

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 2-2011:

INTERNATIONAL UNION OF	)	Case No. 1292-2011
OPERATING ENGINEERS, LOCAL 400,	)	
	)	
Petitioner,	)	<b>FINDINGS OF FACT;</b>
	)	<b>CONCLUSIONS OF LAW;</b>
vs.	)	<b>AND RECOMMENDED ORDER</b>
	)	<b>AFTER REMAND</b>
FLATHEAD COUNTY, SOLID WASTE	)	
DISTRICT,	)	
	)	
Respondent.	)	

\* \* \* \* \*

**I. INTRODUCTION**

By order dated December 1, 2011, the Board of Personnel Appeals remanded this matter to the hearing officer to determine whether there had been “a recent, substantial change to the position” of Container Site Fill Monitor that would permit the hearing officer to then consider whether a community of interest exists and to further “make findings as to whether there is an overwhelming ‘community of interests’ between the monitor position and the bargaining unit based on the existing record.” On December 8, 2011, the hearing officer conferred with counsel for the parties and suggested that he review the transcript, review the parties’ post-hearing briefs, and then undertake the Board’s remand. Counsel for each party agreed with that procedure. Accordingly, the hearing officer issues the following additional findings of fact and conclusions of law requested by the Board of Personnel Appeals.

**II. ADDITIONAL FINDINGS OF FACT**

1. The hearing officer hereby incorporates the findings of fact contained in his decision issued on August 25, 2011, as well as the stipulated facts 1 through 22 presented by the parties at the time of hearing.

2. At all times pertinent to this proceeding, Local 400 and Flathead County Solid Waste District have been operating under a Collective Bargaining Agreement which initially covered the term of July 1, 2008 to June 30, 2011. In December 2010, the union approached the employer about including Blair's position in the bargaining unit. On February 1, 2011, the union notified the employer that it did not wish to reopen negotiations for a successor agreement, but instead would roll over the agreement for another year, thus extending the agreement out until June 30, 2012. On February 3, 2011, the union filed this petition for unit clarification.

3. Prior to August 2010, the monitor position had been filled intermittently by various people. It was not assigned to a specific location but rather served as a roving position at all the remote sites and it was not a full-time position. It was also used as a temporary light duty assignment for injured county employees, some of whom were bargaining unit employees. The gist of the job description was that the position "performs enforcement and education of district waste disposal policies." Exhibit 4, joint exhibits. There is no discussion in the position description about any, much less extensive, manual labor at the sites such as cleaning and maintaining sites.

4. In August 2010, the county filled the position with a permanent employee, Rita Blair, assigning her permanently to the position and assigning her to one location, the Columbia Falls site. The county also changed the position to make it a year round position. The position was made into a full-time position, requiring Blair to work nine hours per day, five days per week. Significantly, 75% of Blair's work in the position involved manual labor which consisted of cleaning and maintaining the Columbia Falls site. As Blair described the laboring facet of her job, "I do all the maintenance, all the upkeep of the area. I do run the cardboard compactor and do light maintenance for it or on it. Fix it if need be. All the weed eating. I clean up all the garbage. If somebody throws something on the ground I have to clean it up. . . . I basically operate the site in every aspect. I do maintain the fence when its broke. Signage, I have to put up signage if need be." RT page 36, lines 881 through 887.

5. In terms of maintaining the container site, Blair stated "I clean it, I rake it, I shovel it, I snow blow it, I direct traffic."

6. The position at issue underwent substantial change just prior to the union seeking to accrete the position into the bargaining unit. Prior to 2010, the monitor position, as demonstrated by the position description, was truly aimed at educating the public and monitoring the various sites to ensure the public's compliance with district policies. It included creating informational flyers for the public. Manual

labor was at best only incidental to the job and certainly not nearly as time consuming as it became after August 2010.

7. Beginning in August 2010, the position became far more aligned with the spotter/laborer position, a position which is clearly within the unit. Although the monitor position does not require driving heavy equipment, 75% of Blair's time was consumed in maintaining the facility. This included cleaning up garbage, weed eating, maintaining the cardboard compactor, setting up signage, and directing the public as to where to dump their garbage. The position was assigned to a single facility, substantially undercutting the position's prior focus on education/rules enforcement. While working at the Columbia Falls site, Blair has never distributed, created, or even contributed to the creation of informational flyers that were provided to the public.

