

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 9-2006:

MONTANA EDUCATION ASSOCIATION -)	Case No. 1730-2006
MONTANA FEDERATION OF TEACHERS,)	
NEA-AFT,)
)
Petitioner,) FINDINGS OF FACT,
) CONCLUSIONS OF LAW
) AND RECOMMENDED ORDER
vs.)
)
DAWSON COMMUNITY COLLEGE,)	
)
Respondent.)

* * * * *

I. INTRODUCTION

On February 21, 2006, the Montana Education Association-Montana Federation of Teachers (MEA-MFT) filed a petition for a new unit determination and election (UD 9-2006) seeking the certification of a unit composed of the following Dawson Community College (DCC) employees: the Director of Continuing Education; the Director of Student Support Services; the Director of Tech Prep; the Director of Technology (Technology Coordinator); the Director of Financial Aid/Admissions; the Director of Public Relations; and the Director of the Physical Plant.

On February 23, 2006, the Board of Personnel Appeals sent a letter to DCC President Lenhart notifying the college of the petition and, among other things, its opportunity to file a counterpetition. On March 9, 2006, DCC filed a counterpetition excluding all of the employees listed above from the proposed bargaining unit. On April 3, 2006, the Board received MEA-MFT's objection to the counterpetition based on timeliness and other issues. On April 6, 2006, DCC filed a motion with the Board to extend the time limit for it to submit its already filed counterpetition. At that point the Board transferred the matter to the Hearings Bureau to determine the timeliness issue. After an initial conference with the parties, it was determined that they would like to proceed if possible on all the issues regarding the petition and counterpetition. Subsequently, the Board issued an amended order transferring the matter to the Hearings Bureau to determine "the issue of the timeliness of the counterpetition, the appropriate unit, ordering an election and any other necessary proceedings."

Hearing Officer David A. Scrimm conducted a hearing in the case on August 22, 2006. Richard Larson represented MEA-MFT. Michael Dahlem represented DCC. Jim Cargill, Justin Cross, Jackie Schultz, Diane Dohrman, Tyler Larson, Cheryl Kolberg, Gar Amundson and

Jolene Myers testified as witnesses in the case. Exhibits A, B, C, E, F-1 and F-2, G, I, J-1 through J-7 were admitted into evidence, pursuant to the stipulation of the parties.

II. ISSUE

The issues in this case are whether a unit proposed for collective bargaining purposes is appropriate pursuant to Mont. Code Ann. § 39-31-202 and whether the DCC counterpetition was timely filed.

III. FINDINGS OF FACT

1. The Montana Education Association-Montana Federation of Teachers is a “labor organization” within the meaning of Mont. Code Ann. § 39-31-103(6).
2. Dawson Community College is a “public employer” within the meaning of Mont. Code Ann. § 39-31-103(10).
3. On February 24, 2006, the Department of Labor and Industry sent the petition to DCC by regular mail addressed to Ralph Lenhart, acting president.
4. The precise date on which the petition was received by the college is unknown.
5. On February 28, 2006, Dr. Lenhart and incoming President Cargill left Glendive to attend the Board of Regents meeting in Dillon from March 1 through March 3, 2006.
6. Dr. Cargill’s first official day as Dawson Community College president was March 1, 2006.
7. Rita O’Neill, the president’s secretary, was absent from work to care for her father from February 14 through March 13, 2006.
8. On March 7, 2006, business office secretary Elaine Schlosser sorted the mail for Dr. Cargill, at which time she delivered the envelope containing the unit determination petition to him.
9. On March 7, 2006, Dr. Cargill executed and posted the certificate of posting.
10. On March 8, 2006, the Dawson Community College Board of Trustees approved the filing of a counterpetition.
11. On March 9, 2006, Dr. Cargill filed a counterpetition with the Department of Labor and Industry.
12. On March 31, 2006, the union filed an objection to the counterpetition.

13. On April 5, 2006, the college filed a motion to extend the time limit, which was responded to by the union on April 18, 2006. The college filed a reply brief on April 25, 2006.

14. On May 11, 2006, the case was transferred to the Hearings Bureau to determine the issue of the timeliness of the filing of the counterpetition.

