

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 7-2003:

AMERICAN FEDERATION OF) Case No. 1705-2003
STATE, COUNTY & MUNICIPAL)
EMPLOYEES, MONTANA COUNCIL)
NO. 8, affiliated with the AFL-CIO,)

Petitioner,)

vs.)

CITY OF WHITEFISH,)

Respondent.)

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

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I. INTRODUCTION

In this matter, the City of Whitefish (Whitefish) seeks to exclude four city positions – parks maintenance foreman, parks superintendent, parks and recreation coordinator, and utilities supervisor – from the bargaining unit on the basis that these positions are supervisory. The American Federation of State, County, and Municipal Employees, Montana Council No. 9 (AFSCME) seeks to exclude the position of assistant city clerk from the bargaining unit on the basis that the position is one of a confidential employee.

Hearing Examiner Gregory L. Hanchett convened a unit determination hearing in this matter on September 16, 2003. Barbara Jerde represented AFSCME. John Phelps, attorney at law, represented Whitefish. The parties stipulated that AFSCME's Exhibits 1 through 12 and Whitefish's Exhibits A through P should be admitted in evidence. The parties further stipulated that the inclusion of two positions in the bargaining unit – the city court clerk and the administrative assistant/customer service clerk – was appropriate.

Jason Loveless, Chad Fincher and Brian Schwartz testified under oath on behalf of AFSCME. John Wilson, Necile Larang, Gary Marks, Dan Keyes, and Greg Acton testified under oath for Whitefish. Based on the evidence and argument adduced at the hearing, the hearing examiner finds that the positions of parks superintendent, parks and recreation coordinator, and utilities supervisor are properly classified as supervisors and should be excluded from the bargaining unit. The position of parks maintenance foreman and the position of assistant city clerk should be included in the bargaining unit. The findings of fact and conclusions of law that support these determinations follow.

II. ISSUE

The issue in this case is whether a unit proposed for collective bargaining purposes is inappropriate under Mont. Code Ann. § 39-31-202 because of the inclusion of certain positions alleged to be supervisory or confidential, as provided in Mont. Code Ann. § 39-31-103(3) and (11). More specifically, should the positions of parks maintenance foreman, parks superintendent, parks and recreation coordinator, and utilities supervisor be excluded from the bargaining unit because these are supervisory positions? Furthermore, should the position of assistant city clerk be excluded from the bargaining unit because it is a confidential position?

III. FINDINGS OF FACT

1. AFSCME is a "labor organization" within the meaning of Mont. Code Ann. § 39-31-103(6).
2. The City of Whitefish is a "public employer" within the meaning of Mont. Code Ann. § 39-31-103(10).
3. The Charter of the City of Whitefish vests the city administrator with the ultimate authority to hire or fire all city employees except for the city judge and the city attorney. Article III, Section 3.03 (2)(h), Whitefish City Charter.
4. On March 21, 2003, AFSCME filed a petition for a unit determination, seeking to include all employees working in the public works, parks and recreation department and the building department of Whitefish. The petition sought to exclude all supervisors and confidential employees.

5. Dan Keyes is the director of the parks and recreation department. Chad Fincher is employed as the superintendent of that department. Brian Schwartz was previously employed as the recreation coordinator of the department. Jason Loveless works as the parks department maintenance foreman.

6. There are only five full time positions in the parks department: director, superintendent, recreation coordinator, parks department maintenance foreman, and custodial services. The city uses several seasonal employees (workers employed by Whitefish during the months of June to October only) to fill gaps in staffing created by additional responsibilities that must be completed during the summer. For example, the city operates a city beach on Whitefish Lake that is open to the public during the months of May through August. Life guards and other persons to staff concessions are hired as seasonal workers during these months to enable Whitefish to operate and maintain the city beach. Likewise, seasonal workers are hired to staff work crews for parks maintenance.

7. Loveless does not supervise any full time year round employees.

8. During the summer months, Loveless supervises six seasonal workers. He also supervises persons who have been assigned to work for Whitefish as a result of court ordered community service. Loveless and the workers he supervises are responsible for the mowing, trimming and general maintenance of city parks, maintenance of some city roads, and maintenance of parks department vehicles.

