

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 12-99:

INTERNATIONAL UNION OF)	
OPERATING ENGINEERS, LOCAL)	
UNION 400,)	
)	
Petitioner,)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
PHILLIPS COUNTY,)	AND RECOMMENDED ORDER
)	
)	
Respondent.)	

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I. INTRODUCTION

The International Union of Operating Engineers, Local Union 400 (Petitioner), filed a petition for unit determination and election with this Board on November 30, 1998, for certain employees of Phillips County (Respondent). The Respondent filed a counter petition with the Board which disagreed with the proposed bargaining unit and proposed a different unit as appropriate.

Hearing Officer Gordon D. Bruce conducted a telephone hearing in Helena, Montana, on May 13, 1999. Sandi Curriero represented the Petitioner. Richard L. Larsen represented the Respondent. Phillips County Commissioner Carol Kienenberger and Chief Librarian Janeen Brookie attended and testified under oath. The Hearing Officer admitted Respondent's Exhibit A, Petitioner's Exhibits Nos. 1 and 2, and Joint Exhibits J-1 through J-12 into the record. The Hearing Officer took administrative notice of Volume 48, Op. Atty. Gen 3 (1999).

II. ISSUE

Petitioner originally requested that the unit composed of employees of Phillips County be "full-time and part-time, at and for, the County Attorney's Office,

Sanitarian/Planner, Extension Service, Probation Department, District Judge's Office, Library, Maintenance, Clerk of Court's Office, Superintendent of Schools Office," excluding "Elected Officials, Supervisory Personnel." On March 15, 1999, Petitioner requested the addition of Council of Aging employees and the Justice Court Secretary. The Respondent objected because the positions were not included in Petitioner's original unit description and should not be part of the unit. The Hearing Officer added the positions to this dispute as a matter of administrative economy.

On May 16, 1999, Petitioner filed notice that the parties had agreed to exclude the Deputy County Attorney, the secretary to the Deputy County Attorney, and the full-time Maintenance position. The parties had also agreed to include the Deputy Clerk of Court and the Deputy Superintendent of Schools in the unit.

The issues presented and argued by the parties at hearing were: Should the following positions be included in the bargaining unit? (1) Chief Librarian; (2) Part-time library employees working under 20 hours a week; (3) Probation Officer; (4) District Judge's Administrative Assistant; (5) Justice Court Secretary; and (6) Council on Aging employees.

III. FINDINGS OF FACT

Chief librarian

1. The Chief Librarian (CL) is a full-time Phillips County employee directly responsible to the library board (board). She is an hourly employee fully responsible for supervising library employees in three libraries located in Phillips County: the main library in Malta and satellite libraries in Saco and Dodson. The CL circulates library books and coordinates activities with the satellites.

2. The CL sets working conditions of the library staff. She has never had to hire new employees or fire or discipline them, however, she can recommend those actions to the board who has that ultimate authority. The CL may call for board meetings when necessary or consult with the board at regularly scheduled meetings.

3. When the Dodson librarian requested a change in the day the library was open, she consulted with the CL, who went to the board for final approval of that request. On occasion, the satellite librarian makes personal calls to the CL to discuss book circulation and other matters pertinent to the operation of the libraries. The satellite librarians call the CL to orally report all hours worked by the respective employees in each branch.

Part-time employees

4. According to Commissioner Kienenberger, Respondent believes that employees working less than 20 hours do not have a community of interest with the other employees and should not be included in the collective bargaining unit. All part-time employees receive the same benefits as other county workers, with the exception that they do not have health insurance coverage. Other benefits such as sick leave and vacation are earned and accrued on a pro rata basis.

Part-time library employees

5. The CL has direct authority over all library employees. Some of the part-time employees work as little as 2½ hours a week, but on a regular basis. They are county employees and are paid out of county funds at an hourly rate. The board sets their wages and all working conditions as recommended by the CL. These workers report their work hours to the CL for payroll purposes and are eligible for county benefits, except that workers with fewer than 20 hours a week do not receive health coverage.

6. Respondent intentionally limits the hours of the part-time library workers to reduce its liability for health coverage benefits for employees working 20 hours or more each week. The part-time library employees have a reasonable expectation of continued employment, although working as little as six hours a week, and have a substantial community of interest with other unit members.

Probation Officer

7. The Phillips County Commissioners have no control over any personnel matters concerning the Phillips County Probation Officer. The Probation Officer manages his own office in Phillips County, but the Blaine County Chief Probation Officer supervises this position. Although the Probation Officer's salary comes out of Respondent's budget, the District Judge sets the amount of pay. The county merely issues the check. The Phillips County Probation Officer is entitled to the same fringe benefits as other county employees.