8. All of the factors previously listed in the hearing officer's August 25, 2011 decision as supporting the basis for finding that Blair's position should be accreted into the unit demonstrate an overwhelming community of interest with the Local 400.

9. Blair's position should be accreted into the bargaining unit.

### III. DISCUSSION<sup>1</sup>

#### *A. Recent Substantial Change to the Position Permits Consideration of Whether Blair's Position Should Be Accreted Into Unit.*

Petitions to accrete employees are generally not appropriate when the accretion would upset an established practice concerning the unit placement of the individuals in question. *CHS, Inc.*, 355 NLRB No. 164 (2010), citing *United Parcel Service*, 303 NLRB 326, 327 (1991). However, the National Labor Relations Board, interpreting the National Labor Relations Act, has held that unit clarification proceedings are "appropriate for resolving ambiguities concerning the unit placement of individuals who . . . come . . . within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create real doubt as to whether individuals in such classification continue to fall within the category-included or excluded-that they occupied in the past." *Union Electric Co.*, 217 NLRB 666, 667 (1975).

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

The union has not challenged the employer's position that the monitor position was not included in the bargaining unit at the time of the implementation of the 2008-2011 collective bargaining agreement. Instead, the union argues that there were in fact recent substantial changes to the monitor position in August 2010 that permit the sought after accretion to proceed in this case. The hearing officer agrees with the union that recent substantial changes did in fact occur during the existence of the collective bargaining agreement that permit a reexamination of the appropriateness of the unit.

Position descriptions do not control a determination of whether a position is appropriately included within a given unit. Rather, it is the work that the position actually performs that is controlling. *FVCC Classified Employees Union v. FVCC*, UC No. 2-2001. Here, the work of the monitor position changed substantially in August 2010. Prior to 2010, the monitor position, as demonstrated by the position description, was truly aimed at educating the public and monitoring the various sites to ensure the public's compliance with district policies. Manual labor was at best only incidental to the job and certainly not nearly as time consuming as it became after August 2010.

Beginning in August 2010, the position became far more similar to the spotter/laborer position, a position which is clearly within the unit. Although the monitor position does not require driving heavy equipment or the employee's possession of a commercial driver's license, 75% of Blair's time was consumed in maintaining the facility. This included cleaning up garbage, weed eating, maintaining the cardboard compactor, setting up signage, and directing the public as to where to dump their garbage. The position was assigned to a single facility, substantially undercutting the position's prior focus on education and policy enforcement.

Blair has never distributed, created, or even contributed to the creation of informational flyers that were provided to the public. Blair engages in a variety of tasks at the landfill, including directing clients at the landfill to proper dumping locations, moving and setting directional signage to identify dumping areas. She spends three-fourths of her time maintaining the facility which includes cleaning, weed eating, and maintaining the cardboard compactor to ensure its proper operation. These changes did not occur until after the 2008 to 2011 CBA had been entered into.

In arguing that no substantial change has occurred to the position, the employer contends that the only changes to the position involve work location and operation of the cardboard compactor. Employer's post-hearing brief, page 10. The

employer's argument substantially understates both the number of changes and the force of those changes on the question before this tribunal. The argument completely ignores the indisputable evidence that Blair now spends all of her working hours at one location with 75% of her time engaged in what could only be reasonably described as spotter/laborer functions. She is cleaning, weed eating, and otherwise maintaining the facility. While not doing substantial repairs to the cardboard compactor, she is maintaining its operability by greasing it and checking its functionality on a routine basis. She is moving signage around directing clients to proper dumping locations, another spotter/laborer function. There is no evidence to suggest that Blair's laborer work, none of which is described in the monitor position description, was undertaken with regularity prior to August 2010.

The employer's downplaying of the fact that the position is now confined to one location fails to consider that this change appears on its face to eviscerate the centrality of the education/policy enforcement function that the monitor position previously had when parties negotiated the 2008-2011 collective bargaining agreement (as demonstrated through the 2006 monitor position description). Thus, contrary to the employer's argument, the fact that the position is now relegated to one location constitutes strong evidence that a substantial change in the position occurred during August 2010.

