STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 2-2011:

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400,	)	Case No. 1292-2011
Petitioner,	)	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER AFTER REMAND**
vs.	)	
FLATHEAD COUNTY, SOLID WASTE DISTRICT,	)	
Respondent.	)	

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I. INTRODUCTION

By order dated December 1, 2011, the Board of Personnel Appeals remanded this matter to the hearing officer to determine whether there had been "a recent, substantial change to the position" of Container Site Fill Monitor that would permit the hearing officer to then consider whether a community of interest exists and to further "make findings as to whether there is an overwhelming 'community of interests' between the monitor position and the bargaining unit based on the existing record." On December 8, 2011, the hearing officer conferred with counsel for the parties and suggested that he review the transcript, review the parties' post-hearing briefs, and then undertake the Board's remand. Counsel for each party agreed with that procedure. Accordingly, the hearing officer issues the following additional findings of fact and conclusions of law requested by the Board of Personnel Appeals.

II. ADDITIONAL FINDINGS OF FACT

1. The hearing officer hereby incorporates the findings of fact contained in his decision issued on August 25, 2011, as well as the stipulated facts 1 through 22 presented by the parties at the time of hearing.

2. At all times pertinent to this proceeding, Local 400 and Flathead County Solid Waste District have been operating under a Collective Bargaining Agreement which initially covered the term of July 1, 2008 to June 30, 2011. In December 2010, the union approached the employer about including Blair's position in the bargaining unit. On February 1, 2011, the union notified the employer that it did not wish to reopen negotiations for a successor agreement, but instead would roll over the agreement for another year, thus extending the agreement out until June 30, 2012. On February 3, 2011, the union filed this petition for unit clarification.

3. Prior to August 2010, the monitor position had been filled intermittently by various people. It was not assigned to a specific location but rather served as a roving position at all the remote sites and it was not a full-time position. It was also used as a temporary light duty assignment for injured county employees, some of whom were bargaining unit employees. The gist of the job description was that the position "performs enforcement and education of district waste disposal policies." Exhibit 4, joint exhibits. There is no discussion in the position description about any, much less extensive, manual labor at the sites such as cleaning and maintaining sites.

4. In August 2010, the county filled the position with a permanent employee, Rita Blair, assigning her permanently to the position and assigning her to one location, the Columbia Falls site. The county also changed the position to make it a year round position. The position was made into a full-time position, requiring Blair to work nine hours per day, five days per week. Significantly, 75% of Blair's work in the position involved manual labor which consisted of cleaning and maintaining the Columbia Falls site. As Blair described the laboring facet of her job, "I do all the maintenance, all the upkeep of the area. I do run the cardboard compactor and do light maintenance for it or on it. Fix it if need be. All the weed eating. I clean up all the garbage. If somebody throws something on the ground I have to clean it up. . . . I basically operate the site in every aspect. I do maintain the fence when its broke. Signage, I have to put up signage if need be." RT page 36, lines 881 through 887.

5. In terms of maintaining the container site, Blair stated "I clean it, I rake it, I shovel it, I snow blow it, I direct traffic."

6. The position at issue underwent substantial change just prior to the union seeking to accrete the position into the bargaining unit. Prior to 2010, the monitor position, as demonstrated by the position description, was truly aimed at educating the public and monitoring the various sites to ensure the public's compliance with district policies. It included creating informational flyers for the public. Manual

labor was at best only incidental to the job and certainly not nearly as time consuming as it became after August 2010.

7. Beginning in August 2010, the position became far more aligned with the spotter/laborer position, a position which is clearly within the unit. Although the monitor position does not require driving heavy equipment, 75% of Blair's time was consumed in maintaining the facility. This included cleaning up garbage, weed eating, maintaining the cardboard compactor, setting up signage, and directing the public as to where to dump their garbage. The position was assigned to a single facility, substantially undercutting the position's prior focus on education/rules enforcement. While working at the Columbia Falls site, Blair has never distributed, created, or even contributed to the creation of informational flyers that were provided to the public.

8. All of the factors previously listed in the hearing officer's August 25, 2011 decision as supporting the basis for finding that Blair's position should be accreted into the unit demonstrate an overwhelming community of interest with the Local 400.

9. Blair's position should be accreted into the bargaining unit.

III. DISCUSSION[1]

A. *Recent Substantial Change to the Position Permits Consideration of Whether Blair's Position Should Be Accreted Into Unit*.

Petitions to accrete employees are generally not appropriate when the accretion would upset an established practice concerning the unit placement of the individuals in question. *CHS, Inc.,* 355 NLRB No. 164 (2010), citing *United Parcel Service*, 303 NLRB 326, 327 (1991). However, the National Labor Relations Board, interpreting the National Labor Relations Act, has held that unit clarification proceedings are "appropriate for resolving ambiguities concerning the unit placement of individuals who . . . come . . . within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create real doubt as to whether individuals in such classification continue to fall within the category-included or excluded-that they occupied in the past." *Union Electric Co.*, 217 NLRB 666, 667 (1975).

