony back into the clinic and to avoid a lawsuit from George over constructive discharge, reversed Greely's actions. But no one at the county questioned Greely's authority to initiate and carry out discipline of her subordinates or to change time cards if such action was merited.

8. Unbeknownst to the county, Greely decided that she wanted to join the MEA/MFT and took steps to do so. She contacted the union representative, Cynthia Kreizwald, and made arrangements to join the union. To that end, Cynthia, on Greely's behalf, presented Greely's signed authorization for the deduction of union dues to the county payroll clerk. The clerk's office implemented Greely's deduction request without question because that was its normal course of conduct. As Carla Matlock testified, and the hearing officer finds, it was not part of the payroll clerk's function to second-guess the propriety of the union representative's presentation of a payroll deduction request. Thus, at no time prior to September 2005 was the county aware that Greely had joined the union.

9. Greely's working relationship with George and other county personnel became a source of concern for the county and the county commissioners. After Greely had changed George's time card, George went to Kellie Doherty, the Jefferson County human resources director, and complained. Doherty intervened and rescinded Greely's time change. Of equal concern was the fact that Greely was apparently not establishing the type of contact with the clinics and the citizenry of the county as the county commissioners would have expected. For example, the

county received complaints about Greely's failure to ever visit or have contact with anyone at the Whitehall Medical Clinic (Exhibit 34).

10. Greely's and George's interactions in the Health Department became a serious point of concern for the Jefferson County health board. On September 1, 2005, health board member Ford sent an e-mail to Greely and George recognizing the "serious discord" between them (Exhibit 36).

11. At a Jefferson County health board meeting on August 11, 2005, Commissioner Barnicoat (the Jefferson County Commissioner who acted as liaison between the commissioners and the county health board) asked for input from the health board on Greely's work as her six-month probationary period would be ending in late September. The input which the board received was, at best, mixed. One of the commissioners, Jeanine Ford, praised Greely's work. Others, however, questioned Greely's competency. Kay Bills-Kazimi e-mailed Barnicoat on August 15, 2005 and stated that two Lewis and Clark County nurses, while highly complimentary of Nicole Todorovich, questioned Greely's competence. The Lewis and Clark County nurses told Kazimi that they felt Greely was "less cooperative [than Todorovich], and tends to work a little too autonomously" (Exhibit 31). Francine Janik recommended that Greely be kept on board but that her probation be extended for an additional three months. In reaching that conclusion, Janik cited 5 instances of improper conduct of which she was aware (Exhibit 32). Betty Handel concurred with Janik and recommended that Greely's probation be extended for an additional three months (Exhibit 34).

12. In light of the mixed response from health board members about Greely's conduct, as well as the obvious personnel problems that had come to exist in the clinic due to Greely's management of staff, the health board voted to extend Greely's probation for a period of 3 months. In a letter to Greely dated August 19, 2005, Barnicoat informed Greely of the decision to extend her probation for three more months. The letter also asked Greely to work more on her communication with the health board and other entities and that she follow county personnel policies. There was no indication in that letter that her supervisory functions were being revoked or paired down in any manner.

13. On September 1, 2005, Greely responded through Kreizwald by informing the health board that Greely wanted to pursue a grievance under the collective bargaining agreement. This was the first time that the health board or the county commissioners became aware that Greely had joined the union. In response,

Barnicoat informed the union that the county did not believe that Greely could be part of the union because she was a supervisor.

14. Despite earlier admonitions from Doherty not to do so, Greely continued to exercise unreasonable supervision tactics over George and the situation between the two only got worse. In one instance, Greely moved her desk in front of George's and continued to stare at George throughout the day. In order to calm the obvious storm in the public health office, the county commissioners on September 19, 2005 sent a letter to Greely reminding her that Doherty had ultimate supervisory authority over the Health Department employees similar to the type of authority Doherty exercised over other county departments. This document did not give Doherty day to day control over the Health Department and did not remove Greely's authority to initiate reasonable discipline.

15. Because of Greely's management of the Health Department and her poor communication with other entities as well as the health board, the health board decided to discharge her from the public health nurse supervisor position on September 22, 2005. Soon afterwards, on November 21, 2005, the health board replaced Greely with Tish Fortier and she took over the duties of public health nurse supervisor.

16. Fortier has not joined the union. Since taking the position, Fortier has exercised supervisory powers over George and Todorovich, including assigning tasks and scheduling employees. As Greely did, Fortier approves George's and Todorovich's time cards. Although she has not had to mete out discipline, she has the power to do so, subject again to advising the county human resources division prior to taking any such discipline.

