

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 5-2013:

INTERNATIONAL ASSOCIATION)	Case No. 1478-2013
OF FIRE FIGHTERS, LOCAL 4939,)	
)	
Petitioner,)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
vs.)	AND RECOMMENDED ORDER
)	
CENTRAL VALLEY FIRE DISTRICT,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

In this matter, International Association of Fire Fighters Local 4939 (IAFF) proposes a bargaining unit at the Central Valley Fire Department (CVFD) that includes career firefighters and seasonal firefighters. Hearing Officer Gregory L. Hanchett convened a unit clarification hearing in this matter in Belgrade, Montana. Ricky Walsh, District Vice President IAFF, represented IAFF Local 4939. Cynthia Walker and Emma Armstrong, attorneys at law, represented CVFD. The parties stipulated to the admission of IAFF’s Exhibit 1 and CVFD’s Exhibits A through F. Chris Dahlhouser, career firefighter, Bill Schmitz, volunteer firefighter, and CVFD Fire Chief Ron Lindroth all testified under oath. The parties requested the opportunity to present post-hearing briefs, the last of which was timely filed with the Hearings Bureau on December 2, 2013. At that time, the matter was deemed submitted for decision. Based on the evidence adduced at hearing as well as the arguments of the parties in their respective post-hearing briefs, the following findings of fact, conclusions of law, and recommended decision are made.

II. ISSUE

The issue in this case is whether IAFF’S proposed collective bargaining unit, specifically, a unit comprised of career and seasonal firefighters, is appropriate under Mont. Code Ann. § 39-31-202.

III. FINDINGS OF FACT

1. The parties have stipulated that the positions of Fire Chief, Deputy Chief, Assistant Chief, Fire Marshall, Secretary, District Clerk, and part-time employees are excluded from the proposed bargaining unit.

2. IAFF Local 4939 is a “labor organization” within the meaning of Mont. Code Ann. § 39-31-103(6).

3. CVFD is a public employer as defined in Mont. Code Ann. § 39-31-103(10).

4. CVFD was formed in the 1940’s and is located in Belgrade, Montana. It is a fire department that provides structure protection, wildland fire protection, and emergency medical response for citizens within its fire protection district which is located in Gallatin County, Montana.

5. Prior to the year 2000, CVFD was comprised entirely of volunteer firefighters. Beginning in 2000, CVFD hired career firefighters while continuing to maintain a large cadre of year round volunteer firefighters whose help is essential to the ongoing business of the employer. In addition, since 2000, CVFD has hired seasonal employees during the summer months to meet the increased demand for services which CVFD faces in fighting wildland fires.

6. At the time of hearing, CVFD’s staffing consisted of 13 full-time paid personnel consisting of one administrative staff person, 12 career firefighters, and 45 volunteer firefighters. No seasonal firefighters are currently employed at CVFD.¹

7. All positions in question in this case are non-managerial firefighters. When working an incident, they have the same duties and are expected to perform up to the

¹ As discussed below in Section B of the Discussion, the hearing officer concludes that the seasonal firefighters may be included in the unit. In the past, the Board of Personnel Appeals has abstained from determining whether seasonal employees should be included in the proposed unit where the parties did not place sufficient facts before the Board to make such a determination and at the time of the unit determination, no seasonal positions were filled. *Matter of Unit Determination No. 4-85*, page 27, discussed *infra* at page 9. Here, the parties have placed several facts before the hearing officer which he believes are sufficient to resolve whether the seasonal employees should be included in the unit and no party has suggested abstaining from making such a determination simply because the seasonal positions are not presently filled.

same standards. While on an incident, they would be supervised by the same person or persons.²

8. Career firefighters work 56 hours per week, completing three 24 hour shifts each week they are scheduled to work. While on shift, the career firefighters are required to remain at the station house where they sleep and eat. They are expected to work all shifts to which they are assigned.