15. The DCC personnel policy manual applies generally to all county employees, although collective bargaining agreements may affect its application in particular cases.

16. On September 15, 2006, the parties stipulated to the inclusion of the Director of Public Relations (Jane Wynne) and the Director of Tech Prep (Cheryl Kolberg) in the proposed bargaining unit. The parties further stipulated to the exclusion of the Director of Physical Plant (Glen Kuehn) and Director of Student Support Services (Kent Dion) from the proposed bargaining unit. The stipulation leaves only three positions at issue: the Director of Continuing Education (Gar Amundson); the Technology Coordinator (Tyler Larson); and the Director of Financial Aid/Admissions (Jolene Myers).

17. DCC employed Gar Amundson as Director of Continuing Education beginning in December of 2004. Amundson's job description provides:

The Director of Continuing Education is a line administrator into instructional services administration. The director has responsibility for the management of all credit and noncredit programs delivered evenings and weekends and all outreach programs. The Director works with local businesses, industries, and area communities to assure that their postsecondary educational needs are being met. The Director also assists the Dean of Instructional Services in the publicity of educational programs, the production of instructor/faculty handbooks, and development of instructional course schedules. The Director is also responsible for the planning, budgeting, and evaluation of all activities within these respective areas.

18. At the direction of the Dean of Instructional Services, Jackie Schultz, Amundson evaluated five or six adjunct faculty consisting of observations but not formal evaluations. Amundson used forms developed by DCC for the observations. Amundson does not hire the adjunct faculty for the continuing education program, but his recommendations are routinely followed. Amundson does not supervise anyone or discipline anyone. He does not work on developing the budget for the continuing education program. Amundson has limited spending authority, beyond which he must make a recommendation that is routinely followed. He has limited interaction with other members of the proposed bargaining unit, primarily Tyler Larson, who helps him with computers every three to four weeks. He does ask Jolene Myers questions about financial aid that may come up. He would like to see an election. Amundson is responsible for the recruiting of faculty for the continuing education program and does make recommendations to retain. Amundson implements existing policies using independent judgment.

19. DCC hired Larson as its Technology Coordinator in 2004. His position description is accurate and provides:

The position is responsible for all aspects of planning, set up, maintenance, and troubleshooting of all technology-related activities of the college. This includes classroom and administration, media, Internet and satellite systems. The coordinator is responsible for all facilitation and effectively integrating the use of various forms of technology into instructional and support programs through consultations with and training of faculty and staff. The technology coordinator may supervise Technology Assistant, student intern, and assigned work-study students on a daily basis.

20. Larson reports to the Dean of Administrative Services, Justin Cross. Larson supervises and evaluates the performance of the Tech Assistant, Bryce Brown. Larson sends work to Brown and makes recommendations on evaluations for areas of improvement. Larson was a member of the hiring team that interviewed and recommended Brown's hiring. Cross and other members of the hiring team relied upon Larson's hiring recommendation. He does not have authority to terminate or hire, but can recommend discipline and has been a member of other hiring committees. Larson is responsible for implementing and enforcing DCC's acceptable use policy. In this capacity, he monitors computer usage and removes inappropriate software as needed. None of the proposed bargaining unit members have the same duties as Larson and if he were to be absent, no one would fill in for him. Larson has never been a member of the bargaining unit. His interaction with other members of the proposed bargaining unit is primarily related to computer problems. Larson has very little role in developing his budget or in making major expenditures under that budget.

21. DCC hired Myers as its Director of Admissions and Financial Aid. Myers' job description is accurate and provides:

This position is responsible for the development and implementation of the college's financial aid programs which provide financial support and services to current and prospective students. The Director of Admissions is responsible for implementing and enforcing the policies of admissions as established by DCC.

