

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 3-2011:

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|------------------------|---|------------------------------|
| TEAMSTERS LOCAL NO. 2, |) | Case No. 488-2011 |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | FINDINGS OF FACT; |
| |) | CONCLUSIONS OF LAW; |
| |) | AND RECOMMENDED ORDER |
| POWELL COUNTY, |) | |
| ROAD DEPARTMENT, |) | |
| |) | |
| Respondent. |) | |

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I. INTRODUCTION

This matter involves the question of whether the unit proposed by Teamsters Local No. 2, consisting of all of the employees of the Powell County Road Department, is an appropriate bargaining unit pursuant to Montana's Public Employees Collective Bargaining Act.

Hearing Officer Terry Spear conducted a unit determination contested case hearing on January 28, 2011. Daniel J. Doogan, Secretary-Treasurer, participated on behalf of Local No. 2. Lewis K. Smith, Powell County Attorney, represented Powell County. Exhibit 1 and Exhibits A through F were admitted into evidence. Duane Hoxworth, Eugene Wallace, Larry Rennfield, Cele Pohle, Ralph (Rem) Mannix, and Donna Young testified under oath.

II. ISSUE

The issue in this case is whether an appropriate bargaining unit for the Powell County Road Department's employees includes the three road foremen and the garbage hauler from the unit, in addition to the other five employees, who are members of the road crews. The parties do not contest the jurisdiction of the Board over this matter.

III. FINDINGS OF FACT

1. Powell County is a local government unit and a public employer within the meaning of Mont. Code Ann. § 39-31-103(10). Powell County's Road Department employs three road crews, each consisting of one or two maintenance workers and a foreman, as well as a garbage hauler. Each road crew is assigned to one of three distinct geographic districts. The five maintenance workers and the three foremen are collectively responsible for the maintenance of county or public highways within

Powell County. The garbage hauler performs duties as assigned regarding maintenance of the highways (in any of the districts as the need exists) when he has time after performing his garbage hauling duties. The individual holding the position of garbage hauler plans to retire this year.

2. Teamsters Local No. 2 filed a petition for a unit determination and election on September 21, 2010, proposing a unit of all of the Road Department employees including the road foremen and the garbage hauler, providing 30 percent proof-of-interest with their petition.

3. The county timely filed a counter-petition, seeking exclusion of the three road foremen and the garbage hauler.

4. There is no dispute that the remaining five positions, the maintenance worker positions (currently held by Jerry Brander, John Kent, Gary Larson, Steve Pocha, and David Shoupe), constitute an appropriate bargaining unit and that an election polling those five employees is appropriate (with or without the employees whose inclusion is at issue, depending upon the Board's ultimate ruling).

5. The county's three road districts are District 1, the Garrison and Deer Lodge Area (containing approximately 300 miles of roads); District 2, the Ovando and Helmville area (containing approximately 300 miles of county roads); and District 3, the Avon and Elliston Area (containing approximately 100 miles of county roads). District 1 has one foreman and two maintenance workers, District 2 has one foreman and two maintenance workers, and District 3 has one foreman and one maintenance worker. Over the years, there has been very little turnover in the Road Department positions.

6. Each of the three Powell County Commissioners takes responsibility for the roads in their respective districts, unless and until an issue arises that requires a decision from the entire Commission. The Commissioners regularly have contacts from residents in their districts about road conditions, and communicate problems and concerns of the public about the roads to that district's road foreman.

7. The County Commissioners rely upon the road foremen's experience and expertise in the maintenance of the districts' roads to assist them in the decision-making process, but the responsibility for the decisions still rests with the individual Commissioner for that district and the Commission as a whole for decisions impacting multiple districts (resurfacing projects that require participation of multiple crews, large equipment expenditures, etc.).

8. The three foremen are each responsible for assigning work to that particular crew on a daily basis, keeping track of the need for equipment repair and restocking of supplies, and maintaining availability for that district's Commissioner. The three "crews" consist of five experienced road maintenance workers who require very little supervision and direction. The precise level of authority for purchases which the

foremen exercise appears to vary somewhat, depending upon the experience of the particular foreman and the working relationship between that foreman and the County Commissioner for that district.

9. The County Commissioners have the authority on a regular recurring basis to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees by the use of independent judgment.

10. The garbage hauler has a community of interest with the rest of the Road Department employees, since he does work performed by the bargaining unit when he has completed his garbage hauling and perhaps also when projects (such as resurfacing) require participation of multiple crews.

11. The exercise of supervisory authority by the Powell County road foremen is routine in nature and, for each foreman, is subject to direct review by a County Commissioner. The authority they exercise does not require the use of independent judgment. The newest of the road foremen is still learning the preferences of the Commissioner for his district with regard to response to public comment and questions about the work, and is having more "training" interactions with that Commissioner as he does learn those preferences. This is clear and convincing evidence that the authority to supervise remains in the Commissioners.