In addition to being substantial in nature, the changes must be recent, that is, they must have come about during the term of the existing bargaining agreement and prior to any opportunity for the union to have bargained with the employer to include the position within the unit. *United Parcel Service, Inc., supra*, 303 NLRB at 327 (If a group of employees comes into existence during the term of a contract for an existing unit, then the parties must timely address the unit status of those employees prior to executing a successor agreement).

The employer argued in its closing brief that the union made no request to include the position during any collective bargaining session with the county, noting that the union did not raise the issue until December 2010 and that the union agreed to "roll over" the contract for another year on February 1, 2011, prior to filing the instant unit clarification. Employer's post-hearing brief, pages 9-10. The employer argues that this constitutes the type of waiver that would preclude the union at present from undertaking this clarification proceeding. The hearing officer does not agree. Here, the union raised its desire to bring Blair's position into the unit in December 2010, prior to February 1, 2011. It filed this unit clarification on February 3, 2011. This is sufficient to show that the union did not waive its right to bargain over this issue.

B. *An Overwhelming Community of Interest Exists Between Blair's Position and the Positions Included Within the Bargaining Unit.*

Having determined that a recent substantial change occurred in the position, the Board's remand directs the hearing officer to go on and determine whether there is an overwhelming community of interest between the position sought to be accreted into the unit and the positions already existing in the unit. In conformity with that request, the hearing officer has set forth this proposition as the beginning of his analysis.

Before going into the analysis requested by the Board, however, the hearing officer wishes to make it clear that he is not at all certain that the policy behind the requirement to prove an overwhelming community of interest should be applied in this case or that the term "overwhelming" requires anything more than a traditional balancing of factors to determine community of interest. "The fundamental purpose behind the accretion doctrine is to 'preserve industrial stability by allowing adjustment in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created.'" *CHS, Inc.*, 355 NLRB No. 164 (2010), citing *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1271 (2005). It appears to the hearing officer that, as matter of policy and logic, the concern over demonstrating an overwhelming community of interest is lessened if not entirely eviscerated where there is no uncertainty about whether an employee wishes to be represented by a particular union. As the NLRB has recognized "[t]he Board's policy on accretion is restrictive *because employees accreted to an existing unit are not accorded a self determination election, and we seek to safeguard the right of employees to determine their own bargaining representative.*" *ATS Acquisition Corp.*, 321 NLRB 712, 713, citing *Towne Ford Sales, Inc.*, 270 NLRB 311 (1984) (Emphasis added). *Accord, CHS, Inc., supra.*

In the case before this tribunal, concerns about preserving the right of the employee to freely choose her own representative are not implicated at all since Blair has made it known in no uncertain terms that she wants to become a member of the bargaining unit. In this case, the only concern of the county that is grounded in labor relations stability is in ensuring that the existing unit is not changed unless the county agrees to the change or the change is permitted by law to occur. In the absence of the employer's acquiescence in the accretion, the employer's right is wholly protected by the requirement that there has been a recent, substantial change to the position. To suggest that an "overwhelming" community of interest must also be proven before the accretion can proceed even though there is no concern about protecting the employee's right to choose a representative does absolutely nothing to

promote labor stability. It merely imposes what the respondent appears to portray as a super hurdle on the unit clarification process, making it unnecessarily difficult for the employee to choose her representative even though there is no employer interest that requires such protection. It seems to the hearing officer that, as urged by the union, once recent substantial changes have been demonstrated, there is no need to demonstrate an “overwhelming” community of interest where it is uncontested that the employee wants to become a part of the bargaining unit. Under those circumstances, industrial stability concerns should require nothing more than a showing that the proposed accreted employees share a community of interest with the existing bargaining unit. *NLRB v. DMT Corp.*, 795 F.2d 472 (5<sup>th</sup> Cir. 1986). *See also, Teamsters National United Parcel Service Negotiating Comm. v. NLRB*, 17 F.3d 1518, 1520 (noting that in contested cases the NLRB generally applies a community of interest test to determine the propriety of a proposed accretion).

