

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

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

CITY OF BOZEMAN,	)	Case No. 1821-2013
	)	
Petitioner,	)	
	)	<b>FINDINGS OF FACT;</b>
vs.	)	<b>CONCLUSIONS OF LAW;</b>
	)	<b>AND RECOMMENDED ORDER</b>
INTERNATIONAL ASSOCIATION	)	
OF FIRE FIGHTERS, LOCAL 613,	)	
	)	
Respondent.	)	

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**I. INTRODUCTION**

On June 6, 2013, the City of Bozeman petitioned the Board of Personnel Appeals to undertake a unit clarification, asking that the three newly created positions of battalion chief be excluded from the Bozeman Fire Fighters bargaining unit, International Association of Fire Fighters, Local 613. The City made this request because it perceived these positions to be either supervisory, management, or confidential positions that could not properly be included in the bargaining unit. The bargaining unit responded and opposed the request for clarification, arguing that the positions were not management or supervisory and in any event, even if they were, the unit's composition of both supervisory and non-supervisory personnel was protected under the grandfather clause of the Montana Public Employees Collective Bargaining Act because the unit existed before July 1, 1973, the effective date of the Act.

On February 13 and March 5, 2014, Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter in Bozeman, Montana. Jason Ritchie and Michelle Sullivan, attorneys at law, represented the City. Karl Englund, attorney at law, represented the Bozeman Fire Fighters. The City's Exhibits 1 through 7 and Bozeman Fire Fighters Exhibits A through F were admitted at hearing. Assistant City Manager Chuck Winn, Chief Jason Shrauger, Deputy Chief Greg Megaard, Battalion Chief Mark Criner, Battalion Chief Keith Johnson, Battalion Chief John Bos, Captain

Matt Norby, and Fire Fighter Nate Bashkirew all testified under oath. The parties graciously provided the hearing officer with post-hearing briefs which were timely received on April 7, 2014. Based on the evidence adduced at hearing and the argument provided in the post-hearing briefing, the hearing officer makes the following findings of fact, conclusions of law and recommended order.

## II. ISSUE

Should the newly created positions of battalion chief be in the bargaining unit?

## III. FINDINGS OF FACT

1. Bozeman and its fire fighters have been parties to a series of collective bargaining agreements, the latest of which is effective from July 1, 2013 through June 30, 2015. Union Exhibit A.

2. Prior to 2003, the written collective bargaining agreements excluded the positions of “chief” and “deputy chiefs.” In July 2001, Bozeman consolidated the police and fire departments into a single public safety department and renamed the management positions within the former fire department. In negotiations in 2003, Bozeman and Local 613 agreed to change the recognition clause to reflect the change in management’s job titles. The chief and deputy chief position became known as “Assistant Director of Public Safety/Fire Operations and EMS Services” and the deputy chief became “Assistant Director of Public Safety/Inspections.” Union Exhibit A, Article II.

3. In 2005, Bozeman abandoned the public safety department experiment, reverted to separate police and fire departments, and went back to using the titles of fire chief and deputy chiefs. In subsequent negotiations, Local 613 proposed changing the management job titles back to chief and deputy chiefs, but the City’s negotiators have never agreed to do so.

4. Currently there is one chief and two deputy chiefs - one deputy chief in charge of operations and the other in charge of inspections - who are management and not in the bargaining unit.

5. The first written collective bargaining agreement between Bozeman and its fire fighters was in 1976, and, as stated, the bargaining unit consisted of all fire fighters below the rank of deputy chief. An organization of Bozeman Fire Fighters

has existed since 1939 when the Bozeman Fire Fighters affiliated with the International Association of Fire Fighters (IAFF). Union Exhibit B. The local organization has existed continuously since 1939 and has consistently been known as the Bozeman Fire Fighters, but it has not consistently been affiliated with the IAFF. It last affiliated with the IAFF in 1999 and has remained affiliated since then.

6. Union archives indicate that as early as the 1950's, the Bozeman Fire Fighters gathered information concerning wages paid to fire fighters in other Montana cities for the purpose of bargaining with the City. As early as 1968, the Bozeman Fire Fighters actively engaged in collective bargaining with the City and the parties arrived at an unwritten agreement concerning wages for all fire fighters below the rank of chief. Union Exhibits C, D, E, and F. Union records indicate that between 1968 and the first written agreement in 1976, the Bozeman Fire Fighters engaged in bargaining with the City.