IV. DISCUSSION¹

Montana law recognizes and protects public employees' right 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 Board of Personnel Appeals determines appropriate units of public employees for collective bargaining purposes. Mont. Code Ann. § 39-31-202. A supervisory employee is expressly excluded from the statutory definition of "public employee." Mont. Code Ann. § 39-31-103(9)(b)(iii). Thus, supervisory employees do not enjoy the rights guaranteed by Mont. Code Ann. § 39-31-201 to public employees and cannot be included in a unit for collective bargaining purposes.

A supervisory employee is "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." Mont. Code Ann. § 39-31-103(11)(a). That definition "is the only criteria that may be used to determine if an employee is a supervisory employee. The use of any other criteria, including any secondary test

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.

developed or applied by the national labor relations board or the Montana board of personnel appeals, may not be used to determine if an employee is a supervisory employee under this section.” Mont. Code Ann. § 39-31-103(11)(b).

Cases decided by courts or decided by either federal or state labor board can be helpful when those cases analyze what facts establish that a particular position is clothed with the authority described in the statute. 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 appropriate federal court and NLRB precedent to interpret the Montana Act. *State ex rel. BOPA v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *Teamsters Local No. 45 v. State ex rel. BOPA* (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. As already noted, Montana law prohibits the Board from using “any secondary test” to determine supervisor status. 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 would be 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. Montana law has the same allocation of the burden of proof:

[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 supervisory status can be established based on proof of 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 that 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” from non-supervisory employees such as “straw bosses, lead men, and set up men” who enjoy the protection of the labor relations laws even though they perform some minor supervisory duties. *NLRB v. Bell Aerospace Co.* (1974), 416 U.S. 267, 280-81.

The county did not establish that the road foremen, on a regularly recurring basis and in the exercise of their independent judgment, either hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or effectively recommend one or more of those actions. At the very most, these road foremen might sometimes assign priorities of work in unusual situations when the one or two-man crew supervised by the particular road foreman has a question about what to do first (subject to inquiry and revision by the district’s Commissioner). In exceedingly rare situations, a road foreman might intervene in an altercation between the other two workers in the district, and decide whether to involve the district’s Commissioner to impose discipline, or simply let the matter go. In the also very rare situations when a new worker must be hired for one of the districts, the road foreman for that district participates in the decision-making, but although the Commissioners want the foreman’s input, the Commissioners ultimately make the hiring decision. The realities of this workplace are that someone has to be the lead worker for each crew, which includes being the liaison between the County Commissioner for that district and the road crew. But the real supervisory authority is still retained by the three Commissioners.

It seems likely that the county could delegate more of the Commissioners’ authority to the road foremen, but it has not done so. The most that can be said is that the road foremen function as lead workers, under the Commissioners’ supervision. Every potentially supervisory act the road foremen perform, except perhaps prioritizing daily work in the rare instances when that might be needed, is performed subject to the supervision and direction of one or all three of the County Commissioners. After a road foreman and a Commissioner have worked together over time, the road foreman can implement what he already understands to be the direction he would get from the Commissioner on most questions, but that road foreman is still not exercising his independent judgment. Instead, he is implementing the directions he knows from experience that the Commissioner would give.

The exigencies of this particular county have led its government to structure the Road Department so that all three of its work crews operate under the direct supervision of the county’s elected Commissioners. Thus, the Road Department consists of three distinct sub-units, each consisting of two or three employees (each sub-unit including a working lead member designated as a “road foreman”), with one “wild card” worker (the garbage hauler) who shares a community of interest with the sub-units’ workers because when he is not hauling garbage, he is participating directly

in Road Department work. The entire department is directly supervised by the County Commissioners. Therefore, the appropriate bargaining unit includes the five maintenance workers, the three road foremen, and the garbage hauler.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over determining the appropriate bargaining unit for the Powell County Road Department in this matter. Mont. Code Ann. §§ 39-31-202 and 207.

2. The unit proposed by Teamsters Local No. 2, consisting of all nine employees in the Powell County Road Department, is an appropriate bargaining unit. Mont. Code Ann. § 39-31-201.

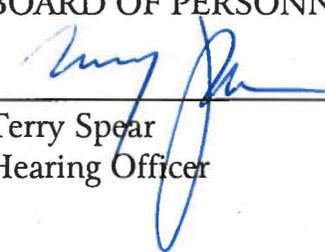
VI. RECOMMENDED ORDER

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 nine employees in the bargaining unit. The bargaining unit shall consist of all of the employees of the Powell County Road Department at the present time, consisting of the positions held by the three road foremen, the positions held by the five maintenance workers, and the position of the one garbage hauler.

DATED this 26th day of April, 2011.

BOARD OF PERSONNEL APPEALS

By: _____


Terry Spear
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 May 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 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:

Bill Rowe
Teamsters Local #2
P.O. Box 3745
Butte, MT 59702

Lewis Smith
Powell County Attorney
409 Missouri Avenue
Deer Lodge, MT 59722

DATED this 26th day of April, 2011.

Sandy Duncan

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Butte, MT 59702

Lewis Smith
Powell County Attorney
409 Missouri Avenue
Deer Lodge, MT 59722

DATED this 29th day of April, 2011.

Sandy Duncan