17. Shortly after Greely's discharge, the county, on October 13, 2005, filed the instant unit clarification seeking to determine whether the public health nurse supervisor position is or is not part of the bargaining unit. The county undertook this pursuant to the 2004-2006 collective bargaining agreement which requires that parties to the agreement seek clarification from the Board of Personnel Appeals in the event the parties cannot reach agreement as to whether a position is or is not part of the bargaining unit.

IV. DISCUSSION²

Montana law gives public employees the right of self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities. Mont. Code Ann. § 39-31-201. The law further authorizes the Board of Personnel Appeals to decide what units of public employees are appropriate for collective bargaining purposes. Mont. Code Ann. § 39-31-202. However, because the statute excludes supervisory employees from the definition of “public employee,” a supervisory employee does not have the rights guaranteed by Montana Code Annotated § 39-31-201 and cannot be included in a unit for collective bargaining purposes. Mont. Code Ann. § 39-31-103(9)(iii).

Montana Code Annotated § 39-31-103(11)(a) defines a supervisory employee as “an individual having 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.” Montana Code Annotated § 39-31-103(11)(b) provides that the authority articulated in subsection 11(a) “is the only criteria that may be used to determine if an employee is a supervisory employee.”

The party asserting that an employee should be excluded from a unit has the burden of proving supervisory status. NLRB v. Bakers of Paris, Inc., 929 F.2d 1427, 1445 (9th Cir. 1991). Not all, or even a large number, of the statutory indicia of supervisory status are necessary to establish that an employee is a supervisor. The statutory definition is in the disjunctive, and it is therefore sufficient for supervisory status to be established based on only one of the statutory criteria. E and L Transport Co. v. NLRB, 85 F.3d 1258, 1269 (7th Cir. 1996).

Applying the criteria set out in Montana Code Annotated § 39-31-103(11)(a), the evidence in this case demonstrates preponderantly that the public health nurse supervisor position is supervisory in character and not properly included within the bargaining unit. The public health nurse supervisor position exercises the statutory criteria relating to supervisory powers, routinely exercising independent judgment and authority in the area of assignment and discipline of subordinate employees.

²Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Greely indisputably exercised supervisory power over the clinic coordinator position held by George and the public health nurse II position held by Todorovich. The position description for the position confirms this power, stating explicitly that the public health nurse supervisor position is responsible for supervising and disciplining clinic personnel. This power was not lost on Greely who, as demonstrated by George's testimony, took pains to correct and discipline George and who unilaterally changed George's time card because she felt George had not worked certain hours which had been claimed. Greely also assigned duties to George and Todorovich as required by Greely's position description.

The supervisory nature of the position is further demonstrated by the testimony of Tish Fortier. As public health nurse supervisor, Fortier has continued to assign duties and retains the power to implement discipline.

The union's contention that Greely's supervisory duties existed in name only is not correct. The fact that the county overrode some of the discipline that Greely meted out had no bearing on the power of the position to exercise the discipline. Rather, it emanated from the fact that from the county's perspective, Greely made poor management decisions that needed to be corrected. At no time did the county indicate that Greely did not have the power to initiate discipline or to make assignments and assign tasks. Rather, only after Greely's conduct toward George (which consisted of meting out purely vindictive discipline to George) did not change, despite Doherty's admonitions to the contrary, did the county then reign her in by reminding her that she was obligated to follow the directions of the human resources division. This, however, did not change the essential management function of the public health nurse supervisor. In short, it is clear that the public health nurse supervisor position is supervisory and should not be included in the bargaining unit.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this matter pursuant to Montana Code Annotated § 39-31-207.

2. The position of public health nurse supervisor is a supervisory position as contemplated by the language of Montana Code Annotated § 39-31-103(11) (a) and is, therefore, properly excluded from the bargaining unit.

VI. RECOMMENDED ORDER

Based on the foregoing, the hearing officer recommends that the Board of Personnel Appeals enter its order finding that the position of Jefferson County public health nurse supervisor is properly excluded from the MEA/MFT bargaining unit as the position is a supervisory position under Montana Code Annotated § 39-31-103(11)(a).

DATED this 30th day of October, 2006.

BOARD OF PERSONNEL APPEALS

By: Gregory L. Hanchett
GREGORY L. HANCHETT
Hearing Officer

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 November 22, 2006. 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

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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:

Matthew J. Johnson
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DATED this 30th day of October, 2006.

Sandy Duncan