7. The fire fighter bargaining unit and the City have a long-standing, productive working relationship. There have been few formal grievances filed by the unit. At hearing, Assistant City Manager Winn, who was hired as a fire fighter with Bozeman in 1984 and remained on the department until his appointment as assistant city manager, could only remember two grievances during his entire time of employment with Bozeman, a span of almost 30 years.

8. Bozeman and its fire fighters have successfully negotiated a series of collective bargaining agreements, both written and oral, without strikes or interest arbitration.

9. The fire department has three fire stations; each staffed 24 hours per day, 365 days per year. Fire fighters are organized into three "shifts," each shift consisting of two engine companies and one ladder company (one company at each station every day). A company consists of a captain, an engineer (fire fighter/equipment operator), and two fire fighters. Bozeman's fire department employs nine captains, nine engineers, and 18 fire fighters, all of whom are in the bargaining unit. The department also has a training officer, a disaster and emergency services staff captain, and a building/life safety specialist who are not assigned to one of the three shifts but who are in the bargaining unit.

10. Combat fire fighters (captains, engineers, and fire fighters) work a schedule of 48 hours on duty followed by 96 hours off duty. They are assigned to their shifts and to their companies on a long-term basis. In other words, the captains work with the same engineers and fire fighters on a consistent basis. On any given

work day, when companies are short-staffed due to Kelly days, comp days off, vacation, injury or illness, employees are temporarily reassigned by the captains from one company to another to equalize the number and qualifications of employees assigned to each company. Additionally, an unstated number of employees were reassigned from one company to another as a result of the movement within the department when the three battalion chiefs were promoted from captain, two fire fighters and an engineer were promoted to captain, and three new fire fighters were hired to fill three vacancies. Otherwise, employees are not reassigned or transferred or moved from one shift or one company to another as a matter of course or as a disciplinary measure.

11. The City created the position of battalion chief (on paper) in 2007 after the passage of a mill levy that funded the construction of a third fire station (and the positions necessary to staff that station) and what the City perceived as the resultant need for better coordination among the nine companies and the need for 24/7 “command coverage.”

12. Battalion chiefs work 48 hours on duty followed by 96 hours off duty and they too are assigned to their shift on a long-term basis so that they work consistently with the same three captains and companies. Battalion chiefs coordinate the work of their shift, ensure effective communication among the three companies, and ensure that all the companies follow department policies and procedures.

13. Battalion chiefs have the authority to assume command on all calls and are required to respond to calls on Interstate 90, cardiac calls, and calls involving two or more companies. On structure fires, of which there are no more than five per year, battalion chiefs generally assume command, determine fire fighting tactics, and direct the captains to perform the tasks necessary to accomplish those tactics.

14. Battalion chiefs will evaluate the captains (although those evaluations have not yet been done). They review timesheets submitted by the employees on their shift and incident reports for incidents occurring on their shift for completeness and accuracy. Battalion chiefs monitor the work of various committees (which are made up of fire fighters and chaired by captains). Battalion chiefs are the highest ranking officer on shift when the chief and deputy chiefs are not on duty or in town. The battalion chiefs testified that they have been informed that they have the unilateral authority to issue verbal or written reprimands, although none of them have done so.

15. Battalion chiefs participate in weekly and monthly department management team meetings.

16. The City of Bozeman for FY 2014 had a total budget of \$75,200,000.00. Of that, \$26,800,000.00 represents money from the general fund. The Fire Department's budget for FY 2014 was \$4,900,000.00. Battalion chiefs are each issued a credit card with a \$1,000.00 total spending limit.

17. There is no evidence that battalion chiefs have the authority to hire, suspend, lay off, recall, promote, discharge, or reward other employees. There are no actual examples of battalion chiefs hiring, suspending, laying off, recalling, promoting, discharging, or rewarding other employees. There are no examples of a battalion chief issuing a verbal or written reprimand.