22. Myers' job description identifies that she supervises two employees, but she does not actually supervise anyone. On the very day that her supervisor, Dean of Student Services, Diane Dohrman, held interviews for the recruiter position, she asked Myers to sit in. Myers had not been involved in the selection process until that point. Myers believes that Dohrman is the recruiter's supervisor. Myers does not tell the recruiter how to do the job. Myers does not have disciplinary authority over the recruiter. Myers regularly assigns tasks for the administrative assistant to complete. She does not develop the budget for her program and needs approval from Dohrman for expenditures. She has no authority to discipline the administrative assistant. She has never done an evaluation of another employee. Myers interacts with Tyler Larson regarding computer problems, but does not interact with Gar Amundson very often. Myers does provide feedback to Dohrman regarding the quality of work performed by the administrative assistant.

23. Because of the differences in the nature of their duties, Amundson, Larson and Myers have little integration of work functions and little interchange with the other members of the proposed collective bargaining unit.

24. The Director of Continuing Education; the Technology Coordinator; and the Director of Financial Aid/Admissions do not share a community of interest.

25. Amundson wishes to be included in the collective bargaining unit.

IV. DISCUSSION¹

A. Timeliness of DCC's Counterpetition

Administrative Rule 24.26.214 requires a counterpetition to be filed five working days from receipt of the petition. On February 24, 2006, the Board mailed the petition to DCC. Assuming that the petition arrived on or about February 28, 2006, DCC's counterpetition was due no later than March 6, 2006. DCC's counterpetition was dated March 9, 2006. As such, it was not timely filed. MEA-MFT objects to the counterpetition based on its untimely filing. Given the circumstances involving the transition to a new president and a lack of prejudice resulting from the delay in filing the counterpetition, the hearing officer finds good cause for the late filing and hereby waives the five-day requirement.

Nonetheless, the Board must still determine whether the proposed bargaining unit is appropriate.

B. Supervisory Status

DCC seeks a determination that Amundson, Larson and Myer should be excluded from the collective bargaining unit for DCC workers on the grounds that they are supervisory employees and/or management officials.

Montana law gives public employees the right of self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities. Mont. Code Ann. § 39-31-201. The law further authorizes the Board of Personnel Appeals to decide what units of public employees are appropriate for collective bargaining purposes. Mont. Code Ann. § 39-31-202. However, because the statute excludes "management official" and "supervisory employee" from the definition of "public employee" (Mont. Code Ann. § 39-31-103(9)), management officials and supervisory employees do not have the rights guaranteed by Mont. Code Ann. § 39-31-201, and are not appropriately included in a unit for collective bargaining purposes.

Mont. Code Ann. § 39-31-103(11)(a) defines supervisory employee as "any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall,

¹Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

discharge, assign, reward, discipline other employees, having responsibility to direct them, to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.”

The statute further requires that the authority in (11)(a) “is the only criteria that may be used to determine if an employee is a supervisory employee.” Mont. Code Ann. § 39-31-103(11)(b).

DCC established, through the testimony of Diana Dohrman, Dean of Student Services, Jim Cross, Dean of Administrative Services, Jim Cargill, President, and Janet Schultz, Dean of Instructional Services, and through the documentary evidence, that Larson is a supervisor, based on the following discussion of the statutory factors. Larson’s own testimony supports the conclusion that he is a supervisor and thus should be excluded from the proposed bargaining unit.

Hiring

Larson testified that his position description was accurate and that he worked primarily independently. Although he did not have the biggest voice in the selection panel decision to hire Bryce Brown, his recommendation was ultimately followed. Larson directs Brown’s work and conducts his performance evaluation. MEA-MFT contended that Larson does not truly have hiring authority because DCC uses hiring committees and because he is not the sole or final authority in hiring decisions. The fact that a supervisor is part of a hiring committee does not show that the supervisor lacks authority. Further, the statutory definition clearly states that to be a supervisor, the employee need not be the sole or final authority, but only have the authority to effectively recommend personnel action. Larson has such authority.

Discharge, Discipline and Adjustment of Grievances

MEA-MFT argued that Amundson, Larson and Myers could not effectively recommend discharge or disciplinary actions. Although Larson has never actually been involved in discipline or discharge of an employee, both he and Cross testified that he had the authority to do so. For the reasons discussed in the paragraph on hiring, above, the union’s argument is without merit with respect to Larson. Neither Myers nor Amundson participate in any meaningful way in the discharge, discipline or adjustment of grievances of other employees.

