

Brown, and John Kendall testified under oath. The parties submitted post-hearing briefs on March 2, 2010, and petitioner filed a reply brief on March 15, 2010.

II. ISSUE

The issue in this matter is whether a unit proposed for collective bargaining purposes is appropriate pursuant to Mont. Code Ann. § 39-31-202. The resolution of that issue depends upon whether the Solid Waste Manager/Supervisor position meets the definition of supervisory employee as provided in Mont. Code Ann. § 39-31-103(11).

III. FINDINGS OF FACT

1. Granite County is a public employer within the meaning of Mont. Code Ann. § 39-31-103(10). Granite County's Solid Waste Department has two full-time employees and four relief employees.

2. The two full-time employees of the Solid Waste Department are John Kendall, the Manager, and Jody Butler, the Container Site Attendant. Both employees were hired by the County Commissioners prior to their current job descriptions being in place. The hours of work, the place of work, and overall job duties of the Attendant and Manager are determined by the County Commissioners, with input or advice from the Solid Waste Board.

3. Granite County has two container sites where County residents dump trash. One site is located outside of Philipsburg and is staffed by the Attendant. The other site is located outside of Drummond and is staffed by the Manager.

4. In March of 2003, the County Commissioners issued a job description for the position of "Solid Waste District Manager/Supervisor", and in April of 2003, issued one for the position of "Container Site Attendant."

5. The Granite County Commission established a wage matrix for the positions with steps and grades. It assigned the Solid Waste District Manager/Supervisor position to a higher grade on the wage matrix than the Container Site Attendant position due to the added responsibility for supervisory functions.

6. The written job description for the "Solid Waste District Manager/Supervisor" position lists several supervisory functions:

Manages the Solid Waste District Class III, including 2 transfer container sites, contracted services, employees, and records. Perform duties of site attendant at one site, while allowing sufficient time away to supervise Granite County's second site.

...

This position performs a variety of professional, administrative, and supervisory duties in the smooth operation of the Solid Waste District . . . May require independent judgement with guidelines.

...

Supervises typically one employees [sic] including container site caretakers; supervises temporary fill-in employees.

Essential functions: Position requires ability to: communicate orally and in writing; supervise, schedule, analyze and evaluate, maintain records and files. . . .

Performs duties in the areas of administrative fiscal management, and personnel supervision. This is a working supervisory position and performs duties of container site attendant. . . .

Supervises assigned projects.

...

Assigns work; supervises employees; communicates work methods, policies, expectations, and priorities. Provides regular feedback to employees on work performance. Evaluates and disciplines employees.

Conducts timely performance appraisals for board review, and the Commissioners [sic] final approval.

If the Container Site Attendant is sick or injured and cannot work, the Attendant shall first call the Solid Waste Board Manager/Supervisor for the Supervisor to find a replacement to be called to work. . . .

7. The contents of the position description correctly reflect the actual duties, requirements, and expectations of the Manager position.

8. Each of the two employees is the sole employee at his respective container site and is responsible for the operation of the site to which he is assigned. The Manager does not have the authority to transfer himself or the Attendant to another site.

9. The Manager, who has held this position since 1995, spends less than 10% of his time on administrative duties associated with his duties as the Manager. The remainder of his work time is spent being the attendant of the Drummond container site. According to the Manager's job description, the administrative duties include administrative functions (drafting policy statements, public office contact, meeting with Solid Waste Board and Commissioners), fiscal management functions, and supervisory functions. *Respondent's Exhibit B.*

10. The relief workers, all of whom were hired by the Commissioners, are called to work only when the Manager or the Attendant is not working at his assigned site – when they are off work due to illness or vacation, or when the Manager has to work at the Philipsburg site to do specific tasks for which he is licensed or to repair equipment, a job for which he has more experience and skill than the Attendant. Relief workers are called to work usually by the Manager, but the Attendant and a secretary have the authority to call in a relief worker if the Manager is not available to do so.

11. Relief workers are called to work according to a list prepared by the Commissioners. The Commissioners have instructed the Manager which relief worker to call to work at which site and which relief workers will be called in which order.

12. The County Commissioners have the ultimate authority to decide whether to discharge an employee. The Manager has the authority to suspend an employee and to recommend discharge of an employee following a pre-termination investigation, but has never experienced a circumstance when the exercise of this authority was warranted. The Manager did not know that he had authority to discharge or suspend an employee until he heard County Commissioner Conner testify to that effect at hearing.

13. The Manager has the authority to lay an employee off, but has never had the need to do so. The Manager did not know that he had authority to lay an employee off until he heard Commissioner Conner testify to that effect at the hearing.

14. The Manager has the authority to warn or counsel the Attendant. There is no requirement that he document such a warning.

15. Wages for the Manager and Attendant are set by the County Commissioners. The Manager is a grade 9. The Attendant is a grade 8 and earns approximately \$1.50 per hour less than the Manager. The pay grade is determined in County policy. *Union Exhibit 1* at 76-78. Annual cost of living pay increases are determined solely by the County Commissioners.