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

The union has not challenged the employer's position that the monitor position was not included in the bargaining unit at the time of the implementation of the 2008-2011 collective bargaining agreement. Instead, the union argues that there were in fact recent substantial changes to the monitor position in August 2010 that permit the sought after accretion to proceed in this case. The hearing officer agrees with the union that recent substantial changes did in fact occur during the existence of the collective bargaining agreement that permit a reexamination of the appropriateness of the unit.

Position descriptions do not control a determination of whether a position is appropriately included within a given unit. Rather, it is the work that the position actually performs that is controlling. *FVCC Classified Employees Union v. FVCC*, UC No. 2-2001. Here, the work of the monitor position changed substantially in August 2010. Prior to 2010, the monitor position, as demonstrated by the position description, was truly aimed at educating the public and monitoring the various sites to ensure the public's compliance with district policies. Manual labor was at best only incidental to the job and certainly not nearly as time consuming as it became after August 2010.

Beginning in August 2010, the position became far more similar to the spotter/laborer position, a position which is clearly within the unit. Although the monitor position does not require driving heavy equipment or the employee's possession of a commercial driver's license, 75% of Blair's time was consumed in maintaining the facility. This included cleaning up garbage, weed eating, maintaining the cardboard compactor, setting up signage, and directing the public as to where to dump their garbage. The position was assigned to a single facility, substantially undercutting the position's prior focus on education and policy enforcement.

Blair has never distributed, created, or even contributed to the creation of informational flyers that were provided to the public. Blair engages in a variety of tasks at the landfill, including directing clients at the landfill to proper dumping locations, moving and setting directional signage to identify dumping areas. She spends three-fourths of her time maintaining the facility which includes cleaning, weed eating, and maintaining the cardboard compactor to ensure its proper operation. These changes did not occur until after the 2008 to 2011 CBA had been entered into.

In arguing that no substantial change has occurred to the position, the employer contends that the only changes to the position involve work location and operation of the cardboard compactor. Employer's post-hearing brief, page 10. The

employer's argument substantially understates both the number of changes and the force of those changes on the question before this tribunal. The argument completely ignores the indisputable evidence that Blair now spends all of her working hours at one location with 75% of her time engaged in what could only be reasonably described as spotter/laborer functions. She is cleaning, weed eating, and otherwise maintaining the facility. While not doing substantial repairs to the cardboard compactor, she is maintaining its operability by greasing it and checking its functionality on a routine basis. She is moving signage around directing clients to proper dumping locations, another spotter/laborer function. There is no evidence to suggest that Blair's laborer work, none of which is described in the monitor position description, was undertaken with regularity prior to August 2010.

The employer's downplaying of the fact that the position is now confined to one location fails to consider that this change appears on its face to eviscerate the centrality of the education/policy enforcement function that the monitor position previously had when parties negotiated the 2008-2011 collective bargaining agreement (as demonstrated through the 2006 monitor position description). Thus, contrary to the employer's argument, the fact that the position is now relegated to one location constitutes strong evidence that a substantial change in the position occurred during August 2010.

In addition to being substantial in nature, the changes must be recent, that is, they must have come about during the term of the existing bargaining agreement and prior to any opportunity for the union to have bargained with the employer to include the position within the unit. *United Parcel Service, Inc., supra*, 303 NLRB at 327 (If a group of employees comes into existence during the term of a contract for an existing unit, then the parties must timely address the unit status of those employees prior to executing a successor agreement).

The employer argued in its closing brief that the union made no request to include the position during any collective bargaining session with the county, noting that the union did not raise the issue until December 2010 and that the union agreed to "roll over" the contract for another year on February 1, 2011, prior to filing the instant unit clarification. Employer's post-hearing brief, pages 9-10. The employer argues that this constitutes the type of waiver that would preclude the union at present from undertaking this clarification proceeding. The hearing officer does not agree. Here, the union raised its desire to bring Blair's position into the unit in December 2010, prior to February 1, 2011. It filed this unit clarification on February 3, 2011. This is sufficient to show that the union did not waive its right to bargain over this issue.

B. *An Overwhelming Community of Interest Exists Between Blair's Position and the Positions Included Within the Bargaining Unit.*

Having determined that a recent substantial change occurred in the position, the Board's remand directs the hearing officer to go on and determine whether there is an overwhelming community of interest between the position sought to be accreted into the unit and the positions already existing in the unit. In conformity with that request, the hearing officer has set forth this proposition as the beginning of his analysis.