Administrative Assistant

8. The District Judge has complete supervisory authority and control over his Administrative Assistant who is employed by the county. The Judge sets hours and pay and directs all work and working conditions for this position. The Administrative Assistant receives a salary set by the Judge using different criteria than other county employees. The Respondent has no direct control over the Administrative Assistant.

Justice Court Clerk

9. The Clerk is a part-time permanent county employee who works less than 20 hours a week for the Respondent under the direction of the Justice Court Judge. The Clerk also works part-time for the City of Malta. The Clerk is entitled to county benefits but does not receive health insurance because of restrictions set by Respondent to exclude health coverage for employees working less than 20 hours a week. The Respondent does not have any direct control over this position.

Council on Aging

10. The Council on Aging Board has control over one full-time bus driver who works 32 hours a week, and three part-time home care workers who work under 20 hours a week performing cleaning tasks for senior citizens. County and federal funds pay for the program. The driver has all county benefits, and the home care

workers, all of whom work less than 20 hours a week, have county benefits, with the exception of health insurance.

The home care workers work under the direct supervision of the County Health Nurse, an employee of Respondent. Commissioner Kienenberger did not know whether Respondent or the Council had authority to hire and fire these county employees. The Respondent has control over them, and does not treat them differently than other affected employees in the unit.

IV. DISCUSSION

Chief Librarian

The Collective Bargaining for Public Employees Act excludes supervisory employees from the definition of public employee and, thereby, removes them from the Act's coverage. § 39-31-103(9)(b)(iii), MCA. A supervisory employee is:

[A]ny individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline other employees, having responsibility to direct them, to adjust their grievances, or effectively recommend such action, 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.

§ 39-31-103(3), MCA.

The National Labor Relations Act, § 2(11), defines "supervisor" in essentially identical terms to § 39-31-103(11), MCA. Under the NLRA, supervisory status exists if the position substantially identifies the employee with management. NLRB v. Doctor's Hospital of Modesto, Inc., 489 F.2d 772, 85 LRRM 2228 (9th CA, 1973).

The degrees of authority to direct the work of others vary from that of a general manager or other top executive to lead workers. The gradations are so infinite and subtle that the federal courts have given the National Labor Relations Board a large measure of informed discretion in exercising its responsibility to

determine who is a supervisor. NLRB v. Swift and Co., 292 F.2d 561, 48 LRRM 2695 (1st CA, 1961).

The Board of Personnel Appeals adopted the following considerations for determining supervisory status in Billings Firefighters Local 521 v. City of Billings, UC 1-77:

1. Whether the employee has independent authority to perform the functions enumerated in the Act.
2. Whether the exercise of authority in the area of assignment and direction is routine.
3. Whether the employee uses independent judgment in directing the activities of others.
4. Whether the recommendations made by the employee are subject to independent review or investigation.
5. Whether a substantial amount of the employee's time is spent doing work which is similar to the work of the subordinates.
6. Whether an unrealistic and excessively high ratio of supervisors to employees would be created. (citations omitted)

The Chief Librarian position is supervisory within the meaning of the statute. Pursuant to § 22-1-310, MCA, the Chief Librarian can effectively recommend to the board of trustees the hiring and firing of employees, setting their salaries and compensation, and prescribe their duties.

The fact that the Chief Librarian has not executed all her authorized authority as a supervisor does not exclude her from supervisory status under the 12 criteria. NLRB v. Winnebago Television Corp., 75 F.3d 1208, 1215 (7th Cir. 1996).

The 12 criteria are disjunctive. If the Chief Librarian has the authority to perform even one of the statutory powers, this confers supervisory status and excludes her from the bargaining unit.

An individual need not meet all of the criteria listed . . . in order to qualify as a "supervisor." Indeed, it is well settled that an individual who meets only one of the criteria qualifies as an "supervisor"

E and L Transport Co. v. NLRB, 85 F.3rd 1269 (7th Cir. 1996)

