

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 1-2009:

MONTANA HISTORICAL SOCIETY,)	Case No. 299-2009
)	
Petitioner,)	HEARING OFFICER'S
)	FINDINGS OF FACT,
vs.)	CONCLUSIONS OF LAW,
)	AND RECOMMENDED
MEA-MFT,)	BOARD ORDER
)	
Respondent.)	

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I. INTRODUCTION

On August 19, 2008, the Department of Administration, State Office of Labor Relations (DOA) and the Montana Historical Society (MHS) jointly filed a petition for unit clarification, with DOA acting on behalf of MHS, requesting that the existing unit established for collective bargaining purposes should no longer include position #51700082, Tour Coordinator, pursuant to Mont. Code Ann. § 39-31-202. On September 9, 2008, the established unit's exclusive bargaining representative, the Montana Education Association-Montana Federation of Teachers (MEA-MFT), filed a counter-petition opposing removal of the position from the existing unit.

On September 29, 2008, the Board of Personnel Appeals (BOPA), acting through BOPA agent Windy Knutson, gave notice to MHS and MEA-MFT that the case was transferred to the Hearings Bureau for a contested case hearing. On October 1, 2008, the Hearings Bureau gave notice to the parties of the identity of the Hearing Officer and set a telephonic scheduling conference. The assigned Hearing Officer held the telephonic conference on October 27, 2008, as scheduled, and, by agreement of the parties, set the contested case hearing for February 2, 2009.

Hearing Officer Terry Spear conducted the contested case hearing as scheduled on February 2, 2009. Ruth Anne Hansen, DOA, participated on behalf of MHS and Rick Larson, Larson Law Office, P.C., represented MEA-MFT, having filed a proper substitution of counsel for the previous counsel at the commencement of the hearing. Denise King and Kirby Lambert testified as witnesses. Exhibits 1 through 12 were admitted into evidence, with substitutions of redacted Exhibits 10, 11, and 12 (for the protection of privacy of non-parties) made during the hearing. In accord with the final pre-hearing order, the parties filed their post-hearing proposed decisions and the matter was submitted on March 20, 2009.

II. ISSUE

The issue in this case is whether the unit established for collective bargaining purposes should no longer include position #51700082, Tour Coordinator, pursuant to Mont. Code Ann. § 39-31-202.

III. FINDINGS OF FACT

1. The Montana Historical Society (MHS) is an agency of state government for the use, learning, culture, and enjoyment of the citizens of the state, for the acquisition, preservation, and protection of historical records, art, archival and museum objects, historical places, sites and monuments and for the custody, maintenance, and operation of the historical library, museums, art galleries, and historical places, sites, and monuments. MHS is a “public employer” as defined in Mont. Code Ann. § 39-31-103(10).

2. The Montana Education Association-Montana Federation of Teachers is a “labor organization” as defined in Mont. Code Ann. § 39-31-103(1) and eligible to be the exclusive representative of certain employees of MHS who are members of a bargaining unit represented by the Montana Federation of Historical Society Workers, Local #4367 (“MEA-MFT”), under the applicable collective bargaining agreement (CBA).

3. In 2006, position #51700082, held by Debra (Deb) Mitchell, was included in the bargaining unit represented by Local #4367, under the terms of the CBA, defining the unit as:

... all state employees of the Montana Historical Society, excluding part-time employees working less than eighteen (18) hours per week, seasonal or temporary who work less than 6 contiguous months, those otherwise excluded by way of occupying managerial, supervisory, or confidential positions, and any employees covered by other collective bargaining agreements.

4. In MHS’s 2006 Organizational Chart (Exhibit 2), Mitchell’s position appears to have consisted of two half-time positions, “Education Outreach Coordinator” and “Tour Coordinator.” She worked in the “Education Office,” which was a multiple position “office” within the “Museum and Education” department of the MHS. The only full-time position in the “Education Office” at that time was the “Education Officer.”

5. In the summer of 2007, MHS reorganized, relocating its education, outreach, and interpretation services under the umbrella of a new program, the Outreach and Interpretation Program (OIP). All of the “Education Office”

employees, previously within the Museum and Education Programs, became employees within the OIP. Position #51700082 was one of those positions.

6. In October 2007, MHS selected and promoted a long-term employee, Kirby Lambert, to be the Program Manager for the OIP.

7. After the reorganization and his hiring as OIP Program Manager, Lambert reviewed the services provided by his program and the work performed by his staff. He restructured some of the positions he supervised.

8. Although Mitchell's position, according to its description, had included supervisory responsibilities, Mitchell's supervisor (the education supervisor) had performed those duties. Among Lambert's changes was modification of the education supervisor's position to remove its supervisory duties (including supervising Mitchell) and placing the position back in the bargaining unit.

9. Lambert assumed direct supervision of Mitchell, and shifted the education supervisor's other supervisory duties to Mitchell. Mitchell, with Lambert's approval and encouragement, undertook supervisory duties regarding the tour guides, the seasonal and part time employees who conduct the tours of Historical Society properties involving the public. Mitchell now actually actively supervises 1.65 tour guide full-time equivalents (FTE's), consisting of between four and seven part-time employees, depending upon the season.

10. Mitchell conducts performance appraisals on the tour guides she supervises, to which her supervisor, Lambert, provides no input.

11. Mitchell assigns work to the tour guides. There are different skill sets needed for each tour location. Mitchell assesses the skill sets of the employees and determines who is qualified to work in which location.