Assignment and Direction

The strongest factors supporting a determination that Larson is a supervisor is assignment and direction. Larson’s position description clearly identifies assignment and direction of his subordinates. The evidence clearly showed that he exercises independent judgment in the performance of these duties. Further, Larson has responsibility for performance appraisal. Although the ability to evaluate employees is not one of the statutory indicia of supervisory status and by itself is insufficient to prove supervisory status, as an aspect of assignment and direction it shows that Larson is a supervisor in this case. While there was some testimony that Myers assigned duties to Mooer, those assignments were of a routine nature and required little, if any, use of independent judgment.

Transfer, Suspension, Layoff, Recall and Reward

The record contains no evidence on the authority of Amundson, Larson and Myers in these areas, except to the extent that suspension may be encompassed within the area of discipline, addressed above.

Summary

MEA-MFT contends that Amundson, Larson and Myers are not supervisors because: 1) their supervisory duties are only a small portion of their duties, 2) they do not perform all of the duties of a supervisor, 3) their actions are subject to review by their supervisors, 4) their hiring decisions are subject to departmental procedures and guidelines, and 5) they are not the final authority in matters of hiring, discipline, and discharge. These are essentially legal arguments rather than factual disputes. However, the law is clear that if an employee has the authority to perform only one of the statutory criteria in the interest of the employer, using independent judgment, that employee is a supervisor for purposes of the law. DCC has proven that Larson exercises independent judgment, has the authority to assign and direct the work of his subordinates and to make effective recommendations concerning hiring, discipline, and discharge. MEA-MFT has failed to put forth any evidence from which a contrary conclusion could be reached. Because of this, the only possible conclusion is that Larson is a statutory supervisor and not properly included in the collective bargaining unit. On the other hand, DCC has failed to prove that any of the statutory supervisor factors apply to Myers and Amundson.

C. Management

Employees may also be excluded if they are management officials. Mont. Code Ann. § 39-31-103(7) provides that management official “means a representative of management having authority to act for the agency on matters relating to the implementation of agency policy.” This definition has not been interpreted by the Montana Supreme Court, but federal cases have held that “managerial employees” are defined as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.”² *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) citing *NLRB v. Bell Aerospace Co.* at 288. “Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management.” *Id.* at 683. The Court went on to say that normally an employee “may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.” *Id.*

²In analyzing this case, it is appropriate to consider cases decided under federal law. Section 9(b) of the National Labor Relations Act gives the National Labor Relations Board (NLRB) comparable authority to determine appropriate bargaining units. Thus, the Montana Supreme Court and the Board of Personnel Appeals follow federal court and NLRB precedent to interpret the Montana Act. *State ex rel. Board of Personnel Appeals v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *Teamsters Local No. 45 v. State ex rel. Board of Personnel Appeals* (1981), 195 Mont. 272, 635 P.2d 1310; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

Amundson testified that his position description was accurate. Under that job description, Amundson was given the responsibility for the continuing education program. Among his specific duties are the planning, budgeting, and evaluation of all activities associated with the continuing education program. His duties also included assessment of the need for continuing education within the community and region and to develop a continuing education program in response to the identified needs. Amundson also has the responsibility to recruit and make recommendations to hire adjunct faculty for his program and those recommendations are routinely accepted. Clearly these duties fall within the category of management activities because Amundson was implementing DCC policy. Applying the federal court standard results in the same outcome. While Amundson does not have unfettered discretion to implement DCC's continuing education program, he is given considerable discretion in building and implementing the program.

Jolene Myers testified that her position description was accurate and all-inclusive. She directs two of the most critical programs at DCC - admissions and financial aid. While testimony did not reveal whether her decisions to admit a student or to grant financial aid were final, there was no evidence adduced that they were not. Moreover, even if it was the Dean of Students who made the final decision, that would not prevent Myers from being a management official. Myers' duties include representing DCC at local and regional financial aid workshops, at state and regional financial aid meetings and at the Board of Regents meetings. She is the school's expert on financial aid. Myers is a management official because her duties are so closely aligned with the essential function of DCC, because she implements policy and because she represents DCC on financial aid issues.

