

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION:

TEAMSTERS UNION LOCAL #2,	)	Case No. 760-2023
	)	
Petitioner,	)	
	)	FINDINGS OF FACTS;
vs.	)	CONCLUSIONS OF LAW; AND
	)	RECOMMENDATION
CITY OF PLAINS,	)	
	)	
Respondent.	)	

* * * * *

I. BACKGROUND

The Teamsters Union Local Number 2, International Brotherhood of Teamsters (Teamsters) filed a petition for unit determination pursuant to ARM 24.26.1012 on February 15, 2023. The petition sought to form a proposed bargaining unit made up of the two full-time police officers for the City of Plains (Plains). A counter petition was filed by Plains on February 23, 2023, proposing to include all the other employees of Plains in the proposed bargaining unit, which included over 20 people in various positions. The positions listed included the reserve police officers (Reserve Officers). The matter was transferred to the Office of Administrative Hearings on March 13, 2023, pursuant to Mont. Code Ann. § 39-31-207, and Admin. R. Mont. 24.26.1008, 24.26.1016. Upon a scheduling conference held on March 20, 2023, the hearing was set for March 30, 2023.

At hearing, the Teamsters were represented by Jason Thompson and Jim Stone. Plains was represented by Loren Fitzpatrick. At the time of the hearing, Plains agreed it no longer asserted all the employees of Plains should be included in the proposed bargaining unit. Further, the parties agreed the volunteer unpaid Reserve Officers should not be included in the proposed bargaining unit. Finally, the parties agreed the part-time, paid Reserve Officer who does not work shifts and instead is only a firearm instructor would not be included in the proposed bargaining unit. In sum, the parties agreed the issue for hearing concerned only whether the three part-time, paid Reserve Officers should be included in the proposed unit. The hearing proceeded on this issue.

The parties stipulated to admission of Teamsters' Exhibit U-1, The Employee Definition Guide for Montana State Government. At hearing, Teamsters' Exhibit U-3, a copy of the Montana Code Annotated, Reserve Force

Coordinator, 7-32-219, was admitted with no objection. Plains' Exhibits, marked as Town's Exhibits A, B, and C, were also admitted with no objection. Teamsters withdrew proposed Exhibit U-2 and Plains withdrew proposed Town's Exhibit D.

The parties waived post-hearing briefs. The matter was deemed submitted at the close of the hearing on March 30, 2023.

II. ISSUE PRESENTED

Can the two full-time officers form a proposed bargaining unit without including the three part-time, paid Reserve Officers in that unit?

III. FINDINGS OF FACT

1. Plains' Chief of Police is Brian Josephson (Josephson). He supervises the full-time police officers and the part-time, paid Reserve Officers.

2. The Reserve Officer program is new since Josephson took over in June 2022. The Reserve Officers have only been employed for seven months out of a 12-month contract. Josephson is the Reserve Force Coordinator pursuant to Montana law. Josephson indicated it was his intention to meet with others to discuss reinstatement of the Reserve Officers' employment before their contracts ended.

3. The Reserve Officers are active officers who Josephson calls upon to fill in for his full-time officers when those officers are gone or when extra coverage is needed. The Reserve Officers take calls, draft reports, conduct traffic stops, and issue citations, among other duties. The Reserve Officers do anything a full-time officer does, with the exception of one paid Reserve Officer who was currently unable to undertake DUI processing. That paid Reserve Officer is in the process of getting his certification updated.

4. Town's Ex. A shows that one of the Reserve Officers issued more citations than another of his full-time officers in the same timeframe. Josephson does not use Reserve Officers weekly, but uses them monthly, including up to three days each month for approximate ten-hour shifts.

5. The difference in pay between the Reserve Officers and the full-time officers is less than \$2.00 per hour.

6. The Reserve Officers are subject to Plains' Employee Conduct provisions as part of their employment with the town (Town's Ex. B) and Plains' Employee Guidelines (Town's Ex. C) as part of employment with the police department. The full-time officers and the volunteer reserve officers are also subject to both sets of policies.