That aside having been stated, the hearing officer will now proceed with the analysis requested by the Board. Accretion is proper when the employees sought to be added to an existing unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted. *E.I. DuPont, Inc.*, 341 NLRB 607, 608 (2004). In *E.I. Dupont*, the NLRB, after articulating the standard set forth above, proceeded to analyze the community of interest in the same way that this hearing officer did in his August 25, 2011 decision. That is, the NLRB went on to state:

In determining under this standard whether an employee in a newly created position shares a sufficient community of interests with employees of an existing bargaining unit several factors are considered. Among these are (1) interchange and contact among employees, (2) degree of functional integration of the business, (3) geographic proximity, (4) similarity of working conditions, (5) similarity of employee skills, and (6) functions and centralization of managerial control. *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001). *See also, Universal Security Instruments v. NLRB*, 649 F.2d 247 (4<sup>th</sup> Cir. 1981). Cases in which every factor favors accretion are rare, and the “normal situation presents a variety of elements, some militating toward and some against accretion, so that a balancing of factors is necessary.” *Great A & P Tea Co.*, 144 NLRB 1011, 1021 (1963). Employee interchange and common day-to-day supervision are

significant factors. *Archer Daniels Midland Co.*, *supra*, 333 NLRB at 675, citing *Towne Ford Sales*, 270 NLRB 311, 312 (1984).

*Id. Accord*, *The Developing labor Law*, § Ch. 10. II E.5 (5<sup>th</sup> Ed. 2006).

Considering the above factors in the context of the facts of this case convinces the hearing officer that an overwhelming community of interest exists such that accretion is appropriate. As to the first factor, the interchange and contact between Blair's position and those of the union weigh in favor of accretion. The fact that union members fill in for Blair on her days off, when combined with the fact that 75% of Blair's time is spent doing maintenance work just like the bargaining unit laborer position, demonstrates this point. Moreover, Blair assists members of the unit who come out to the Columbia Falls site to collect trash and appliances and transport those commodities back to the dump.

The degree of functional integration of the separate facilities also militates in favor of accretion. The Columbia Falls site is completely integrated into the operations of the landfill. It is an important extension of the serving as a collection site for county waste that is ultimately transported to the landfill.

While the sites are geographically separate, which might otherwise favor a finding of a lack of community of interest, that separation is of little importance here. The separateness is really more a function of the county's desire to make it more convenient for county residents to dispose of waste. Moreover, the geographical separateness is far outweighed by the fact that the entire operation, both the dump itself and the Columbia Falls site, are all part of an integrated system of waste collection in Flathead County.

The similarity of skills and similarity of working conditions also weighs in favor of accretion. While there is not a precise match between Blair's position and that of the bargaining unit laborer, the similarity of skills and working conditions clearly weighs in favor of finding a community of interest adequate to satisfy the standard articulated in *E.I. Dupont*, *supra*. Again, Blair spends 75% of her time engaging in maintenance of the site, something that the laborers in the unit spend much of their time doing, as demonstrated by their position description. They direct clients to appropriate dumping areas and move signage around, just as Blair does in her position. Like the union employees at the landfill, Blair's position exists to ensure efficient and lawful disposal of waste. In addition, Blair is covered by the same employee policies as the unit members are. She is an hourly employee and is paid overtime when she exceeds a 40-hour week like the union personnel are. She

spends her day working in and around waste collection and removal as the union employees do. Blair wears the same safety vest uniform that bargaining unit laborers do, reinforcing not only their identify as a cohesive unit but also underscoring the fact that they are out and about in the landfill and at the Columbia Falls site engaging in similar duties of labor that require safety vests in order to be seen. The facts in this case plainly paint a scenario that demonstrates such similarity of interests that the proposed accreted position would choose to be in the union (and in fact, Blair has indicated that such is her desire). Under these circumstances, accretion of Blair's position into the Local 400 is proper.

The only real difference between the two positions is the fact that the laborer position in the bargaining unit also requires a commercial driver's license (CDL) and the ability to drive heavy equipment, something which Blair's position is not required to do. However, the fact that a CDL is not necessary to fill Blair's position does very little to detract from the appropriateness of the unit under the facts of this case. As the union has pointed out, it is common practice in the construction and landfill services to include CDL heavy equipment operators and CDL truck drivers with unlicensed helpers and laborers. *See, e.g., Gibraltar Land Company d/b/a Country Wide Landfill*, 352 NLRB No. 3 (2008) (involving a private landfill and a unit of equipment operators, maintenance employees, landfill/utility employees, mechanics, and yardmen); *NLRB Decision and Direction of Election, 4-RC20287, Waste Management of Pennsylvania* (finding appropriate a unit that included helpers, laborers, truck drivers, and equipment operators employed by a garbage hauling business).