9. Career firefighters are paid an hourly wage. They receive a W-2 form from CVFD each year. They also receive health insurance benefits and participate in the Firefighter Unified Retirement System (FURS) (Mont. Code Ann. § 19-13-101 et. seq.). In the event a career firefighter is laid off, that firefighter would be eligible for unemployment insurance benefits.

10. Seasonal employees are also paid an hourly wage. They receive a W-2 form from CVFD. They do not receive fringe benefits from CVFD. They are eligible to participate in the Public Employee Retirement System (PERS) (Title 19, Chapters 2 and 3, Mont. Code Ann.) only during the time they are employed. They are not eligible for unemployment insurance benefits when their temporary position ends. They have no expectation of recurring annual employment.

11. It is CVFD's desire to hire career firefighters from the ranks of volunteer and/or seasonal firefighters. That, however, does not always happen. Indeed, two firefighters who were employed as seasonal firefighters during the summer wildland fire season of 2013 were not hired into two career firefighter positions that were filled in the fall of 2013. It is CVFD's plan to hire seasonal employees during the summer months in the coming years as they have done in the past and did so most recently during the 2013 summer wildland fire season. Testimony of Chief Lindroth.

² There was no direct testimony about the firefighters' supervision during an incident response. As the parties were informed prior to hearing, however, this hearing officer served as a volunteer firefighter from 2003 until 2012. He has more than a passing familiarity with the Incident Command System (ICS) employed during incident responses. The United States Department of Homeland Security implemented the National Incident Management System in 2004 in response to Homeland Security Presidential Directive #5 issued on February 28, 2003. Broadly speaking, the purpose was to create a nationwide and uniform methodology of incident command among the various federal, state, and local law enforcement, firefighting, and emergency response agencies across the United States. All fire departments in Montana have adopted ICS. Under this system, both volunteers and career staff at an incident would ultimately be supervised by the incident commander during an incident. On smaller incidents, they might report directly to the incident commander. On sufficiently large incidents, firefighters may be broken into divisions having different division supervisors who report to the incident commander.

12. Like their career firefighter counterparts, seasonal employees are scheduled for 24 hour shifts while they are employed by CVFD and have a regular full time schedule working 56 hours per week. While on shift, they remain at the fire house. They, too, are expected to work all shifts for which they are scheduled.

13. Volunteer firefighters do not work under any implied or actual contract for hire. They are not placed on any schedule. Unlike their paid counterparts, they are not required to respond to fires and do not have regularly scheduled shifts. They are free to sign up for either a 12 or 24 hour shift if they choose to do so. They may also respond from home when they receive a page. When volunteers are paged from home to an incident, they are not required to respond.

14. Volunteers are eligible to be reimbursed for documented fuel expenses. They also have the opportunity to participate in a Health Savings Account should they so choose, but they are not required to do so. Beginning in 2007, volunteers were eligible to be reimbursed up to \$29.00 for a three hour training session and \$39.00 for one 12-hour shift. Testimony of Bill Schmitz.

15. By statute, volunteers are also eligible to participate in a pension system, the Volunteer Firefighters' Compensation Act (Mont. Code Ann. § 19-17-101 et. seq.). They do not pay any money into their pension in order to participate in it and the dollar amounts that they may receive from the pension are strictly circumscribed by statute. Mont. Code Ann. § 19-13-404. Also, by statute, volunteer firefighters may not be compensated for their work and may only be reimbursed for documented expenses and given an allowance that may not exceed \$300.00 per year. Mont. Code Ann. § 19-17-110.

16. At CVFD, the volunteers have their own volunteer association. The volunteer association exists to fill the needs of the volunteers that might arise that cannot be filled by the district. The volunteer firefighters have "different needs and desires" than the career firefighters. Testimony of Bill Schmitz. Most pointedly, it is evident that the volunteer firefighters do not volunteer for the purpose of being compensated for their work. Testimony of Schmitz.