7. The Reserve Officers have grievance procedures available to them through the town's policies and police department's policies.

8. The Reserve Officers are held to the same standards of conduct as the full-time officers. They are sworn officers and are POST (Peace Officer's Standards and Training)-certified. Should a Reserve Officer face discipline, the same disciplinary policies apply to that Reserve Officer as would apply to a full-time officer.

9. The Reserve Officers receive different fringe benefits than the full-time officers.

IV. DISCUSSION

As part of asserting the Reserve Officers should not be included in the proposed bargaining unit, the Teamsters argue that the Reserve Officers are seasonal or temporary employees under the Employee Definition Guide for Montana State Government. They contend the Reserve Officers are only employed for a 12-month period, after which time their continued employment will be re-evaluated. The Teamsters argue they do not receive the same benefits as the full-time officers, nor do they work the same hours. The Teamsters argue the Reserve Officers' work hours of 30 hours per month on average show how they meet the definition of a temporary employee. Accordingly, the Teamsters assert the Reserve Officers should not be included in the proposed bargaining unit because being a member when their employment is sporadic presents a hardship for the union.

Plains argues that the community interest factors weigh in favor of including the Reserve Officers in the proposed bargaining unit. The community interest factors are what govern this situation, according to Plains, and not the Employee Definition Guide for Montana State Government. Plains asserts those factors show common supervision, integration of work, similar wages, and shared policies. And while the Reserve Officers' hours and fringe benefits are different, Plains asserts the factors still weigh in favor of inclusion. Moreover, Plains contends that the Reserve Officers under the Employee Definition Guide are permanent employees and not seasonal given their work hours.

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 has the authority to "decide the unit appropriate for the purpose of collective bargaining." Mont. Code Ann. § 39-31-202(1).

Courts use the National Labor Relations Board (NLRB) and federal interpretation of the National Labor Relations Act (NLRA) for guidance in interpreting Montana's Collective Bargaining for Public Employees Act (Act). *See State ex rel. Board of Personnel Appeals v. District Court*, 183 Mont. 223, 598 P.2d 1117 (1979); *State by Department of Highways v. Public Employees Craft Council*, 165 Mont. 349, 529 P.2d 785 (1974); *Local 2390 of Amer. Fed'n of State, County, Mun. Employees v. City of Billings*, 171 Mont. 20, 555 P.2d 507 (1976); *Missoula County High Sch. Dist. v. Board of Personnel Appeals*, 224 Mont. 50, 54, 727 P.2d 1327, 1330 (1986); *In re Unfair Labor Practice*, 211 Mont. 13, 17, 686 P.2d 185, 187 (1984).

A. Employment Status of Reserve Officers

The parties reference several kinds of employees, arguing that the Reserve Officers fit into different slots. The parties assert the Reserve Officers should either be included or excluded depending on which employment definition they fit into.

As defined by Montana statute, a permanent employee is an "employee who is designated by an agency as permanent, who was hired through a competitive selection process unless excepted from the competitive process by law, and who has attained or is eligible to attain permanent status." Mont. Code Ann. § 2-18-101(19). The same definition was used by the parties in referencing the Employee Definition Guide for Montana State Government, which delineates a permanent employee as "an employee designated by an agency as permanent who has attained or is eligible to attain permanent status (2-18-101, MCA)." Teamsters' U-1 at p. 1.

A seasonal employee means a "permanent employee who is designated by an agency as seasonal, who performs duties interrupted by the seasons, and who may be recalled without the loss of rights or benefits accrued during the preceding season." Mont. Code Ann. § 2-18-101(24). The Employee Definition Guide for Montana State Government delineates the same definition. Teamsters' U-1 at p. 3.