Finally, the last factor, common supervision, supports the finding that an overwhelming community of interest between Blair's position and those of the members of the bargaining unit exists in this case. Supervisor Chiton is the direct supervisor for Blair and all of the members of the bargaining unit.

All six factors taken together demonstrate that Blair's position shares an overwhelming community of interest with the bargaining unit. This conclusion is only buttressed by considering that both factors of employee interchange and uniform day to day supervision weigh in favor of accreting Blair's position into the existing bargaining unit. It is of considerable significance to the hearing officer that Blair shares the same direct supervisor as the union members do and when she is off duty, union members fill her position. The common supervision speaks for itself. The fact that union members fill in for Blair on her days off, when combined with the fact that 75% of Blair's time is spent doing maintenance work just like the bargaining unit laborer position, demonstrates employee interchange sufficient to prove that the accretion which the union seeks in this matter is warranted.

Standing in stark contrast to the case before this tribunal is the *E.I. Dupont* case. There, the union sought to accrete a quality assurance inspector into a unit of production and maintenance workers who produced Corian and Tedlar, materials used in making the employer's counter top products and sinks. The inspector did not have the same supervisor as the production and maintenance workers. He did not work in any production capacity as the unit workers did and he did not inspect the materials produced by those workers. Other than to be in the same general vicinity of the shop as those workers, he had almost no job related interaction with those production and maintenance workers. Not surprisingly, under those circumstances, the NLRB found that there was not an overwhelming community of interest between the quality assurance person and the production and maintenance workers that would support accreting the inspector's accretion into the unit. 341 NLRB at 609.

Here, Blair shares the same direct supervisor as the unit members and spends 75% of her time engaging in the same functions as a laborer in the bargaining unit. Her position is filled on her days off by members from the bargaining unit. She is paid an hourly wage, receives the same benefits as the unit members, and is subject to the same personnel policies. As such, Blair's position shares an overwhelming community of interest with at least the laborer unit member positions. The union has demonstrated preponderantly that Blair's position should be accreted into IUOE Local 400.

#### IV. RECOMMENDED DECISION

Based on the foregoing, the hearing officer again recommends to the Board of Personnel Appeals that the position of landfill monitor within the Flathead County Solid Waste District be accreted into IUOE Local 400.

DATED this 7<sup>th</sup> day of February, 2012.

BOARD OF PERSONNEL APPEALS

By:   
GREGORY L. HANCHETT  
Hearing Officer

NOTICE: Pursuant to Admin. R. Mont. 24.26.222, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than March 1, 2012. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.222, 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 201503  
Helena, MT 59620-1503

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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 e-mail and depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

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DATED this 7<sup>th</sup> day of February, 2012.

Sandy Duncan

RECEIVED

DEC 03 2011

HEARING BUREAU

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNIT CLARIFICATION NO. 2-2011:

INTERNATIONAL UNION OF OPERATING, ENGINEERS,	)	
	)	
Petitioner,	)	
	)	
- vs -	)	
	)	
FLATHEAD COUNTY, SOLID WASTE DISTRICT,	)	
	)	
Respondent.	)	

**ORDER OF REMAND**

**INTRODUCTION**

On February 2, 2011, the International Union of Operating Engineers, Local 400 (Local 400) filed a petition for unit clarification with the Board of Personnel Appeals (Board) to determine if a "site attendant" position with Respondent, Flathead County Solid Waste District (District), should be accreted to Local 400's existing union with the District. Following a contested case proceeding, the hearing officer's issued a recommended decision on August 25, 2011. The District filed timely exceptions to the recommended decision. The Board considered oral argument on November 17, 2011. Michael Dahlem appeared on behalf of the District and Karl Englund appeared on behalf of Local 400.

**ARGUMENTS**

In briefing and arguments before the Board, the District argued that the hearing officer erred when he failed to adopt and seemingly ignored the stipulated findings of fact. The District also takes issue with the hearing officer's misidentification of the position at issue. The decision refers to the position as a "landfill monitor," but the position at issue is the "Container Site Monitor/Educator."