17. CVFD has proposed (but at the time of hearing had not yet implemented) proposals for reimbursement and benefits that volunteers can receive if they meet training and incident response guidelines. Exhibit F. None of these reimbursements is a wage nor can they be considered to be compensation as the law prohibits such compensation.

18. The volunteer firefighters do not share a community of interest with the career firefighters and cannot, therefore, be included in the proposed unit.

19. The seasonal firefighters share a community of interest with the career firefighters and would properly be included within the proposed unit.

20. On March 27, 2013, the career firefighters met with Ricky Walsh of IAFF Local 4939 and decided they would like to join a union. With the exception of one firefighter, all the career firefighters indicated an interest in joining IAFF.

IV. DISCUSSION³

In this matter, the union contends that the appropriate bargaining unit is the full time career firefighters along with seasonal firefighters who may be hired. The employer does not object to the career firefighters being in the bargaining unit. Their concern focuses on the seasonal firefighters. The employer contends that if the seasonal firefighters are to be included within the proposed unit, then volunteer firefighters must also be included in the unit because the fire department “draws no distinction among the work performed by the different classes of firefighters utilized in its operations.” Employer’s closing brief, page 3. It argues in the alternative that if the bargaining unit “is not based on community of interest in relation to work performed” (*id.*), then seasonal and volunteers should be excluded from the bargaining unit.

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. Factors that may be considered in determining whether a bargaining unit is appropriate include such factors as community of interest, wage, hours, fringe benefits, and other working conditions of the employees involved, the history of collective bargaining, common supervision, common personnel policies, extent of integration of work functions, and the desires of the employees. Mont. Code Ann. § 39-31-202(1); Admin. R. Mont. 24.26.611. An “appropriate unit” is defined as a group of public employees banded together for

³Statements 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.

collective bargaining purposes as designated by the board. Mont. Code Ann. § 39-31-103(1).

A. *The Volunteers Cannot Be Part of the Proposed Unit.*

Turning first to CVFD's contention that volunteers must be included in the unit, it appears to the hearing officer that the respondent is operating under two faulty premises in making its argument. The first faulty premise is the notion that volunteer firefighters can be considered to be public employees under the public employees' collective bargaining statutes. The second faulty premise is the respondent's implicit argument that all firefighters at CVFD who have a community of interest must necessarily be included in any unit found to be appropriate as a result of this unit determination. Each argument is incorrect.

First, the public employees' collective bargaining statutes apply only to public *employees*. This tribunal is required to give the words of a statute their ordinary meaning and to construe them in a commonsense manner. *Montana Vending, Inc., v. Coca Cola Bottling Co.*, 2003 MT 282, 318 Mont. 1, 78 P.3d 499. In focusing on the argument that the definition of "public employee" contained in Title 39, Chapter 31 does not exclude volunteers, the respondent misses the fact that the statute uses the term "employee." A public employee is "a person *employed* by a public employer in any capacity." Mont. Code Ann. § 39-31-103(9). Black's Law Dictionary defines "employed" as "performing work under an employer-employee relationship." It defines "employee" as "a person in the service of another *under any contract for hire*, express or implied, oral or written" *Id.* at p. 525 (emphasis added). It also defines the noun "hire" as "compensation for the use of a thing, or for labor or services." *Id.* at p. 729. By using the term "employee," the plain language of the statute excludes volunteers.

Moreover, while the public employees' collective bargaining act does not define "employee," other parts of Title 39 which relate to labor define an employee as one who works for hire. *See, e.g.*, Mont. Code Ann. § 39-3-201(4) (the term "employee" means any person who works for another for hire). Indeed, in the workers' compensation statutes (Title 39-71-101 et. seq.), the legislature took care to specifically include volunteer firefighters within the definition of "employee" when it wanted them to be considered employees almost certainly because the term is not generally understood to include volunteers. Had the legislature intended that the term "employee" within the public employees' collective bargaining act include volunteers, it would have specifically included volunteers within the definition as it did in the workers' compensation statutes. It did not, and given the well understood

meaning of the term to apply to persons who work for another for hire, the hearing officer will not read the term “employee” to include volunteers for purposes of the public employees’ collective bargaining statute.