9. When supervising the seasonal employees, Loveless prepares a daily list of tasks that each of the employees must complete. Loveless controls those employees in the performance of their work.

10. If an issue comes up with a seasonal employee's work, Loveless talks with the employee. Loveless does not have the power to hire or fire employees. In one instance this year, Loveless recommended that an employee under his supervision be discharged (Exhibit O).

11. During the winter months, when mowing and trimming are not a concern, Loveless does the maintenance of the parks vehicles on his own and performs snow removal for Whitefish. On occasion, a person who has been ordered to complete community service or another person is assigned on a temporary basis to assist Loveless in snow removal duties.

12. Loveless' immediate supervisor is Chad Fincher. Fincher does not control every facet of Loveless' work. Loveless checks with Fincher on a daily basis in prioritizing the work for the six seasonal employees Loveless supervises.

13. Fincher serves as the superintendent of the parks department. In this position, he supervises Loveless and one other person who performs custodial services. He also supervises the seasonal employees at the city beach. He has the power to supervise any of the seasonal employees utilized in the park maintenance department.

14. Fincher conducts interviews of seasonal employees on his own and makes recommendations to his supervisor, Dan Keyes, regarding which ones should be hired. If the city manager gives approval to hire an employee, it is based on Fincher's interview and recommendation. While Fincher does not have the ultimate authority to terminate personnel, he has the power to recommend termination. He has the authority to discipline both seasonal and full time employees who work under him (as made clear by Whitefish's Exhibit P, a written warning to a seasonal employee prepared by Fincher).

15. Fincher is also responsible for some supervision and training of employees and vendors at Whitefish's ice skating rink.

16. Fincher has the unilateral power to make purchases of necessary equipment and materials up to the amount of \$100.00. Fincher gives his supervisor recommendations for department budgets during each fiscal year.

17. Brian Schwartz was employed by Whitefish as its recreation coordinator until recently.¹ As recreation coordinator, Schwartz was charged with hiring seasonal employees and finding independent contractors to run various summer and winter recreational activities. He determined the need for programs, their content, the estimated cost and revenue of the programs, and he advertised to recruit seasonal employees or independent contractors to fill positions to run the programs.

18. Schwartz did not have the ultimate authority to hire seasonal employees or retain independent contractors. He did, however, conduct interviews

¹ Schwartz has resigned and the position has been filled by a different person. The duties of the position have not changed since the time that Schwartz held the position.

of the employees, recommend to Dan Keyes whether those employees should be hired, and further recommended to Keyes whether to retain contractors. During any given year, Schwartz was responsible for hiring six to ten people. He was also responsible for contracting with about six independent contractors. During Schwartz's three year tenure as recreation coordinator, Keyes approved every one of Schwartz's recommendations for hiring employees or retaining contractors.

19. Schwartz made recommendations to fire two persons. These recommendations were not approved, apparently due to Whitefish's concerns about the legality of discharging those particular employees.

20. Greg Acton serves as the utilities supervisor for Whitefish. In this capacity, he is responsible for supervising ten full time employees on a day to day basis. These employees include water and wastewater plant operators, water customer service clerks, a water meter repair person, and an equipment operator.

21. Acton is privy to confidential information about those employees. In addition, he has the power to issue written and verbal or "on the spot" discipline to employees. Acton also interviews applicants on his own and recommends to the city engineer, John Wilson, which applicants should be hired. Wilson relies exclusively on Acton's recommendations in determining whom should be hired. In fact, during Wilson's tenure as city engineer, he has never vetoed Acton's recommendations regarding new hires.

22. Acton approves all pay sheets submitted by his charges and also has the responsibility and power to approve all invoices submitted by vendors.

23. The description of the assistant city clerk position indicates that the assistant city clerk "performs general secretarial/administrative duties for the City Manager . . . as requested" (Exhibit I, position description of assistant city clerk). The position description also indicates that the assistant city clerk assists the city clerk in records management duties "as assigned."

24. The position of assistant city clerk has no access to any confidential information possessed by the city. The assistant city clerk does not assist the city manager or any management personnel with handling any labor relations matters, confidential personnel matters, or budget matters. The assistant city clerk is not permitted to look at personnel files.