Before going into the analysis requested by the Board, however, the hearing officer wishes to make it clear that he is not at all certain that the policy behind the requirement to prove an overwhelming community of interest should be applied in this case or that the term "overwhelming" requires anything more than a traditional balancing of factors to determine community of interest. "The fundamental purpose behind the accretion doctrine is to 'preserve industrial stability by allowing adjustment in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created.'" *CHS, Inc.*, 355 NLRB No. 164 (2010), *citing Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1271 (2005). It appears to the hearing officer that, as matter of policy and logic, the concern over demonstrating an overwhelming community of interest is lessened if not entirely eviscerated where there is no uncertainty about whether an employee wishes to be represented by a particular union. As the NLRB has recognized "[t]he Board's policy on accretion is restrictive ***because employees accreted to an existing unit are not accorded a self determination election, and we seek to safeguard the right of employees to determine their own bargaining representative***." *ATS Acquisition Corp.*, 321 NLRB 712, 713, citing *Towne Ford Sales, Inc.*, 270 NLRB 311 (1984) (Emphasis added). *Accord, CHS, Inc., supra.*

In the case before this tribunal, concerns about preserving the right of the employee to freely choose her own representative are not implicated at all since Blair has made it known in no uncertain terms that she wants to become a member of the bargaining unit. In this case, the only concern of the county that is grounded in labor relations stability is in ensuring that the existing unit is not changed unless the county agrees to the change or the change is permitted by law to occur. In the absence of the employer's acquiescence in the accretion, the employer's right is wholly protected by the requirement that there has been a recent, substantial change to the position. To suggest that an "overwhelming" community of interest must also be proven before the accretion can proceed even though there is no concern about protecting the employee's right to choose a representative does absolutely nothing to

promote labor stability. It merely imposes what the respondent appears to portray as a super hurdle on the unit clarification process, making it unnecessarily difficult for the employee to choose her representative even though there is no employer interest that requires such protection. It seems to the hearing officer that, as urged by the union, once recent substantial changes have been demonstrated, there is no need to demonstrate an "overwhelming" community of interest where it is uncontested that the employee wants to become a part of the bargaining unit. Under those circumstances, industrial stability concerns should require nothing more than a showing that the proposed accreted employees share a community of interest with the existing bargaining unit. *NLRB v. DMT Corp.*, 795 F.2d 472 (5th Cir. 1986). *See also, Teamsters National United Parcel Service Negotiating Comm. v. NLRB*, 17 F.3d 1518, 1520 (noting that in contested cases the NLRB generally applies a community of interest test to determine the propriety of a proposed accretion).

That aside having been stated, the hearing officer will now proceed with the analysis requested by the Board. Accretion is proper when the employees sought to be added to an existing unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted. *E.I. DuPont, Inc.*, 341 NLRB 607, 608 (2004). In *E.I. Dupont*, the NLRB, after articulating the standard set forth above, proceeded to analyze the community of interest in the same way that this hearing officer did in his August 25, 2011 decision. That is, the NLRB went on to state:

> In determining under this standard whether an employee in a newly created position shares a sufficient community of interests with employees of an existing bargaining unit several factors are considered. Among these are (1) interchange and contact among employees, (2) degree of functional integration of the business, (3) geographic proximity, (4) similarity of working conditions, (5) similarity of employee skills, and (6) functions and centralization of managerial control. *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001). *See also, Universal Security Instruments v. NLRB*, 649 F.2d 247 (4th Cir. 1981). Cases in which every factor favors accretion are rare, and the "normal situation presents a variety of elements, some militating toward and some against accretion, so that a balancing of factors is necessary." *Great A & P Tea Co.*, 144 NLRB 1011, 1021 (1963). Employee interchange and common day-to-day supervision are

significant factors. *Archer Daniels Midland Co.*, *supra,* 333 NLRB at 675, citing *Towne Ford Sales*, 270 NLRB 311, 312 (1984).

Id. Accord, The Developing labor Law, § Ch. 10. II E.5 (5th Ed. 2006).

Considering the above factors in the context of the facts of this case convinces the hearing officer that an overwhelming community of interest exists such that accretion is appropriate. As to the first factor, the interchange and contact between Blair's position and those of the union weigh in favor of accretion. The fact that union members fill in for Blair on her days off, when combined with the fact that 75% of Blair's time is spent doing maintenance work just like the bargaining unit laborer position, demonstrates this point. Moreover, Blair assists members of the unit who come out to the Columbia Falls site to collect trash and appliances and transport those commodities back to the dump.

The degree of functional integration of the separate facilities also militates in favor of accretion. The Columbia Falls site is completely integrated into the operations of the landfill. It is an important extension of the serving as a collection site for county waste that is ultimately transported to the landfill.