D. Community of Interest

Even if Amundson, Larson and Myers were not excluded from the proposed bargaining unit based on their supervisory or management official status, their inclusion in the unit would still be inappropriate because they lack sufficient community of interest. The DCC seeks to exclude the Director of Continuing Education; the Technology Coordinator; and the Director of Financial Aid/Admissions positions from the unit proposed by MEA-MFT. The MEA-MFT contends that the positions are properly included in the unit on community of interest grounds.

Like federal law, Montana law requires the Board to consider “community of interest” in determining an appropriate unit. Mont. Code Ann. § 39-31-202(1). However, the Montana statute enumerates a number of factors in addition to community of interest to be considered in determining when a unit is appropriate. Those factors, such as wages, hours, benefits, working conditions, and so on, are not enumerated in the federal law but are by case law the factors evaluated to determine whether a community of interest exists. Thus, in this decision, the phrase “community of interest” is used to refer to all of the statutory factors. All of the factors have to be weighed together and no one factor has controlling weight. UC 1-2000, *Montana Public Employees’ Association v. Cascade County* (2000).

Considering the community of interest factors in the context of this case, the factors of wages, hours, fringe benefits, working conditions of the employees involved, the history of collective bargaining, common supervision, and common personnel policies all favor a finding that Amundson, Larson and Myers are not properly included in the unit. These employees are not located in a single DCC department but are the managers of separate DCC programs. Each employee has a different supervisor. All DCC employees in the proposed unit are however subject to common personnel policies and are paid pursuant to a common pay plan and work in the same building. There is no evidence in the record that indicates any history of collective bargaining involving the three positions at issue.

The DCC contends that two factors, the extent of integration of work functions and interchange among employees affected, and the desires of the employees, support a finding that Amundson, Larson and Myers should not be included in the unit.

The evidence at hearing clearly established that Amundson, Larson and Myers have limited contact with the other employees in the proposed unit. While Larson works on computers for the whole college, it is hard to interpret that as integration of work functions. The testimony revealed that most of the interaction of the proposed unit members came about because of the close proximity of their physical location on the DCC campus and not due to any integration of their activities toward specific DCC goals. However, the factor of integration and interchange must be considered in light of the overall structure and mission of the employing entity. In this case, the employing entity is DCC. Its purpose is to provide educational resources for the community and the region. All of the employees of the DCC are employed to carry out this important mission. Not surprisingly, they have different roles in carrying out their work. As a result, they have limited integration and interchange.

Only Amundson testified that he wanted to be part of the bargaining unit. The lack of further testimony on this factor indicates a lack of community of interest. Ultimately, however, the desires of the employees are only one factor, but taken together with the other factors results in a determination that a community of interest does not exist.

Weighing all of the factors together, the evidence supports a conclusion that the Director of Continuing Education; the Technology Coordinator; and the Director of Financial Aid/Admissions lack sufficient community of interest to support their inclusion in the proposed bargaining unit.

V. CONCLUSIONS OF LAW

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

2. Larson is a supervisor pursuant to Mont. Code Ann. § 39-31-103(11). As such, his position is not properly included in the unit established by the Board for collective bargaining purposes.

3. Amundson and Myers are management officials pursuant to Mont. Code Ann. § 39-31-103(7). As such, their positions are not properly included in the unit established by the Board for collective bargaining purposes.

4. The Director of Continuing Education; the Technology Coordinator; and the Director of Financial Aid/Admissions lack sufficient community of interest to support their inclusion in the proposed bargaining unit.

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 employees in the bargaining unit. Except as provided below, the bargaining unit shall consist of the Director of Tech Prep and the Director of Public Relations. By stipulation, the Director of Student Support Services and the Director of the Physical Plant are excluded from the bargaining unit. The Director of Financial Aid/Admissions; the Director of Continuing Education and the Technology Coordinator shall also be excluded from the bargaining unit.

DATED this 2nd day of April, 2007.

BOARD OF PERSONNEL APPEALS

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
Hearing Officer

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than April 25, 2007. 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