Part-Time Positions

Part-time employees are included in the bargaining unit if the regularity and frequency of their employment, along with other factors, show they have a substantial community of interest with the unit's full-time employees in wages, hours, and conditions of employment. A part-time employee who averaged four hours per week for six months, who received vacation and holiday pay, but did not get sick leave or pension benefits, was part of the bargaining unit as a regular part-time employee. Leaders - Nameski, Inc., 237 NLRB 1268, 99 LRRM 1132 (1978). An hourly reporter who averaged from five to ten hours per week, worked on a flexible schedule and had a reasonable expectation of continued employment was part of the unit. Muncie Newspaper, 246 NLRB No. 272, 203 LRRM 1089 (1979). Part-time employees (including some students) who worked 19½ hours per week under the same working conditions and for similar wages to other employees, but who received limited fringe benefits, were part of the bargaining unit. Hearst Corp., 221 NLRB No. 67, 90 LRRM 1468 (1975). This employer had a policy of not giving holiday, insurance, and pension benefits to employees who worked less than 20 hours per week. Id. Part-time employee-students working 20 hours per week and summer and part-time laborer-students have been part of bargaining units when they shared a community of interest with the other bargaining unit employees. W&W Took & Die

Mfg. Co., 225 NLRB No. 138, 93 LRRM 1006 (1976); Dick Kelchner Excavating Co., 236 NLRB No. 189, 98 LRRM 1442 (1978).

The Board considers community of interest, wages, hours, fringe benefits and other working conditions, history of collective bargaining, common supervision, common personnel policies, integration of work functions, and the desires of employees in determining the composition of a bargaining unit. ARM 24.26.611. In this case, Petitioner proved a community of interest, fringe benefits, common supervision, common personnel policies, integration of work functions, and interchange among employees affected as pertains to library functions of the three libraries. Community of interest is a fundamental factor in determining the appropriateness of a bargaining unit. The part-time library workers have common supervision and common personnel policies with other unit members. They have the same or integrated unit member work functions. With such commonality, all the part-time library workers are properly part of the bargaining unit.

Probation Officer

The Probation Officer is not part of the collective bargaining unit. There is little, if any, community of interest with unit members. The only commonality is that the position is county funded and has full benefits. There is nothing in the record to show that the Probation Officer falls under the personnel policy of Phillips County. That is not sufficient to make the position part of the unit.

Administrative Assistant

The District Judge has complete supervisory authority and control over his Administrative Assistant. The county pays the Administrative Assistant's wages, however, the county merely writes the payroll check for this position. The Judge sets the Administrative Assistant's salary, using different criteria than other county employees. This position is not part of the collective bargaining unit.

Justice Court Clerk

The Justice Court Clerk is a part-time permanent county employee who works less than 20 hours a week under the sole direction of the Justice Court Judge. The county only issues the payroll check, and has no direct control over this position or the Justice Court. There is insufficient community of interest with other affected employees to include this position in the unit.

Council on Aging

The full-time bus driver and three part-time home care workers are part of the collective bargaining unit. The driver has all county benefits. The home care workers, all of whom work less than 20 hours a week, have county benefits, with the exception of health insurance. The home care workers work under the direct supervision of the County Health Nurse, another county employee. This denotes sufficient community of interest to include them in the unit.

The record is devoid of any facts to indicate any of the part-time workers' expectations of permanency of employment were less than those of full-time workers. Similar expectations also denote community of interest. Finally, these positions are funded by both county and federal funds, but that does not void a community of interest with employees paid wages solely by the county. Montana Federation of Teachers, AFT, AFL-CIO v. Flathead Valley Community College, UD 4-85.

Additionally, it appears that most, if not all of the affected employees, wanted to be included in the unit.

V. CONCLUSIONS OF LAW

1. The Department of Labor has jurisdiction over this matter pursuant to § 39-31-101, et seq., MCA.
2. Pursuant to § 39-31-202, MCA, the unit appropriate for the purpose of collective bargaining for certain employees of Phillips County is one comprised of all full-time and part-time employees, at and for, the County Attorney's office, Sanitarian/Planner, Extension Service, Probation Department, District Judge's office,

Library, Maintenance, Clerk of Court's office, Superintendent of Schools office, Council on Aging; excluding the Deputy County Attorney, secretary to the Deputy County Attorney, full-time Maintenance position, Chief Librarian, Probation Officer, District Judge's Administrative Assistant, Justice Court Secretary, elected officials, and other supervisory personnel.

VI. RECOMMENDED ORDER

It is hereby Ordered that this file be returned to the Employment Relations Division, Department of Labor and Industry, for purposes of conducting a secret ballot election pursuant to § 39-31-208, MCA, among those employees in the appropriate unit as determined herein.

DATED this 4TH day of June, 1999.

BOARD OF PERSONNEL APPEALS

By: Gordon D. Bruce
GORDON D. BRUCE
Hearing Officer

NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than June 28, 1999. This time period includes the 20 days provided for in ARM 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 documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

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Phillips County Commissioner
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DATED this 4th day of June, 1999.

Sandy Duncan