Additionally, the District argued that the Container Site Monitor/Educator position (monitor position) has been historically excluded from the bargaining unit by the bargaining parties. Since it has been historically excluded, the District contends that

precedent requires the hearing officer to make an initial determination of whether there had been a recent, substantial change in the duties and responsibilities of the particular position. The District contends there has been no such change, and further, the hearing officer's recommended order failed find such a change. Without such a finding, the hearing officer is not authorized to go forward with the analysis.

But, even assuming there was a change, the District argues the hearing officer failed to appropriately apply the Board's unit clarification precedent set forth in the *FVCC* case. *FVCC Classified Employees Union v. FVCC, UC No. 2-2001*. It is the District's position that the *FVCC* case held when looking at an accretion case, the Board must look at work performed. Meaning, are the duties and responsibilities assigned to the position in question (the monitor position) the same or similar to those assigned to members of the bargaining unit. The District argues that there is no such similarity in the work performed in this case. Additionally, the District contends that the hearing officer erred in his application of a "community of interests" standard to the unit. The decision reveals that the hearing officer does not appear to address all of the issues nor does he conclude that that the standard is "overwhelmingly" met. See *Giant Eagle Markets, 308 N.L.R.B. 206 (1992)*. Given these errors, the District feels the hearing officer's decision should be reversed.

In response, Local 400 contends whether the hearing officer explicitly adopted the parties' stipulated facts is not an issue because they are part of the record. The hearing officer is only obligated to make findings sufficient for his conclusions. As for the substantive arguments, Local 400 contends that the District is asking the Board to get wrapped up in the minutia of various tests and standards. Although interesting, it is Local 400's position that this is distracting from purpose of collective bargaining statutes as well as the facts of this case.

On some level, the purpose behind collective bargaining is giving the employee the right to a "seat at the table." It is Local 400's contention that blue-collar employees that work with garbage belong to a bargaining unit with Local 400 - except for the monitor position. Both the person filling the monitor position and Local 400 have expressed their interest in the monitor position being a part of this particular bargaining unit. Local 400 contends there are obvious recent, substantial changes to this monitor position. In August 2010, the monitor position became a "real job." Prior to this time, the monitor position did not exist full-time, it did not have a permanent site assignment, and there was not a clear designation of performing 75% manual labor. At this point, Local 400 contends that the facts reflect that the monitor position had a clear "community of interests" with the bargaining unit.

## ANALYSIS

After careful consideration, the Board deliberated and decided that the matter needed to be remanded for further clarification. The Board agrees that given the bargaining history of the parties and the historical exclusion of the monitor position, the hearing officer was obligated to identify a recent, substantial change to the position

before moving forward with the analysis. Additionally, the Board asks the hearing officer to provide findings regarding whether there is an overwhelming "community of interests" between the monitor position and the bargaining unit.

**ORDER**

This matter is remanded to the hearing officer for the purpose of determining whether there has been a recent, substantial change to the position and further to make findings as to whether there is an overwhelming "community of interests" between the monitor position and the bargaining unit based on the existing record.

DATED this 1 day of December, 2011.

BOARD OF PERSONNEL APPEALS

By:   
Richard L. Parish, Presiding Officer

Board members Parish, Stanton and Johnson concurred.

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NOTICE: You MAY BE 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.

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**CERTIFICATE OF MAILING**

I, Windy Knutson, do hereby certify that a true and correct copy of this document was mailed to the following on the 21<sup>st</sup> day of December, 2011:

KARL ENGNLUD  
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STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 2-2011:

INTERNATIONAL UNION OF	)	Case No. 1292-2011
OPERATING ENGINEERS, LOCAL 400,	)	
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Petitioner,	)	
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	)	<b>CONCLUSIONS OF LAW; AND</b>
	)	<b>RECOMMENDED DECISION</b>
FLATHEAD COUNTY, SOLID WASTE	)	
DISTRICT,	)	
	)	
Respondent.	)	

