

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 4-2001:

TEAMSTERS UNION LOCAL NO.2,) Case No. 976-2001
Missoula, Montana,)

Petitioner,)

v.)

CITY OF EUREKA, PUBLIC WORKS)
DEPARTMENT,)

Respondent.)

**FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER**

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I. INTRODUCTION

Teamsters Union, Local No. 2, IBT, filed a petition for unit determination of a unit established for collective bargaining purposes on October 11, 2000. The proposed unit was to include "all employees of the Public Works department" for the City of Eureka. The City of Eureka filed a counter-petition on October 31, 2000. The counter-petition states: "The town of Eureka objects to Joseph W. Richards being included within the bargaining unit, on the grounds that he is a supervisory employee, as that term is defined in §39-31-103(11), MCA. As a supervisory employee, Richards is not a 'public employee' within the meaning of §39-31-103(9), MCA." On December 5, 2000, the Board ordered that the case be transferred to the Hearings Bureau for a hearing on the petition.

Hearing Officer Michael T. Furlong conducted a telephone hearing in this matter on March 8, 2001. John M. Phelps, City Attorney, represented the City of Eureka. Daniel J. Doogan represented the Teamsters Union Local No. 2. Paul

McDowell, Roger Butler, Joseph Richards, Craig Eaton, and Mary Duran testified as witnesses in the case. Joint Exhibits 1 through 9C were admitted into evidence.

II. ISSUE

The issue in this case is whether is the Director for the City of Eureka Public Works should be included in the collective bargaining unit pursuant to §§ 39-3-103(11) and 39-31-103(9), MCA.

III. FINDINGS OF FACT

1. The City of Eureka has a population of approximately 1,045. Its chief administrative employee is the City Clerk/Treasurer, who has held the position for approximately 3½ years. The City has an elected mayor, a part time position. The current mayor has held the position for approximately 7 years.

2. The city's workforce consists of the Clerk/Treasurer, an assistant city clerk, a city police department consisting of three officers, and a public works department consisting of three employees. All three public works employees are state certified in Water Treatment – Class 2; Water Distribution – Class 3; and Wastewater Treatment – Class 3. Each must possess a valid driver's license, Class B, type 2.

3. Teamsters Union Local No. 2, IBT is the exclusive bargaining unit for all non-certified employees in the city public works department.

4. The public works department is responsible for operation and maintenance of the city's waste water treatment plant, sewer system, public drinking water system, and for maintenance of the city's streets, parks, buildings, and related infrastructure.

5. Joseph Richards has been employed by the city's public works department in excess of 17 years.

6. In 1998, the public works department supervisor responsible for day-to-day activities terminated his employment with the city. Upon his departure, Richards and another employee, Paul McDowell, shared responsibility for the everyday operation of the department. A few months later, the city hired another employee, Roger Butler, who was assigned to the public works department.

7. On May 8, 2000, the city adopted Ordinance No. 290, "Public Works Director, Duties," which provides as follows (Joint Exhibit 8):

The Mayor shall appoint a Public Works Director, who shall be the general manager under the authority of the Mayor, of the water-works and shall have day-to-day charge of all employees and all property pertaining to the waterworks system. The Public Works Director shall not be authorized to hire and fire employees, but shall be entitled to recommend the hiring and firing of employees to the Mayor. He shall give written orders for all supplies and materials and preserve a copy of such orders in such as is his office. He shall have charge of all contracts and shall see that they are faithfully executed. He shall have charge of the erection, alteration and repair of all buildings, engines, pumps, fixtures, wells, reservoirs and grounds. He shall determine the location and size of all water mains, service connections, valves, hydrants and specials (according to state requirements).

8. Following the adoption of Ordinance No. 290, the Mayor appointed Richards to the position of Public Works Director.

9. The city formulated a position description for Richards after his appointment as Public Works Director, reflecting his new supervisory status. Richards was given the opportunity to assist in formulating the position description, and contributed notes and comments to the final position description which states, in part, the following (Joint Exhibit 9):

Position performs a wide variety of administrative, skilled and semi-skilled duties for the Public Works Department. Oversees and performs maintenance and construction work on municipal water, wastewater, streets, parks, facilities, and equipment; schedules and supervises staff.

Sees that Public Works Department meets Department of Environmental Quality requirements.

SUPERVISION RECEIVED: This position is under the direction of the Mayor who may assign additional tasks as needed. Position is self-directed to carry out daily tasks of the position.

SUPERVISION EXERCISED: Daily supervision of two public works employees.

Competently oversees use of Town fund for water, waste water, streets, parks and facilities.

Effectively supervises crew and sets schedules for tasks to be performed.

Competently operates water and waste water treatment plants.

10. As director, Richards assumed extra responsibilities and authority over McDowell and Butler. He prepares the department budget, which he presents to the city Clerk/Treasurer for inclusion in the overall city budget. He is responsible for keeping in contact with various state, federal and county agencies and files the necessary reports with respect to regulatory requirements for city water and sewers. He works directly under the Mayor, making requests for approval or guidance for the public works department. Richards consults with the Mayor once or twice per month. There are occasions where he does not find it necessary to consult with the Mayor on a monthly basis.

11. As director, Richards fills out, approves and signs time sheets for McDowell and Butler which are used by the county for payroll purposes. He also fills out his own time sheet, which the Mayor signs. Richards approves and keeps track of vacation time and sick leave for McDowell and Butler. Richards checks with the city Clerk/Treasurer to verify the accrual of vacation and sick time against city records. Richards has the authority to recommend pay increases for McDowell and

Butler. In addition to his supervisory responsibilities, Richards frequently works alongside McDowell and Butler on various projects.