18. On one occasion, Battalion Chief Bos told a fire fighter who he believed was rude to a trainer to stop the rude behavior, but there is no evidence that this incident resulted in a verbal or written reprimand. There was no testimony at all about the impact of a verbal or written warning on an employee's job status.

19. There was testimony that Battalion Chief Johnson was involved in the process by which the deputy chief of operations transferred or reassigned some personnel from one shift or from one company to another when vacancies were created and filled as a result of the promotions of captains to battalion chief and fire fighters to captains and the hiring of new fire fighters. According to Battalion Chief Johnson, those reassignments were based on equalizing qualifications (i.e. paramedics, engineers, and probationary fire fighters) across the companies (i.e. to insure that there was one engineer assigned to each company and that paramedics and probationary employees were placed evenly across the shifts and companies) and, in the end, the reassignments were done by "drawing names from a hat."

20. There are no actual examples of battalion chiefs having any access to confidential labor relations information in the normal course of employment. Assistant City Manager Winn testified that if he is the lead negotiator for the City the next time the parties negotiate, he intends to have the battalion chiefs "at the table." At this point, however, neither the decision to have Winn serve as the lead negotiator nor the decision to have battalion chiefs at the bargaining table have been made. To date, there are no examples of battalion chiefs participating in any manner as a City representative or as part of the City's bargaining team in negotiations with Local 613.

21. When the City created the three battalion chief positions, the union, which supported the creation of the positions, took a vote on whether or not to retain the three positions in the bargaining unit. Of the 38 members in the unit, 30 voted in favor of keeping the three battalion chief positions in the unit, one member indicated he was neutral on the idea, and the remaining seven members did not respond. No member voted in favor of removing the three positions from the unit.

#### IV. DISCUSSION<sup>1</sup>

The parties have ably argued the two central issues in this matter, the question of whether the grandfather statute contained in Mont. Code Ann. § 39-1-109 applies to this unit clarification and, if it does not, whether the newly created positions of battalion chief are exempt either as supervisory or confidential employees or as management personnel. As explained below, the hearing officer finds that the grandfather statute applies to this case because the bargaining unit of the Bozeman Fire Fighters, which includes all personnel in the fire department below the rank of chief and assistant chief, predates the effective date of the grandfather clause. Furthermore, because there is no actual substantial conflict in keeping all positions below the rank of fire chief or deputy fire chief in the bargaining unit, there is no basis for granting the City's request in this unit clarification. As the hearing officer has resolved the case on this basis, there is no need to analyze the second issue of whether in fact the three positions are supervisory or confidential employees or management personnel since the historical makeup of the unit does not preclude the inclusion of such employees.<sup>2</sup>

This discussion must start with a recognition of the core principle of Montana's Collective Bargaining for Public Employees Act: to "encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees." Mont. Code Ann.

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<sup>1</sup>Statements 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.

<sup>2</sup>Given the hearing officer's resolution of this case on the finding that the positions are part of a unit that has grandfathered status under the Act, the hearing officer does not need to reach the legal conclusion of whether the three positions are in fact supervisory, managerial, or confidential employees. He does note, however, that he tends to agree with the fire fighters union that the facts do not support a finding of having supervisory, managerial, or confidential employee status as there are not sufficient concrete examples of utilizing the supervisory or management power on a regular, recurring basis nor do the positions act in confidential capacities in the ordinary course of their duties.

§ 39-31-101. In furtherance of this principle, 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.

Supervisory and confidential employees and management officials do not have the rights guaranteed by Montana Code Annotated § 39-31-201 and, with one arcane exception, cannot be included in a unit for collective bargaining purposes. Mont. Code Ann. § 39-31-103(9)(b)(ii), (iii) and (iv). The longevity of the Bozeman Fire Fighter's collective bargaining unit brings that exception to the forefront of this case.