Construing volunteer firefighters to not be protected by the public employees’ collective bargaining act is consonant with cases construing the reach of the term “employee” under the National Labor Relations Act (NLRA). Under the NLRA, similar to Montana’s public employees’ collective bargaining act, an “employee” is defined to include any employee unless the NLRA explicitly states otherwise. 29 USC §152(3). The definition uses the term “employee” but does not otherwise state that the term pertains only to one who is engaged under a contract for hire. Nonetheless, under 29 USC §152(3), volunteers are not considered to be employees. *WBAI Pacifica Foundation*, 328 N.L.R.B. 1273 (1999). *See also, The Developing Labor Law*, Ch. 27.III.C.1, p. 2381 (6th Ed. 2012). In the *WBAI* case, the NLRB held that volunteers could not be appropriately included in a bargaining unit because they were not employees within the meaning of the 29 USC §152(3) as there was no “economic aspect to their relationship with the employer, either actual or anticipated.” *Id.* at 1275. The volunteers in that case were not paid but did receive reimbursement for traveling expenses and child care expenses.

CVFD has cited no case law that supports the notion that a volunteer firefighter should be considered to be an “employee” for purposes of the public employees’ collective bargaining statute.⁴ Like the volunteers in *WBAI*, the volunteer firefighters here have no economic relationship with CVFD that would implicate the need to provide the volunteers with any of the protections that underlie the public employees’ collective bargaining act. The amount of their pension is set by statute and cannot be affected by bargaining. They cannot be compensated and can only be reimbursed for expenses that are documented.

Implicit support for the notion that volunteers are not employees within the meaning of the statute is also found in the fact that the Board has previously certified as appropriate a bargaining unit that excluded volunteer firefighters. *See, e.g., Unit*

⁴ CVFD’s reliance on the determination in *Matter of Unit Determination No. 4-2011*, No. 1020-2011 (July 27, 2011) is misplaced. In that case, the hearing officer noted in Paragraph 13 of his findings of fact that the graduate students were paid wages. In Paragraph 14, he specifically noted that “[i]n every common meaning of the term, GTAs and GRAs at MSU are *employees* of the university when they are performing their GA duties.” *Id.* at p. 4 (emphasis added). The graduate students were employees, not volunteers, making the holding in *Unit Determination No. 4-2011* inapposite to the case before this tribunal.

Determination No. 6-2009 (certifying IAFF Local 4732 as the exclusive bargaining representative for full-time uniformed personnel at the Gallatin County Rural Fire District but excluding volunteers from the unit). The volunteer firefighters cannot form a part of any collective bargaining unit at CVFD.

The respondent's second premise that all firefighters at CVFD who have a community of interest must necessarily be included in any unit that is formed is not the law in Montana. A unit may consist of all of the employees of the employer or any department, division, bureau, section, or combination thereof if found appropriate by the Board. Admin. R. Mont. 24.26.610. The fact that an appropriate unit can be defined by work performed does not mean that in every instance it must be so defined. The Board of Personnel Appeals has long recognized that the issue in a unit determination is not to determine the most comprehensive unit, but only whether the unit sought to be formed is an appropriate unit. *United Assoc. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry v. Montana Dept. of Commerce*, UD No. 10-2000. In that case, the hearing officer noted:

In determining an appropriate bargaining unit . . . the Board seeks to fulfill the objectives of ensuring employee self determination, promoting freedom of choice in collective bargaining, and advancing industrial peace and stability. Under the Act, our task is to determine not the most appropriate or comprehensive unit, but simply an appropriate unit. In doing so, we first look to the unit sought by the petitioner. ***If it is appropriate, our inquiry ends.***

Id., page 9, quoting *Dezcon, Inc.*, 295 NLRB 109, 111 (1989) (emphasis added).