IV. OPINION

Montana law gives public employees the right of self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities. Mont. Code Ann. § 39-31-201. The law further authorizes the Board of Personnel Appeals to decide what units of public employees are appropriate for collective bargaining purposes. Mont. Code Ann. § 39-31-202. However, because the statute excludes supervisory and confidential employees from the definition of “public employee” (Mont. Code Ann. § 39-31-103(9)), neither a supervisory nor a confidential employee has the rights guaranteed by Mont. Code Ann. § 39-31-201 and neither can be included in a unit for collective bargaining purposes.

Mont. Code Ann. § 39-31-103(11) defines supervisory employee as “any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, 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.” Mont. Code Ann. § 39-31-103(9)(3) defines a confidential employee to be a person “found by the board to be a confidential labor relations employee”

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, (1979), 183 Mont. 223, 598 P.2d 1117; Teamsters Local No. 45 v. State ex rel. Board of Personnel Appeals, (1981), 195 Mont. 272, 635 P.2d 1310; City of Great Falls v. Young (Young III), (1984), 211 Mont. 13, 686 P.2d 185. Further, supervisors are also excluded from bargaining units under federal law, and the definition of supervisor in the federal law is almost identical to the definition in the state law.

The party asserting that an employee should be excluded from a unit has the burden of proving supervisory status. NLRB v. Bakers of Paris, Inc., 929 F.2d 1427, 1445 (9th Cir. 1991). Not all, or even a large number, of the statutory indicia of supervisory status are necessary to establish that an employee is a supervisor. The statutory definition is in the disjunctive, and it is therefore sufficient for supervisory

status to be established based on only one of the statutory criteria. E and L Transport Co. v. NLRB, 85 F.3d 1258, 1269 (7th Cir. 1996). 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., (1974), 416 U.S. 267, 280-81.

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).

With respect to confidential employees, federal case law contains two distinct theories for excluding confidential employees. First, confidential employees are those “who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the area of labor relations.” B. F. Goodrich Co., (1956), 115 NLRB 722, 724 (footnote omitted, emphasis deleted).

“[T]he test is whether [the employee] is expected to, and in fact does, act in a confidential capacity in the normal course of her duties.” Siemens Corp., (1976), 224 NLRB 1579. Second, employees who regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations are excluded from collective bargaining units. Pullman Standard Division of Pullman, Inc., (1974), 214 NLRB 762, 762-763.

In NLRB v. Hendricks County Rural Electric Membership Corp., (1981), 454 U.S. 170, the U. S. Supreme Court upheld the NLRB's practice of requiring that a “labor nexus” be present in order to exclude employees from collective bargaining units. The exception is construed narrowly in order not to deprive employees of their rights to bargain collectively. Hendricks County, 454 U.S. at 180-181, citing with approval Ford Motor Co., (1946), 66 NLRB 1317, 1322.

In UC 2-87, Livingston School District No. 4 and 1 v. Montana Education Association/Livingston Classified Employees Association, the Board adopted a hearing officer's decision which held that for an employee to be excluded, both tests must be met. In other words, to be a confidential labor relations employee, the employee must assist an official who formulates, determines, and effectuates labor relations policies *and* must have access to confidential labor relations information in the normal course of employment.

The Parks Superintendent, The Recreation Coordinator, and The Utilities Supervisor Are Supervisory Personnel.

AFSCME's single argument with respect to Whitefish's contentions is that none of the positions has the ability to hire or fire subordinates without authorization from the city administrator. This argument, however, plainly and inexplicably ignores the very strong evidence that these positions exercise many of the other statutory criteria relating to supervisory powers. It also ignores the fact the recommendations on hiring made by the parks superintendent, the recreation coordinator, and the utilities supervisor are virtually “rubber stamped” by the city administrator. The evidence further demonstrates that these positions routinely exercise independent judgment and authority in the area of assignment and direction of subordinate employees. The evidence also discloses that each of the people in these positions routinely handles at least minor discipline.