The Public Employees Collective Bargaining Act contains a grandfather clause which recognizes all bargaining agreements and bargaining units that were in existence prior to July 1, 1973. Mont. Code Ann. § 39-31-109. Under a test developed by the Board of Personnel Appeals (BOPA) and approved by the Montana Supreme Court, bargaining units in existence prior to July 1, 1973 that contain excluded positions are considered appropriate unless the inclusion of the positions creates an actual substantial conflict which results in compromising the interest of a party to the agreement to its detriment. *City of Billings v. Billings Firefighters Local 521* (1982), 200 Mont. 421, 426, 651 P.2d 627, 630 (Weber, J., dissenting). In approving BOPA's test, the supreme court reasoned that the test:

is a rational, considered effort by the B[O]PA to assure an effective bargaining unit. The test considers the policy of the act, i.e., to remove strife and unrest from bargaining units, as well as some of the factors set forth in section 39-31-202, MCA, for determining unit composition—the “history of collective bargaining” and the “desires of the employees.” The result accomplished preserves the public policy underlying the act. We find the Board's approach to be a rational one for determining bargaining unit memberships.

Id at 432, 651 P.2d at 633. The supreme court has never overruled this holding, nor has the hearing officer found or been directed to any BOPA decision that changed the test approved in *City of Billings*. The hearing officer is constrained to follow BOPA's directives on the issue.

The evidence adduced at hearing in this matter leads to the inescapable conclusion that the Bozeman Fire Fighters have been a continuous cohesive

bargaining unit since at least 1968 when they first engaged in collective bargaining and reached agreement with the City on wages and benefits for fire fighters below the rank of chief. See, e.g., Exhibit C (May 13, 1968 letter from Daniel Figgins, president, Bozeman Fire Fighters, to Fire Chief Jack Huber requesting salary and leave benefit increases for the fire fighters), Exhibit D (Collective bargaining brief of the Bozeman Fire Fighters to the Mayor and members of the Bozeman City Council seeking increased wages and benefits), Exhibit E (minutes of the Bozeman City Commission from July 2, 1968, discussing Figgins's appearance before the city council on behalf of the Bozeman Fire Fighters and his May 13, 1968 letter seeking salary and leave benefit increases on their behalf), and Exhibit F (July 25, 1968 meeting minutes of the Bozeman City Commission indicating the City's counterproposal to the May 13, 1968 salary request and the Bozeman Fire Fighters' acceptance of that counter proposal). As such, the Bozeman Fire Fighters were a bargaining unit and were party to a valid enforceable collective bargaining with the City prior to July 1, 1973. The considerations of the grandfather clause contained in Mont. Code Ann. § 39-31-109 are in play in this unit clarification.

The City, relying on the Montana Supreme Court's decision in *Unit Clarification 6-80 v. Dept. Of Admin, Labor Relations Bureau* (1985), 217 Mont. 230, 703 P.2d 862, has argued that the grandfather statute has no application to this matter because the Bozeman Fire Fighters were at one time affiliated with, then unaffiliated with, and then again in 1999 reaffiliated with the IAFF. For the reasons pointed out by the union in its post-hearing brief, the hearing officer agrees that Unit Clarification 6-80 is distinguishable. In that case, a bargaining unit of prison guards at the Montana State Prison had formed a bargaining unit and had affiliated with the American Federation of State County and Municipal Employees prior to July 1, 1973. In 1979, the pre-1973 representative was decertified and replaced by the Montana Public Employees Association (MPEA). *Id.* at 231, 703 P.2d at 863. The court held that the grandfather clause did not apply where there was such a change of exclusive representatives in a grandfathered agreement and bargaining unit. *Id.* at 233, 703 P.2d at 864. The court then held that "such a change" meant an election and certification of a new exclusive representative. *Id.* at 233, 703 P.2d at 864<sup>3</sup>.

In the case before this tribunal, there has been no such change. There has been no post July 1, 1973 election for a new bargaining representative and there has been

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<sup>3</sup>BOPA's decision in Unit Clarification 6-80 states in no uncertain terms that "[t]he grandfather clause was and is used to protect contracts and bargaining units in existence in 1973 (the date of the act)." Emphasis added. In the Matter of Unit Clarification #6-80, page 1.

no change in the bargaining representative. The bargaining unit's affiliation or lack of affiliation with the international, IAFF, has not changed the essential nature nor the continued existence of the Bozeman Fire Fighters bargaining unit. Admin. R. Mont. 24.26.650. Certainly since 1968 (and most likely since 1939) the unit has continuously been in existence as and comprised of all fire fighting personnel except the chief and deputy chief. Unit Clarification 6-80, therefore, is inapposite.