The rationale behind this principle is straight forward. Integral to ensuring bargaining parity, and ultimately, labor tranquility, is employee self determination. Requiring that employees form the most comprehensive unit would hinder employees' freedom of choice. Hence, the Board recognizes that it need go no further than to determine whether the unit *sought* is appropriate. If it is, the Board may approve it.

Here, the fact of the matter is that the volunteers are not employees. Regardless of the fact that volunteers do the same work as career firefighters, they cannot be considered as employees for purposes of the act. The union has recognized as much and has chosen not to attempt to include the volunteers in the bargaining unit. The volunteer and career firefighters are separate groups and to require the union to include the volunteers within the proposed bargaining unit would seem to

undermine the self determination aspect of bargaining that is so critical to creating bargaining parity in the workplace.

Even if the hearing officer were to ignore the plain language of the public employees' collective bargaining act statute and proceed to ascertain community of interest between the volunteers and the career firefighters, the bargaining unit urged by CVFD could not be found to be appropriate. In asserting that the union must also include the volunteers in the unit, CVFD bears the burden of proof to show that the volunteers and career firefighters share an overwhelming community of interest. *The Developing Labor Law*, Ch. 11.II.A, p. 693 (6th Ed. 2012) (where one party contends that the smallest appropriate unit must include additional employees beyond those in the petitioned-for unit, that party must demonstrate that the excluded employees share an overwhelming community of interest). For several reasons, no overwhelming community of interest can be shown here. First and foremost among these reasons are the facts that the volunteer firefighters are not paid a wage and they do not work under any contract for hire. In addition, they are not required to respond to incidents. Neither are they required to undertake shift work. They have their own association and, also importantly, the volunteers have not expressed a desire to be in the proposed unit. In fact, to the contrary, the fact that they have their own association coupled with Schmitz's testimony that the volunteers have different needs and desires than the career firefighters supports a strong inference that the volunteers have no desire to belong to the proposed unit. These differences preclude a finding of an overwhelming community of interest between the two groups. The appropriate bargaining unit in this determination need not and cannot include the volunteer firefighters.

B. The Seasonal Firefighters Can Be Included In the Unit.

What remains to be considered, then, is the question of whether a bargaining unit containing both seasonal firefighters and career firefighters is appropriate. The union contends that because the seasonal and career firefighters do the same work, work together on incidents, have the same training qualifications, are scheduled in the same way and both work full time, and are both paid hourly, they share sufficient statutory attributes such that inclusion of the seasonal firefighters in the unit is appropriate. The employer contends that the differences between the seasonal firefighters and career firefighters - specifically, the fact that they are seasonal, have no guarantee of continued employment from season to season, and do not get benefits - militates against including the seasonal firefighters in the unit.

The Board of Personnel Appeals has followed the NLRB's practice of including seasonal employees "only if they share a sufficient community of interest with the regular employees or if they have a reasonable expectation of re-employment from year to year." *Laborer's International Union of North America, Local 3254 v. City of Helena*, Unit Determination #2-80, p. 7 (June 19, 1980), citing *NLRB v. Belcher Towing*, 284 F.2d 118 (5th Cir. 1960), *NLRB v. George Groh & Sons*, 329 F.2d 265 (10th Cir. 1964) and *Baumer Foods*, 190 N.L.R.B. 690 (1971). The Board has also held that in determining whether seasonal employees share a community of interest with full time employees, "each position and its regularity and frequency of utilization in the work force by the employer must be considered . . ." *MFT, AFT, AFL-CIO v. Flathead Valley Community College*, Unit Determination 4-85, p. 26 (August 22, 1985).