An employee has the power effectively to recommend personnel action when the employee's recommendations are accepted without question. UDs No. 15-87

and 19-87, Board of Regents v. Montana Federation of Teachers (May 4, 1988), following City of Davenport v. Public Employment Relations Board, 264 N.W.2d 307 (Iowa 1978). Here, the evidence with respect to these three positions is that the city administrator relied exclusively on the determinations made by these personnel in their interviews and assessments of applicants and independent contractors. No witness could recall a time when the recommendation of these three had not been accepted by the city administrator. In addition, each of the workers in these positions conducted interviews of potential employees on their own without participation from their department head. Under these circumstances, the ability of persons in these positions to recommend in every case whether to hire certain applicants demonstrates that these positions are supervisory.

The evidence is undisputed that the parks superintendent, the recreation coordinator, and the utilities supervisor retain unfettered discretion in directing the daily activities of subordinates. They utilize independent judgment in directing the activities of their subordinates. This statutory consideration is alone sufficient to determine that the positions of parks superintendent, recreation coordinator, and utilities supervisor are supervisory.

Furthermore, each of these employees has the authority to at least engage in some minor "on the spot" discipline of subordinate employees. Indeed, the utilities supervisor issues written warnings to subordinates. This authority is implemented using independent judgment and, as is true of the assignment and direction criterion, is alone sufficient to show that the three positions are supervisory.

The Position of Parks Maintenance Foreman Should Not Be Excluded From The Bargaining Unit.

On balance, application of the statutory criteria to the position of parks maintenance foreman shows that, unlike the other positions, this position is not supervisory. This position has no involvement in determining who among applicants is selected for seasonal positions. During the winter months, the person in this position does all of the work that the seasonal employees would engage in during the summer months. Indeed, it appears that the person filling this position works side by side with the seasonal employees during the summer months. While it is true that the person in this position wrote a letter to his supervisor recommending discharge of a seasonal employee, this does not, under the circumstances of this case, show that this position wields supervisory power. Furthermore, it is clear that the person in this position, while utilizing some

independent judgment in assigning tasks to the summer seasonal employees, nevertheless checks in with his supervisor on a day to day basis to ascertain which jobs need to be completed that day. In this case, the parks maintenance foreman is nothing more than a working foreman and the position should, therefore, be included within the bargaining unit.

The Assistant City Clerk Is Not A Confidential Employee.

AFSCME contends that the assistant city clerk is a confidential employee and should be excluded from the bargaining unit. Because AFSCME contends exclusion of this position is appropriate, it bears the burden of proof on this issue. AFSCME presented no proof to show that the assistant city clerk is a confidential employee. The uncontroverted testimony presented by Whitefish shows that the person occupying the position does not in fact act in a confidential capacity. To the contrary, the only evidence presented at the hearing shows that the assistant city clerk has no access to confidential records and does not assist any official who formulates, determines, and effectuates labor relations policies. The position description appears to be broad enough to show that the assistant city clerk might act in a confidential capacity in the normal course of duties. The reality of the situation, however, as demonstrated by the testimony, is that the assistant city clerk does not act in a confidential capacity in Whitefish. Because the proponent of excluding the position from the bargaining unit has failed to meet its burden of proof, inclusion of this position in the bargaining unit is appropriate.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this matter pursuant to Mont. Code Ann. § 39-31-207.
2. The positions of parks superintendent, recreation coordinator, and utilities supervisor are supervisory positions as contemplated by the language in Mont. Code Ann. § 39-31-103(11) and are therefore properly excluded from the bargaining unit.
3. The position of parks maintenance foreman is not supervisory within the meaning of Mont. Code Ann. § 39-31-103(11) and is therefore properly included in the unit.

4. The position of assistant city clerk is not a confidential position within the meaning of Mont. Code Ann. § 39-31-103(3) and therefore should be included in the unit.

VI. RECOMMENDED ORDER

An election by secret ballot shall be conducted as soon as possible, in accordance with the rules and regulations of the Board of Personnel Appeals, among the employees in the bargaining unit. Except as provided below, the bargaining unit shall consist of employees in the public works department, parks and recreation department, and building department, and shall include the parks maintenance foreman, the assistant city clerk, the city court clerk and the administrative assistant/customer service clerk. The parks superintendent, the recreation coordinator, the utilities supervisor, all other supervisors, contract employees, and members of other bargaining units shall be excluded from the bargaining unit.

DATED this 7th day of October, 2003.

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 October 30, 2003. 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

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document was, 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:

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DATED this 7th day of October, 2003.

Sandy Durcan