\* \* \* \* \*

I. INTRODUCTION

In this matter, International Union of Operating Engineers Local 400 seeks to include the position of landfill monitor within the bargaining unit. Hearing Officer Gregory L. Hanchett convened a unit clarification hearing in Kalispell, Montana, on May 26, 2011, to determine whether the position should be placed in the unit under the doctrine of accretion. Karl Englund, attorney at law, represented IUOE Local 400. Michael Dahlem, attorney at law, represented Flathead County Solid Waste District. The parties stipulated to the admission of Exhibits 1 through 9. James Chilton, Flathead County solid waste operations manager, David Prunty, Flathead County solid waste/road department manager, Rayanne Campbell, Flathead County human resources officer, Rita Blair, incumbent in position, Wynn Zelmer, unit member/Flathead County operator (junk vehicle program manager), Dave Adams, unit member/Flathead County spotter/laborer, Devon Anderson, unit member/Flathead County operator, and Mike Downing, unit member/Flathead County operator, all testified under oath. The parties requested the opportunity to present post-hearing briefs, the last of which was timely filed with the Hearings Bureau on June 29, 2011 at which time the matter was deemed submitted for decision. Based on the evidence adduced at hearing as well as the arguments of the parties in their respective post-hearing briefs, the following findings of fact, conclusions of law and recommended decision are made.

## II. ISSUE

Should the position of landfill monitor be accreted into the IUOE Local 400 bargaining unit?

## III. FINDINGS OF FACT

1. International Union of Operating Engineers Local 400 (IUOE Local 400) is a "labor organization" within the meaning of Mont. Code Ann. § 39-31-103(6).

2. The Flathead County Solid Waste District (District) is a "public employer" within the meaning of Mont. Code Ann. § 39-31-103(10).

3. The Flathead County Solid Waste District operates the Flathead County landfill and several remote container sites in Flathead County. At these remote sites, Flathead County residents can dump their trash into large containers.

4. The trash collected at these remote sites is moved to the landfill in District trucks by District employed truck drivers.

5. Local 400 represented all of the District employees except supervisors, office personnel, and a maintenance man. Local 400 represented employees driving trucks and hauling garbage to the landfill and operating heavy equipment at the landfill.

6. In 2006, the county created a position known as the "Container Site Monitor/Educator" position (monitor position). The position as originally envisioned was intended to monitor and maintain all of the remote container sites in the District. Initially, the position was filled intermittently (not on a regular full-time basis). At times it was filled as a seasonal position and at other times existing county employees on light duty status (both within and outside of the Local 400 bargaining unit) filled the position.

7. In July 2010, the District hired Rita Blair to fill the monitor position. Her principle duties include:

1. distribution of informational flyers to customers
2. cleaning the container site and preparing scrap metal for pick-up
3. directing customers who enter the site to the proper disposal area on the site

4. operating and maintaining the cardboard compactor that is located on site
5. informing commercial customers that they must haul the material they have brought in to the landfill
6. informing customers of recycling opportunities and promoting the use of those opportunities
7. keeping records of site visitors

8. In August 2010, Blair was assigned exclusively to the Columbia Falls container site. She works nine hours per day, five days per week, and is paid 40 hours at the regular wage rate and five hours overtime. At Columbia Falls, 75% of Blair's time is engaged in manual labor which consists of cleaning and maintaining the Columbia Falls site. Twenty-five percent of her time is spent interfacing with customers.

9. Blair's health insurance, vacation, and sick leave benefits are identical to those enjoyed by the District's union employees. She is paid on an hourly basis and is paid overtime like the District's union employees. Operations Manager Jim Chilton directly supervises Blair and the District's union employees. In addition, Blair is subject to the same personnel policies as Local 400 members.

10. Blair is off of work on Mondays and Tuesdays. During these two days, Local 400 bargaining unit members fill in for Blair at the Columbia Falls container site. When Blair is working, she is in daily contact with the District's Local 400 employees who pick up and transfer the garbage and recyclables from the Columbia Falls container site to the landfill. Finally, Blair wears the same District provided uniform that the District's Local 400 employees wear.

11. Blair has indicated that she desires to be a member of the Local 400.

#### IV. DISCUSSION<sup>1</sup>

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.

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<sup>1</sup>Statements 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.

Mont. Code Ann. § 39-31-202. Factors that may be considered in determining whether a bargaining unit is appropriate include such factors as community of interest, wage, 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. Mont. Code Ann. § 39-31-202(1); Admin. R. Mont. 24.26.611.