Applying the statutory factors, there are several that weigh in favor of finding a sufficient community of interest to justify including the seasonal firefighters in the proposed unit. Not the least of these are the facts that the seasonal workers are paid an hourly wage like their career counterparts and they are full time employees, being scheduled 56 hours per week and in shifts just like their career counterparts. They are also supervised by captains in the same fashion as their career counterparts. While working, they are fully integrated with the career firefighters, doing the same work and interacting together in responding to fire calls or emergency medical calls. Moreover, while no particular individual is guaranteed continued employment from season to season, CVFD has a regular and recurring practice of hiring seasonal firefighters. CVFD makes efforts to hire persons into the career ranks from the seasonal ranks, although it does not always do so.

As CVFD points out, however, there are clearly some statutory factors that do not exist here. Most notably, there is no guarantee that a person in the position of seasonal firefighter will have the position from one season to the next. Likewise, seasonal employees do not receive any benefits.

On balance, the hearing officer finds that sufficient community of interest exists in this case to find that the seasonal positions should be included in the bargaining unit. There is no question that they are fully integrated while working. They share the same supervisors and they are scheduled in the same manner as their career counterparts. They are both paid hourly wages. While there is no guarantee that a seasonal employee will be hired back in subsequent years, it is clearly the

employer's desire to attempt to hire career firefighters from the ranks of the seasonal firefighters.⁵

The hearing officer's decision in the *Matter of Unit Determination No. 4-2011*, No. 1020-2011 (July 27, 2011), while inapposite to the question of the volunteer firefighters, is nevertheless quite instructive in ascertaining the community of interest with respect to the seasonal firefighters. In that case, the persons in the graduate student assistant positions were not permanent employees, although the positions were permanent. Notwithstanding that fact, the hearing officer found that the graduate assistants were properly part of the bargaining unit. Here, like the graduate assistants, while an incumbent in any given position may not be there from one year to the next, there is no question that CVFD relies on the seasonal firefighters to fulfill its responsibilities for community fire protection and that CVFD has in the past and will continue in the future to hire seasonal firefighters. This factor, taken in conjunction with the other wise strong alignment of community of interest factors described above, weighs in favor of finding that the seasonal and career personnel should be included in the proposed unit.

Finally, the hearing officer notes that it appears to him that CVFD has attempted to persuade the hearing officer that he faces a dilemma in that he must find either that the seasonal and volunteer positions are both in the proposed unit or they are both out. While counsel has ably argued CVFD's position, the hearing officer believes CVFD has created a false dilemma. Determining whether the volunteer and seasonal firefighters should be included in the proposed unit is not an "all or nothing" proposition. As stated above, the volunteers do not have the requisite economic relationship with CVFD that the seasonal firefighters do. Because of this, it is wholly consistent to hold that the protections of the public employees' collective bargaining act do not apply to the volunteers and they do not share a community of interest with the career firefighters while at the same time finding that the seasonal firefighters have a sufficient community of interest that permits them to be included in the proposed unit.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this matter pursuant to Mont. Code Ann. § 39-31-207.

⁵ The rationale for favoring hiring from among seasonal and volunteer firefighters undoubtedly stems from the efficacy in hiring persons into the career ranks from applicants who have already undergone the extensive training necessary to become and remain a career firefighter.

2. The positions of career firefighter and seasonal firefighter have a community of interest under Mont. Code Ann. § 39-31-202 that makes it appropriate to include them within the same bargaining unit as proposed by IAFF.

3. Volunteer firefighters cannot be included in the unit because they are not “public employees” within the meaning of that term under the Montana Public Employees Collective Bargaining Act and, in any event, they do not share an overwhelming community of interest with the career and seasonal firefighters.

VI. RECOMMENDED ORDER

Based on the foregoing, it is recommended that 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. The bargaining unit shall consist of career and seasonal firefighters. The positions of Fire Chief, Deputy Chief, Assistant Chief, Fire Marshall, Secretary, District Clerk, part time firefighter, and volunteer firefighter are excluded from the proposed bargaining unit.

DATED this 11th day of February, 2014.

BOARD OF PERSONNEL APPEALS

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer

NOTICE: Pursuant to Admin. R. Mont. 24.26.222, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than March 6, 2014. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.222, 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 201503
Helena, MT 59620-1503