Because the Bozeman Fire Fighters bargaining unit predates the act, the question becomes one of whether the continued inclusion of all positions below the rank of chief and deputy chief, even though some of those positions wield supervisory or managerial power, creates an actual substantial conflict such that it is appropriate to wrest those positions out of the unit. In *City of Billings*, the hearing officer at the administrative hearing found that the line battalion chiefs were supervisory but the hearing officer permitted those positions to remain in the unit because she found that doing so created no actual substantial conflict in the unit. In reaching this conclusion, the hearing officer relied on certain factors, including:

1. That the local had never gone on strike;
2. The testimony of the fire chief that in his twenty-six years on the department, very few formal grievances had been filed;
3. Testimony that only one grievance had gone to arbitration;
4. Testimony of the fire marshal that his membership in the unit had never caused problems at staff meetings with the fire chief;
5. Testimony of the fire chief, battalion chiefs and captains that the structure of the bargaining unit had never interfered with the efficient operation of the Department; and
6. Testimony of a captain that his membership in the unit had never interfered with the exercise of his authority.

Id at 427-28, 651 P.2d at 630.

In assessing these factors, it is important to keep in mind that theoretical conflict that could arise from retaining the otherwise supervisory positions in the unit does not mean that a finding of actual substantial conflict must ensue. In *City of Billings*, the **supreme court** specifically rejected the district court's finding that the presence of supervisory or management officials in the bargaining unit was "inherently conflicting." Id at 432, 651 P.2d at 633. Rather, the court found that "[t]estimony that Local #521, a bargaining unit consisting of fire fighters as well as supervisors, has had a relatively peaceful existence since 1968 indicates the lack of any inherent conflict." Id.

Turning, then, to the factors articulated in *City of Billings*, the similarities between that case and the one before this tribunal are striking. Assistant City Manager Winn could only recall two grievances in 30 years. The unit and City have repeatedly entered into bargaining agreements since before 1968 with the same structure of the chief and deputy chief being excluded and fire fighting personnel below those ranks being included in the unit. There have been no strikes or any interest-based arbitrations and there is no history to suggest that keeping the battalion chiefs, who work side-by-side with captains and fire fighters, in the unit will create problems at the bargaining table or in the day to day or long term operations of the fire department. No testimony was presented to show that battalion chiefs have access to confidential labor relations in the ordinary course of their employment. It is patently obvious that the bargaining unit and the City have had a very good working relationship for many decades. While it may be Assistant City Manager Winn's plan to include the battalion chief positions at the table with management for the next collective bargaining agreement, that decision has not yet been made. As of the date of hearing, there are no examples of battalion chiefs participating in any manner as a City representative or as part of the City's bargaining team in negotiations with Local 613.

Moreover, as demonstrated through the findings of fact, the battalion chiefs do not wield sufficient supervisory, management, or confidential personnel attributes at this point in time that actual substantial conflict will necessarily exist if those positions are left in the unit. The incumbents in these newly created positions have worked hand-in-hand with the bargaining unit for years with no discernable labor strife and it appears that they will be able to continue to do so if the three positions are left in the unit. Wresting these three positions out of the unit without some discernable indication of the actual substantial conflict which BOPA requires will, by fiat, introduce the strife that the parties have heretofore avoided. Under BOPA'S existing test, the facts do not demonstrate that an actual substantial conflict that has or will enure to the detriment of either party exists in this matter such that the battalion chiefs must be removed from the unit.

## **V. CONCLUSIONS OF LAW**

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

2. The collective bargaining unit of the Bozeman Fire Fighters has been in existence since 1939 and predates the effective date of the Montana Public

Employee's Collective Bargaining Act. The grandfather clause contained in Mont. Code Ann. § 39-31-109 applies to this case.

3. Keeping all positions except the chief and deputy in chief in the bargaining unit is consistent with the party's historical practices and has not created an actual substantial conflict between management and the bargaining unit. Therefore, there is no basis to remove the positions from the unit, even if they are found to wield supervisory or management authority.

## VI. RECOMMENDED ORDER

Based on the foregoing, the hearing officer recommends that the Board of Personnel Appeals enter its order denying the City's request for unit clarification.

DATED this 6th day of June, 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 June 30, 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