While the sites are geographically separate, which might otherwise favor a finding of a lack of community of interest, that separation is of little importance here. The separateness is really more a function of the county's desire to make it more convenient for county residents to dispose of waste. Moreover, the geographical separateness is far outweighed by the fact that the entire operation, both the dump itself and the Columbia Falls site, are all part of an integrated system of waste collection in Flathead County.

The similarity of skills and similarity of working conditions also weighs in favor of accretion. While there is not a precise match between Blair's position and that of the bargaining unit laborer, the similarity of skills and working conditions clearly weighs in favor of finding a community of interest adequate to satisfy the standard articulated in *E.I. Dupont, supra*. Again, Blair spends 75% of her time engaging in maintenance of the site, something that the laborers in the unit spend much of their time doing, as demonstrated by their position description. They direct clients to appropriate dumping areas and move signage around, just as Blair does in her position. Like the union employees at the landfill, Blair's position exists to ensure efficient and lawful disposal of waste. In addition, Blair is covered by the same employee policies as the unit members are. She is an hourly employee and is paid overtime when she exceeds a 40-hour week like the union personnel are. She

spends her day working in and around waste collection and removal as the union employees do. Blair wears the same safety vest uniform that bargaining unit laborers do, reinforcing not only their identify as a cohesive unit but also underscoring the fact that they are out and about in the landfill and at the Columbia Falls site engaging in similar duties of labor that require safety vests in order to be seen. The facts in this case plainly paint a scenario that demonstrates such similarity of interests that the proposed accreted position would choose to be in the union (and in fact, Blair has indicated that such is her desire). Under these circumstances, accretion of Blair's position into the Local 400 is proper.

The only real difference between the two positions is the fact that the laborer position in the bargaining unit also requires a commercial driver's license (CDL) and the ability to drive heavy equipment, something which Blair's position is not required to do. However, the fact that a CDL is not necessary to fill Blair's position does very little to detract from the appropriateness of the unit under the facts of this case. As the union has pointed out, it is common practice in the construction and landfill services to include CDL heavy equipment operators and CDL truck drivers with unlicensed helpers and laborers. *See, e.g., Gibralter Land Company d/b/a Country Wide Landfill*, 352 NLRB No. 3 (2008) (involving a private landfill and a unit of equipment operators, maintenance employees, landfill/utility employees, mechanics, and yardmen); *NLRB Decision and Direction of Election,* 4-RC20287*, Waste Management of Pennsylvania* (finding appropriate a unit that included helpers, laborers, truck drivers, and equipment operators employed by a garbage hauling business).

Finally, the last factor, common supervision, supports the finding that an overwhelming community of interest between Blair's position and those of the members of the bargaining unit exists in this case. Supervisor Chiton is the direct supervisor for Blair and all of the members of the bargaining unit.

All six factors taken together demonstrate that Blair's position shares an overwhelming community of interest with the bargaining unit. This conclusion is only buttressed by considering that both factors of employee interchange and uniform day to day supervision weigh in favor of accreting Blair's position into the existing bargaining unit. It is of considerable significance to the hearing officer that Blair shares the same direct supervisor as the union members do and when she is off duty, union members fill her position. The common supervision speaks for itself. The fact that union members fill in for Blair on her days off, when combined with the fact that 75% of Blair's time is spent doing maintenance work just like the bargaining unit laborer position, demonstrates employee interchange sufficient to prove that the accretion which the union seeks in this matter is warranted.

Standing in stark contrast to the case before this tribunal is the *E.I. Dupont* case. There, the union sought to accrete a quality assurance inspector into a unit of production and maintenance workers who produced Corian and Tedlar, materials used in making the employer's counter top products and sinks. The inspector did not have the same supervisor as the production and maintenance workers. He did not work in any production capacity as the unit workers did and he did not inspect the materials produced by those workers. Other than to be in the same general vicinity of the shop as those workers, he had almost no job related interaction with those production and maintenance workers. Not surprisingly, under those circumstances, the NLRB found that there was not an overwhelming community of interest between the quality assurance person and the production and maintenance workers that would support accreting the inspector's accretion into the unit. 341 NLRB at 609.

Here, Blair shares the same direct supervisor as the unit members and spends 75% of her time engaging in the same functions as a laborer in the bargaining unit. Her position is filled on her days off by members from the bargaining unit. She is paid an hourly wage, receives the same benefits as the unit members, and is subject to the same personnel policies. As such, Blair's position shares an overwhelming community of interest with at least the laborer unit member positions. The union has demonstrated preponderantly that Blair's position should be accreted into IUOE Local 400.

IV. RECOMMENDED DECISION

Based on the foregoing, the hearing officer again recommends to the Board of Personnel Appeals that the position of landfill monitor within the Flathead County Solid Waste District be accreted into IUOE Local 400.

DATED this 7th day of February, 2012.

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 1, 2012. 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