In analyzing this case, it is appropriate to consider cases decided under federal law. Section 9(b) of the National Labor Relations Act gives the National Labor Relations Board (NLRB) comparable authority to determine appropriate bargaining units. Thus, the Montana Supreme Court and the Board of Personnel Appeals follow federal court and NLRB precedent to interpret the Montana Act. *State ex rel. Board of Personnel Appeals v. District Court*, 183 Mont. 223, 598 P.2d 1117 (1979); *Teamsters Local No. 45 v. State ex rel. Board of Personnel Appeals*, 195 Mont. 272, 635 P.2d 1310 (1981); *City of Great Falls v. Young (Young III)*, 211 Mont. 13, 686 P.2d 185 (1984).

Under the accretion doctrine, groups of new employees or present employees in new jobs can be added to an existing bargaining unit without holding a vote on their representation. The doctrine is designed to preserve stability by allowing adjustments in bargaining units to conform to new conditions without requiring an election every time jobs are created. *NLRB v. Stevens Ford, Inc.*, 773 F.2d 468 (7th Cir. 1985). Accretion is proper only when the employees sought to be added to the existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the unit to which they are accreted. *Safeway Stores*, 256 NLRB 918 (1981). However, where there is reasonable certainty that no election is required and that accreted employees share similar interests with employees in the bargaining unit such that they would chose it, accretion should occur. *Baltimore Sun v. NLRB*, 257 F.3d 419, 428 (4<sup>th</sup> Cir. 2001). The proper test is whether the proposed accreted employees share a community of interests with the existing bargaining unit. *NLRB v. DMR Corp.*, 795 F.2d 472, (5<sup>th</sup> Cir, 1986).

Several factors are considered in determining whether a sufficient community of interests with employees of an existing bargaining unit exist. Among these are (1) interchange and contact among employees, (2) degree of functional integration of the business, (3) interchangeability of employees, (4) geographic proximity, similarity of working conditions, (5) similarity of employee skills, and (6) functions and centralization of managerial control. *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001). *See also, Universal Security Instruments v. NLRB*, 649 F.2d 247 (4<sup>th</sup> Cir. 1981). Cases in which every factor favors accretion are rare, and the “normal situation

presents a variety of elements, some militating toward and some against accretion, so that a balancing of factors is necessary.” *E.I Du Pont de Nemours Inc.*, 341 NLRB 607, 608 (2004), citing *Great A & P Tea Co.*, 144 NLRB 1011, 1021 (1963). Employee interchange and common day-to-day supervision are significant factors. *Archer Daniels Midland Co.*, *supra*, 333 NLRB at 675, citing *Towne Ford Sales*, 270 NLRB 311, 312 (1984).

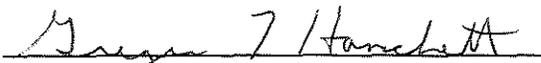
On balance, the factors that exist in this case favor accretion of Blair’s position into the existing bargaining unit. As the union correctly notes, the Columbia Falls site is completely integrated into the operations of the landfill. It is an important extension of the serving as a collection site for county waste that is ultimately transported to the landfill. Like the union employees at the landfill, Blair’s position exists to ensure efficient and lawful disposal of waste. Blair assists union drivers in collecting the trash and recyclable items that are ultimately transported to the landfill. In addition, Blair is covered by the same employee policies as the unit members are. She is an hourly employee and is paid overtime when she exceeds a 40 hour week like the union personnel are. She spends her day working in and around waste collection and removal as the union employees do. Of considerable significance to the hearing officer is the fact that she shares the same supervisor as the union members do and when she is off, union members fill her position. In addition, Blair wears the same uniform that union members do. The facts in this case plainly paint a scenario that demonstrates such similarity of interests that the proposed accreted position would choose to be in the union (and in fact, Blair has indicated that such is her desire). Under these circumstances, accretion of Blair’s position into the Local 400 is proper.

#### V. RECOMMENDED DECISION

Based on the foregoing, the hearing officer recommends that the position of landfill monitor within the Flathead County Solid Waste District be accreted into IUOE Local 400.

DATED this 25<sup>th</sup> day of August, 2011.

BOARD OF PERSONNEL APPEALS

By:   
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 September 19, 2011. 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 201503  
Helena, MT 59620-1503

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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:

Karl Englund  
Attorney at Law  
P.O. Box 8358  
Missoula, MT 59807-8358

Michael Dahlem  
Attorney at Law  
14 Green Place  
Whitefish, MT 59937

DATED this 25<sup>th</sup> day of August, 2011.

Sandy Duncan