12. Richards did not receive a pay raise until approximately eight months following his appointment as department director. He currently earns \$13.51 per hour.

13. In 1999, the city council accepted Richards' recommendation and gave McDowell and Butler a \$2.00 per hour raise. McDowell has been employed with the public works department for 4 years and currently earns \$11.04 per hour. Butler, who has worked for the public works department for approximately 3 years, currently earns \$11.04 per hour.

14. The Mayor has the ultimate authority to hire and fire city employees. However, the Mayor relies on Richards to make recommendations for the hiring and firing of employees assigned to the public works department before a final decision is made.

15. Richards is responsible for dealing with complaints, needs and providing information to the public and customers of the city relating to the matters within the public works department.

16. The Mayor is not experienced or educated in water and sewer treatment procedures. He depends on Richards' expertise to manage the day-to-day operations of the municipal water system, sewer system, roads, parks, and buildings.

IV. DISCUSSION/RATIONALE

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. §39-31-201, MCA. The law further authorizes the Board of Personnel Appeals to decide what units of

public employees are appropriate for collective bargaining purposes. §39-31-202, MCA.

In analyzing this case, it is appropriate to consider cases decided under Federal law, Section 9(b) of the National Labor Relations Act (NLRA) 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).

The union seeks a determination that includes the position of Public Works Director in the bargaining unit. The city contends that the Public Works Director, Joseph W. Richards, is, in fact, a supervisor, as defined in §39-31-103(11), MCA, and as such, is not a "public employee" within the meaning of §39-31-103(9), MCA.

Section 39-31-103 (9)(b), MCA, excludes supervisors from the definition of public employee. The term "supervisory employee" is defined in §39-31-103(11), MCA, which includes 12 criteria as follows: "any 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 to 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." The "supervisory employee" definition contained in state law is virtually identical to the term "supervisor" in Section 2(11) of the NLRA.

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). It is well settled that 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). However, possession of one of the enumerated powers confers supervisory status only when the employee performs one of the powers using independent judgment. NLRB v. S.R.D.C., Inc., 45 F.3d 328, 332 (9th Cir. 1995). The law distinguishes between true supervisory personnel vested with “genuine management prerogatives” and employees such as “straw bosses, lead men, and set up men” who enjoy the protection of the labor relations laws, even though they perform minor supervisory duties. NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-81 (1974).

The Board has outlined the following considerations in determining whether employees are supervisory under state law:

Whether the employee has independent authority to perform the functions enumerated in the Act.

Whether the exercise of authority in the area of assignment and direction is routine.

Whether the employee uses independent judgment in directing the activities of others.

Whether the recommendations made by the employee are subject to independent review or investigation.

Whether a substantial amount of the employee’s time is spent doing work which is similar to the work of the subordinates.

Whether an unrealistic and excessively high ratio of supervisors to employees would be created.

UC No. 2-97, Yellowstone County v. Montana Public Employees Association
(January 22, 1998).

Richards clearly possesses at least five of the responsibilities addressed in the statutory definition, including the authority to recommend the hire, recommend the discharge, recommend a reward, and to recommend disciplinary actions that are less severe than a discharge, such as a suspension, a layoff, a recall or other discipline.

Authority to Hire and Fire

The public works director has the authority to effectively recommend the hiring of and disciplinary measures for employees within the department to the mayor. Further, under the city's general course of operation, the mayor ultimately has to rely on the discretion of the public works director to determine the most qualified applicants, and accepts his recommendations. Richards has discretionary authority to effectively recommend disciplinary measures, including discharge.

Assignment, Direction, and Reward

Richards' authority as the designated director of the public works department, is not merely routine or clerical in nature. He is virtually left on his own to manage the overall operation of the department. He uses independent judgment and discretion directing employees. He has no formal written guidelines to follow in carrying out his managerial tasks. He reports only and directly to the mayor. He only meets with the Mayor on an occasional basis, primarily for the purpose of updating the mayor on the department's status. Employees within the department regard Richards as their supervisor and refer to him to address all management decisions. Richards also provides direction for department employees when they do not know how to solve a problem. He assigns job tasks and is responsible for inspection of his subordinates' work. He prepares and approves department employee time sheets for payroll purposes. He approves vacation and sick leave. He is given the discretionary authority to recommend pay raises for employees. The

department employees did, in fact, receive a pay raise as a reward for their performance upon recommendation by Richards.

Richards meets the test standards under the definition of "supervisory employee" as described in the above court decisions and the statutory provisions above, under the definition of supervision under §39-31-103(11), MCA.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this case.
§39-31-207, MCA.

2. The City of Eureka, Director of Public Works performs duties that fall within the definition of "supervisory employee" pursuant to §39-31-103, MCA, and is therefore not properly included in a bargaining unit.

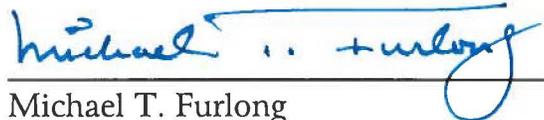
VI. RECOMMENDED ORDER

It is ORDERED that an election be held by secret ballot involving all employees of the public works department as early as possible, in accordance with the rules and regulations of the Board of Personnel Appeals. The individual employed as Public Works Director for the City of Eureka is a supervisor under § 39-31-103 (11), MCA, and pursuant to this recommended order, is excluded from the bargaining unit.

DATED this 19th day of October, 2001.

BOARD OF PERSONNEL APPEALS

By:



Michael T. Furlong
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 November 12th, 2001. 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

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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:

Daniel Doogan
PO Box 8144
Missoula, Montana 59807-8144

John M. Phelps
Eureka City Attorney
204 Central Avenue
Whitefish, Montana 59937

DATED this 19th day of October, 2001.

Carol A. Larkin