12. Mitchell participates in hiring panels. At MHS, the hiring supervisor leads the hiring panel; Mitchell has led a hiring panel for a tour guide hire – coordinating the interview process, conducting reference checks and making the job offer.

13. Lambert appraises Mitchell's performance. He evaluates her with the MHS supervisor performance appraisal tool which has a stronger focus on supervisory duties than the non-supervisor performance appraisal tool utilized by MHS to evaluate non-supervisor performance.

14. Mitchell is responsible for administering corrective discipline within the tour guide work unit.

15. Mitchell is also responsible for independently approving all time sheets for the employee tour guides. She has the authority to change the time on the sheets

where she determines it to be inaccurate. Lambert provides no oversight to this process.

16. Lambert and Mitchell have updated her job profile, expanding the supervisory duties to reflect the actual work performed.

17. Because of Mitchell's actual supervisory work and because of some other changes in her job responsibilities, Lambert updated Mitchell's job profile, with her assistance.

18. Lambert asked MHS Central Services Administrator Denise King to review the new job profile for Mitchell's position. King noticed the job profile included supervisory duties. King was familiar with the CBA between MHS and MEA-MFT. She knew that the CBA excluded supervisors from membership in the unit. She contacted the State Office of Labor Relations because she believed there could be an "issue" with having Mitchell, who now might be a supervisor, in the collective bargaining unit.

19. The updated job profile has been submitted for classification, and upgraded to a Band 4. Lambert recommended a pay raise for Mitchell based on this upgrade.

20. King reviewed the compensation for Mitchell, considering that although the old job description for the position contained supervisory duties, Mitchell had not performed many, if any, of those functions, but that now she was performing supervisory duties under the updated job profile.

21. King referenced the MHS Broadband Pay Plan to determine appropriate compensation for Mitchell. She reviewed the scope of the position including both the increased complexity and the supervisory duties. King concluded a raise of \$1.00 per hour would be appropriate compensation for Mitchell. Mitchell received the pay increase in July 2008.

22. Even if Mitchell has not exercised the specific authority to transfer, suspend, lay off, recall, promote, discharge, or reward other employees of the Historical Society, she does exercise, in a regular, recurring fashion with independent judgment, the authority to assign the tour guides to locations and to supervise and to evaluate their work, as well as to review and to approve their time sheets.

IV. DISCUSSION¹

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 self-organizing 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. Because the statute excludes “management official” and “supervisory employee” from the definition of “public employee” (Mont. Code Ann. § 39-31-103(9)), management officials and supervisory employees do not have the rights guaranteed by Mont. Code Ann. § 39-31-201, and are not appropriately included in a unit for collective bargaining purposes.

Mont. Code Ann. § 39-31-103(11)(a) defines supervisory employee as “any individual having authority on a regular, recurring basis while acting in the interest of the employer to hire, transfer, suspend, lay off, recall, discharge, assign, reward, or discipline other employees, having responsibility to direct them, to adjust their grievances, or to effectively recommend the above actions if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.”

The possession of the “authority” defined in (11)(a) is the exclusive test, the “only criteria” by which “to determine if an employee is a supervisory employee.” Mont. Code Ann. § 39-31-103(11)(b). Applying that exclusive test, Mitchell is a supervisory employee.

Mitchell actively participates in hiring decisions regarding the tour guides. Clearly, she has the authority effectively to recommend personnel action. Mitchell assigns and directs the tour guides, and exercises independent judgment in the performance of these duties. She has responsibility for performance appraisals of the tour guides. The authority to evaluate employees is not one of the statutory indicia of supervisory status and by itself may be insufficient to prove supervisory status. As an aspect of assignment and direction, on the other hand, it shows that Mitchell is a supervisor in this specific fact situation.

An employee with authority on a regular, recurring basis to perform at least one of the statutory criteria for the employer, using independent judgment, is a supervisor. Mitchell exercises such authority on MHS’s behalf in assigning work (and locations) to the tour guides. Therefore, although some of the other supervisory

¹Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

duties may be less clear, Mitchell is a supervisory employee and her position is no longer properly included in the unit.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this petition for unit clarification. Mont. Code Ann. § 39-31-207.

2. Position #51700082, held by Debra (Deb) Mitchell, is now that of a supervisory employee, and therefore is no longer properly included in the collective bargaining unit established pursuant to the express terms of the applicable CBA between MHS and MEA-MFT, according to the applicable criteria established by Mont. Code Ann. § 39-31-103(11).

VI. RECOMMENDED ORDER

The existing bargaining unit established at the MHS, pursuant to the Collective Bargaining Agreement between MHS and MEA-MFT, is clarified to exclude position #51700082, Tour Coordinator, which is now a supervisory employee position.

DATED this 30th day of April, 2009.

By: Terry Spear
BOARD OF PERSONNEL APPEALS
Hearing Officer

NOTICE OF RIGHT TO FILE WRITTEN EXCEPTIONS

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 May 26, 2009. 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

Copies today served, by deposit in the U.S. Mail (postage prepaid) or the State of Montana's Interdepartmental mail service, addressed to:

Ruth Anne Hansen,
Labor Relations Specialist
Department of Administration
P.O. Box 200127
Helena, MT 59620-0127

Richard Larson
Attorney at Law
P.O. Box 1152
Helena, MT 59624

DATED this 30th day of April, 2009.

Sandy Duncan