16. The Granite County Personnel Manual sets out the procedure by which employees are granted step increases on the wage matrix:

28.61 The compensation step of each employee shall be determined by recommendation of the employee's department head and approval of the governing body at the time of adoption of the County's compensation plan. Steps will be determined thereafter on the two year anniversary date of each employee's date of hire following annual evaluation; upon promotion of an employee to a new pay grade; or upon the hiring of a new employee. Each step increase will be 1% or [sic] the previous year's wage for that grade and step.

28.62 A recommendation by a department head to advance the compensation step of an incumbent employee shall be based solely upon the employee's meritorious performance of duties, as documented by the employee's annual performance evaluation. Length of satisfactory service shall not alone constitute a sufficient basis for advancement of an employee's compensation step, however, employees shall be considered for a compensation step increase every two years. The department head shall consider the employee's annual performance evaluation and thereafter make a recommendation to the governing body to approve the employee's compensation step increase. If approved by the governing body the step increase shall become effective on the anniversary of the employee's date of hire.

17. Based on this policy, the Manager has the authority to review the performance of the Attendant and effectively to recommend an increase in pay to the County Commissioners. Every other year, the County Clerk and Recorder notifies the Manager that he must perform a performance evaluation of the Attendant. The Manager completes a performance evaluation form in the presence of the Attendant, signs it, and turns it in to the County Clerk and Recorder. The Manager's positive appraisal of his employee acts as a recommendation for a step increase. If an employee were to receive a negative evaluation from the Manager, the Commission would likely not approve a step increase.

IV. DISCUSSION¹

Montana law gives public employees the right of self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted 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 employees from the definition of “public employee,” a supervisory employee does not have the rights guaranteed by Mont. Code Ann. § 39-31-201 and cannot be included in a unit for collective bargaining purposes. Mont. Code Ann. § 39-31-103(9)(iii).

Granite County contends that the Manager position at issue in this case has the authority on a regular and recurring basis to exercise many of the indicia of supervisory power. The union argues that the supervisory authority that Granite County contends the position wields is largely illusory and is by no means regular and recurring.

Mont. Code Ann. § 39-31-103(11)(a) defines a supervisory employee as “an individual having authority on a regular, recurring basis while acting in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or to effectively recommend the above actions if, in connection with the foregoing, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment.” Subpart (b) provides that the authority articulated in subsection 11(a) “is the only criteria that may be used to determine if an employee is a supervisory 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. 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. Supervisors are also excluded from bargaining units under federal law, and the definition of supervisor in the federal law is very similar to the definition in the state law. However, the Montana statute prohibits the Board from using “any

¹Statements 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.

secondary test developed or applied by the National Labor Relations Board” to determine whether an employee is a supervisor. Mont. Code Ann. § 39-31-103(11)(b). Therefore, to the extent that NLRB precedent relies on any “secondary test” or other test not consistent with Mont. Code Ann. § 39-31-103(11)(a), reliance on such precedent is improper.

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.* (9th Cir. 1991), 929 F.2d 1427, 1445. Further:

[T]he party contesting the inclusion of an employee into a bargaining unit on the basis of supervisory status must provide evidence or examples of the regular and recurring existence of the authority of the alleged supervisor to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or to effectively recommend one or more of those actions. Additionally, the party asserting supervisory status must provide evidence or examples of the exercise of that authority.

Montana Department of Corrections, Montana State Prison, UD 2-2007 (October 24, 2008).

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* (7th Cir. 1996), 85 F.3d 1258, 1269. However, possession of one of the enumerated powers confers supervisory status only when the employee exercises the power using independent judgment. *NLRB v. S.R.D.C., Inc.* (9th Cir. 1995), 45 F.3d 328, 332. 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 evidence establishes that the Manager has the authority to discipline the Attendant through oral warnings or counseling, to effectively recommend the reward of the Attendant through the performance appraisal process that the County uses to determine whether an employee qualifies for a pay increase, and both to assign work to the Attendant and to elect to perform work himself when he considers the Attendant not qualified to do so. The issue is whether the authority exists “on a regular and recurring basis.” To determine whether authority exists on a regular and

recurring basis, the Board must consider the realities of the workplace. In this case, the workplace is a work unit consisting of two employees and a few relief workers within a very small governmental entity. In this context, the Manager exercises supervisory authority as much as is necessary.

Even though supervisory duties make up only a small part of the overall work of the Manager position, they are performed with regularity and are adequate, in the context of this very small work unit, to establish the Manager as a supervisor for purposes of the collective bargaining laws.

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 position of Granite County Solid Waste District Manager/Supervisor is that of a supervisor pursuant to Mont. Code Ann. § 39-31-103(11)(a), and is therefore not properly included in a unit established for collective bargaining purposes.