A temporary employee is one who "(a) is designated as temporary by an agency for a definite period of time not to exceed 12 months; (b) performs duties on a temporary basis; (c) is not eligible for permanent status; (d) is terminated at the end of the employment period; and (e) is not eligible to become a permanent employee without a competitive selection process." Mont. Code Ann. § 2-18-101(28); *see also Campanella v. Bd. of Pers. Appeals*, 2006 Mont. Dist. LEXIS 285, ¶ 15. The Employee Definition Guide for Montana State Government delineates the same definition. Teamsters' U-1 at p. 6.

While the Teamsters argue the Reserve Officers are temporary employees and Plains argues they are permanent employees, the statutory definitions of employment status must be read in conjunction with the statutes that govern collective bargaining for public employees. Mont. Code Ann. § 39-31-101 et seq.

Public employees may collectively bargain if they are part of an “appropriate unit” as defined by Mont. Code Ann. § 39-31-103(1). (“‘Appropriate unit’ means a group of public employees banded together for collective bargaining purposes as designated by the board.”). Critical to this matter, a public employee is defined as “a person employed by a public employer in any capacity.” Mont. Code Ann. § 39-31-103(9)(a). “Public employer” means “the state of Montana or any political subdivision thereof, including but not limited to any town, city, county, district, school board, board of regents, public and quasi-public corporation, housing authority or other authority established by law, and any representative or agent designated by the public employer to act in its interest in dealing with public employees.” Mont. Code Ann. § 39-31-103(10).

Whether the Reserve Officers are considered permanent, seasonal, or temporary employees is not determinative in this matter. The Reserve Officers cannot be excluded from the proposed bargaining unit because they meet the definition of public employee in the Collective Bargaining Act. The Reserve Officers qualify as persons “employed by a public employer in *any* capacity.” (Emphasis added). Words are to be understood in their ordinary sense and with meaning commonly given to them. *Lewis v. Petroleum County*, 92 Mont. 563, 566, 17 P.2d 60, 61 (1932). The ordinary and common use of the term “any” is that it includes “every” and “all.” See Merriam-Webster Dictionary, available at <https://www.merriam-webster.com/dictionary/any> (last accessed April 6, 2023). A statute is first interpreted by its plain language. *State v. Letasky*, 2007 MT 51, ¶ 11, 336 Mont. 178, 152 P.3d 1288; see also *City of Great Falls v. Morris*, 2006 MT 93, ¶ 19, 332 Mont. 85, 134 P.3d 692 (A statute is construed by reading and interpreting it as a whole, “without isolating specific terms from the context in which they are used by the Legislature.”); *Local 2390*, 171 Mont. at 22, 555 P.2d at 508 (adopting a broad definition of public employer). In harmonizing the collective bargaining statutes and giving effect to Mont. Code Ann. §§ 39-31-103 and -201, therefore, the Reserve Officers must be included given their public employee status, regardless of further designation as to the type of public employee. See *Yellowstone Fed. Credit Union v. Daniels*, 2008 MT 111, ¶ 18, 342 Mont. 451, 181 P.3d 595 (courts must harmonize statutes relating to the same subject, as much as possible, giving effect to each).

Moreover, even if the Reserve Officers more closely align with the definition of a temporary employee, the NLRB discusses more fully the

temporary status of employees. Under NLRB authority, the Reserve Officers would likely not be excluded from the proposed bargaining unit based on a temporary employee status.

“It is established Board policy that a temporary employee is ineligible to be included in [a] bargaining unit.” See *Phx. New Times, LLC*, 370 NLRB 84 (quoting *Pen Mar Packaging Corp.*, 261 NLRB 874 (1982)). In determining the temporary employee status, the NLRB examines whether “the employee’s tenure is finite and its end is reasonably ascertainable, either by reference to a calendar date, or the completion of a specific job or event, or the satisfaction of the condition or contingency by which the temporary employment was created.” *Marian Med. Ctr.*, 339 NLRB 127, 128 (2003). Temporary employees will be excluded from the bargaining unit where “they do not have a reasonable expectation of reemployment, such as when they are employed for a brief period of time and given no promise of permanent employment.” *Phx. New Times*, 374 NLRB 84 (2021) (fellows designated as temporary employees where they had a finite tenure of six months with a readily ascertainable end date and no guarantee of a permanent position at the end of their fellowship); *Sealite, Inc.*, 125 NLRB 619 (1959) (construction site workers and laborers designated as temporary where their employment timeframe varied and their employment ceased at the end of a particular job). Temporary employees, however, will be included in a bargaining unit where they are “drawn from the same labor force, are employed every year in substantial numbers for substantial periods of time, are composed primarily of former employees, and work with and do the same kind of work as the permanent employees.” *F. A. Bartlett Tree Expert Co.*, 137 NLRB 501 (1962).

Here, testimony established that the Reserve Officers have a 12-month contract under which they are employed, with a future intention for reinstatement of that contract at the end of the 12-month period. Consequently, unlike the fellows or the construction workers and laborers, the Reserve Officers do not have a finite tenure with a readily ascertainable ending. The Reserve Officers are able to do any work the full-time officers undertake and are called in to fill in for the full-time officers and to add coverage during special events. The Reserve Officers are thereby drawn from a pool of individuals who have the skill and abilities to be sworn, POST-certified officers. They are employed all year, again, with an intention made for reinstatement. On these facts, therefore, the Hearing Officer concludes the Reserve Officers are not temporary employees for collective bargaining purposes.

Further, while the temporary employment statute prohibits a public employer from reemploying a temporary employee after 12 months into another 12-month temporary position, the evidence in this matter does not indicate Plains intends these employees to be temporary. Rather, this is a newly established program. Budget and other factors permitting, the program will

continue and the Reserve Officers will be permanent part-time employees since the statute prohibits the continuous stringing together of 12-month temporary contracts. However, again, because the Reserve Officers meet the definition of public employee, they cannot be excluded as a matter of law because they started with an initial 12-month contract.

Given the status of the Reserve Officers as public employees, the next question to be addressed is whether the Reserve Officers may be included as part of the proposed bargaining unit with the full-time officers.

B. Community of Interest

On this issue, the same arguments of the parties set out above apply. To determine the make-up of an appropriate unit, the Act provides community interest factors to be considered. See Mont. Code Ann. § 39-31-202; *NLRB v. Great Western Produce, Inc.*, 839 F.2d 555, 557 (9th Cir. 1988) (generally the standard for determining the appropriateness of a bargaining unit is whether the employees in the unit share a community of interest). The community interest factors listed include such things as wages, hours, fringe benefits, working conditions, the history of collective bargaining, common supervision, common personnel policies, extent of integration of work and interchange among affected employees, and the desires of the employees. Administrative Rule of Montana 24.26.1005 provides further clarification of these community of interest factors. See also *Great Western Produce*, 839 F.2d at 559 (In determining whether a sufficient community interest exists among employees, the following is considered: “(1) similarity in employee skills, duties, and working conditions; (2) integration of function and personnel; (3) employees’ organizational framework; (4) employee choice; (5) extent of union organization; (6) bargaining history.”). “[T]he most reliable indicium of common interests among employees is similarity in their skills, duties and working conditions.” *NLRB v. Carson Cabe TV*, 795 F.2d 879, 885 (9th Cir. 1986).

Although the Reserve Officers may not be excluded based on whether they are defined as temporary or permanent, they may be excluded if they do not share a community of interest with the full-time officers due to the conditions of their work.

Taking these factors individually, the police officers in Plains do not have a history of collective bargaining. This factor, therefore, does not favor either excluding or including the Reserve Officers.

The Teamsters filed a petition to form a bargaining unit comprised of the full-time officers only, which would not include the Reserve Officers. Therefore, this factor weighs in favor of excluding the Reserve Officers.