VI. RECOMMENDED ORDER

1. The position of Granite County Solid Waste District Manager/Supervisor is exempt from collective bargaining as required by Mont. Code Ann. § 39-31-103(9)(b)(iii).

2. There being only one qualified voter for a bargaining unit consisting of full-time employees in the Granite County Solid Waste Department, the employer's August 4, 2009 Motion to Dismiss the Union's petition for election is granted.

DATED this 5th day of July, 2010.

BOARD OF PERSONNEL APPEALS

By:



DAVID A. SCRIMM
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 August 2, 2010. 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 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

Jeff Minckler
P.O. Box 5540
Whitefish, MT 59937

DATED this 8th day of July, 2010.

Sandy Duncan

...having authority on a regular recurring basis while acting in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or to effectively recommend the above actions if, in connection with the foregoing, the exercise of the authority is not of and merely routine or clerical nature but requires the use of independent judgment.

Mont. Code Ann. § 39-31-103(11).

In order to establish the existence of one, or more, of the statutory criteria, the Board has held that the Board will need to consider a tangible example or examples of one or more of the listed actions. *MEA-MFT v. Mont. Dep't of Corrections, Mont. State Prison, Unit Determination Charge No. 2.-2007 (October 2008)*. In its review of these examples, the Board will need to ascertain whether the "authority vested in the employee is merely routine or clerical and whether it requires the use of independent judgment." *Id.*

In this matter, after careful and due consideration and a review of the complete record, the Board determined that the hearing officer's findings were not based upon competent substantial evidence and that the hearing officer's determination that the District Manager/Supervisor position was a supervisory position was in error. The Board based its conclusion on the grounds that the competent substantial evidence in the record did not support a finding that Granite County met its burden of establishing that the Manager used his "independent judgment" in exercising the asserted statutory indicia of supervision. Therefore, the hearing officer's conclusion that he was a supervisor was in error of law.

The record indicates the supervisory activities that the Manager performed, were performed in a routine or rote manner. For example, the best argument that Granite County provided that the Manager was a supervisor rested with its assertion that the Manager effectively recommended a reward. Every other year, the Manager would evaluate his employee and it appears that a good evaluation would result in a "step increase" in pay. *Hearing Officer's Recommended Order at 7*. But, the record reflects that the Manager did not conduct this performance evaluation on his own volition. Instead, the Clerk and Recorder would given him a call and tell him that he needed to do the paperwork. *See Hearings Tr. at 102, ln. 22-23*. And, despite clear direction in the Granite County's Personnel Manual at 28.62 that a "step increase" required the Manager to not only perform the evaluation, but to "make a recommendation to the governing body" for the step increase, it was clear that the Manager did not affirmatively make a recommendation. (Nothing was conveyed, either verbally or in writing, to the governing body that indicated that the Manager thought that the employee should get the "step increase.")

Arguments raised by Granite County that a supervisor would have to fire or discipline an employee in order to confer supervisory status are not well taken. As noted in a previous Board decision, a party seeking exclusion has ten separate possible actions and "the effective recommendation" of ten separate possible actions. *MEA-MFT v. Mont. Dep't of Corrections, Mont. State Prison, Unit Determination Charge No. 2-2007 (October 2008)*. This gives a party seeking exclusion twenty different ways (not all negative) to meet the required burden of proof; a seemingly surmountable burden given the 15 year tenure of this particular employee.

Accordingly, the Board finds and concludes that Granite County, as the party seeking the exclusion, has failed to establish that the Manager performed or effectively recommended the performance of any of the listed statutory indicia of supervision with requisite "independent judgment" necessary to confer supervisory status pursuant to Section 39-31-103(11), MCA.

The Board hereby adopts and incorporates the Hearing Officer's Recommended Order's Findings of Facts Nos. 1 through 11, 14, 15, and 16. The Board specifically rejects Findings of Fact number 12, 13, and 17, and those portions of the recommended order's discussion to the extent that they do not conform with the Board's findings and conclusions.

CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this matter pursuant to Mont. Code Ann. § 39-31-207.
2. The position of Granite County Solid Waste District Manager/Supervisor is not that of supervisor pursuant to Section 39-31-103(11)(a), and is therefore properly included in a unit established for collective bargaining purposes.

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 employees in the bargaining unit.

DATED this 30th day of March, 2011.

BOARD OF PERSONNEL APPEALS

By: 

David Gallik, Presiding Officer

Board members Rukavina, Johnson, Nyman, and Verlanic concur.

NOTICE: You are 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.

CERTIFICATE OF MAILING

I, David Krutson, do hereby certify that a true and correct copy of this document was mailed to the following on the 4th day of April 2011:

KARL ENGLUND
ATTORNEY AT LAW
PO BOX 8358
MISSOULA MT 59807

CHRISTOPHER MILLER
GRANITE COUNTY ATTORNEY
GRANITE COUNTY COURTHOUSE
PHILIPSBURG MT 59858