The Reserve Officers do not receive the same fringe benefits as the full-time officers. This factor weighs in favor of excluding the Reserve Officers since a difference exists.

The difference in pay between the full-time officers and the Reserve Officers is less than \$2.00 per hour. It weighs in favor of including the Reserve Officers, given that the Reserve Officers undertake the same work as the full-time officers and are sworn and POST-certified.

Regarding hours, “consistent employment but one day a week may be enough to satisfy the Board’s community of interest standard.” *H. P. Hood v. NLRB*, 2002 U.S. App. LEXIS 3357, **16-17 (individual’s work that was less than one day per week did not show a sufficient community interest with the other employees, nor was the individual on the eligibility list and was listed as seasonal). Here, the Reserve Officers work, on average, three days per month or 30 hours per month or less than ten hours per week. While testimony indicated the Reserve Officers may not be called in weekly, their work is not sporadic and the Reserve Officers are maintained as an integrated part of the office to fill in for shifts and to add coverage for events. One paid reserve officer issued more citations than a full-time officer for the same timeframe. Because the Reserve Officers’ work roughly equates to one day a week, the Hearing Officer concludes the hours factor of the community interest test weighs in favor of including the Reserve Officers in the bargaining unit.

The Reserve Officers are supervised by the same individual, Josephson, and are subject to the same working conditions and personnel policies for the town and the police department as the full-time officers. That the Reserve Officers can rely on the grievance procedure in those policies, however, does not negate the common supervision and common personnel policy factors to which they are subject. Each of these factors weighs in favor of including the Reserve Officers.

Finally, the Reserve Officers are integrated into the police department by being available to fill in shifts and add coverage during certain events. They have similar skills as the full-time officers and similar duties. The only difference in duties included the fact one paid reserve officer had a certification lapse, but he was in the process of getting that updated. The integration factor, therefore, weighs in favor of including the Reserve Officers.

Considering all the community interest factors together, the Hearing Officer concludes that the part-time, paid Reserve Officers share a community of interest with the full-time police officers. Therefore, the Reserve Officers must be included in the proposed bargaining unit.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction in this matter pursuant to Mont. Code Ann. § 39-31-207.
2. The parties hereto are both subject to Title 39, Chapter 31 of the Montana Code Annotated.
3. The Reserve Officers are public employees and, as such, cannot be excluded from the proposed bargaining unit based on which definition of public employee they meet.
4. The full-time officers and the part-time paid Reserve Officers share a community of interest.

VI. RECOMMENDED ORDER

1. The Hearing Officer recommends inclusion of the three part-time, paid Reserve Officers in the proposed bargaining unit with the two full-time officers.
2. Plains changed its position from its initial counter petition regarding which employees should be included in the proposed bargaining unit. There was no evidence presented in this matter regarding whether any of the three Reserve Officers wished to join the petition to form a bargaining unit. Therefore, the Hearing Officer recommends the Board remand this matter for a determination of whether any of the three Reserve Officers wish to join the petition to form a bargaining unit. Any communication from Plains to the Reserve Officers regarding its position on this matter is not advised in order to hold an election properly.

DATED this 7th day of April, 2023.

BOARD OF PERSONNEL APPEALS



By: _____
JOSLYN HUNT
Hearing Officer

Pursuant to ARM 24.26.1016(4)(a) "If a party disputes the recommended order of the hearing officer, the party may file exceptions pursuant to ARM 24.26.254 within ten days of service of the hearing officer's recommended order." Therefore, any appeal of this order must be filed by **April 17, 2023**.

* * * * *

CERTIFICATE OF SERVICE

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 either email to the indicated email addresses or depositing them into the U.S. Mail, postage prepaid, and addressed as follows below. Please note, if both email and postal addresses are indicated for a party, service was made in both forms.

Jason Thompson
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Loren Fitzpatrick
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DATED this 7th day of April, 2023.

